

CONSTITUTIONAL DEVELOPMENTS  
in  
BANGLADESH

GIFT

PH.D. DISSERTATION

By

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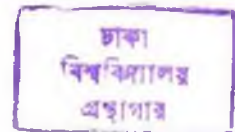


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By

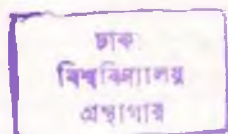
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## Preface

Constitution and its developments, as the supreme legal framework of a country, is a continuing process so that the hopes and aspirations of its populace can be accommodated along with the socio-economic changes. Constitutional government is enshrined with a value system which ensures societal change as well as justice, liberty and freedom of the individuals. As such it is a sacred document whose formal institutional arrangements provide mechanism to check the arbitrary actions of the executive and channels for the populace to influence the decisions of the government.

Many Third World countries are still experimenting with the functioning of constitutional government. Many have been successful where as constitutional developments took place keeping in line with people's demands and interests whereas in several cases constitutions were aberrated due to various factors like quartantic socio-economic challenges, erosion of civil and political institutions giving rise to over-developed military-bureaucratic apparatus.

Constitutional Development in Bangladesh has been as chequered as it had been as the part of erstwhile Pakistan. I became keenly aware of the nature of its developments while I was doing my research on relations of Bangladesh at Columbia University, 1989-1990. It is evident that the external policies and internal political determinants are interlinked. So while I was engaged

in my research on external policies of Bangladesh, I had to pay my full attention to internal political development of the country as well as of the growth of constitutionalism.

So I made up my mind to take up Constitutional Developments of Bangladesh as my next subject of research and study. On my return from Columbia University in the Spring of 1990, I discussed my plan with Professor Emajuddin Ahamed, the then Pro Vice-Chancellor, University of Dhaka. As I have already pointed out in my acknowledgment, he readily agreed to guide my Ph.D. dissertation. This is the background of my work for last three years. In my acknowledgment I have already mentioned persons, institutions, foundations from whom I got help, guidance, encouragement in my endeavour to complete this work.

I hope my pioneer work on Constitutional Developments in Bangladesh will stimulate other scholars to undertake research and publications on the growth of constitutionalism in Bangladesh.

Opinions expressed in the dissertation are entirely mine and I alone am responsible for my shortcomings, if any.

Dhaka,  
31 August, 1992

Dilara Choudhury

### **Acknowledgment**

Writing Ph.D. dissertation is a laborious and painstaking exercise. I came close to undertake such an endeavour after I had completed my graduate studies at the University of London, 1972. Family obligations and other responsibilities became paramount, at the time, than my full-time engagement in the Ph.D. research. I do not regret that decision as I knew my priorities too well. I, however, never abandoned my dream completely but I have had cold-feet whenever I thought of undertaking such a task. Finally when I decided to register as a PH.D. student at the University of Dhaka, I was given enthusiastic encouragement by Professor Emajuddin Ahamed, Department of Political Science, and the then Pro-Vice-Chancellor, University of Dhaka.

I, thus, begin my acknowledgment with sincere thanks to Professor Emajuddin Ahamed under whose supervision I have been able to complete this dissertation. His patient guidance at every stage of my work has been of immense help. He was never tired of giving suggestions and adding new dimensions to my work. I am also indebted to Professor Kazi Saleh Ahmed, Vice-Chancellor, Jahangirnagar University, Savar, Dhaka, for granting me leave of absence in order to pursue my research. I must mention Janab Kazi Tauhid Hasan, Chief Librarian, Sangsad Library, for the special help I received while I was going through the relevant documents in the library. For one-an-half year, I made numerous visits to the library and his staff and he helped always

me with smiling faces and ungrudgingly.

As part of the research was done at Columbia University, New York, where my husband is a Adjunct Visiting Professor, I would like to take this opportunity to express my sincere thanks to Professor Ainslee Embree, Department of History, Dean Robin Lewis, Southern Asian Institute, and staff of International Affairs Library for their kind help. I am greatly thankful to Asia Foundation, in particular, to Dr. John Somers, the then country representative of the Foundation for granting me a modest grant.

I must also express my affectionate feelings for my family -- my sons -- Pappu and Sayeed, daughters-in-law, Lipi and Jui for encouraging me during my research at home and abroad. Last but not least, my heartfelt gratitude to my husband, Golam W. Choudhury for letting me 'disturb' our married life. He was indeed patient, kind, inspiring inspite of the fact that I was, at the time, according to him, married to my research.

Lastly, I would like to take this opportunity to honor my mother, Anowara Khatune, who would have been the happiest person had she been alive, to see the fulfillment of my academic pursuit.

Dhaka,  
31 August, 1992.

Dilara Choudhury

## INTRODUCTION

### CONSTITUTIONALISM:

Every country has a constitution but that does not invariably imply that every country in the world is endowed with constitutional government or the practice of constitutionalism. Constitutional experts like K.C. Wheare and Lord Bryce elaborately defined various constitutions which are in existence today. According to Lord Bryce, "Constitution is a frame of political society, organised through law; that is to say, one in which law has established permanent institutions with recognized functions and definite rights." <sup>1</sup> It also establishes the relations between the government and the governed but it does not explicitly differentiate between a constitutional government and the non-constitutional one.

The factor which turns a government into a constitutional one is the underlying fact that the governmental powers are limited by both substantive and procedural legal measures. The restrictions put on the actions of governmental powers are based on the consensus of the governed. The absence of arbitrariness, personal will or caprice is the predominant feature of a constitutional government. It is fundamentally a government of law and not of caprice.

This view of constitutionalism is widely accepted by the constitutional experts. Charles Howard McIlwain, in his though provoking analysis of the concept of constitutionalism made the following comment: "it (constitutionalism) is a legal limitation on



government; it is anti-thesis of arbitrary rule; it's opposite to despotic government, the government of will instead of law." He further points out that " the most ancient, most persistence and the most lasting of the essentials of true constitutionalism still remain what has been almost from the beginning, the limitation of government by law. "2

McIlwain, however, was addressing the issue, at a time, when constitutionalism was threatened all over the world, especially in Europe, with the rise of Nazism in Germany and Fascism in Italy. He was expressing the classical liberal view of constitutionalism by emphasizing on the concept of a "Government of Law" whose fundamental basis was the protection of the rights of the individuals. This concept of liberal constitutionalism, which in turn is interrelated with the protection of individual rights, has been traced with "the evolution of constitutionalism in its relations to liberalism, rationalism and individualism." (The Puritan Revolution) The most distinctive roots of modern constitutionalism is " the belief in the dignity and worth of each person, each human being, no matter how lowly. Each man is supposed to possess a sphere of genuine autonomy. The constitution is meant for the protection of the self; for 'self' is believed to be the primary and ultimate priority".<sup>3</sup> This preoccupation with the 'self' rooted in religious, beliefs, eventually gave rise to the notion of Fundamental Rights through 19th century. These rights was synonymous with bourgeoisie rights and interests, as the concept of "modern constitutionalism found its apogee during laize-

fair".<sup>4</sup> It found its classical expression in John Locke's 'freedom of contracts' and rights of private property' theories. But the fact remains that a government ruled by law not only protected the interests of the property but also the individuals. In the words of McIlwain, " the agitator for a communist revolution, like the capitalist, is in danger of forgetting that law does something more than merely protect vested rights of property: in capitalistic states it is law alone that leaves the agitator free to preach capitals overthrow." As such "the problem of constitutionalism then, is everybody 's problem, what ever economic or social system he may prefer. It is law alone that gives protection to rights of any kind in any individual, personal as well as proprietary, whatever form the state may take and whatever the nature of social control."<sup>5</sup>

Hence the function of a constitution is based upon defining and maintaining individual rights whose concept has been broadened and expanded with progressive democratization of constitutionalism. The transformation of 19th century "bourgeoisie democracy" into "popular democracy", especially, since world war has injected new spirit and dynamism into constitutionalism and its underlying postulations are the existence of a limited government and protection of human rights and liberty of political community against any interference by the state. Among these rights-- twentieth century constitutionalism is more protective of substantive rights.

The fundamental difference between the basis of 19th century constitutionalism and that of the twentieth century i.e., the non-arbitrary nature of the constitution has remained intact while the concept of individual rights has undergone profound transformation, thanks to the democratization of constitutionalism by late 19th century. Democracy does not necessarily mean constitutionalism. It is evidenced by the presence of constitutionalism in the 19th century Great Britain before the establishment of full representative government. Though the underlying idea of democracy is that the government is based on popular consent, derived through elections and universal franchise, a government freely elected by adult franchise does not automatically guarantee a constitutional government. In the words of K.C. Wheare, "universal suffrage can create and support a tyranny of the majority one man ....The absolutisms of the twentieth century have usually been based upon universal suffrage and a compulsory universal suffrage at that. Have not modern tyrannies been returned to power by majorities of over 90 per cent?"<sup>6</sup> In spite of that, it must be remembered that there is a strong co-relationship between the two: "The Ideals of democracy, like the ideals of constitutionalism emphasize the overriding importance of each human being"<sup>7</sup> and make the two compatible and complimentary by providing a mechanism to limit governmental powers, make government accountable to the people and provide techniques and format for a peaceful transfer of power.

While there is a general agreement that democracy and constitutionalism are not incompatible, there can be some valid

arguments that in some cases the correlations between democracy and constitutionalism may give rise to some paradoxical phenomenon. Constitutionalism, in its rigid form in the 18th and 19th century implied a rigid sphere of 'private' jurisdiction. Democracy, as well as constitutionalism are, however, both dynamic in nature. Ultimate objectives of both is the welfare of the citizens. Until 19th century, protection of private property, for instance, was considered as an important ingredients of constitutionalism. Any encroachment on individual's private property would be regarded as unconstitutional. But in today's welfare state democratic state is assuming an ever increasing role in socio-economic spheres. Under the changing concept of role of governments private property may rightfully be encroached in order to achieve a fairer and equitable distribution of wealth. Constitutionalism is not threatened by the extension of such governmental authority as long as these activities are done not in the interests of any individual or group but for the community as a whole. If we look upon democracy and constitutionalism in this spirit, then we have no difficulty in agreeing with the conclusion that "there is no inevitable tension between democracy and constitutionalism. The tasks for the future are to devise appropriate conception of democracy and to design constitutional provisions that will support rather than undermine them."<sup>8</sup>

Thus, twentieth century constitutionalism is three-dimensional. They are the structure, procedures-process and principles of constitutionalism. No particular form of government

represent constitutional government. It may be classified in many ways: presidential or parliamentary, federal or unitary but one distinctive criterion for separating the governmental-systems is the one which distinguishes the difference between Rule of Law and Authoritarianism. In a system based on the Rule of Law, a society and its people are subjected to certain absolute norms and regulations; nobody, not even the government, is above the law. However, under an authoritarian system everything is decided by decrees made by an individual or a group of individuals. In a constitutional government, which must also abide by certain established rules and regulations. Whether they are written as in the United States, or based upon conventions and traditions as in Great Britain.

The procedures and processes of constitutionalism can be both written and unwritten. The most common way is to have the political order formalized is to have a written constitution as initiated by the instrument of Government. (1648). This concept is not a "prerequisite" of constitutionalism as " true constitution can be found in unwritten procedures used to change the substantive policies of the formal document."<sup>9</sup>

The Constitution of U.S. is a striking example of such procedure in which combination of 'informal procedural consensus' like 'due process of law' and 'living constitution' provided enough flexibility and adaptability essential for the practice of constitutional as well as established non-arbitrary democratic government whose powers are limited. American constitutionalism

thus advocated successfully that 'social pluralism', 'fracturing of power' i.e., federalism and a system of checks and balances can effectively bring the government under limitations.<sup>10</sup>

This concept of "informal procedural consensus" takes the idea of constitutionalism to a different plane which indicates that the powers of the Government are not only limited but also subjected to higher laws. According to this concept, "constitutionalism may be defined as "establishing high-level general principles what might be called the primary or imperative principles of government ...this is in a sense, for example, of the English constitutional principle of "Rule of Law", first adumbrated by Dicey and embodying basic concept like the absence of arbitrary power and equality before the law... the idea of constitutionalism seems to introduce, in any case, a further supra-positivist element of evaluation of constitutional law processes that even though a governmental act may be 'legal' in the strict sense of conformity to the letter of pro-existing positive law, it may still be unconstitutional because of its conflict with historically received imperative constitutional norm."<sup>11</sup> President De Gaulle's action in 1962 when he sought a referendum in order to change the mode of presidential election is a glaring example of the practice of such constitutionalism. Recently, Philippino President Mrs. Corazon Aquino has violated established constitutional law by seeking a referendum over the status of American bases in that country where as Senate is the sole constitutional power to do so. In some cases -- it gave rise to the Doctoring of Civil Necessity and many

developing countries -- it has been misused.

A recent development in Philippines on the issue of continuance or otherwise of the American bases in that country raised some issues on correlation between limits of constitutionalism and inarticulate wishes or aspirations of the people. Under the Philippine Constitution a treaty becomes effective or rejected by a two-thirds votes in the Senate, Senate rejected the recommendation made by the popularly elected President Madame Aquino.

President Aquino was not inclined to accept the constitutional provisions of the Senate having final say in the matter. She, therefore, proposed a referendum to the people on the issue. But the Philippino Constitution does not provide for any such reference to the people. It therefore, became a national debate whether constitutional provision should prevail or peoples' wishes get priority. Here was an example of a conflict between limited Government as demanded by constitutionalism and popular sovereignty.<sup>12</sup>

Other informal procedures call for existence of multi-party system, periodical free and fair election, forms of representation, existence of independent judiciary in order to implement the goals of constitutionalism i.e., establishing a free society with constitutionally guaranteed rights of the citizens as well as fulfilling the hopes and aspirations of the people. Since constitutionalism means limited government -questions may be raised as to how and what forms are the limitations imposed. And to what

extent are the limitations observed in practice ? How these issues are in practice handled determine the nature of constitutionalism in a particular country. Prof. de Smith prescribes what he considers minimum constraint or limitation for constitutionalism: "A contemporary liberal democrat, if asked to lay down a set of minimum standard, may be very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals; where political groups are free to organize in opposition to the government in office and where are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of those conditions is lacking."<sup>13</sup>

#### MARXIAN VIEW OF CONSTITUTIONALISM:

Theory of constitutionalism as evolved by the western liberal scholars and democratic Philosophers was challenged by Marx and Engels. According to classical theory of constitutionalism state is limited by law -- laws which are meant for achieving welfare of its citizen. But Marx in his Communist Manifesto presented a strongly negative theory of state-that state is nothing but an instrument of class struggle. The propertied class or the capitalists control the economic forces or means of production and with economic power in their hands, they exploit the rest of the



society the working class (proletariat). The state provides a mechanism by which the working class is deprived of his share of labour. By introducing his theory of production- "the labour theory of value" and by devising his concept of "surplus value", Marx tried to prove that thanks to the control of means of production, the working class do not get the full benefits of their hard labour and this benefit is extracted from the proletariat by taking away from them what he terms as surplus value.<sup>14</sup>

If this is the sole function of the state, i.e., depriving the due share of their labour from the proletariat, how could state be a constitutional one or a true democratic state ?

Marxism, therefore, believe that the state will "wither away" or disappear as soon as class exploitation will be ended and in a classless society, the state, in its present form, must "wither away".

The Marxist-Leninist theories, however, acknowledge the need of a temporary entity before the state will finally be abolished.

The transitional system is "Dictatorship of the Proletariat".<sup>15</sup>

Therefore, the classical concept of constitutionalism seemed to be incompatible with Marxian Theory of State.

The Marxists would insist that ultimate objective of constitutionalism namely the establishment of a fair and equitable society for everyone irrespective of classes cannot be achieved by the traditional concept of the democratic state. It is only through the establishment of a state (temporary) is possible only in a one which is based on the principle of Marxism. Marxists

would not deny that political rights as required by traditional concept of constitutionalism but there contention is that it is worth sacrificing those 'illusory' rights and privileges in order to achieve the lasting and real ones.

It we look at the Constitutions of the Soviet Union and those of the Eastern Europe till the recent changes -- we find that many of the phenomenas which are cherished and valued by the believers in constitutionalism were missing. Particularly, the western scholars find it extremely difficult to regard some from of; dictatorship such as "Dictatorship of the Proletariat" acceptable to any form or idea of constitutionalism or democracy. It is true that the Constitutions of the Soviet Union and those of Eastern Europe had a long list of Fundamental Rights and it fact all familiar civil and political rights. But in practice, because of the dictatorship of the Communist Party these provisions of fundamental rights and other liberties were only on paper.<sup>16</sup> As Carl J. Friedrich has pointed out that a constitution cannot be regarded as ideal, even if it fulfills the generalized concepts of philosophical, legal, or political standards. It must be supported by "the distinct notion of constitutionalism as a kind of political order which contrasts with non-constitutional system such as totalitarian dictatorship. In order to develop such a concept, a constitution must be defined in a way that indicates the features which make it contrast with other kinds of political order."<sup>17</sup>

Communist government can be anything but not constitutional since the governmental powers are not limited by any procedures.

Their emphasis was on economic justice and a fairer and equitable distribution of wealth. Marxism-Leninism became a new challenge to the traditional concept of constitutionalism. Their argument was that without fair economic system or welfare state, there cannot be true constitutionalism. We, thus, find that rise of Marxism-Leninism and emergence of a number of Socialist or Communist states after world war II constituted countries of Africa and Asia, Marxist-Leninist concept of a fair equitable society had strong appeals. We find in the constitutions of these emergent countries some strong references to the problems of economic justice and fairness. Although the numbers of formal communist countries in the Third World are not many as only a few had formally declared it such as Vietnam, North-Korea, Indo-China in Asia. Of course the largest Asian example is China. In Latin America-- the conspicuous case is Fidel Castro's Cuba. In Africa, there were a few temporary example of Marxist states.

In all these countries we find new and greater emphasis on economic aspects of "Fundamental Rights". Fundamental rights should include not only the familiar political and civil liberties such as freedom of press, of expression of thought and of forming association and political parties. It may also include some basic human rights such as right to work, right to leisure etc.

In particular, the concept of "Right to Private Property" has been challenged and even in non-socialist or non-communist countries, unqualified "Right to Property" has been modified in order to achieve a fair and more equitable system of economic order

without which the benefits of constitutionalism or of democracy are not fully implemented: A free tongue with empty stomach' is meaningless as it has become evident in poorer countries of the Third World.

So while the Marxist concept of the absolute rule of communist party or dictatorship is not compatible with the broad and large aims and objectives of constitutionalism or of democratic state, Marxism-Leninism has brought some new concepts to idea of constitutionalism with its goal of achieving general welfare by stressing economic aspects of human rights.

Seven decades of communist rule in the Soviet Union and Eastern Europe as well as in China, however, has not shown any sign of 'withering away' of the state; on the contrary, the state-machinery in the communist countries had shown greater and greater control over the population. It was said rightly that it was becoming the dictatorship over the proletariat. Finally the Marxist-Leninist system failed in the Soviet Union and in Eastern Europe making way to democratic system and rule of law. The only large serving communist state is the Peoples' Republic of China in Asia.

Communism or non communism, the emphasis on economic aspects of human rights is a new and desirable development in the theory and practice of constitutionalism. We may finally add that some socialist countries like Scandinavian countries could achieve a synthesis of economic justice and political freedom, thereby demonstrating that a western state can be established within the

framework of constitutionalism.

Stresses and strains on constitutionalism in the emerging Third World countries.

Since world War II, democracy and constitutionalism have been widely experimented by emerging Third World nations. They have been the battle cry of the twentieth century, as most afro-Asian countries, who have been under the shackle of European colonial rule, carried their national liberation movement under their banner. Woodrow Wilson's call for the "right of self-determination" and President Roosevelt's claim of "Four Freedoms" in 1941 created unprecedented hopes among the nationalist leaders of the emerging countries. They dreamt of creating sovereign states within which the ideals, hopes and aspirations of their people would be fulfilled. The leaders of these new nations hoped to end exploitation, ensure social and economic justice as well as political freedom which was so long denied to them by their colonial masters. The charter of civil liberties, thus, held a special significance to them. Nationally, the political order they chose was inspired by liberalism, individualism and rationalism-principles deeply rooted in western traditions and civilization.

The option for western constitutional government by the new nations was no surprise. Most of them had lived under a political order introduced by their colonial masters. Powers were transferred under provisional constitutions which were derivative-attained after years of progressive devolution. Former British colonial

countries obviously opted for the parliamentary system, based on western model. Likewise, others copied the system of their respective European rulers. The factors which motivated them to make such historic decisions have been aptly summarized by professor. O. P. Gauba, as he states, the factors include: (a) leaders' familiarity with the political institutions of their colonial rulers; (b) the compatibility of the administration left behind by the colonial rulers with the western constitutional structure; (c) an effective alternative to anarchy or dictatorship whether charismatic or military; (d) diverse culture and multi-nationality called for a federal structure necessitating a written constitution imperative; (e) western constitutional models were thought to be an effective means to bring quick and speedy modernization which was so desperately needed; (f) the western institutional establishment was ideal for the indigenous social classes to quickly join the rank of the political elite.<sup>18</sup>

Unfortunately, in most Afro-Asian countries, there has been a breakdown of constitutionalism giving rise to authoritarian type systems. A number of factors have been cited for this failure. Lack of education and rampant illiteracy are often shown as one of the causes. A free mind, an essential element of constitutionalism, is the product of education. If a vast majority of the people of the country remain illiterate and are not aware of their rights and duties the function of a constitutional government becomes difficult. The English constitutional expert, Sir Ivory Jennings, pointed out that "if there were gallop poll in almost in

any country in Asia and Africa most of the answers would be: don't know' ".<sup>19</sup>

There is no doubt that there are some serious limitations and obstacles in the way of the growth of constitutionalism in the newly independent Afro-Asian countries because of the lack of vigilant public opinion and free press. Both of these are essential, in western as well as non-western nations. While free press may be specifically provided in a constitution, it is a product of a free mind, which, in its turn, is dependent upon education. If there is no free press or the governmental authority works to suppress freedom of press, the working of the constitutional government becomes extremely difficult. Similarly, if people themselves do not preserve their rights and obligations a great challenge is created to the growth of constitutionalism.

The lack of political and philosophical traditions are considered to be significant factors when considering the failure of democracy in the underdeveloped world. According to many western experts the lack or established beliefs create impediments in the formation and institutionalization of political structures. And as such they put constraints on the smooth working of constitutionalism. Other essential elements of democracy such as the principle of toleration, recognition of officially recognized opposition, acceptance of the idea of a pluralistic society, existence of voluntary non-political association and belief in state machinery's job to harmonize and safeguard the interests of

various interest groups in bringing about a social equilibrium are missing in many Third World nations.

Does it imply that constitutionalism is not suitable for Afro-Asian countries? Is it only a prerogative of the people of Europe and of North America? There have been many western scholars who subscribe to the view that constitutionalism is only possible in a western society: that it is a legacy of their long tradition of liberalism and democracy. No less a person than a great champion of liberty, John Stuart Mill in his classic book Representative Government expressed some reservations and doubts about the suitability of democratic or constitutional forms of government in India.

Democracy or constitutionalism implies the peoples participation in public affairs. And it is true that certain socio-economic factors essential for self rule, like universal education, a certain high standard of living, the existence of middle class, are absent in the Third World countries. Absence of these "pre-requisites" has led many western scholars to express doubts about the suitability of constitutional government in these countries.

It should be, however, pointed out that only the absence of these "pre-requisites" does not cause the breakdown of the constitutional system. (Therefore, I would challenge their classification as pre-requisites.) There are some inherent impediments in the experimentation with democracy by the nations of the Third World. These impediments emanate from their experience



under colonial rule.- Let us discuss some of those impediments which put stresses and strains on constitutionalism.

Party system in new democracies and its impact on constitutionalism.

In this classic book on democracy, Lord Bryce points out the correlation between the political parties and democracy: democracy cannot function without party-system. Existence of more than one political party, divided by broad principles, rather than narrow, sectarian, racial, ethnic difference is regarded as one of the fundamentals for the successful working of democracy and constitutionalism. In the West, party systems are the result of long-term, complex historical developments expanding over centuries, as in Great Britain. Well organized political parties, in these countries, by aggregating and articulating various interest groups, provide mechanism of conflict resolution as well as bear on the policy making decisions of the government. Institutionalized parties, thus, play the role of integrating the society by absorbing the new social classes into the community.

The importance of organized political parties in the new democracies can hardly be overemphasized. An institutionalized party system is an absolute necessity in these countries' efforts for modernization. An effective party system not only accelerates process of modernization by successfully integrating new social forces into the community but also creates constructive opposition parties in order to limit the powers of the executive.

The history of party systems, in most emergent nations, however, is not fully successful. Majority of these countries have demonstrated a tendency towards one-party system which encourages arbitrary executive. The political parties, which led the nationalist movement in many of these nations, either got fragmented or transformed into one-party system by eliminating the scope of competitive politics. Fragmented parties, whose number ran into hundreds in many cases, created acute political instability- giving rise to the demand of a strong authoritarian party in order to achieve order and stability. Before it could be decided whether a particular country required two-party or multi-party system the system itself withered away by making the prospects of democracy rather grim. It should, however, be pointed out that a number of new democracies, especially, India, have been able to build an institutionalized base for stable party system. It has made India the largest democracy in the world. The credit goes to Congress Party and its leadership for increasing the organizational strength of the party by congruencing the roles with those of the modernizing party.<sup>20</sup>

Various factors or 'conditions' as termed by Weiner,<sup>21</sup> have been attributed to such disarrayed growth of political parties in the Afro-Asian countries. In most of these countries, Political parties have not evolved from grassroots levels. On the other hand, it has developed through a charismatic leader. In many cases, a particular leader has formed the party, not the masses producing the leader. This has been interpreted by some

development theorists as 'personalismo'.<sup>22</sup> This particular factor, more than anything else, is responsible for the general pitiful situation in the development of political parties of the Afro-Asian countries.

A very interesting interpretation has been provided by Lucian Pye by referring to the cultural dimension of the Asian Power. According to Professor Pye, Asian concept of Power is<sup>15</sup> "that the power presumably follows downward from the ruler through the elite to the masses, whereas the actual process is just the reverse" and "that power is co-equal with status and rulers have rights by ascription" give rise to paternalistic authority and as result, dependency becomes a trait. The parties are organized around personalities and not on principles and policies. This characteristic sharply weakens party's organizational strength, adaptability, increases factionalism and sets a process of patron-client relationship".<sup>23</sup>

This phenomenon explains the divergent view of the role of the political parties in political development held by the Asian leaders. Ayub Khan of Pakistan intensely disliked the political parties and tried to run the country on non-party basis through basic democracy and Ziaul Hoque attempted a party-less democracy as late as in 1988. In Bangladesh, Mujib established a one-party authoritarian state. The under-lying idea is the same- it is the leader who armed with arbitrary powers can deliver the fruits of independence. It can not be achieved through an open and competitive system. All powers must, then emanate from the leader

and leader alone. He is like a "Patriot King" who is "to espouse no party, but to govern like the common father of his people".<sup>24</sup>

Besides the cultural factor, there are other factors which influence the attitudes of a polity towards competitive politics. First, traditional Asian politics, namely traditional imperial system in China, feudal system in Japan and competitive parochial system in Southeast Asia have influenced the development of the political systems. Divergent party system developed depending upon the format of the traditional Asian politics-- imperial system contributing more to "monopolistic" politics rather than the other two formats. Second, combination of colonial legacies which were distrustful of open politics and conflicts of interests, and those of the nationalist movement, which also discouraged divisive politics at that historical juncture-- paved the way for traditional Asian politics with authoritarian aura. Lastly the nationalist leaders in most Afro-Asian countries were faced with the urgent need of nation-building and gave priority to socio-economic development over political development. This called for quick decisions and a powerful executive giving rise to either one-party system or personal dictatorship.<sup>25</sup> Some leaders are convinced that due to the pressures of "accelerated history"-- they cannot afford the luxury of having a pluralistic democracy.<sup>26</sup> Moreover, the failure of the ruling elites in integrating the demands of the new elites for broader participation created acute legitimacy crisis leading the leaders to opt for a single-party system.<sup>27</sup>

The tendency towards one-party system hinders the creation of constructive loyal opposition whose characteristics should be: (i) a clear unambiguous public commitment to achievement of power only by electoral means and a readiness to surrender it unconditionally to other participants with the same commitment; (ii) a clear and uncompromising rejection of the use of violent means to achieve or maintain power; (iii) an rejection of any nonconstitutional appeal to the armed forces to gain power or to retain it against a loyal democratic opposition; (iv) an unambiguous rejection of the rhetoric of violence to mobilize supporters in order to achieve power, to retain it beyond the constitutional mandate, or to destroy opponents. The defense of democracy must be carried out within a legal framework, more or less narrowly construed, without arousing popular passions and political vigilantism. (v) a commitment to participate in the political process, elections, and parliamentary activity without setting up conditions beyond the guarantee of the necessary of civil liberties for reasonably fair democratic political process.<sup>28</sup> These are the characteristics which cannot be developed overnight. These are values which develop with experience and time. The rules of 'ins' and 'outs' cannot be practiced unless there is more than one parties. One-party system creates vicious circle which becomes difficult to break

Thus, the growth of sound political party system, which is so much needed to "buckle various social forces to one another, creating a basis for loyalty and identity transcending parochial

grouping,<sup>29</sup> and to carry out governmental policies of national integration and economic development, has been retarded in most emergent nations. The results have been a breakdown of constitutional politics -- ranging from one-party dictatorship to military intervention to civil war.

#### The Military Intervention and Constitutionalism.

A significant factor creating impediment to the growth of a healthy constitutional order in the post-colonial Afro-Asian countries is military intervention in politics. Since 1945, military intervention in the form of coup-d'e-tat have been taking place in bewildering manner, and three-fourth of the newly emergent states have already experienced some form of military rule -- either direct or indirect. Military in the Third World countries has emerged as an independent political institution posing threats to civil institutions like civil bureaucracies, legislature, political parties, and judiciary, which are essential for the working of constitutionalism.

Various theories provided by the experts on military politics explain the role of military, causes of its intervention and its impacts and effects on the society. Since independence--developing countries have been besieged with enormous problems of national-integration/nation-building, socio-economic inequalities, and injustices. In search of their modernization goals most countries adopted liberal democratic model. But soon it was evident that out of the political and administrative institutions left behind by

their colonial rulers-- administrative units especially military was the most strongest. In spite of that fact -- the intervening capacities of military vary from country to country. This is due to the fact that there are some "distinct class of countries" with "peculiar political phenomenon"<sup>30</sup> where army intervention is endemic; whereas some countries with similar colonial legacies have escaped such unfortunate developments. Why is it that some post-colonial countries experience army rule and others don't?

Various approaches have been advanced to locate the causes of army intervention. One of the reasons is the organizational strengths like discipline, cohesiveness, administrative and technological skill, hierarchy, which provide military to take quick action in dislodging a civilian regime. As Riggs pointed out that unbalanced development (legacy of colonial period) of administrative units compared to the institutions of political participation encourage and prompt military to step in and take powers.<sup>31</sup> But besides such institutional strengths -- there are other deep-rooted and ingrained motives for the army to make such move. Motives of 'the Manifest Destiny of the soldiers', 'national interest' 'sectional interest' 'regional interest' 'individual self-interest' 'self-importance of the armed forces' 'morbidly high self-esteem' 'class-interest (Finer:23-71) 'corporate interest' (Nordlinger:75) and 'the performance failures of civilian governments' (Nordlinger:85-95) and 'American military assistance' (Bienen:XIV-XVII) to the armies of the Third World countries have been cited as factors for army proclivities, American assistance

which provided the army with scope for increasing expansion and autonomy enhancing its powers for eventual take-over has been refuted by Huntington.<sup>32</sup> But many observers believe that the direct link between U.S. military assistance and expanding power and autonomy of the Pakistan army, which eventually staged a coup in 1958, cannot be altogether overlooked. One can cite such examples in many cases-- the most recent one being the case of the Philippines where the military is reported to be in favour of continued U.S. bases in their countries so that this might make their influence and power enhanced.<sup>33</sup> The external military aid whether from the U.S. or U.S.S.R. does increase the chances of military coups: Ethiopia, Afghanistan, and Cuba are cases in point. Use of military in quelling civil disorder may erode the neutrality of the army at the same time make it popular in the eyes of the public which exacerbate praetorianism.

In spite of the long list of the motives for military intervention cited above- praetorianism cannot take roots in a society which does not belong to the 'distant class of countries'. This has been emphasized by both Finer and Huntington. This approach is basically cultural which holds much water. Finer categorized four distinct political cultures: mature political culture, developed political culture, low political culture and minimal political culture. He gives a detailed analysis of these political cultures and predicts that countries with last two categories of political cultures are likely to fall prey to praetorianism' because these are countries whose population have or



had little attachment to or even comprehension of their political institutions, countries of latest opposition to the ruling group, countries in which there is no clear and well -established political formula; and countries in which , for the most part , civilian organization is feeble. In such countries, politics does not run in clearly defined channels; there is no widespread consensus on the channels it should run in; and even if there were, opinion is too inchoate to make it do so. Here the legitimacy which attaches to institutions is paramount as mature' political culture, nor resistant to overt military rule as in 'developed' political cultures. It is fluid; and , possibly, even ductile. It is easily impugned by the military, and in the least developed political culture of this third order it has been relatively easy for the military to reshape it by a new political formula which legitimizes their pretensions".<sup>34</sup>

This kind of societies have been termed by Huntington as "praetorian" societies in where "politics lack autonomy, complexity, coherence, and adaptability". All sorts of social forces and groups become directly engaged in general politics;" and in "the absence of effective political institutions capable of mediation, refining, and moderating groups political action, in a praetorian system, social forces confront each other nakedly where political process has not been institutionalized."<sup>35</sup> Both experts, thereby conform that the underlying reason for military intervention lies at weaknesses of social and political structures of these societies. Feeble and weak civil governments, thus,

without significant social forces behind them, become easy victims of a highly professional organized disciplined and coherent modern institution like the military.

Next point of query is to assess the impacts of praetorianism on these societies. Do they actually contribute to the overall political development by telescoping century old socio-economic problems and pave the way for constitutionalism? Or do their intervention create more hindrances to constitutionalism by disrupting the existing social and political order? Initial reactions to military coup d'etat in the Third World countries were mixed. A score of experts viewed military in the Third World countries as a critical element in their efforts of modernization. They viewed military as progressive element who with their expertise and western values were capable of accelerating the process of modernization. Morris Janotiwz, for instance, looked for the causes of military intervention in politics in the "characteristics of the military establishment of the country and attempts to relate the propensity and ability of the military officers to intervene in politics in their "ethos of public service, "their skill structure, "which combines managerial ability with a heroic posture, " their middle-class social origins, and their internal cohesion."<sup>36</sup> Luncian Pye was one of the pioneering social scientist to project a new image of the Third World countries' military as 'modernizing agents.' By then, i.e. mid-1960s military coups had displaced a large number of civilian governments of a large number of Afro-Asian countries who had

adopted the liberal-democratic model in coping with the gigantic task of nation-building. It was argued that military with its efficient, skilled, coherent and managerial ability would be able to quicken the process of modernization and thereby contribute to political development. Pye, thus, advocated "that the military in the underdeveloped countries can make a major contribution to strengthening essentially administrative functions. If the new countries are to become modern nation-states, they will have to have a class of competent administrators;" and military can provide that element of nation-building. He, however hastened to add that "the growth of responsible and representative politicians" remained a fundamental aspect of political development.<sup>37</sup>

This view has, however, been challenged by theorist of modernization like Huntington. To Huntington, modernization and political development are not same. The critical element in political development is the process of institutionalization whereas modernization represents mobilization and participation. Military regimes, according to Huntington, are confronted with a peculiar situation. They generate rapid mobilization of social forces, as a consequence participation as well, due to their efforts in modernization i.e. economic and social reforms, but are unable to institutionalize the process as they are "ill prepared to make the fundamental changes in the political processes and institutions."<sup>38</sup>

Case of Pakistan is a striking example. (1958-1971). Pakistan's first military president Ayub Khan sieged power in a

bloodless coup in 1958. His intervention in politics was greatly welcomed initially as people were frustrated by the inefficient working of the parliamentary system in Pakistan. Ayub was expected to bring new political stability and political institutions. His concept of basic democracy roused a lot of expectations and speculations both inside and outside the country. It was regarded in certain quarters as a 'third way' as compared to capitalist or socialist democratic systems. But when Ayub left his office in 1969 the country was exactly in the same political vacuum as it was in 1958. His plan was to have a partyless democracy and he also wanted to bypass the urban elites. Instead, he wanted to develop a rural elite composed of 80,000 basic democrats. But the experiment failed, mainly, because the urban elite whose existence is a fundamental requirement for the working of any viable political order, was not associated with it. Thus, Ayub's failure in institutionalizing the political order triggered the second Martial law in Pakistan.

The military which was regarded as a force of unity, has also in many cases failed in its efforts to achieve national integration. The lack of cohesive and integrated society is also common within the countries of the Third World. In most countries -- division exists along communal lines based on religion, linguistic, ethnic, tribal and region. These nations, according to Rupert Emerson, are not yet nations but trying to be one.<sup>39</sup>

In the absence of recognized and viable political institutions -- various communally interest groups clash quite openly. In these

societies, the task of constitution makers is rather guarantic. They strive to attain a constitutional arrangement so that various ethnic, linguistic and other diverse issues are negotiated, discussed and compromised. Without such arrangement resort to extra-constitutional measures by the aggrieved parties to redress their grievances is not without precedent. The germs of ethnic conflict in Sri Lanka can be stressed to the language issue of the Tamil origin Shilanese. The secessionist movement in Punjab and Kashmir in India are also two most glaring examples. The break-up of Indian sub-continent in 1947 originated from the failure to accommodate Muslim minority demands within the coustitutional framework of united India. The communal conflicts within a given society must be sorted out through constitutional mechanism as evidenced in the constitutional measures adopted by the Federal Government of Canada which accommodated the hopes and aspirations of the French Canadians.

Pandits of military experts initially ascribed a lot of emphasis on military's role in achieving much needed national integration of the Third World countries. The events, however, proved otherwise. The Army in power, either directly or under the facade of a civilian government, does not seem to understand the intricate political mechanism by which various interest groups bear themselves on the decision making process of the government, and try to solve the problems by "soldiers' governing style". The Praetorians' proclivities" become the only way, as they believe that " severe communal conflicts and other political problems are

similar to military and technical ones and they can be quickly solved if 'attacked' directly".<sup>40</sup>

The attitudes and beliefs of the military regime of Ayub Khan and Yahaya in Pakistan provide us with some insights of the military minds and *modus operandi* in tackling the serious political conflicts, whose basis were ethnic, linguistic as well as regional, which threatened the viability of nation's constitutional order and the nation itself.

Ayub Khan, who was considered by many as "Asian De Gaulle" for his "prudent" rule made the fatal mistake of not accepting the legitimate autonomy demands of the Bengalis in 1965, and threatened to deal with it with the 'language of weapons' instead of dialogue. Ayub's military successor, Yahaya Khan demonstrated similar trends of behavioral patterns. His actions were the final blows to the nationhood of Pakistan, when in March, 1971, during the political deadlock he sought a military solution instead of a political one. In the face of mass uprising and constitutional deadlock, Yahaya's Chief of Army Staff, reported to have said: "We need a quick decision; my boys are getting restless".<sup>41</sup>

General Tikka Khan, who was sent to tackle the "situation" in the then East Pakistan, boasted that the "situation" would be brought under control within seventy two hours. That prescription warranted a nine-month long bloody civil war ending with the emergence of an independent Bangladesh. Military government's failure of national integration in Pakistan is a glaring example of how "the Praetorians had transformed the overlapping regional-

linguistic-ethnic divisions into an intense conflict and ordered and executed a debacle of deathly repression and terror, culminating in one of the bloodiest civil wars of the post-1945 period, mass starvation, economic ruin, and the dismemberment of the Pakistan that they had set out to preserve.<sup>42</sup> Moreover, the assumption that military rule hastens economic development and industrialization has been proved to be incorrect. Norlinger, in his study of 74 non-western, non-communist countries, showed that there is no significant difference on impacts on the process of modernization and economic development between the countries which experienced military interventions and the others which did not.<sup>43</sup> Most important of all almost none has created a civil successor-regime. So, from the point of view of the constitutional order, their record is profoundly disappointing"<sup>44</sup>

#### Socio-Economic Challenges to New Democracies of Afro-Asian Countries.

We have already referred to some challenges and problems confronting the emergent democratic states in Afro-Asian countries. These challenges create serious inhibitions to the growth of constitutionalism in these countries. Some of the problems emanate from the social structure of these polities which are not homogenous. The populations of most these countries are amalgamation of various ethnic groups who live within the borders hastily drawn by their colonial rulers. The colonial rulers paid little attention to the actual physical location of these diverse

groups. Borders of some countries have been drawn dividing a particular ethnic group who live on both sides of an international border.

The word 'ethnic' covers as noted by an expert on "Managing Ethnic Conflict" a wide range of communal or group interactions-- racial, tribal, religions, linguistic or any other characteristic that distinguishes groups from each other'.<sup>45</sup> Individuals of each group is loyal to their communal group rather than identifying with the abstract nation of statehood or nationhood. During the colonial rule-- these groups were less conscious relative advantages and disadvantages as they had only one objective in mind i.e. to get rid of the foreign rule. The hopes and aspirations of diverse groups burst open once the colonial rule ended. Ethnicity, which is considered a plastic, and originally ascriptive trait, can be extremely politicized under certain historical and socio-economic circumstances. Such situations exist in transitional societies of the developing nations because these societies are characterized with structured interethnic inequalities. As the process of modernization continues each group becomes aware of the existing inequalities and uneven development. The sense of deprivation is intense as individuals in such societies identify with their 'primordial' feeling rather than identifying with the nation.<sup>46</sup> The social order in these countries is, thus noted for acute ethnic diversities. According to Almond and Coleman, this is "due to the religious, racial, linguistic, and cultural pluralism characteristic of the societies in part to due to the limited and



uneven operation of the process of modernity."<sup>47</sup> which presents the peculiar problem of social integration which is distinctly different from their western countries at the early phase of modernization. This is a formidable challenge to the smooth working of the constitutionalism.

These ethnic differences, quite often lead to tensions and struggles which may sometimes be even violent. The conflicts may occur on political, economic, cultural issues. Only three years after Myron Weiner's expectation<sup>48</sup> that Nigeria, with no single dominant ethnic group held a prospective assimilation-- was plunged into a bloody civil war. Ethnic tension in that country has caused four coup d'e-tats, nearly three years of civil war and thirteen years of military rule. Only recently has the country returned to a constitutional government. The nature and degree of conflicts differ from country to country and courses also vary in different countries.

The government of these new countries which have inherited from the former colonial powers these divergent social order try to achieve national integration by complicated and lengthy processes. In some cases national integration is achieved, though not fully but in some cases it leads to dismal failure as in Pakistan (1947-1971). It has led civil wars in countries like Ethopia, Sri Lanka causing both severe damages to economic and political development.

The process of development with which these countries are involved, sometimes lead to further aggravating social strains and stresses, as the process of modernity and degree of economic

development are even. Some regions may be developed to greater extents or some groups may be benefitted more as compared with other groups. As a result of the uneven process of modernity and economic development group or regional tensions may be increased rather than reduced. So the ethnic differences and socio-economic developments are interrelated. " In modernizing societies," as pointedd out in a study on 'Primordial sentiments and civil Politics in the New States', "where the tradition of civil politics is weak and where technical requirements for an effective welfare government are poorly understood, Primordial attachments"<sup>49</sup> may give rise to serious impediments to the growth of common nationalism overriding lesser communities.

But without an effective common nationalism, it is difficult to achieve successful democracy. As A.D. Lindsay in his, The Essetial of Democracy, tells: it is commonplace that successful political ddemocracy on a large scale implies something we call nationality.. Nationality is a sense of belonging together, involving a readiness on the parts of the members of a state to subordinate their differences to it choose such common understanding and sense of belonging together either does not exist or is overshadowed by other differences, successful democracy is not really possible'.<sup>50</sup>

Wide prevailance of primordial sentiments and lack of strong national feeling and sense of solidarity are, therefore, some of the basic problems of new democracies in many cases. The sound and proper functioning of constitutionalism in few Afro-Asian

countries demands subordination of group loyalties to a common and higher sense of loyalty. The constitutions of such countries must ensure an orderly political development. The institutions, terms and procedures of a constitutional document conducive to such development is very important.

#### Social Structure in New States

One of the dysfunctional aspects of constitutionalism is the existing social structure found in most of the New States. In essence, as pointed out earlier, these societies are pluralistic due to cleavages among the different segments of the society as well as lack of identifiable consensus. Lucian Pye referred to these divisions as "communal" divisions<sup>51</sup> whereas Clifford Geertz termed these communal attachments as "Primordial," whose effects on the constitutionalism have been already discussed.<sup>52</sup>

Besides such communal cleavages, the transitional societies are characterized by the existence of a small modern elites and vast masses of traditional population. A group of western educated elites, one of the legacies of colonial rule occupy a special place in these societies and consider their role vital in the process of nation-building.<sup>53</sup> They were the first ones to be exposed to western liberal philosophy and their role during the nationalist movement was crucial. Although they were exposed to the liberal philosophy some of them were strongly attracted to socialism since their fight was to alleviate the miseries of their

country people.

These modernizing elites were, thus, committed to policies, may they be socialists or capitalists whose implementations were to result in rapid economic growth. But the modernizing activities of the government quickly became dysfunctional due the existing "gap"<sup>54</sup> between the modernizing elites and the traditional masses: "the underlying tensions are everywhere much the same village versus town, land versus cash, illiteracy versus ambition, piety versus excitement."<sup>55</sup> In their eagerness to modernize, the adopted 'foreign' machineries whose language, approach and objectives are quite non-comprehendable. Professor Morris-Jones, in his book, *Government and Politics in India*, discusses the various 'levels of politics' in India which operate at three levels-- modern; traditional, 'and' saintly.<sup>56</sup> Without the infusion of all three levels, the task of nation-building is difficult. Thus, the modern institutions and machineries whether political or economic lose much of their speed and energy when confronted with traditional techniques and mechanism. It seems that most of the modern institutions have been grafted on the ones instead of trying to bring a gradual adjustment between the two.

This brings us to the discussion of another component of the social structure namely the middle class. Class structure of a society is an important determinant in organizing a government. According to Aristotle existence of a large middle class is synonymous with democracy and constitutionalism. He was of opinion that extreme poverty among the large number of people or

concentration of wealth in the hands of a few are not conducive to the growth of stable political order in such case, the system transformed either into an oligarchy or tyranny. Machiavelli also dealt with the class structure of a society in determining its form of government.

Recently Sociologists have been able to point out certain conditions which foster the growth of a stable democracy. These have been termed by S.M. Lipset as the 'structural characteristics of a society which sustain a democratic political system'<sup>57</sup> According to Lipset, economic development comprising industrialization, wealth, urbanization, and education are some of these characteristics. There are deviant cases but mostly Lipset's hypothesis indicates right direction,.

Industrialization, urbanization, wealth all have bearing on the growth of democracy. But education has singularly fostered democratic ideals in any polity. As Lipset pointed out that education not only broadens the outlooks but also "enables them to understand the need for norms of tolerance, restrains them from adhering to extremist and monistic doctrines, and increase their capacity to make rational electoral choices".<sup>58</sup> Researchers have found that people with better education respond more positively on national issues than less educated ones whose response to vital public issues are usually, "I don't know".<sup>59</sup>

Increased economic development accompanied by education, thus give rise to a large middle class who play an increasingly moderating role in bringing 'elite-mass intergration'.<sup>60</sup> Most middle

classes belong to the modernizing urban groups while they are not completely cut off from their traditional roots. They are capable of "communicating ideas and attitude" and thus, act as modernizing agents "for spreading among a large public vivid image of its own New Way is what modernization distinctly does".<sup>61</sup> Moreover, outlooks of the middle class are broad and thanks to their tolerant attitude they show a tendency to "overlapping membership".<sup>62</sup> This tendency reduces the tension in a plural society because "when individuals belong to a number of different organized or unorganized groups with diverse interests and outlooks, their attitudes would tend to be moderate as a result of these psychological cross-pressures. Moreover, leaders of organization with heterogeneous membership would tend to assume moderate, middle of the road positions. Such moderation is essential to political stability."<sup>63</sup> The role of the middle class in bridging the elite-mass gap as well as tensions of plural society can hardly be overemphasized. As Lipset argues, "the chances for a stable democracy, are enhanced to the extent that groups and individuals have a number of cross-cutting, politically relevant affiliations".<sup>64</sup> Absence of a large middle class, thus, creates a vacuum which is detrimental to the stability of a constitutional government.

#### Political Leadership in the New Democracies

We have been discussing the strains and stresses confronting the emergent constitutionalism of Afro-Asian countries. Among these challenges, the issue of able, honest, and dedicated

leadership is also a vital one. In countries where political parties are not yet well-developed or well organized, as we have already stated, where the vast majority of the population are either illiterate or hardly literate; where public opinion is not fully articulate-- a vigilant public opinion is regarded as eternal price of democracy -- the qualities of leadership become very important.

In many emergent nations the process of democracy and constitutionalism, after initial rough sailing, has been set on a firm footing due to mature and pragmatic leadership. Universal suffrage in an illiterate country has compelled the government to expand educational facilities thereby increase the rate literacy whereas introduction of and continuence of democratic government has increased the number of middle class from a marginal existence to a formidale one. These have enhanced the chance of a stable democracy and have been possible due to pragmatic leadership. As such, given the right direction by able leaders many of the "pre-quisites" of a constitutional goverment can be successfully tackled. Malaysia, Philippines, India and Sri Lnaka are some of the examples. The leader of these countries were able to institutionalize the political process through political acumen, charisma and pragmatic approach.

The question of leadership has become even greater due to "the changes in the character of politics" during twentieth century. Increase state activities in this century has given rise to executive leadership in the developed nations which called for the

redefinition of the politics of leadership. In the developed nations -- the institutional provisions for executive leadership minimized the importance of personal leadership though its importance cannot be completely ignored.<sup>65</sup>

But as we turn to the politics of the developing nations the issue of personal leadership takes a different dimension, especially in the post colonial countries. The democratic institutions in these countries are fragile and the executive leaders rule by mass appeal and through broad political powers. The rise of a charismatic leader is rather common. Charismatic leadership can be successful in transitional societies due to peculiar social and political phenomenon.<sup>66</sup> But the success or failure of charismatic leaders depend on how they use their charisma. A charismatic leader can bridge the gap between modernity and tradition by pushing "institutional development". In doing so he has to relinquish his personal power in favour of institutionalization. He has to make a conscious choice between the use of his arbitrary powers and the powers to create institutions.<sup>67</sup> This is a critical choice which may set the future course of polity because individuals take cue from their leaders or follow their examples. We may here recall Montesque's classic statement: "At the birth of societies, it is the leaders of the Commonwealth who create the institutions; afterwards it is the institutions that shape the leaders."<sup>68</sup>

Besides the social and political phenomenon, the urgent need for economic development in the developing polities makes the



necessity of able and skillful leadership almost an imperative. The governments of these countries are required to play a vital role as modernizing agents. Without some state intervention the economic development programs cannot be accelerated. Rapid social economic development call for pragmatic but the leaders often shroud their professed plans and policies with the aura of an ideology. Most of the ideologies formulated in the developing nations are "developmentalist. The slogans and rhetorics of "catching up" with the west, thus flourish successfully while the development of social and political institutions lagg behind the pace of social and political mobilization. Use of ideology bring instability and uncertainty, particularly when the dysfunctional institutions of the past have not be replaced<sup>69</sup> The political leadership should try to bring a balance between commitments to ideology and political pragmatism. To strike a middle ground between the two need skillful leadership and political acumen.

"What must a ruler do to remain in power and to affect his country's affairs how can he best use his person to achieve his ends beyond mere survival in the President or Prime Ministers office"<sup>70</sup> are matter of great significance and importance for the nascent ddemocracies of New States. Professor Wriggins further states: " they (political leaders) seek to mutual identity and national loyalty to replace the parachocial loyalties characteristics of their present societies perhaps the most difficult of all is the challenge of succession: the preparatin of orderly and peaceful means for replacing rulers in ways that bestow

legitimacy on succession.<sup>71</sup>

In a democracy, orderly and peaceful succession is vitally important; ballot, not bullet must decide the issue of succession if constitutionalism and democracy are to be successful. In New States, the dearth or what Sir Ivor Jennings terms "famine" of honest and dedicated leader"<sup>72</sup> is a serious problem for these states. Once in power, they want to perpetuate their rule. In that process, the political and electoral process are perverted and the opposition not tolerated. They consider themselves to be indispensable and identify themselves with the state. A vicious trend of personality cult is born which hampers the process of peaceful transfer of leadership within the party. Wide prevalence of corruption in the New States makes it more imperative for able and honest political leaders.

What presence or absence of good leadership can create may be illustrated from the fate of two democracies in neighbouring two South Asian countries: India and Pakistan. These two countries had inherited from the British raj some rudimentary form of parliamentary democracy and their leaders had also some training and experiences in the democratic system under similar political and socio-economic conditions. But post-independence political developments since 1947 in India and Pakistan have been widely divergent. In India democracy, with some limitations here and there, has proved to be successful; India is termed as "world's largest democracy" and is one good example of constitutionalism in the Third-World. But in Pakistan the fate of democracy has been

very dismal: since its independence, Pakistan had three Martial law regimes lasting for about sixteen years (1958-63; 1969-1971 and 1977-1985.) Democratic foundation in Pakistan had never been strong or sound either in "united" Pakistan or in "new" Pakistan. There have been queries and analyses about the comparative success or failure of democracy in India and Pakistan. While many factors have been attributed for this comparative fate of democracy in these two countries, the consensus is that India has been benefited by honest and able leaders like Gandhi and Nehru whose decisions and guidance paved the way for institutionalization of the democratic process while in Pakistan, the critical choice by its leaders and elites created impediments for the growth of stable democratic institutions. Pakistan Constitution Commission of 1960 headed by a former Chief Justice came to the conclusion that lack of able leadership was the "prime factor" for the failure of democracy in Pakistan.<sup>73</sup>

We may cite the cases of many other Afro-Asian countries where absence of good and able leadership have created many problems creating hindrance to the success of constitutional Government. The leaders may be classified into three categories popularly elected leaders; military leaders and civil or "constitutional dictators" Each type has its distinctive characteristics and different *modus operandi* to achieve their objectives. Dankwart Rustow tells: "Political modernization poses with particular intensity the need for political leadership and the more rapid the transition the more urgent the need".<sup>74</sup>

Political leadership is not a new issue; Plato talked about it the "Philosopher king" while designing his ideal Republic, Rousseau talked about the need of "supreme leaders". But in New States, the role of political leaders is more important because of gigantic socio-economic problems, ethnic diversities, and many other challenges. A demagogue or a leader with charismatic appeal may make temporary or illusionary success. But what is needed is democratically elected leaders with qualities of honesty, dedication to public services. His role must be that of promoting national interests rather than prolonging his stay in Presidential or Prime Minister's palace.

We have pointed out some of the challenges to the smooth working of constitutional governments. In spite of all the constraints discussed in the preceding pages it is encouraging to see the reemergence of trends towards constitutional government in many of the developing nations. After years of experimentation with various models beginning from totalitarian to bureaucratic authoritarian to one-party dictatorship the political process in these countries are showing preference for a democratic order. The democratization process started in mid 1970s with the collapse of dictatorship in Greece, Portugal and Spain. The gloomy forecast made about the fate of democracy in Latin American countries, is no longer applicable. Philippines, Taiwan and South Korea soon joined the rank. Pakistan and Bangladesh with their long struggle for democracy recently opted for democratic order. Much of black Africa is following the trail. Recently President Mobutu of Zaire

ended his twenty six years of authoritarian rule and agreed to form a care-taker government until the election is held. The democratic trends have been enhanced due to the collapse of communism in Soviet Union and East Europe and dependency theories. This in not say that constitutional government could have an instant success in these countries. The political, social and economic development are still not mature. A lot would depend on the leadership and how the process of institutionalization take place. Much depends on the international environment. The future is still known but one thing seems to be sure that these developing nations are moving in the direction of constitutionalism in the context of world-wide spread of democratic way of life. It has touched even Himalayan Kingdom of Nepal, and feudal Arab societies of Middle East are also getting its vibration.

### **CONSTITUTIONALISM IN BANGLADESH**

In the context of the limiting factors and conditions we have discussed in the preceding pages relating to the growth of constitutionalism and functioning of democracy in emerging Afro-Asian countries, we shall now examine how functioning of democracy and growth of constitutionalism in the new nation of South Asia, Bangladesh, have been affected by those limiting factors, if at all.

The liberation war of Bangladesh was fought in the name of democracy. The Awami League which spearheaded the nationalist movement had a long standing commitment to democracy and

parliamentary form of government<sup>75</sup>. Civil-military dictatorship during the Pakistan period and the use of various constitutional, political, economic and cultural mechanisms to aggrandize West Pakistani ruling elites' hold on former East Pakistan had profoundly effected the emerging Bengali nationalist leaders. Internal colonization of the then East Pakistan was possible because of the existing political order of the country. During the Pakistan period (1947-71) - with a short span (1958-1962) of naked military dictatorship - the country was ruled by a West Pakistani ruling coterie under the grab of a constitutional facade. The absence of democracy was thought to be the most important reason for the then East Pakistanis' sufferings and humiliation<sup>76</sup>. The famous "Six-point" programme, which became a charter for Bengali nationalist movement, thus, made specific emphasis on the importance of liberal democracy.

It was consequently no surprise that Bangladesh began its journey as an independent nation with a constitutional government. The legal basis of the government was provided by the Proclamation of Independence, issue on April 10, 1971, by the Exiled Government of Bangladesh. The Ordinance established a presidential form of government on provisional basis. It created an all powerful President with both executive and legislative powers.<sup>77</sup>

The revolutionary government was replaced by a parliamentary form of government soon after Sheikh Mujib's return from Pakistani jail. According to the instrument of the Provisional Constitutional Ordinance, 1972, Mujib relinquished his legislative powers given by

the Proclamation of Independence Order. He proceeded to step down from the presidency to become the Prime Minister and former justice Abu Sayeed Choudhury, was made the President of the Republic. By the same Ordinance, a Constituent Assembly and a Constitution Draft Committee were formed. The Draft Committee completed its task within a short span of time and the Constitution Bill was presented in the CA by November 1972. It came into force on December 16, 1972. Bangladesh, thus, enacted its constitution within nine months of its independence.

The Bangladesh Constitution of 1972 established a Westminster variety of parliamentary system with some socialist overtones. Its' organizational format had all the trappings of a parliamentary system. But in practice, however, under the dominance of the party and its charismatic leader, Sheikh Mujib, the country started experiencing the tyranny of the brute majority rule. The power of the legislature began to wane at the expense of the all powerful leader and his party.

Soon the stresses and strains on the constitutional government were evidenced by the changes in the constitution itself brought about through the Second Amendment. It granted emergency powers to the government and reduced the role of the legislature.

Far-reaching changes were brought by the controversial Fourth Amendment which established an authoritarian presidential system and a one-party state. Thus the founder of the state himself buried democracy in Bangladesh. The contribution of the Fourth Amendment in eroding the principle of constitutionalism is quite significant.

After the change of government in 1975, following a chaotic situation and after a series of coups and counter-coups, Ziaur Rahman, the then Chief of Army consolidated his position. The Civil-military bureaucrats were able to take advantage of the political leadership due to the previous regimes's inability to cope with the situation constitutionally<sup>78</sup>.

Ziaur Rahman, then, became anxious to give some civilian contents to his military rule. Once he could afford to lift Martial Law, he was in a position to restore a multi-party system as well as to introduce some features of democratic system. The parliamentary system was not restored but he managed to restore fundamental rights, a multi-party system and the lifting of control on the press. They were all popular measures.

The system of government introduced by Ziaur Rahman met socio-political requirements - a strong executive under the all powerful presidential system and a declined role for the legislature initially started by Mujib through the Second Amendment. The system was tailored made for Ziaur Rahman. There was a legislature but it was not the type of a sovereign legislature found in a parliamentary system. It was a short of a civilian-military partnership - although the constitution did not assign any specific role to the army, as is the case in Turkey or Indonesia. But when one would examine real position, the civil military partnership could be discerned. And without an independent and powerful legislature the presidential system had all the risk of being perverted into a constitutional dictatorship. The role of the



"rubber stamp" legislature was evidenced by the passage of a number of presidential decrees through the Fifth Amendment. It was a reminiscence of the action of the constituent assembly (Second session) when it made a number of Presidential Orders of the Constitution. It is, however, admitted that Zia's political order as compared to the system installed on January 25, 1975 was a better one.

The interval between the Zia regime and that of Ershad regime who seized power in a bloodless coup in 1983 was the Satter regime which was elected through a comparatively free and fair election. It was a difficult job for General Ershad to justify the "suspension" of the constitution. After seizing power, he introduced Amendments such as declaring "Islam" as the state religion. Some reforms of the Judiciary, which was successfully challenged in the law courts and provisions for a running mate. But none of these are fundamental changes as brought about by Mujib and Zia.

After ruling the country under martial Law from 1982-1983, Ershad declared himself to be the President of the country and won a "popular" referendum. He followed the footsteps of Zia in his attempts to civilianize his regime. In his endeavour to do so, he, however, was confronted with greater public opposition than Zia did. This was due to difference of the underlying factors of coup d'états of 1975 and 1982. The coup of 1975 was viewed more as a "putch" than a corporate coup because it was carried out solely by a group of young army officials belonging to Bengal Lancers. Although Army's corporate interests were at a stake the coup

occurred mainly due to personal rivalries, grudges against Mubib as well as the ineffectiveness of the Mujib government<sup>79</sup>.

Assumption of power by Zia was thus, welcomed by the people since he filled in a dangerously existent power vacuum in the backdrop of acute instability, chaos and clamour for change in country's direction. In contrast to 1975 scenario-the coup of 1982 was staged mainly due to the alleged threats to Bangladesh army's corporate interests and its nagging demand of a constitutional role in country's affairs as well as personal ambition of the then Chief of the Army Staff, General H.M. Ershad<sup>80</sup>

He however, was successful in holding parliamentary election in 1986 and had all Presidential Proclamations ratified issued during the suspended Constitution (1982-1986) through the Seventh Amendment. He, however, failed to assign a constitutional role for the army.

One has to come to a sad conclusion constitutional government was installed soon after the independence and all the features of a democratic regime were incorporated such as fundamental rights, independence of judiciary, division of powers between three organs. But in reality, the country's governmental structure had been noted more for deviation of the constitutionalism rather than for adherence. Constitution of the country was never abrogated but kept in suspension under Martial Law and subsequently the constitutional vacuums were filled by various amendments. Both Zia and Ershad declared their prophesed faith in democracy and promised speedy return to democratic rule "as soon as" possible. Mujub was the only

leader who directly challenged the democratic system while establishing a one - party state. His one - party system was thought to be a better model than the Western liberal model.

All three important regimes - Mujib (1972-75), Zia (1975-81) and Ershad (1982-1990) maintained the facade of constitutionalism. There was parody of democratic and constitutional institutions. In actual practice, all the three regimes on some pretext or other resorted to extra-constitutional means to establish autocratic rule. In case of Mujib era, as pointed out earlier, there was a constitutional Amendment to transfer the democratic system into constitutional dictatorship. Both Zia and Ershad began their rule by suspending the constitution and declaring Martial Law. In both the cases the regime began with Martial Law and even when they lifted Marital Law by a process of civilization they retained some extraordinary measures and powers such as Special Powers Act, Preventive Detention, Emergency Powers, which all went against the spirit of constitutionalism. There were, however, differences between zia and Ershad but so far as the spirit of constitutionalism was concerned the difference was that of degree and not of kind.

What went wrong in Bangladesh? Why did the experiment with constitutionalism meet with so many set backs in a country with a history of struggle for democracy? What were the stresses and strains on constitutionalism latent and apparent? Some of the callaenges facing new demoracies, such as, lack of proper and well-organized party system, leadership crisis, threats to democracy

from the civil-military bureaucracy, acute socio-economic issues had seriously affected the working of democracy in Bangladesh. We will briefly analyze those factors and detailed the impacts of these constraints on the evolution of constitutional development in Bangladesh.

#### PARTY SYSTEM

Stable and working party system is synonymous with stable constitutional government. Usually a system of two or multiple parties with broad ideological and social bases enhance the changes a smooth working of democracy. It should be noted, however, that evolution of a party system largely depends on the social and political conglomeration of a polity. Sometimes a dominant single party is capable of aggregating and incorporating diverse interests of various social groups. But it depends on the party's institutional strength such as coherence, complexity, autonomy and adaptability.<sup>81</sup>

The Congress Party of India, which was like an umbrella organization at the time of independence was successful in institutionalizing the party because of its organizational strength, clear-cut policy preference, autonomy and adaptability. Moreover, political parties are most essential ingredients for the working of a democracy, parties represent political views of the people and they also represent political pluralism prevailing in a country. Well organized political parties play vital role by aggregating and articulating various interest groups and by

providing mechanism of conflict resolution as well as bear impacts on the policy making decisions of the government. Institutionalized parties, thus, play the role of integrating the society by absorbing the new social classes into the community. Moreover, it is through the parties that people exercise their inherent right of choosing and firing a government under which they live. The political parties, thus, should be broad based and issue oriented facilitating electorate's right to choose its government. Parties which are unable to form the government also play important role by constructively criticising the government, highlighting government's failure in certain areas to the electorate in order to win the election. As pointed out earlier, the malice of democracy in Bangladesh have been acknowledged and truly admitted in almost all quarters. Among the factors responsible for this sad state of affairs Political parties in Bangladesh bear a major if not the major responsibility. Due to absence of open politics the political parties in Bangladesh are characterized with politics of conspiracy and known to have pursued narrow, sectarian interest instead of broader interest. As a result, parties in Bangladesh are hardly based on broad principles or issues. They are mostly personality oriented, followers mainly cluster around a political leader who in turn becomes dictatorial. In fact, there is hardly any democratic structures or organisations within most of the parties. The leader's Image and personal popularity are the main strength of the party. He is hardly challenged or questioned. Most political parties have not evolved from grass root levels. Awami League is

the oldest and most organized party which traces its origin back in 1949 and is known to have some grass-root organizations. In spite of such comparatively longer history, Awami League reached the crest of popularity in mid-1960s, due to the charismatic leadership of Sheikh Mujib. Mujib's undisputed stature was a strength during independence movement while it proved to be a fatal weakness during the period following liberation. The nascent democratic order soon was characterized by personalized rule of Sheikh Mujib.

The disarrayed party situation in Bangladesh can be attributed to another very important factor which is rooted deep in history. Since 1947, most political parties due to the lack of democratic order became prone to agitational politics. Both ruling and opposition parties view themselves as adversaries rather than partners in running the governmental affairs of the country. The ruling party consider the opposition's criticism as anti-state whereas the opposition feels that it is their solemn duty to dislodge the government at any cost. Lack of experience with the working of a democratic order has instilled a deep-rooted suspicion in the minds of the politicians which has become difficult to get rid of. The parties are more prone to agitational politics rather than having the art of governing.

Another unfortunate fact is that none of the political parties except Awami League is a national party with nation wide constituencies. According to the report of BAMANA which monitored the recent parliamentary election in 1991 except Awami League apart from being concentrated mostly in the urban cities, most political

parties' strengths are regionally based.

The Awami League which was instrumental in spearheading the independence movement, like any other parties of nationalist movement, had become an umbrella organization. The liberation war and traumatic birth of Bangladesh in 1971 had radicalized its polity; as a result, post-independence Awami League differed from pre-independence situation which was then the first opposition party in Pakistan, and judged by the criterion of political parties in New States, with its organizational structure, grass-root support, leadership it could be regarded as a properly organized party.

In 1972, the Awami League was almost the single party in Bangladesh; the rightist parties were banned for their alleged 'collaboration' with Pakistan army during the liberation war. The leftist parties had very little role in country's Parliament - the First Parliament was almost entirely dominated by a single party (Awami League) and there was hardly any effective Opposition party which is regarded as a unhealthy feature of parliamentary democracy. Unfortunately, AL had not escaped from factionalism; even before the creation of Bangladesh, a powerful group of the party formed a new one known as National Awami Party (NAP). After the death of the supreme leader Shruawardy there were internal squabbling and factionalism within the party. But by 1968-69, Mujib established himself as its effective, if not, the sole leader; he had a party organizational framework, enjoyed wide popular support. He successfully challenged the Pakistan government and in due

course became the founder of Bangladesh.

The more serious hindrance or threat to functioning of democracy was the tendency of the Awami League, in particular, its leader Mujib not to tolerate any opposition to the ruling regime. Opposition to the government was quite often misinterpreted as 'opposition to the state'. This was not at all a healthy factor in the evolution of constitutionalism. The single-party system, though not in theory, but in practice was a big limiting factor for the nascent democracy. Subsequently Mujib, by the Fourth Amendment of the Constitution formally established a one-party constitutional dictatorship.

The factionalism within Awami League during post-independence was however, further exacerbated due to controversy over the nature of socialism to be introduced in the country, conflicts among the young Awami League workers. Thanks to such infighting within the party, the Awami League soon started to lose its effectiveness as an "organizational weapon" On October 23, 1974 pro-Moscow Tajuddin openly split with the prime Minister, and was asked to resign from the Cabinet.

Other major two political parties - neither Bangladesh Nationalist party and nor Jatiyo Party evolved from the grass-root levels. They were floated by Zia and Ershad in their efforts to legitimize and civilianize their rule. Both parties are conglomeration of politicians from different political parties with various political beliefs with a wide spectrum of far left to far right. Relatively speaking this tendency of hero worship is less



evident in the extreme rightist and leftist parties. The main function of the major parties were to recruit supporters through political patronage. The followers of these parties without any broad support base was in no position to challenge their leaders. Personalization of politics was, thus, a prominent trend in both BNP and Jatiyo party. It may sound paradoxical but it is correct to say that democratic parties like Awami League, BNP and Jatiyo Party are lesser developed democratically than left and right ones. Although BNP since its inception has gone through a profound transformation, the dis-satisfaction and behind scene criticism of Begum Khaleda Zia about her alleged authoritarian treatment towards her parliamentary party members - demonstrate the lack of democracy within the party. It is difficult to maintain democracy at the governmental structure if there is no democracy at the party unit.

Lack of party discipline is another important issue facing prospect of democracy in Bangladesh. If we examine care fully, the actual functionary of three major 'democratic' political parties - Awami League, BNP and jatiyo party we find that they have hardly any source of strong discipline or loyalty among its rank and file. This is one of the main reasons why there are so many groups/factions and sub-factions within the parties. The opportunistic nature of politicians also helped the proliferation of factionalism. Factionalism was further compounded during the civilianization process of Zia/Ershad military rule. In the process of civilianization of their system the military leaders could always 'procure' support of some factions of the democratic

parties. The two military Presidents of the country Zia and Ershad could easily manage to get support from some factions of the opposition parties by offering them political positions and privileges. As a result, there are now, at least on paper, more than 100 political parties of which 70 contested the election in 1990. In reality, however, the number of significant parties are not more than half a dozen. They are the Awami League, BNP, Jatiyo Party, Jamaat-i-Islami, NAP(M) and conglomeration of leftist parties. Unless the political parties demonstrate their organizational strength at the grass-root level and bring the majority of the population into the mainstream of the political system, constitutionalism and democracy would be seriously under constraints and stresses.

If one wishes to ensure political stability and prevent periodical rise of authoritarian regime, a lot has to be done to improve the quality of party system in Bangladesh.

**Politicized Military Establishment:** In undivided Pakistan, inordinate ambitions of some top army generals and bureaucrats had contributed to the collapse of democracy in that country. The military bureaucrats are capable of seizing state power in most post-colonial countries because they have inherited a "overdeveloped state apparatus" from their colonial rulers.

The Bangladesh military establishment is different both from Pakistan and Indian army. The Pakistan army is political but cohesive whereas Indian army is apolitical in true sense of the

term. Unfortunately the history of Bangladesh army is intertwined with the traumatic, confusing and bloody history of the country. The army personnel who deserted the Pakistan army at the wake of liberation war did so on their own initiative and were thus drawn directly to fight a political cause and thus truly become a revolutionary army. The nucleus of Bangladesh army was formed initially from these highly politically motivated group.

To make the matter worse, like the rest of the society, the army was highly factionalized, especially with return of large number of Bengali expriate, who were held in the then West Pakistan. The basis of division was in the line of "freedom fighter" vis-a-vis the "returnee". This highly politicized and factionalized army added a far-reaching demension to already chaotic political situation of the country. The army in Bangladesh were, as a matter of fact, given ample opportunity to step into the political situation of the country. The reasons were many: first, they were well acquainted with the political role played by the Pakistani army and as a junior partners, they had no difficulty in absorbing that culture; sceond, during post-liberation period, they watched from a close quarter the inffective management of the state affairs by the civil administration; third, formation of para-military Rakkhi Bahini became a source of intense irritation to the established army and lastly repeated use of army by Mujib to administer civilian affairs, finally triggered the coup of 1975. There were, however, othe factors involved, as one expert, pointed out that it was more a "putch" rather than a regular coup as it was

carried out by only a handful of army officials who wanted to save the country from total disintegration'. It indeed came at the wake of corruption, stagnation and breakdown of the democratic institutions.

Once in power, the military of Bangladesh has regrouped and organized and under Zia regime forged a close partnership with the civilian bureaucrats. (The rise of the authoritative institutions at the cost of political institutions has been, indeed detrimental in the process of constitutionalism.) Since then, Bangladesh military have had profoundly affected the political system of Bangladesh<sup>82</sup>. The decision-making process was effectively transformed in the hands of the bureaucratic elite rather than the political ones inspite of the fact that both Zia and Ershad had civilianized their regimes complete with the trappings of civilian institutions. The army, however, remained factionalized inspite of Zia's ruthless purging of army personnel in 1977-1978.

General Ershad, however, tried and some what successfully made the army a cohesive one. Unlike Zia, who had to constantly attempt to contain the factionalism within military, Ershad's support from the army was more or less solid. His endeavour to give a constitutional role to army was not successful as evidenced by the shelving of District Bill which would have given army an institutionalized role in the district management committee.

The fact of the matter is that inspite of Bengalis' overwhelming urge for a democratic order, Bangladesh has been ruled by military fourteen years out of its twenty years of independence.

It has come out to be the most powerful institution and final arbitrator in the political affairs of the country<sup>83</sup>.

One redeeming feature has been the role of the army during the democracy movement of 1990 in which President Ershad was overthrown. It seems over the last twenty years of independence, a young group of army officials, commissioned during post-liberation period, have different notion about army's political role. They hold the ranks of Lt. Colonels, Colonels, Brigadiers, the ones who actually hold the fire power and call themselves nationalist who allegedly played a crucial role in the overthrow of President Ershad. It is reported that it is their refusal to support Ershad finally made the dictator to relinquish his power. This is not say that army in Bangladesh has made up its mind to excommunicate itself from playing any political role. It is still far from a cohesive body. It is alleged that even in this young group there are three opinions. One group adheres to complete professionalism. whereas the second group feels that if things go wrong, they would have certainly a meaningful role to play and the third group is sitting on the fence and would be willing to take side with the winning side. One must also remember that army intervention in politics arises due to various other factors of which the role and effectiveness of the civilian government is most important.

Leadership Crisis: Bangladesh, since its inception has been suffering from leadership crisis<sup>84</sup>.

The independence was accompanied with the rise of charismatic leadership, which according to many experts, are common in

transitional societies. The critical choice made by the leaders and the elite is extremely important because the condition under which new social forces begin to participate continue to direct and influence their activities.

Sheikh Mujib was a leader with great personal appeal. He was the 'Bangabandhu', 'the father of the nation' and unchallenged leader of seventy-million Bangalis. The authority was unquestionable. But due to his lack of organizational ability, he could not or did not transfer Awami League or the ruling regime into a proper organizational framework. The politics of patronage and personal loyalty which acted as bedrocks of AL during pre-independence era actually weakened the organizational strengths of post-independence AL. Moreover, personalization of power in Mujib weakened the autonomy, coherence and discipline within the party. Thus, the rise of personality cult hampered orderly succession and recruitment of leadership. Unwillingness on the part of charismatic leaders to institutionalize the political process by parting with personal power eventually turn the system into a personal one.

Mujib was no different from other Third world country's leaders who think that they are indispensable. Everything must be decided by them, otherwise the country cannot survive. He, thus, turned the governmental machinery into a personal and one-man show: he used to decide even the small details leaving no scope for sound administrative framework. His enormous personal power, his intolerant personality trait went a long way in retarding the healthy growth of autonomous, independent and free institutions of

press and media so vital for the working of a sustainable democracy. His initial attempts to bring the bureaucracy to bring it under political control was highly commendable but his inability to maintain a coherent party structure, slowly and surely made him dependent on the top civil servants. The civil servants who had begun to lose their *esprit-de-corp* soon started to wield powers at the cost of the legislature. The legislature began to degenerate into a 'rubber stamp' legislature while Mujib unlike, Nehru of India, was unable to institutionalize his charisma which left profound effects on the evolution of a healthy political order.

The unfortunate tendency of one-man show continued during the two subsequent regimes Zia and Ershad.<sup>85</sup>

Thus the leadership crisis also became a serious limiting factor for democracy in Bangladesh. Zia was also a charismatic leader and had great popular appeal. Most observers believed in his sincerity in country's developmental programmes and his faith in Bangladesh's destiny. But his leadership was flawed due to his inability to build political institutions. While in power, he was more dependent on civil-military institutions rather than the political one, especially Zia's encouragement to party factionalism of the opposition parties and the use of legislature as 'rubber stamp' created serious complication for the sound growth of constitutionalism.

Ershad's long era was also noted for his encouragement to

party factionalism within the opposition parties. But his greatest disservice to democracy and constitutionalism was the destruction of the process of election. Free, fair and periodical election is *sine-qua-non* for democracy but Ershad destroyed the whole process of free and fair election. Elections held under his regime were simply farce and mockery. On the part of all three leaders, there were lack of commitments to democratic traditions which Juan Linz calls "Loyalty" to democratic system. Toleration rejection of violence and unconstitutional means to fair power, condone the anti-democratic actions by other participants are all part of such loyalty.<sup>86</sup>

Since Ershad's fall in December 1990, a free and fair election, however, has been held Bangladesh.

There should be, however, no doubt that the rise of authoritative institutions at the cost of political institutions have been, detrimental in the process of constitutionalism. The ineffectiveness of the political institutions and military interventions, have created a vicious circle of 'which comes first' hypothesis. The military must realize (especially since the fall of Ershad) that weak and ineffective political institutions should be given a chance to take roots. Periodic intervention by the army does not create any such congenial atmosphere.

#### Bureaucracy:

Bureaucracy is an essential element of a modern state. While the popularly elected ministers provide the democratic element the



bureaucracy provide expertise knowledge. A commendable synthesis of the both is needed for the successful working of any form of democratic government.

We cannot describe the role and nature of bureaucracy in Bangladesh without some reference to its growth and functioning first in British India and then in undivided Pakistan. Since there is enough materials on the historical development of bureaucracy and civil servants in the sub-continent, we would simply mention that British developed large and structured bureaucracy in order to maintain law and order to serve British colonial interest. Representatives institutions were introduced but the bureaucracy remained outside the purview of the Indian political leaders. Here, we shall confine our survey to the role of bureaucracy in Bangladesh since its inception.

In undivided Pakistan the officials who formed the civil service or bureaucracy in Bangladesh were the junior partners of the Pakistan civil service. In Pakistan where democracy practically eclipsed since 1958 bureaucracy played highly political role. The British tradition of impartial and non-partisan civil service had been destroyed. Civil-military dictators like, Ghulam Mohammed, Iskander Mirza, Ayub Khan had no faith in peoples ability to rule. They rather believed in civil-military partnership in which top army officials and bureaucrats ran the administration. Bengali members of the erstwhile Pakistan civil service did not directly take part in the national decision making process but they watched the political role of the civil service from a close

quarter and seems to have developed a nostalgia for such political dominating role of the civil service.

When Bangladesh was created political leadership was not effective. It was, however, true that Mujib's authority could not be challenged by any top civil servant but Mujib was not a capable or experienced administrator. The Awami League ministers, with the exceptions of one or two, were also not sufficiently experienced or capable to challenge effectively the inherent tendencies of the civil servants to dominate. The political parties and parliament were not in that stage of development so as to challenge the bureaucracy.

In spite of that -bureaucracy was initially relegated to the background due to AL's pre-independence promise to democratize the administrative system including radical restructuring of the civil service. Mujib was highly critical of the bureaucrats and was determined to restructure the entire administrative system. Accordingly certain measures were taken by the regime which weakened the bureaucracy. It was further weakened by internal schism and factionalism. Their morale was at the lowest ebb during 1972-74.

Due to the subsequent political developments like factionalism and fragmentation of Awami League, inefficient management of the economy, rampant corruption and challenge from the radical left - Sheikh Mujib started to rely heavily on the bureaucracy. The bureaucratic elites who had lost their *esprit de corps* soon forged unity and cohesion within its ranks. The corruption and internal weakness of the Mujibur Rahman government finally provided an

opportunity to the bureaucratic elite to dominate country's political process.

Then came the period of full or quasi military rule (1975-1990). It is almost a truism that civil servants under an authoritarian government whether civilian or military exercise greater power and influence than under properly constituted democratic system where there is vigilant parliament.

The civil-military bureaucratic apparatus came to the forefront of state management with Zia's coming to power. In order to consolidate his rule Zia co-opted many civil servants by appointing them in the Council of Advisors formed in 1975 and in key ministerial positions. The civil servants, thus, could exert enormous influence in political decision making. Whereas in a democratic system policy making is the primary responsibilities of the ministries, Zia's policy of civilianization and his mass-oriented administration without the support of a truly popular party provided policy making responsibilities within bureaucratic control. They were virtually in control of both policy formulation as well as policy implementation. The civil servants were deployed in the self-reliant and institution-building programs. The thorough bureaucratization of administration by Zia helped the civil-military to become the dominant elites of the country. Zia's hand made political party, on the other hand, without much popular support was in no position to threaten the bureaucratic elites.

Zia's Civil-military state apparatus came under a civilian

regime for a brief period. Due to the weakness of the democratic institutions the regime was unable to withstand the onslaught of an army intervention. During Ershad's nine year rule civil-military bureaucracy became more entrenched. Top civil and military officials held important positions and were involved in critical policy formulation. They maintained their positions in spite of Ershad's civilianization process and 'decentralization' at Upzilla level. No impediments were created to challenge the dominance of the bureaucracy in Bangladesh.

In Bangladesh, as pointed out earlier, neither a vigilant parliament nor a responsible executive was in existence to restrain the political ambitions of the civil servants. As such both under the military regimes of Zia and Ershad top civil servants had direct access to the President and even sometimes could override the decisions of their ministers by evoking President's support to their side. The 'rules of business' as it existed in Bangladesh allowed a matter to be referred to the President in case of a difference of opinion between the minister and his departmental secretary. There were many instances where both Zia and Ershad in such cases of differences used to prefer the opinions of the departmental secretaries over those of the ministers. Obviously under such circumstances the civil servants developed a sense of superiority complex vis-a-vis their ministers.

Thus during the period of 1975-1990 when the country was ruled by the civil-military bureaucracy under the facade of civilian rule, the civil-military became the key element in management of state

affairs. In the absence of strong political institutions the bureaucracy took control of the scarce resources and were in a position to distribute patronage where as the political parties were unable to build any local bases due to their disadvantageous position.

The overdeveloped bureaucracy in Bangladesh, thus, is an entrenched interest group. The enlargement of state instruments with no corresponding development in the political sector has made this group formidably powerful. They have in their disposal an enormous amount of patronage which would be difficult for them to give up.

With the introduction of parliamentary system under Begum Zia in 1991 situation as yet seems to have not changed in a significant way. Initial witch-hunting by the present government created some inertia but they seem to have consolidated their position. The top civil servants have still direct access to the Prime Minister. It is reported in certain quarter that Begum Zia wanted to change the rules of business to curb the domination of the civil servants but thanks to the opposition from all powerful bureaucracy it is not yet been achieved. Some members of the bureaucrats still have greater powers and influence as compared to their ministers. It is however, true that some members of Begum Zia's cabinet are closer to her and they can successfully resist the dominating role of the civil servants. But basically the relationship between popularly elected ministers and experienced civil-servants, is same as it has been the case in 1971, in particular since 1975.

The bureaucrats are still in a position to thwart any major initiatives taken by the present regime like privatisation and the end of subsidies in public sector. A lack of accountability, monitoring of their performance and proper auditing system further enhance their invincibility and power. Thanks to lack of ministerial experience some policies of liberalisation, for example, of foreign exchange excess, have been diluted. They would not also see government's policy of deregulation in public sector which will be detrimental to their interest. Even to this day, in private sector, one has to cross forty-nine bureaucratic barriers in order to get government license. The larger the number of barriers the greater are the chances of manipulation. There is, however still scope for bringing out a synthesis in the relationship between bureaucracy and the ministers.

#### SCIOIO-ECONOMIC FACTORS

Judging by macro-economic measures i.e., GNP, per capita income, percentage of rural and urbanized population, the capacity of the agricultural population to contribute to commercial market and related socio-economic status, Bangladesh is one of the poorest countries of the world. It has meagre natural resources and highest man/land ratio in the world.<sup>87</sup>

Inspite of infusion of huge foreign aid by the donor countries since independence, the political economy of the country remained grim. The overview of social and economic conditions continue to portray a very dismal picture of the situation. The high

population growth rate (2.8%), the prevalence of poverty, (89% of the population live below poverty line,) high illiteracy rate ((32%), poor health facilities (6730 person per physician), low life expectancy (58 years), high infant mortality(116/1000) all substantiate the above mentioned fact.<sup>88</sup> The people of Bangladesh waged the liberation war not only to gain political freedom but economic freedom as well. Since independence, every regime has been confronted with the huge socio-economic problems and the problem of equitable distribution of the meagre resources among its population. The gigantic socio-economic problems have contributed largely to political instability and wide-spread corruption. One such big aid scandal in Bangladesh is regarding electricity generation. The transmission loss is huge as it has been aptly put by a commentator that "Bangladesh is experiencing not survival strategies or petty theft but grand larceny".<sup>89</sup>

Both horizontal and vertical cleavages exist in Bangladesh society though the country is remarkably homogenous. The rural-urban gap as well as rich-poor gap are too evident. In most Third World countries similar pattern of urban-rural gap is quite common. What make the 'gap' situation in Bangladesh so volatile is the ratio and the way urban-rural population is distributed. Majority i.e. 80% of country's population live in the rural areas -65% of which are land less whereas another 20% own some tiny farms who need to substantiate their farm income with other farm related labour. A small percentage about 5% who form the rural gentry, have small businesses and trades besides having land which they

themselves do not work on. But as noted earlier, most people in Bangladesh belong to the category who live below the poverty line.

An alarming picture has been painted by a recent report by BIDS which stated that in all respects i.e. their purchasing capability, opportunities for education and health care, susceptibility of natural disasters, malnutrition have deteriorated progressively over the last three years.<sup>90</sup> They are the marginalized group and do not play an active role in the country's affairs. The urban population consisting of a range from industrialized workers, low-middle class to upper-middle class are the key players. The political system of the country is controlled by them in varying forms and they are mostly successful in getting their interests served through various mechanisms.

Moreover, a new urban elite has become unbelievably rich, mainly by seemingly unfair means, while the rural population is becoming poor and poorer.<sup>91</sup>

Economic management by each regime has been disappointing. The socio-economic injustices and unfair distribution of the country's meagre wealth have been the most serious challenge to the constitutional order as we all know, that economic factor is the single largest threat to a constitutional state. We must remember that twentieth century constitutionalism does not only guarantee the political rights of the individuals but economic rights as well. To guarantee both freedoms and bring them within the constitutional framework needs a host of factors which we have already discussed in the preceding pages.



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## THE EXECUTIVE

The dominant theme during the last half of 19th century had been to establish the sovereignty of the people exercised through democratically elected representative body called legislature. The battle cry of the last century has been, thus, to reinforce the supremacy of the parliament and limit the powers of the executive. Legislature has been viewed as the most important organ of the government. The 20th century, however, witnessed the emergence of a strong executive as the 19th century liberalism gave way to broader democratization which called for increased state activity. The role of modern state, today, is immensely different from that of the last century. In the past, to limit the state powers has been necessary in order to protect the political liberties but today enlarged states involvement is called upon to ensure both political and economic justice.

As such, executive branch of the government has become most prominent. Today executive needs to be strong, stable and capable of taking quicker actions in order to tackle complexities of modern life. But increased powers of the executive, at the same time, must not encroach upon the liberties of the citizens. The task of bringing about a balance between the two has been the greatest challenge in the 20th century, especially in the Third World countries where need for a strong executive should be counter-balanced through constitutional mechanism.

While adopting the constitutions, most post-colonial countries give considerable attention to the type, nature, and powers of the

executive branch. Three models are usually looked into: the British Cabinet System, the American Presidential System and the Swiss Elected Executive. Recently, however, French model which is a synthesis of parliamentary and presidential System, has drawn attention from a number of countries.

Bangladesh emerged as an independent country after a brutal nine-month civil war. The liberation war started with Pakistan army's crackdown on March 25, 1971. The legal basis of the Provisional Government, established on April 10, 1972, was provided by the Proclamation of Independence Order with retrospective effect from March 26, 1971. The Constitution established under this Order created an all powerful presidential executive. Both executive and legislative powers including the power to grant pardon were vested in the President. He had the power to appoint a Prime Minister and other Ministers, if he considered it as necessary. Power to summon and dissolve the Assembly as well as levying taxes and expanding monies were exclusively vested in him. Furthermore, the President was entitled to do whatever was necessary to establish an orderly and just government for the people of Bangladesh.

The creation of an all powerful executive is not uncommon under special circumstances especially during a revolutionary war situation. Drastic and quick steps needed during war time can be facilitated such powerful executive without being constrained by 'unnecessary parliamentary hassles'. There are instances when a group of people or a nation or a sub-nation tries to achieve their independence by resolving to armed uprising or struggle--they take

such extra-ordinary measures. The most conspicuous example is that of the U.S. declaration of Independence of July 4, 1976, when people of the thirteen 'British Colonies' revolted against the English monarch George III by waging a war. There are recent instances as well. Independence struggle of the people of Palestine is a case in point. The PLO even has an exile Parliament. The Order, thus, created an all powerful presidential executive in extraordinary circumstances prevailing at the time of the liberation war.<sup>1</sup> Sheikh Mujib was named as the President of the Republic as the movement was carried in his name. Since he was still held in a Pakistani jail--an Office of Vice-President was also created who was to exercise all powers, duties and responsibilities of the President. Bangladesh was to be governed under the proclaimed Constitution until a new Constitution was adopted.

Bangladesh, thus, began its journey as an independent nation under a presidential system in which the president had unchecked and unrestricted powers. Adoption of a presidential system by the Provisional Government of Bangladesh, which was constituted by prominent members of Awami League, made a departure from AL's long standing commitment in favour of parliamentary democracy.<sup>2</sup> But creation of an executive with sweeping powers was needed, as pointed out earlier, in order to take swift and quick actions to meet the emergency situation of liberation war. This action of the Awami League is not without precedents. History has demonstrated that whenever grievances needed to be settled through quicker

measures--concentration of powers in one leader became inevitable. The AL, however, reverted to parliamentary form of government, which we shall discuss in details, at the earliest possible opportunity.

Before we discuss the change of government and adoption of the Constitution of 1972, let us briefly analyze the nature and form of the executive under parliamentary form of government. The system has originated and evolved in England spreading over centuries. It was later adopted by the older dominions like Australia, New Zealand and Canada as well as by former colonies like India, Pakistan and Sri Lanka. The unique feature of a parliamentary executive is that it consists of two components--"ceremonial" and "effective" what had been termed by Bagehot as "dignified" and "efficient" parts of the government.<sup>3</sup> The real executive power is vested with the "efficient" part namely the Cabinet whereas the "dignified" part of the executive is merely ceremonial with no real power. There is no fixed tenure for the executive as it can remain in power as long as it commands the daily confidence of the legislature. The first British Prime Minister, Walpole, was in power for twenty-one years and recently it has been evidenced by Mrs. Thatcher's continuation as Prime Minister for more than a decade. On the flip side of the coin--a Prime Minister can be removed from office within a short time. The nearest and recent examples are Mr. Chandra Shekhar of India and Mrs. Benazir Bhutto of Pakistan.

Another feature of a parliamentary executive is the fusion

between executive and legislature. Before the true nature of English Constitution was known--it was believed that there cannot be any true form of constitutionalism without separation of powers between legislature and executive but parliamentary executive through ministerial responsibility bring the similar desired result. The cabinet is in a sense a committee of the legislature, in fact, the most important one. The executive remains in power as long as it enjoys the confidence of the legislature but the recent developments in parliamentary system have also demonstrated the fact that the tenure of the legislature is also determined by the executive through its power to dissolve the parliament. In a nutshell "either the ministry leads the majority or it accepts the supremacy of the legislature. If it cannot or does not want to follow the one or other of these alternatives, there two further possibilities: it may dissolve the legislature, or resign."<sup>4</sup> Lastly it calls for strict neutrality of the "dignified" part of the government. The ceremonial executive must be separated from the real executive so that the "ceremonial" executive can mediate and intervene, though, discreetly, in case of a conflict between the executive and the legislature. This particular issue raises questions like "ceremonial" executive's mode of election, if he is not a hereditary monarch, its sphere of powers, specification of relationship between the executive and the legislature, cabinet and the Head of the State.

Since liberation war was fought on the basis of six-point and eleven point programmes both of which had advocated parliamentary

form of government, adoption of a parliamentary system in Bangladesh seemed to be a foregone conclusion. Even in India, where the power was transferred under a parliamentary form of government through the Indian Act of Independence, 1947, there were some debates about the type and nature of the executive to be adopted in the future constitution. In the Indian CA a small minority group had advocated for a presidential form of government prevalent in the US in order to ensure the stability in a country as diverse as India. The Swiss form of Collegiate Executive was also looked into which provides both stability and responsibility at the same time. Of course, it is a well known fact that most members of the Indian CA, especially, Nehru felt that presidential system could only work where there is a close union between the executive and the legislature. The parliamentary system had better mechanism in preventing conflicts between the executive and the legislature and in promoting harmony between different parts of governmental system.<sup>5</sup> Consequently parliamentary form of government was adopted in India.

But in Bangladesh, there was no such debates about the type and nature of the executive to be adopted. There were hardly any discussions on the constitutional issues. The journey towards the parliamentary system started soon after Sheikh Mujib's return from Pakistan on January 10, 1972. Using his legislative power under the Proclamation of Independence, he changed the basic structure of the revolutionary government and adopted parliamentary form of government by a Presidential Order called the Provisional

Constitution of Bangladesh Order, 1972. The Provisional Constitution created by the above mentioned decree had all the features of British Westminster type government with a Council of Ministers headed by a Prime Minister to aid and advice a ceremonial Head of the State, namely the President.

The Order enabled Sheikh Mujib to step down to become the Prime Minister whereas Section 8 provided the opportunity for Justice Abu Sayed Chowdhury--who was not a member of the Parliament--to assume the Office of the Presidency until another President was elected according to the Constitution framed by the Constituent Assembly.<sup>6</sup>

Cabinet form of government was thought to be suitable for Bangladesh not only to fulfill "the manifest aspirations of the people of Bangladesh that a parliamentary democracy shall function in the country" but due to other factors as well. First, since its inception in 1949 the Awami League committed itself in favour of a parliamentary form of government; second the political class of Bangladesh have had familiarity of the system since the British colonial rule; third, the influence of British liberal philosophy on the prominent Awami League leaders like H.S. Suhrawardy who happened to be the political mentor of Sheikh Mujib; third the influence of the lawyer politicians within the Awami League. Lawyers in the Indian sub-continent have had a long tradition of involvement in parliamentary politics. During British as well as Pakistan era--the lawyers played very prominent part in defending the political rights of the citizens against the arbitrary powers



of the government. Even in small towns--there was a pool of lawyer population who understood and practiced parliamentary politics. During Pakistan period, it was they, who more than any group, was convinced that absence of proper parliamentary system--that the government of the day was not direct, responsible and popular--deprived the Bengalis of their fair share in country's political and economic affairs. This sense of deprivation was felt from the very beginning, as Pakistan during initial years, was under a perverted parliamentary system in which the real power was concentrated in the hands of a small coterie of non-Bengali civil and military bureaucrats. The situation, however, somewhat changed with the adoption of 1956 Constitution. For the first time--the two wings of former Pakistan had evolved a compromise formula.<sup>7</sup> The 1956 Constitution of Pakistan provided not only a parliamentary form of government but it sought to protect the system by statutory provisions against arbitrary dismissal of the cabinet by the Head of the state as it happened in Pakistan under its interim Constitution.<sup>8</sup> But neither the fate of parliamentary democracy nor that of Bengalis' did improve in any marked way except during the thirteen months of Suhrawardy Cabinet, (1956-58). So, the distrust and opposition to any other form of government other than genuine parliamentary form of government continued to persist among the then East Pakistanis.<sup>9</sup> Until the Martial Law in 1958, the politicians had at least, a limited sense of involvement in nation-building process. The parliamentary form of government, thus, had a special standing among the Bengali intelligensia; fourth, the

parliamentary form of government was thought to be the most democratic since the government of the day is constantly in public eye through parliamentary mechanism, and in the face of a vigilant public opinion--it remains responsible and sensitive to public issues; and lastly, influence of India --'Indian example' factor in constitution-making in Bangladesh in 1972 was quite important. The preamble, directive principle etc. were heavily borrowed from the Indian Constitution. As India had and still has a successful system of parliamentary form of government Bangladesh readily accepted it. It was, however, one of the several factors, influencing the adoption of parliamentary form.

The main factor, seemed to be the sad experiences of the then East Pakistan under the perverted presidential system introduced in Pakistan under Ayub in 1962 and continued till the break-up of United Pakistan in 1971. Under the political order of Ayub-Yahya regimes, the Bengalis lost all shares in decision-making process in Pakistan. It was simply rule by a small West Pakistani ruling elite and Bangalis were reduced to almost a people under colonial rule. In the minds of Bengalis the presidential system epitomized dictatorial rule. Parliamentary system, on the other hand, became almost synonymous with only form of true democracy.

#### THE TYPE OF EXECUTIVE AS INTRODUCED UNDER THE PROVISIONAL CONSTITUTION ORDER

The change in the form of government, under the Provisional Constitutional Order, thus, ostensibly completed an historic task.

It had all the features of a parliamentary executive but in reality the executive continued to exercise unrestricted powers. There was no ministerial responsibility in the absence of a Parliament. As a matter of fact, Mujib, like an all powerful President under the Proclamation of Independence Order, continued to rule Bangladesh through proclamations and decrees until the Constitution was adopted on December 16, 1972.

#### THE EXECUTIVE SYSTEM UNDER THE ORIGINAL 1972 CONSTITUTION

We have examined the reasoning in favour of the parliamentary government among the Bengali intelligensia, particularly, the Awami Leaguers. So when the time for framing a constitution for the country came in 1972, there was hardly any debates or doubts, as pointed out earlier, that it would be a parliamentary one. A 34-member Draft-Committee headed by Law Minister Dr. Kamal Hossain was set up on the very day Constituent Assembly convened. The committee was dominated by Awami League members excepting a lone opposition member from Ganatantri Party. After 74 meetings and nearly 300 hours of deliberation the committee submitted its report to the Constituent Assembly on October 12, 1972. The CA after 8 working days of debates adopted unanimously an unqualified form of parliamentary system.

Part IV of the Constitution (Articles. 48-58) dealt with the executive--the President, the Prime Minister and the Cabinet encompassing such issues as the qualifications of the President,

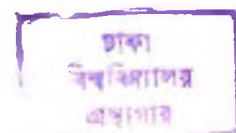
his term of the office, methods for the removal of the President etc. Similarly, with regards to the Prime Minister and the Cabinet--the Constitution provided familiar provisions relating to their appointments, tenure and removal of office etc.

The executive adopted under the original 1972 had the traditional features of parliamentary executive. It consisted of two components: a ceremonial Head of the State in the form of President and an effective Prime Minister--such as found under the usual pattern of the parliamentary system.

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The President of the Republic: The relationship between the two parts of the executive in parliamentary systems are not similar in various constitutions though they may be broadly classified as parliamentary ones. The exact relationship between the ceremonial and real parts of the executive is based in some cases on conventions and well-established traditions as in England, Australia, Canada, India etc. while in some cases as in the Third and Fourth Republic in France, 1949 Basic Law of Federal Republic of Germany or in 1956 and 1973 Constitutions of Pakistan, this relationship is not merely based on conventions but also on specific provisions of their respective constitutions.

Both in France (Third and Fourth Republics) and Germany (Basic Law 1949), every act, saving the power to nominate the Premier or Chancellor, needed to be counter-signed by the Premier/Chancellor or by a competent Minister. In the 1956 Constitution of Pakistan--President's power of dismissal and appointment of the Prime



Minister was based on both conventions and subjective provisions. The then Governor-Generals of Pakistan, Ghulam Mohammed and Iskander Mirza misused the power causing instability and incalculable damage to the growth of the nascent democratic process in Pakistan.

When Pakistan was disintegrated and a 'new' and smaller Pakistan emerged in 1971, Z.A. Bhutto who was the architect of the 1971 tragedy became the President of the 'new' Pakistan. Left to himself, Bhutto would probably prefer presidential form. But like the Awami League in Bangladesh, he and his party were committed to parliamentary system. So he had to opt for parliamentary form but ensured to make the P.M. all-powerful and reduced the President a *really* nominal entity.<sup>10</sup> He included a number of written provisions which made the advice of the Prime Minister binding on the President as well as required that every act of the President was to be counter-signed by the Prime Minister.<sup>11</sup> A host of other articles in 1973 Constitution of Pakistan reduced the office of the President insignificant whereas paving the way for a Prime Ministerial Government.

The framers of the original 1972 Constitution were also extremely careful in limiting the powers of the President in order to establish parliamentary democratic system. The relationship within the executive was based on a mixture of conventions and written safeguards. There was to be a President who would be the Head of the State and elected by a majority votes of members of the Parliament through a secret ballot. The question of an direct

election or by a broader electoral college was considered inappropriate since it would have given him higher status and put him somewhat above the P.M. and the Cabinet. The method was kept in line with some of the existing parliamentary systems. Similarly, parliamentary practice of President's right of being informed by the Prime Minister was ensured.<sup>12</sup> President's power to appoint a Prime Minister who appeared to have the command of the majority in the Parliament was reaffirmed. Usually, in a traditional parliamentary system, power to nominate a Prime Minister is given to the Head of the State as it was under the French Third and Fourth Republics and Basic Law of FRG 1949 but the actual appointment of a leader who appeared to have the command of the majority of parliament was left to convention as it is the case in England. In Bangladesh, in the original Constitution of 1972, the power to appoint a Prime Minister was given to the President but that he should appoint the one with majority in the legislature was ensured by a written provision. Sacking of Prime Minister Khawaja Nazimuddin in Pakistan, who still commanded the majority and appointment of Mohammed Ali as Prime Minister who did not have any majority in the legislature by Governor General in 1953 probably made the framers of the Constitution to be extra-cautious and include such a safeguard.

Curiously, no provision was made specifically to vest Executive powers either with the President or the Prime Minister though the President was vested with the Supreme Command of the defence forces. Article 48(2) only provided that President would

be the Head of the State and would exercise powers and perform duties conferred on him by the Constitution; whereas Article.55(2), (4) laid down that the Executive Authority of the Republic was to be exercised by or on the authority of the Prime Minister in the name of the President. As such unlike Bhutto who under 1973 Pakistan Constitution had the executive authority vested in the office of the Prime Minister by written provision (Article. 90), 1972 Constitution of Bangladesh was ambiguous and left it to the office of the Prime Minister.

As pointed out earlier, all but one member of the 34-member Constitution Draft-Committee were Awami Leaguers. The psychology and past political experience of these members seemed to have contributed to the shaping of the office of the Prime Minister. Two factors had profoundly influenced them. First, the personality factor. Unfortunately, Bangladeshi culture has become personality centered. This is more evident among the leadership pattern of our political parties. Most political parties including the Awami League, as we have pointed out earlier, are personality oriented. Sheikh Mujib in 1972 was at the peak of his popularity and there was none in the party equal to him. As the office of the Prime Minister was destined for him, it was to be created for him. He was the undisputed leader, fountainhead of all powers, and he knew what was to be done for Bangladesh. So, unlike in a cabinet or parliamentary government in which the institutions or the permanent structures of the government shape the office of the P.M. defining what must be done and what cannot be done <sup>13</sup> individual or person

was more important in shaping the office of the Prime Minister. According to one member of the Draft-Committee if Tajudding instead of Mujib was to be the Prime Minister of Bangladesh, the constitutional provisions for Prime Ministerial office would have been traditional as found in India or Australia.<sup>16</sup> Second, the undemocratic activities of the Governor-Generals like Ghulam Mohammed and Iskandar Mirza of the Pakistan in undermining the authority of the Prime Minister which thwarted the parliamentary process in Pakistan lied heavily in the minds of the framers of the Constitution.

The President in a parliamentary system, usually makes appointments to some non-controversial and non-political offices such as Chairman and members of the Public Service Commission, Chief Election Commissioner and its members and Judges of the Supreme and those of High Courts, Attorney General etc. The 1972 Constitution of Bangladesh also provided such provisions and power of these were kept in line with the traditional parliamentary system i.e. binding on the advice of the Cabinet.

#### Legislative Powers of the President

The President in a parliamentary system is an integral part of legislative process. Most important legislative power of the President is the Ordinance-making power. He is entitled to issue Proclamations when the Parliament is not in session and under unusual circumstances. But these Proclamations must be laid before the Parliament for its approval; if they are not approved by the



Parliament, they become null and void. It is in reality a legislative power exercised by the executive under special circumstances.

He is also given power to summon, prorogue and dissolve legislature, which, however, is supposed to be exercised, thanks to well-established conventions, only on the advice of the Prime Minister. In England, the classic land of parliamentarism, the King has ceased to exercise this power long before without any written provisions but through convention. Both in 1950 Indian Constitution and in the 1956 Constitution of United Pakistan such was the provision. It was thought that as long as the Council of Minister enjoy the confidence of the parliament, the President acting without the advice of the Prime Minister can be impeached. So, even there is no written provisions, the President usually is bound by convention.

In the original 1972 version of Bangladesh Constitution, the President is bound to dissolve Parliament if the Prime Minister would advise so <sup>15</sup> in case he loses the confidence of the legislature. This power of dissolution is still a matter of controversy in parliamentary system. According to Sir Ivor Jennings, the monarch may refuse the advice of a defeated Prime Minister to dissolve the Parliament if the King would have good reasons that an alternative government could be formed in the existing Parliament. But in practice, it has not happen for a long time.

But in some other parliamentary system, situation has not been

so simple or clear. In India, as recently as in 1990-- the President refused to accept the advice of the Prime Minister, V.P. Singh to dissolve the House when another leader Chandra Shekhar could be made P.M. with the help of Congress I. We may, here also cite a recent case in Australia. The Governor-General John Kerr dismissed Prime Minister Whitlam and dissolved the Parliament in a complicated situation of constitutional deadlock and confusion.<sup>16</sup> Similarly, even in strong parliamentary executive like of FRG, the President can play some important role vis-a-vis the Chancellor. He can dissolve the Bundstage if there is a plain vote of no-confidence against the Chancellor (i.e. vote of no-confidence without naming a successor) or can back a weak Chancellor by declaring, at the request of federal government, a state of legislative emergency. The President, thus, can play a vital role in either strengthening a weak Chancellor or compelling him to resign.

So, we find that power to dissolve the House by the Head of the State is neither uniform in all cases of parliamentary system nor the debate is settled on this issue. Uses of this discretionary power, however, is vital since it can affect the proper functioning of a parliamentary system in a given country. When we turn to the original Constitution of Bangladesh, it would appear that the framers of the Constitution had decided in favour of Prime Minister in a matter of dissolution of the Parliament. Article, 52(2) provided that if the Prime Minister advised the President to dissolve the Parliament that advice would be binding on the

President. The President had no other choice. Presumably it was done to ensure any arbitrary use of this power by the Head of the State as experienced in united Pakistan in 1954 when the Governor-General Ghulam Mohammed dissolved a "Sovereign Parliament" without any advice from the Prime Minister or the Cabinet.<sup>17</sup> The framers of the 1972 Constitution of Bangladesh ensured that no such repetition of the drama would take place.

Thus, the office of the President was truly relegated to a mere constitutional Head of the State like that of the British Monarch. In contrast to that, in the parliamentary systems like India and Australia, President was not made only a figure-head but also "an arbiter or umpire between competing claims and contesting parties."<sup>18</sup> In these countries it has been assumed that in case of constitutional deadlock, the President should play a Constructive role by resolving the issue impartially. But under the 1972 Constitution no such powers were given to the President. He was made a mere absolute figure-head.

The Ministry: The procedure set up by the 1972 original Constitution with regard to the formation of a Cabinet was similar to that of Great Britain. The leader to has the command or who appeared to be the leader of the majority in the Parliament, was to be appointed as P.M. by the President of the Republic.<sup>19</sup> The President in theory, could appoint a P.M. in his discretion, but unlike in Great Britain he had not much freedom in the context of the their party-system in Bangladesh. The French President, under

the Third Republic, was entitled to name the Premier, but in practice, he appointed a Premier after consulting the best informed men like presiding officers of the Senate and Chambers of Deputies, Committee Chairmen and other party leaders. But thanks to the party-system in France, the President could, if he wanted, to have a Premier of his liking, through maneuvering. Under the Fourth Republic, President's power to name a Premier was much more restricted. Under the Basic Law 1949 of FRG, the President has the power to appoint and dismiss a Chancellor but in actual practice, Bundstag elects a nominee through negotiation and removes him through a "constructive vote of no-confidence".

The selection and appointment of a Prime Minister under the original 1972 Constitution was simple and straight forward. Other members of the Cabinet were appointed by the President on the advice of the P.M.<sup>20</sup> As pointed out earlier, the real executive power was to be exercised the Prime Minister<sup>21</sup> and he would be aided by a Council of Ministers who would hold office during the his pleasure.<sup>22</sup>

Mujib was the leader of Awami League and almost all members of the CA belonged to the same party and had similar ideological affinity. Moreover, power of appointment and dismissal of the members of his Cabinet as well as the effective power to dissolve the Parliament<sup>23</sup> were to make him the unquestionable leader of the group. Through his disciplinary powers and party connections, it was easier for him to assert his leadership and command absolute supremacy within the Cabinet. Prime Minister's dominance was also

made effective by making the tenure of P.M.'s office subject only to be majority will of the Parliament. The Cabinet was to be collectively responsible.<sup>24</sup>

What picture emerges about the nature of executive authority under the original 1972 Constitution of Bangladesh? In theory, the extent of authority of the Prime Minister was not made so extensive as in 1949 Basic Law of FRG or 1973 Pakistan Constitution. The reasons seemed to be that Bangladesh had neither a legacy of strong executive as in Germany nor Mujib had any doubt about his unlimited authority and power in the country unlike his counter-part in Pakistan, Z.A. Bhutto.

More significantly, the executive authorities both in India and Pakistan are protected by some strong provisions against any real or potential 'inroad' of popular control in the form of Preventive Detention, Security Acts, Emergency Powers and similar provisions. We find similar provisions in the democratic Constitution of India (1950) and various constitutional drafts and actual Constitutions of undivided Pakistan. Mujib and his party which were almost always in opposition group in undivided Pakistan used to raise their strong opposition to such restrictive provisions or "black laws" in a free democratic constitution.

Again we find that the prevailing circumstances i.e. Mujib's faith in unlimited popular support and unqualified confidence of his power and popularity led the framers of the Constitution to make an undiluted form of parliamentary democracy without any Statutory Provisions restraining the powers of the executive.

Attempts were made to establish a genuine Westminster type of parliamentary system in which the protection of the government depends on Parliament's vigilance "which... is the true political sovereign of the State -- the majority of the electors or the nations."<sup>25</sup>

#### Failure of the First Experiment of Parliamentary Democracy in Bangladesh

In our preceding pages we have described how people of Bangladesh under Sheikh Mujib's leadership adopted a parliamentary form of democracy amidst great funfare and expectations. Bangladesh was created in the expectation of having a "Golden Bengal" (Sonar Bangla) where centuries old suppression, oppression, injustices, persecution and prosecution of the people who constitute Bangladesh would come to an end. The constitutional machinery as set up by Mujib was considered as a vehicle for achieving a free-from exploitation society.

The framers of the constitution almost unanimously granted adequate, if no unlimited powers to the Prime Minister--an office which was occupied by their popular leader--Sheikh Mujibur Rahman. Mujib could be described as a populist and he seemed to have faith in peoples' control and supremacy. He had unlimited confidence in his personal popularity among the people. He, therefore, had no hesitation or fear in introducing a political order free from all restraints and limiting executive authority which one sometimes finds even in a parliamentary system. In a sense, the 1972

Constitution of Bangladesh could be described as of Jefferson model--a political system which is based on the myth of popular control and supremacy. The 1972 Constitution, therefore, was a bold measure in a revolutionary environment.

But, Bangladesh with so many gargantuan socio-economic problems and volatile political dynamics was probably not a right place to have the luxury of having such Constitution. The government began to face, soon after the creation of Bangladesh, big challenges in all spheres--political, social, and economic. In spite of Mujib's unique and dominating control in the party as well as popularity among the people--he was not able to face or solve these challenges confronting the new nation. Soon Mujib seemed to have realized the need of a more stronger political system to deal with the prevailing situation.

His political party, the Awami League, began to manifest splits and dissensions. Party squabbling and factionalism became the rule of the ruling party. This led to many limitations--the most divesting ones were the widespread corruption, nepotism and favoritism. These factors led the process which ultimately led to the failure of first experiment of parliamentary democracy and rise of authoritarian rule.

Let us examine the various factors responsible for the failure of parliamentary democracy and rise of one-party dictatorship in 1973-75:

i) Constitutional Factors: We have noted that a parliamentary system was adopted. Parliamentary system is rather difficult and

delicate system to operate. In order that it works smoothly, certain basic requirements are needed such as an impartial and effective Head of the State; strong and independent Parliament; existence of a powerful opposition party -- 'Her Majesty's Loyal Opposition. Were these factors present in the political order of 1972? There was a titular Head of State whose powers and role were somewhat restricted as compared to a mature parliamentary system in England and in some other countries. Even today the English monarch and his counterparts in older members of the Commonwealth have retained some powers like 'right to be informed', 'right to advice', and 'right to warn'.<sup>26</sup> The equation between the President and the Prime Minister, however, depends not so much on the wordings of the constitution as the personality and position of the holders of the two offices.

In the first phase of Bangladesh politics (1972-75), Mujib, the Prime Minister had clear cut and absolute supremacy over the two ceremonial Heads of the State, Abu Sayeed Chowdhury and Mahmudullah. Neither of them had the courage or the conviction to stand up against any arbitrary or unconstitutional actions of the Prime Minister. They could neither demand reverence and courtesy expected by the holder of such office. They had the authority to ensure the sanctity of the Constitution. But neither one could perform their duty to preserve and protect the Constitution when the provisions of the Constitution were misused by the government. Whereas in a parliamentary system--the Head of the State, being neutral and above the party politics is supposed to maintain the



balance of the constitutional order. So the first political order of Bangladesh during Mujib era was more in the nature of 'Prime Minister's Dictatorship' than genuine parliamentary one.

Relations between Mujib and his Cabinet colleagues were also one of subordination rather than 'one among the equals'. Mujib used to treat his Cabinet colleagues more like a Cabinet in a Presidential system as the American one where President's decisions are accepted no matter whether it is shared by majorities or not. There is a famous saying of Abraham Lincoln stated after he had consulted his Cabinet: "Nos, seven, ayes, one. The ayes have it."

When we turn to the actual role and status of the Parliament, we find a pathetic state of affairs. Parliament, in a parliament is regarded as the most important organ. As it consists of the representatives of the people, its role is vital. In modern state, legislature, besides law-making, performs the vital role of being the watchdog of the peoples' rights and privileges. The usual techniques to perform these vital role are 'questions and answers, 'adjournment motions', 'cut motions' etc. It employs what has been described as process of 'ventilation of grievances' and 'extraction of information.' Democratic government must work in public eyes and not in any secrecy. The techniques as discussed above are used to preserve these vital aspects of parliamentary democracy.

Judged by these criterions, the role of the first Parliament was simply disappointing. The number or questions raised by the members were fast and scattered; adjournment motions were also few and ineffective. This was mainly because there was hardly any

opposition party. It was in a real sense, a one-party Parliament dominated by one man. As a commentator has nicely pointed out: "Mujib was himself the Awami League Party."<sup>27</sup> He could also probably add that it was not only within the Awami League Party but Mujib was also the 'political order himself'. Mujib's autocratic style of party management was never questioned by the party as it was with Edward Heath or Margaret Thatcher in England. Both lost party leadership, because they had lost, due to their autocratic style, the confidence of the Conservative MPs. Unless there is democratic process in the ruling party and unless there is effective role and checks by an independent legislature decline or demise of the process is bound to come sooner or later.

The most important and effective way to check the executive in a cabinet system is the existence of a well organized opposition party. There is no denying that cabinet system prevents concentration of powers in the hands of one man but cabinet itself becomes *de fact to* sovereign by virtue of its legislative and executive authority. Such an executive contains the seeds of constitutional dictatorship if there is no effective opposition. The opposition's role is to scrutinize and to point out the excess of the government. It also provides an alternative government to the people.

But in the first Parliament of Mujib, there was hardly any opposition. It was feeble and had no hope of winning the election. The government could, thus, take the House for granted. He could always keep the House at bay thanks to his power of dissolution.

Without any opposition Mujib, whose authority was virtually unchallenged, turned the political order of Bangladesh into a one-man show with all the trappings of a parliamentary government.

Political factors: At the cost of repetition, we shall state that a sound party-system, preferably two party-system is needed for the smooth functioning of a parliamentary democracy. What was the political dynamics of Bangladesh in 1974-75 ? The Awami League, as pointed out earlier, was the dominating party with a dominating leader. It had no effective challenger or rival in 1972-75 as evidenced from the election results of 1973 though there were allegations of rigging and malpractice in that election. But making allowances for such real or alleged malpractices, there was no denial of the fact that the AL with Mujib as its leader would win 1973 election.

But the party was weakened by factionalism, lack of sense of dedication and public service among its members. The members of the ruling party including the family members of the leader himself were more interested in getting and dividing spoils after their victory in the liberation war. They did not pay proper attention to the serious socio-economic problems facing the country. On the contrary, it was alleged by many quarters that unethical devices such as smuggling across the Indian Border were not only overlooked by the ruling party but encouraged it. The result was rise of radical political forces in the formation of Jatiyo Samajtantrik Dal and other groups who from the beginning were not at ease with

a bourgeoisie party like the AL even during the liberation war itself. But as the days passed on and the AL's failure and shortcomings became more and more evident--the influence of the radical forces began to rise decline in marked ways. Instead of searching the hearts--the AL, in particular, its supreme boss Mujib took the path of confrontation rather than appreciating or understanding the forces which were bedeviling the Bangladesh politics.<sup>28</sup>

Peoples' expectations during and preceding the liberation war were high. Mujib, himself gave big hopes. He assured Bengalis again and again that once Bangladesh was established peoples' aspirations would be fulfilled. But instead--the overall political and economic situation during the Mujib era could hardly gave hopes or encouragement to the suffering people of Bangladesh. This obviously led to widespread political discontentment. Mujib wanted to achieve the goals of a free and fair society by a particular strategy which may be described as outwardly socialistic but in reality the system was still a bourgeoisie one. So the political conflict was not merely one of party differences as it is understood in a country like England or other older parliamentary democracy--the cleavages in Bangladesh moved beyond the realm of party differences to ideological differences. The scenario in 1972-73 was one of confusion, bewilderment, and frustrating. In such volatile and explosive situation, political agitation, upheavals, unrest became quite frequent. One could even discern anomic tendencies in certain quarters such as Sharbohara party.

Mujib was neither a talented nor a constructive administrator.

As a leader of Bangladesh movement--he was successful but as Prime Minister his role was disappointing. Instead of adopting democratic methods and techniques, he began to deal with rising opposition forces in a dictatorial way. This led him to resort to measures like Preventive Detention or Emergency Power, which he himself used to designate as 'black laws' to deal with growing political unrest and thereby undermining and weakening the democratic process or constitutionalism which he himself founded in 1972.

Nature also did not favour him. Natural calamities like floods, which Bangladesh is quite often subjected to, occurred in 1974 in a damaging way. Far more worse was a divastating famine in 1974 in which hundreds and thousands of people died. Death from starvation was everywhere, even in the capital city of Dhaka. This obviously created a highly untenable situation.

Socio-economic Factors: Bangladesh from its beginning was confronted with serious socio-economic problems. No doubt, the Mujib Government applied itself vigorously in tackling these problems. But his methods and techniques were far from satisfactory. His immature policy of nationalization almost ruined country's few nascent industries like jute, tea and textiles. A Planning Commission headed by 'top' economists was formed with lots of fanfare. They were given much more independent authority than the then Pakistan's Planning Commission. In Pakistan the Planning Commission was headed by top bureaucrats. Bangladesh wanted to

avoid it by giving almost unlimited autonomy to the Planning Commission. Again the performance of this all powerful and independent economic commission was disappointing.<sup>29</sup>

There was no dearth of external economic aid for Bangladesh; thanks to world wide sympathy for the suffering humanity during the liberation war of 1971, there was generous response to Bangladesh's appeal to foreign aid from both capitalists, socialists and other countries. Quantum of aid was larger than the aid received by United Pakistan immediately before the splitting of the country.

Utilization of such foreign or external assistance was, however, not encouraging or fruitful. Unsatisfactory planning, lack of a economic infrastructure and above all widespread corruption among the ruling party led to large-scale misuse of the foreign aid. This was another source of popular resentment and discontent. A small group of urban elites became rich and richer while there was growing poverty among the rural population. The number of landless rural population also kept on growing at an alarming rate.<sup>30</sup>

The result was an increasing dangerous gap between a small urban elite and the vast majority of the rural population. Unemployment rate was rising at an alarming rate. Popularity among the students was Mujib's one of the biggest assets. But here also he began to loose their unqualified 'love' and 'support'.

Other Factors: Apart from the constitutional, political and socio-economic factors, there was also one or two other factors

during this period which created an explosive situation. One such factor was the discontentment and alienation of the top bureaucrats. Bengali bureaucrats played a crucial role in the creation of Bangladesh like the Muslim bureaucrats in undivided India played for the creation of Pakistan in 1947. Bangladeshi bureaucrats watched at close quarters the political role and domination of their counter-parts in Pakistan. They probably had similar hopes and aspirations. But Mujib regime did not satisfy the political ambitions of the bureaucrats. On the contrary, following independence, the bureaucracy which was ridden with factionalism was further shaken by certain policy measures like Presidential Order No.9 of the government. Some developments like undue interference by the Awami League politicians and the ruling coterie in the day-to-day administration and the creation of all powerful Planning Commission, as stated above, alienated them. During the Pakistan era, bureaucrats could even control the academicians through Ayub's 'black' University Ordinance but by introducing new ordinance giving autonomy to the universities and creation of University Grants Commission, Mujib curtailed their influence in the university campus.

Another potential source of friction was Mujib's relationship with the armed forces of the country. It was widely believed that under pressure from India as well as his reservation about army's role, he curtailed army's strength in several ways like creation of a para-military force called Rakkhi Bahini and drastically reducing the allocation for the armed forces. There was real sense of

grievances and discontentment among the army against Mujib.

#### Towards One-Party Dictatorship

Confronted with unfavorable situations and challenges, Mujib, began to think of first curtailing and limiting the democratic process by introducing a series of undemocratic measures. Ironically he started to take those measures soon after the parliamentary election in which his party had a landslide victory.

On September 23, 1973, through the Second Amendment of the constitution--he added the provisions of preventive detention which abridged the fundamental rights guaranteed by the Constitution and inserted a new section--Part.IXA of the Constitution arming the executive with emergency powers which, however, needed to be countersigned by the Prime Minister. This step was taken in the context of the formation of United Front (a colmeration of about half a dozen opposition parties) in April 1973. In February, 1974, he amended the Jatiyo Rakkhi Bahiani Ordinance giving the Bahini sweeping powers to deal with the 'so-called' law and order situation. In April 1974, the Special Powers Act was enacted under which an individual could be held in detention for unspecified period of time after being reviewed by a Board. In the same month Newspaper Printing and Publication Act was passed with the objective of curtailing the freedom of the press. Again in July Special Powers Act was amended to set up special tribunals which had the locus standi to awarding summary death sentence.

When he finally realized that even with curtailed democratic



process--he was unable to control the growing discontentment and challenges to his authority he decided to take more drastic step, particularly when he realized that myth of his popularity had begun to wane. It seems that his faith in peoples' control or supremacy lasted as long as he thought that people would be always swayed by his dictation.

The preparation for such drastic change started with the declaration of state of emergency on December 28,1974. The President, on the advice of the Prime Minister used Article.141A of the Constitution to declare a state of emergency and suspended all fundamental rights. The grounds for such action were the familiar rhetoric and accusations by the government against the so-called 'miscreants' and 'anti-social' elements, who, according to the government were bent to destroy the state of Bangladesh. In reality, however, the government was preparing the way for a drastic change in the fundamental law of the country. The state of emergency was just a prelude as the existing penal laws were enough to deal with the 'anti-state' activities of the radical elements.<sup>31</sup> Moreover, the Prime Minister with his unlimited powers could take actions, if needed, even by abridging fundamental rights without having a state of emergency.<sup>32</sup>

What made Mujib to take such drastic measures ? He was known to be a centrist and without any history of radical politics. His six-point programme was middle class bourgeoisie based. The Awami League basically represented the interests of the urbanite middle class, rising industrialists and well-off peasantry of the rural

areas. The system of government established was, thus, a bourgeois liberal democracy with an aura of socialism. Why did he then switch to a system which was a total negation of all his political values and commitments ?

Like a typical leader of an emergent nations of Africa and Asia, Mujib had by 1974 dashed the hope of a healthy constitutional government. More often--constitutional governments in these countries are threatened not so much by the institutional framework laid down by the constitution but by the individual behavior of the politicians. The success of democracy in these countries does not only depend on the institutional framework but on what is called the democratic spirit of the leadership. The leadership must demonstrate the spirit of toleration, self-restraint and mutual cooperation and compromise. Unfortunately, Mujib by practicing the familiar devices like political coercion, undermining of press and assembly, treatment of opposition as anti-state elements had prepared the ground for a one-party state. When the basic characteristics of constitutional order i.e. restraints limiting the government no longer worked the leadership, in order to perpetuate its rule sought other devices and methods, Mujib by 1974 had exhausted all known political mechanism and was now looking for new and stationeries ways to remain in power. In order to do so, he reversed his political phisology and conviction which he believed in his political career. A new ideology was invented.

Mujib was, however, not the first leader of the developing nations to discard western liberal model and opted for one-party

state. In early 1960s, a number of emergent nations of Africa and Asia turned their state into one-party state in order to tackle the gargantuan socio-economic problems. In Ghana, Algeria, Tanganyika, Kenya, one-party state was constitutionally instituted. Each of these leaders labelled western parliamentary model as unsuitable for their needs. Sukarno of Indonesia called it 'free-flight democracy'. They gave a new interpretation of democracy and socialism which could be achieved through single-party system. Sukarno termed it as 'guided democracy' or 'democracy with leadership.'

Julius Nyerere of Tanganyika's brand of democracy was one-party democracy through discussion. The single party was to serve that purpose. It would serve as a link between the masses and the government. No opposition was to be tolerated because the party represented the popular will. As Modibo Keita of Mali stated that "democracy in its naive original sense is the exercise of public authority in conformity with the will of the masses."<sup>33</sup> Not surprisingly, however, the single-party government tended to be one-man rule. In its final analysis it is the personalization of rule to regain the legitimacy of the regime.

Unlike Julius Nyerere of Tanganyika, Mujib while declaring the need for a single-party system did not claim that there was no class differentiation in Bangladesh and as such multi-party system was not needed. His emphasis was more on the need to root out "wanton corruption" of the old regime which only a presidential form of government was able to tackle. He saw the hidden hands of the

"Pakistani collaborators" and "conspiracy" by the "foreign agents" which needed to be crushed by adopting a different variant of "democracy". His version of democracy was to be the "democracy of the exploited" and "socialism of the toiling masses" and to bring "economic emancipation" of the exploited masses. In order to bring such far reaching changes--establishment of the "democracy of the exploited" should be brought about through single-party system and the "Father of the Nation" would deal with the state affairs in simple and straight forward ways instead of any constitutional checks and balances.

Besides such elaborate ideological aura, other factors like the influence of Sheikh Moni, leader of splinter Awami Jubo League, nephew and closet associate of Mujib; government's inability to contain the radical elements, influence of the pro-Soviet political parties like NAP(M) and Bangladesh Communist Party, and Mujib's own ambition for total state power<sup>34</sup> are also cited for Mujib's change of heart. Mujib knew that his system of government was faltering, the legitimacy and consensus of his constitution achieved through 1973 election was shattered, and he, himself was losing the grip over the populace. Instead of compromise, negotiation, Mujib thought that concentration of powers in his person (as if he already did not enough) could bring the situation under control.

Eventually, the plan for a one-party dictatorship was introduced at the Awami League Parliamentary Party meeting held on January 19, 1975. With the presence of Awami League Working Committee, Sheikh Moni unfolded the doctrine of one-party state,

and decision was taken to empower Mujib to take whatever steps necessary to tackle the beleaguering problems of the country.

A Constitutional Amendment Bill, the infamous Fourth Amendment to the 1972 Constitution was introduced. A constitutional dictatorship was established which formally gave a burial to parliamentary democracy and growth of constitutionalism in Bangladesh.

Mujib, thus, overnight transformed his own created democratic process by introducing an all out form of one-party dictatorship. This was achieved by so-called constitutional method by hastily introduced and approved an amendment--the Fourth Amendment--Mujib brought the era of parliamentary democracy to an end. No discussion was allowed on the Bill as the parliamentary procedures were changed just before the Bill was introduced and within half an hour the crucial Amendment changing the basic structure of the Constitution was adopted. The way the Bill was adopted demonstrated the omnipotence of Sheikh Mujib's leadership.

#### THE EXECUTIVE UNDER THE FOURTH AMENDMENT OF 1972 CONSTITUTION

The Fourth Amendment created a constitutional one-party dictatorship from parliamentary democracy in which all powers were concentrated in a President virtually abolishing the two-parts of the executive. The main stress was on Presidency as it dealt with in details of his mode of election, tenure of office, procedure of impeachment and removal, powers of appointments, relations with Parliament, relations with Council of Minister etc.

The President, instead of being indirectly elected by the members of the Parliament, provided as in the Second Schedule, was abolished, was now to be directly elected.<sup>35</sup> The mode of election gave the office of the President greater stature and an independent source of power by virtue of which he was to hold the office independent of the legislature. He was no more the creature of the parliament which made him holder of independent power and authority.

He was also the Head of the State and would take precedence over all other persons in the state.<sup>36</sup> An office of Vice-President was created who was to be appointed by the President. In case of a vacancy due to impeachment, removal or illness, the Vice-President was to take over. The term of office of the President was for five years.<sup>37</sup> But interestingly there was no restriction on the tenure of the office. In the original 1972 Constitution the tenure of the President's office was for two-term. This provision was incorporated in the Constitution in order to curb the ambitions of the President. But under Fourth Amendment it was virtually for unlimited period of time. This feature became evident especially in the context of the procedures of impeachment and removal of the President. Under the original 1972 Constitution such procedures were rather simple so that the President could be kept on guard regarding his constitutional duties.

Under the new arrangements a motion for the impeachment or removal of the President needed to be signed by two-third members of the Parliament instead of simple majority whereas in order to

get the motion passed, it now required three-fourths instead of two-third. So, once elected, an all powerful President, created by Fourth Amendment, could remain in office for life by manipulating the election result through the one-party of which was all in all. It was extremely difficult to remove him through constitutional mechanism as the members of the Parliament would be only from his party. In case of vacancy of the office by resignation or death or removal a fresh election was to be held within 180 days instead of 90 days.<sup>38</sup>

#### THE EXECUTIVE AUTHORITY OF THE PRESIDENT

The executive authority of the President under the Fourth Amendment was altogether changed. Under the parliamentary system, the executive authority was exercised by the Prime Minister in his name and he was to act on the advice of the P.M. The original 1972 Constitution was vague about the actual location of executive authority but it implied that it was with the Prime Minister.

Under the Fourth Amendment all executive authority was vested in the President which would be exercised either directly by him.<sup>39</sup> A Council Minister to aid and advice the President<sup>40</sup> was created whose members including the Prime Minister was to be appointed by the President at his discretion.<sup>41</sup> His discretionary powers in this matter was such that he could appoint any members of his Council including the Prime Minister from outside the Parliament. This was justified that since there is a famine of experienced and capable people such provision would allow the President to recruit capable

people. The Council would be presided over by the President <sup>42</sup> and hold office during his pleasure. <sup>43</sup> One can easily discern the concentration of executive powers in the hands of the President. The advice of the Cabinet was not binding on him and he could hire and fire them at his own individual judgement without being accountable to the Parliament.

#### THE PRESIDENT AND THE PARLIAMENT

The legislative and financial powers of the President acting on the advice of the Prime Minister were turned into real powers acting in his individual judgement. He had the power to summon, prorogue and dissolve the Parliament. His rights to address the Parliament or send messages to the Parliament were retained. He could not, however, withhold the assent any bill if passed by the Parliament by a majority vote for the second time. But an interesting amendment was made in Article. 80 where the words "or declares that he withholds assent therefrom" were inserted. The possible explanation is that a Parliament drawn from one-national party created by the President would dare not try to pass the bill for the second time under such circumstances. The factor of veiled threats to the members who would have voted against the bill could not be completely ruled out.

With regards to the appointments of semi-judicial and non-political officials like those of Election Commission he now could act without the advice of the Cabinet. Under the circumstances the entire process of election became irrelevant when the Election



Commissioner was to be appointed by such omnipotent partisan President. The most unique and disturbing feature was the powers of the President with regard to the appointment and removal of the judges of the Supreme Court and the High Court. One of the fundamentals of constitutionalism is to ensure the independence of the judiciary and separation from the Executive so that its judgements are not flouted or influenced by the executive. The impartiality of the Judiciary is expected to be accomplished if the salary of the Judges is charged permanently on the Consolidated Revenue Fund and their appointments and removals are done impartially.

One of the fundamental principles of State Policy--Article.22 -- was to ensure that goal. Various constitutional mechanism like security and permanency, conditions for removal and salary etc. were provided under the original 1972 Constitution to ensure the independence of the Judiciary. But under the Fourth Amendment-- Article.96 which ensured the pernanacy of the judges was amended and now the President could remove a judge on the grounds of 'misbehavior' and 'incapacity' by simply giving him an opportunity of show cause. Formerly a Judge could only be removed by an order of the President pursuant to a resolution passed by two-third majority in the Parliament. Article 96(3) provided that procedure relating removal resolution be regulated by Parliament. Under the Fourth Amendment--Article.96(3) was omitted. President's authority to appoint other judges of Supreme Court and High Court was broaden as Article.98 was amended in which 'consultation of the Chief

Justice' required by the President to make such appointments were omitted. One can easily discern it's psychological effects on the Judges as President's unlimited power of dismissal would surely keep them in line.

Several other Articles were also amended in order to concentrate all powers in the hands of the President. Article 116 was, thus, amended to entrust all powers to the President to appointment of persons exercising judicial functions formerly done by the President on the recommendations of the Supreme Court and in consultation with the Public Service Commission and Supreme Court (done by the President in accordance with rules made by him in that behalf). The control and discipline of the persons employed in the judicial service and magistrate exercising judicial functions were vested in the President, an amendment of Article.116, instead of the Supreme Court. Similarly, Article.141A was amended as the clause (1) proviso which provided that such Proclamation i.e., the Proclamation of a State of Emergency requiring for it's validity the counter signature of the Prime Minister was omitted. The President, thus, got undeterred powers to declare a State of Emergency. Lastly special provision relating to President provided immediate assumption of office by Mujib as President for a term under the amended Constitution and was deemed to have been elected. The existing President Mahmullah was not even given a chance to resign from his office. This lack of formality regarding vacating the Office of the Presidency demonstrated regime's intolerance and impatience.

This was further demonstrated by the fact and the way the Third Schedule regarding the administration of Oath of Office was amended. In the democracies of the new states--as well as in the older democracies -- as the United States--the Oath of the President is administered by the Chief Justice of the Supreme Court. The office of the Chief Justice of the Supreme Court is usually held in high esteem in most countries. It gives a special touch of informal legal niceties. Under Fourth Amendment--Oath administration was passed on to the Speaker and administration of oath like the offices of the Speaker and the Deputy Speaker to the President instead of the Chief Justice. The Speaker was readily available to swear in the President and the entire process was completed on the same day the bill was introduced. The rules of procedure were amended in order to facilitate its quick and smooth sailing.

To top off the concentration of powers in the and of the President a new section namely Part.VIA was added to the Constitution in which Article 117A empowered the President to create one single party, if needed, in order to give full effect to the fundamental Principles of State Policy set out in Part II of the Constitution. Once President, by order, created such a National Party--all political parties would stand dissolved.<sup>44</sup> The nomenclature, programme, membership, organization, discipline, finance, and functions of the National Party were to be decided by Presidential Order.<sup>45</sup>

For the first time in the history of the sub-continent the

individuals holding offices of public profit were allowed to join the National Party. The members of the Parliament were required to join the Party; otherwise they were to lose their seats. Nobody could contest either parliamentary or presidential election unless nominated by the party and nobody was allowed to take part in the activities rather than the National Party.

The scheme of one National Party, according to some observers, was planned after former Soviet model. The ultimate power of the state would reside with the Party having superiority over the government. It would serve as a link between the government and the people, bring about much needed integration between the various segments of the society. The state and the party being one would facilitate much needed socio-economic development. Obviously, Mujib and his followers foresaw him in charge of both state power and the party. People were to elect their representatives from among 3/4 nominees of the party. The formation of one-party state and concentration of all state power in the hands of one man, thus, negated all elements essential for a constitutional government.

Mujib formed the National Party, namely, Bangladesh Krishak Sramik Awami League, on February 24, 1975 by exercising his constitutional power. Various political parties were either incorporated or outright outlawed. The party structure had a fifteen member executive committee--the real decision-making body below which stood a 115 member central committee. The lowest tier of the party structure were the executive committees of five wings of BAKSAL. According to the Constitution of the Party Sheikh Mujib

who was the Chairman of the Executive Committee-nominated the members of the various organizational tiers of the party. In the meantime, on March 26, 1975, Mujib unfolded the socio-economic planning of the government. He also formulated policies for major administrative plan.

According to the new programme--65,000 villages were to be organized into compulsory multipurpose co-operatives. The co-operatives were visualized to be formed on an idealistic vision of co-operation between the landed and the landless peasants who would share the scarce resources as well as increase the output for the benefits of the poor and the state. It was, as pointed out earlier more a vision than reality. Mujib perhaps was not aware of the fierce resistance given by the 'Kulaks' in the former Soviet Union during Stalin's brutal collectivization programme.

On the administrative plane--60 sub-divisions were to be upgraded into full-fledged districts, each headed by a hand-picked Governor with a contingent of Rakkhi Bahini at his disposal. At both district and thana level (a low-level administrative unit with a population of 80,000)--the administrative councils would be consisted by the representatives of five fronts--the peasants, workers, students, youth, and women. So, the linchpin of Mujib's political order was the party which was to bring unity among the different strata of the society. The political order was the party which was to bring unity among the different strata of the society. The politicians, in such case, were supposed to be non self-motivated and do their best to serve the state. These far reaching

social and political programme was called Mujib's Second Revolution in which the selfless and self-motivated politicians and party workers would be working under the direct leadership of their supreme leader, Sheikh Mujibur Rahman.

Ostensibly--the entire political order had an aura of regime's attempts to shift the administrative weight to the country side bypassing the urban middle class who were alleged to be the trouble-makers<sup>46</sup> (similar ideas were attempted by President Ayub in 1960s) and endeavor to bring about far-reaching socio-political changes which would transfer the country into a genuine socialist state. But a deeper analysis reveals that in the absence of a strong ideological oriented Communist Party like that of the former Soviet Union (even there, the results were a dismal failure as evidenced by the collapse of communist regime in former Soviet Union which is being followed by an acute economic crisis the system had all the indications of being perverted into a system of distribution of patronage and a machinery of suppression and oppression. Unlike a communist party- BAKSAL Constitution did not have any provisions for democratic centralism. As such--even with wildest imagination--the system could be anything but democratic. On the contrary, behind all the paraphernalia there was one central figure whose powers were so enormous that "his political friends and admirers shudder at the dead weight of such concentration of power in an individual."<sup>47</sup> Especially his Second Revolution lost its weight when it was revealed that most of the fifteen members of the all powerful Executive Committee, excepting one, were Mujib's close

associates and relatives whereas in guiding a revolution "the revolutionist is a doomed man. He has no personal interests, no affairs, sentiments, attachments, property, not even a name of his own...."<sup>68</sup> No wonder the people of Bangladesh were so skeptical about the outcome of Mujib's Second Revolution.

SECOND PHASE OF EXPERIMENT OF DEMOCRATIC GOVERNMENT IN BANGLADESH  
: AN AL POWERFUL PRESIDENCY

Establishment of one-party dictatorship by Mujib in January 1975 through the process of Fourth Amendment to the Constitution caused widespread frustration and discontentment in the country. One particular segment of the society became especially potential for some revolutionary upheavals--the army. We have already noted how Mujib alienated the Bangladesh army by his formation of a para-military force Jatiyo Rakshi Bahini and by his attempts to reduce the strength and effectiveness of the armed forces.

Mujib's constitutional dictatorship lasted only a few (January 25, 1975-August 15, 1975) months. It was overthrown by a bloody military coup in which Mujib and his entire family (with the exception of his two daughters who were abroad) were assassinated. It would be oversimplification to say that army coup of August 15, 1975, was solely the result of Fourth Amendment. Intervention by the army was motivated by a number of factors. In our introductory chapter, we have given some analysis of the various factors for military intervention in the newly independent Afro-Asian countries. In that connection, we also referred to the

potential threat of military intervention in Bangladesh. The last days of Mujib-era was noted for growing public discontentment over the fast deteriorating economic conditions, almost near anarchic social order.

The army was particularly resentful of Mujib's alleged or real pro-Indian attitudes and policies. The younger groups of the Bangladesh army--one of such groups led by Col. Faruk and Col. Rashid actually performed the August 15 coup who seemed to be convinced that one `Mujib's new one-party dictatorship was fully established in the country--there would be hardly any scope to remove him from power through ballot. So, it seemed that they came to the conclusion that bullet was the only available means to put an end of the Mujib regime.<sup>49</sup> Bangladesh army, unlike the Pakistan one, was divided into many factions and groups. There is still debate whether the coup of August 1975 had the support of majority of the Bangladesh army, particularly of the high army officials like Generals or Brigadiers. Perhaps the real story will never be disclosed fully.<sup>50</sup>

Whatever might be the origin of the coup--the first military coup of Bangladesh on the early hours of August 15, 1975 was carried on in rather successful way from the point of view of its makers. The coup was, however, followed by a period of total chaos and confusion as well as political uncertainty. A member of Mujib's Cabinet, Musthaq Ahamed was called upon to assume the governmental authority by the young Colonels and the Majors who performed the coup. Mustaq also formed a 18-member `civilian' Cabinet of which



ten were members of the Mujib Cabinet. The state-ministership was also dominated by the former state Ministers of Mujib-era. A revolutionary council consisting of five majors and some senior officials took care of national security. But nobody was sure where the real power lay in those days of instability and confusion. The 'guns and tanks' were visible in the streets of Dhaka.

From August 15 to November 3, 1975, a state of uncertainty prevailed. Musthaq tried to conform to some sort of constitutional order. He promulgated Ordinances repealing the part of the Constitution that provided for one National Party. On October 3, 1975, he announced that the parliamentary democracy would be established as soon as possible. He also tried to convene the defunct National Assembly by meeting with the members informally although the country was still under Martial Law. Outside influences were also active and working, particularly, the neighboring country India which was most unhappy to see the fate of its trusted ally Mujib. Musthaq also sought to widen his diplomatic options by cultivating relations with China and the Muslim countries like Saudi Arabia and Pakistan. There were, therefore, eyebrows as well as welcoming signs in neighboring countries.<sup>51</sup>

As a result of prevailing constitutional and political instability Bangladesh was rocked by coups and counter-coups. On November 3, 1975, another military coup was attempted by allegedly pro Indian elements of the army, which, however, did not last more

than three days. Then on November 7, 1975, an army uprising, popularly known as "Sepoy Revolution", took place. There was bitter and costly fighting among the various factions and groups within the army.

Finally, strongman of the Bangladesh army, Major-General Ziaur Rahman became effective power holder of the country. Zia was, somewhat, under shadow during the Mujib-era but Musthaq made him Chief of Staff and promoted him to Major-General. Zia was a dedicated and honest man who had faith in the destiny of Bangladesh. Though Zia became the real power holder—he did not himself take over the office of the Presidency which had passed to Chief Justice Md. Sayeem during the short-lived coup of November 3-7, 1975. Zia's official status was one of the three Deputy Martial Law Administrators—Sayeem being the Chief Martial Law Administrator. But Zia in meantime began to exercise real authority and in due course, on November 30, 1976, Sayeem was replaced by Zia as the Chief Martial Law Administrator and President through a Proclamation. Bangladesh army, thus, emerged to be a powerful political force in the country since independence.

Thus began, the second era of Bangladesh's constitutional and political history. Zia continued to rule under Martial Law from November 30, 1976 till April 1979. During this period, Zia's main concern and attention seemed to be devoted to bringing political stability and to solving country's basic economic needs and problems. Like most of the military leaders of the Third World countries, Zia made the restoration of democracy as his ultimate

goal but postponed the parliamentary election in view of the prevailing situation as his immediate and top priorities were given to the economic development of the country and political integration of the society. He was also anxious to put an end to factionalism within the Bangladesh army and develop a strong and united armed forces in the country. Constitutional matters and issues seemed to be set aside for the time-being though Zia never stopped discussing with his close associates and outside experts about the country's constitutional shape and order.

The actions and steps taken by Ziaur Rahman during the initial years of his (i.e., last half of 1976 till the parliamentary election of 1979) were reminiscent of those taken in the then Pakistan under Ayub's Martial Law. But unlike Ayub<sup>52</sup>, Zia neither had a specific plan of a political order for Bangladesh nor did he hold the politicians entirely responsible for the sorry state affairs. He was, however, like Ayub decided to postpone having any specific constitutional formula and decided to stabilize the domestic situation. This single party system was abolished, political parties were revived and allowed to have 'indoor' activities which needed government approval. Indications were that though in Zia's future political order--political parties had specific role, he wanted to keep them under control through Martial Law regulation No.XXII, 76, known as Political Parties Regulation. A further amendment by another Martial Law regulation No.VIII, 1977, empowered the Martial Law Administration to give approval to political parties and twenty-one parties were given

such approval. All signs indicated that General Zia was moving towards to guide democracy, and if the politicians were to fail, he could launch a guided democracy.<sup>53</sup>

Ziaur Rahman moved cautiously in the context of prevailing uncertain political order and embittered relationship with India. First, on 23 April, 1977, through a Presidential Ordinance amended a number of provisions in the Constitution. Addition of "Bismillah-Ar-Rahman-ar-Rahim", before the Preamble and amendment of Article.6(2) defining distinct identity helped create support base among the rightist elements of the country. Moreover, replacement of "socialism" (Article.8) with "meaning economic and social justice" attracted relevant sections of the population who were disenchanted with the results produced by Mujib's experimentation with socialism. Second, by 1977, he formulated a 19-point programme dealing with all aspects of country's various problems-political, economic and social. He put the 19-point programme to the people through a referendum called Martial No.1,1977--The Referendum Order, 1977. In the referendum, Zia's programme got '98%' approval which is the usual phenomenon of a referendum practiced under a military regime. His role as Chief of Army Staff, however, continued to demonstrate army's importance in the political affairs of the country.

Zia interpreted the approval of his 19-point programme as a 'mandate' and it gave some form of legitimacy to his political authority. He now began to think seriously in terms of making more accurately giving a constitution or constitutional reforms to the

country.

Mujib's one-party system had already gone. Political parties were revived--'indoor politics' had began. Zia either directly or through his close civil and military advisors began dialogues and negotiations with various political groups.

The next important step by Zia was to hold a presidential election in June 1978. In order to implement his tailor made system, Zia had, before the election, made sure that he was not debarred from contesting the election through Second Proclamation Order No.II, 1978. The Ordinance proclaimed that "the Chief Martial Law Administrator" will not be deemed to be holding an "office of profit" of the Republic. The election was, however, contested by more than one candidates. Though there were several candidates--Zia's main opponent was Major General Osmani--hero of Bangladesh liberation war and leader of Jatiyo Ganatantrik Dal. Zia won the election for a term of five years with 76% of the votes cast. After having legitimized his regime through the referendum and presidential election, he felt confident to bring about further amendments of the Constitution.

In due course, it appeared from available sources that Zia became convinced that Bangladesh could not afford the luxury of a parliamentary democracy. What Bangladesh needed, he felt was a strong executive, but not absolute dictatorial, to deal with big challenges facing the country in socio-economic spheres. He wanted to have a synthesis between political rights of the people and the urgent needs of rapid economic development in Bangladesh. Zia felt

that this could be achieved only under a strong executive and neither by a parliamentary system of westminster variety nor by a one-party dictatorship as introduced by Mujib before his regime came to an end.

Zia did not set up any new Constituent Assembly or any other body to frame the country's future constitution. His modus operandi as the days passed on seemed to be direct consultancy and negotiations with party leaders, constitutional experts and similar such sources. By early 1977, Zia had some ideas, though, not definite at that stage about country's future constitutional structure. Some are of opinion that Zia's model was somewhat nearer to that of Ayub Khan of Pakistan whose 1962 Constitution could be described as a blend of democratic and authoritarian features. Ayub was also guided by his desire to have a 'strong and powerful executive' and a legislature with restricted powers with regard to the relationship of the executive.

There were also speculations that government was also considering adoption of a French style government with directly elected President, a Prime Minister, Cabinet Ministers and an elected Parliament. The exact role of the army in Zia's future constitution was also an issue of intense debate. He had considered to adopt certain clauses of the Turkish Constitution in which the army's role in times of political crisis is spelled out.

The late President Ziaur Rahman had also toyed with the idea of adopting Indonesian model before taking final steps to establish a democratic system in the country in late 1979. Zia had

reportedly sent representatives to Turkey and Indonesia whether either of their systems could be transplanted to Bangladesh. Apparently he was convinced that the democratic forms of government that exist in industrially advanced societies were unsuitable for a country like Bangladesh. However, after much deliberation Zia settled for a multi-party presidential form of government closer to the French system than to the Indonesian or Turkish model. Zia, thus, took an important step through the Second Proclamation Order No.4, on December 18, 1978, known as Fifteenth Amendment Order which introduced constitutional reforms putting a formal ending of Mujib's political order. The Proclamation began with the words that the "President and CMLA in response to the popular demand to repeal the remaining undemocratic provision decided to bring constitutional reforms in exercise of his mandate from the people." He, thus, implemented constitutional formula which brought changes in the original 1972 Constitution and introduced a modified presidential system. Before we discuss the exact nature of executive under Zia's presidential system, let us now discuss the relevant features of a genuine presidential system. (1) the office of the President is directly elected for the period of time and he has direct mandate from the people to perform his executive functions. The legislature is elected separately by a direct election; (2) once elected, he cannot be removed by a vote of no-confidence in the legislature. The constitution provides special provisions for his removal; (3) the legislature is directly elected for a fixed period of time and cannot be dissolved by the

executive; (4) the legislature is the supreme-law making body and executive has no power to interfere with the law-making function of the legislature excepting causing some delay; (5) constitutional provisions establish an independent judiciary whose responsibility is to interpret the laws and executive orders.

The U.S. political order furnished the genuine form of presidential system. It is based on separation of powers and careful arrangement of checks and balances. The framers of the U.S. Constitution were particularly careful to ensure the prevention of too much concentration of powers in any one of the three organs of the government. President's powers were supposed to be limited within the execution of laws passed by the Congress. But due to the emergence of various social, economic and political forces--the office of the American Presidency has emerged to be one of the most powerful executives of twentieth century. He is the Chief of State, Chief Executive, Commander-in-Chief, Chief Diplomat, Chief Legislator. His powers and influence are immense, as pointed out by Mr. Truman, that "they form an aggregate of power that would have made Caesar or Genghis Khan or Napoleon bite his nail with envy."<sup>54</sup> But in reality no President can neither formulate nor execute any policy whether foreign or national without the approval of Congress. The Congress acts as a watch-dog over President's powers whereas the latter prevents misuse of powers of the former by his veto power. The Congress is unable to remove him through a no-confidence motion whereas the President has no power to dissolve it. The balance of powers in the system is



further reinforced through the judicial review by an independent Judiciary. The Americans themselves look upon the office of the President with certain ambivalence.<sup>55</sup> Whereas the American Congress is so powerful that President Widraw Wilson termed it as "Congressional Government."

Experimentation with American model has been done in a number of countries. C.J. Friedrich, while analyzing the impact of American Constitutionalism abroad indicated that a number of countries, especially, the newly independent Asian and African countries are looking for properly modified presidential system in the face of shaky parliamentary system which are being perverted under different circumstances. But the presidential system introduced in their countries are no where near the American System. Like the parliamentary one-this has also been perverted. In this respect, he cites the example of Fifth Republic of France which is not like the American Presidential system. As he succinctly puts that "for a highly centralized system like the French, a presidential system raises problems.. which are quite alien to the American Presidency."<sup>56</sup>

The first encounter of the Bengalis with a presidential form government was the one introduced by General Ayub Khan in 1962. Ayub, as pointed out earlier, had his own plan known as 'Dorchester Hotel Plan' of 1954. He was convinced that parliamentary system of government was unsuitable for a country like Pakistan. In his speeches and writings Ayub made his disliking of parliamentary politics quite clear. He envisaged a highly centralized political

system with a strong, effective and powerful executive unhampered by the 'undue interferences' from the legislature. He rejected Constitution Commission's recommendations of a presidential system modelled after American Presidency with sufficiently strong federal and provincial assemblies to check the executive. His notion of a strong executive was given into a constitutional charter by Monzoor Qudir (Ayub's law minister) in 1962. It created a strong executive at the expense of the legislature. His legislative veto was most effective as he had the power to send any bill for a national referendum even after being passed by the National Assembly by two-third votes. (Article.27) Unlike American President he did not share power with regards to the appointment of ministers. His ministers were handpicked and provincial governors were his agents. In case of a disagreement between a minister and his secretary-- the matter was to be laid before the Governor for final analysis which clearly undermined the authority of the ministers and demonstrating Ayub's dependence on the civil-military bureaucracy. His term of office was fixed and impeachment procedures were complicated making his removal almost impossible. The traditional rights of the legislature to control the finance was tampered with and shared by the President. The legislature was allowed to vote only on the new expenditure of the budget. He could declare emergency if he was satisfied that grave emergency existed in the country and could rule the country by decrees and ordinances.

With regards to the centre-province relations--the provincial administrations were brought under the control of the central

administration. Most important was that Article.131 empowered the centre to legislate for the whole of Pakistan whenever 'national interests' of the country required.<sup>57</sup> It was, therefore, no wonder that the Bengalis were super-sensitive to the idea of a presidential form of government.

There are, of course, other types of presidential form of government. The Fifth Republic of France is a case in point. France has had a long history of parliamentary politics. Both under the Third (1870-1934) and Fourth Republic (1946-1958)--the country was ruled by a parliamentary form of government modelled after British westminister variety. They were, however, more like the classical British parliamentary system as existed in the late 19th century i.e., they were government by assemblies. Under the circumstances --there was extreme cabinet instability in France. On the average, during the Third Republic--there were 88 ministers, none lasting longer than two years whereas during the same period Britain had 18 ministries lasting on the average of more than three-an-half year. During Fourth Republic similar scenes were repeated. The frantic search for a stable and effective executive resulted in the inauguration of Fifth Republic in 1958.

The Fifth Republic of France is a curious mixture of presidential and parliamentary systems. In the 1958 Constitution--the executive-legislative relations remained ambiguous. It was a presidential system operating through the familiar parliamentary device. Under the normal situation--the Prime Minister and his Cabinet "determine and direct the policy." (Article.21). The

President's policy making power concerned external matters. The P.M. and his Cabinet is collectively responsible to the Parliament which is directly elected. Except that the ministers are not drawn from the legislature--all devices conform with parliamentary regime. But during emergency and constitutional deadlock--the powers of the French President assumes a different dimension. Article.16 empowers the President to declare emergency after only consulting the P.M., Speakers of the two Chambers and Constitutional Council and can take any measures deems necessary to deal with "grave and immediate" dangers to the state. He then reincarnates the national will. Parliament however, automatically meets to monitor and cannot be dissolved. This power also can not be constitutionally withheld if he is challenged by the P.M. who has a majority in the lower house. So, his emergency power is not unequivocal. The President's powers as arbitrator are laid down in articles 5,11,12 and 64. The office of the president who was originally indirectly elected--was created so that he could act as the guardian of the constitution, national territories and international commitments as a neutral and impartial observer standing above the political strifes. He was, as such, given the powder to call a referendum at the government's request on constitutional bill or treaties, dissolve the parliament after consulting the P.M. and Speakers of the two Chambers. Attempts were, thus, made to bring a balance in the executive-legislative relationship. But in actual functioning of the Constitution--the powers of the legislature has been rationalized at the expense of

the Presidential powers. Subsequently by making the office of the President a directly elected office, thereby giving him direct mandate to perform his executive functions and reducing the status of the Cabinet into merely a consultative body-the President has emerged to be the key power holder in France. (The Cabinet does not act as a collective and decision-making body). It is also somewhat irrelevant that Cabinet is collectively responsible to the lower house for a policy not formulated by the Cabinet but by the President. The system in France is Presidential without questions and the President holds more power than those of the American President. As pointed out by Fridrich "the Prime drafter of the Constitutions of Fifth Republic, Michael Debre, preferred the British system, which de Gaulle has perverted by widening the Presidential powers until they formally executed those of the American President - "being less limited by the preventative Assembly, and not at all by either federal or judicially enforced Constitutional restraints."<sup>58</sup>

The Republic has, in its turn, served as a model to its former African Colonies. The Constitution of Ghana (1960), for example introduced a mixed version or synthesis of presidential and parliamentary system. The Constitution provided the direct election for both the offices of the President and legislature. But the office of the president was made the corner-stone of the Constitution through various devices to control the legislature. The method of elections, President's legislative veto power, ministers drawn from the legislature, non-responsibility of the

President and the ministers all helped create an all powerful President.

Another example of combination of presidential and parliamentary system is the amended 1973 Constitution of Pakistan. Pakistan after the autocratic rule of Ayub and Yahaya, like a thesis after anti-thesis, opted for parliamentary form of government. Bhutto's quest for personal powers resulted in the concentration of all powers in the office of the Prime Minister. When General Ziaul Hoque seized power in 1977, he sought to modify the constitution in order to bring a balance between the office of the Prime Minister and that of the President. Through the 8th Amendment of the constitution in 1985, he made the office of President more in line with that of the President under 1956 Constitution of Pakistan. Articles 58,48,90,91,56,243,75 was amended in order to broaden President's powers. The executive authority is now vested with the President, and he can exercise wide range of powers including appointment of non-contraversional but important officers like Election Commissioner, Public Service Commissioner in his discretion-similar to the ones enjoyed by the President under 1956 Constitution. He has been given the limited legislative veto power, and right to address the assembly on his own initiative. He can dissolve the national assembly but his power to dismiss the P.M. has been curtailed. The P.M. can only be dismissed if he is unable to secure a vote of no confidencebut he can be removed through his power of dissolution. The President can go over the representation body and refer bill of national

importance to a referendum. The political order of Pakistan, as such as again back to a presidential, inspite of having the parliamentary trappings of a cabinet headed by a Prime Minister.

Ziaur Rahman, as pointed out earlier, had started dialogue with various political leaders about the future constitutional structure of the country. Since he was also the Chief of Army - he remained in close touch with his army associates. These contacts with army ensured the acceptance of the future political system by the army. The constitutional issues were not openly discussed in view of the prevailing Martial Law in the country. But, as pointed out earlier, he was aware that large section of Bengali intellectuals, urban middle class, lawyers and politicians were skeptical of presidential form of government. One of the main reasons of Mujib's downfall was the introduction of one-party presidential form of government in 1975. As one observer pointed out that "the last straw came when Mujib imposed one-party rule, discarded the parliamentary system and replaced it with a curious amalgam of American Style Presidential structure with Soviet-style party cadres. Basically it was intended to cement one man-rule and bitterly resented by people who for three generations have fought for their rights of democratic expression."<sup>59</sup> Majority people in Bangladesh are particularly sensitive to presidential form of government especially if the office of the presidency is held by military. To a large section of population - it meant one-man show, parliamentary form of government is synonymous with democracy where as presidential form of government spelled autocracy. That

a genuine Presidential form of government like the American presidential system also provides a democracy is unknown to many. This misgivings about a presidential form of government is the result of historical experience of the Bengalis. The memories were still fresh when Ayub introduced his autocratic rule under the garb of presidential form of government and deprived Bengalis of their democratic rights.

At the same time, Zia felt, as pointed out earlier, that an effective and strong executive less restrained by representative assembly was what Bangladesh needed in order to establish a stable political order. The need for stable political order was more urgent in the context of gargantuan socio-economic problems facing the country even if meant curtailment of some democratic rights. The idea of a strong executive was more acceptable to the military as an institution known for its orderly discipline and hierarchy. Nothing can be achieved if there is no order and order can only be established when it comes in the form of a command rather than through the amalgamation of various opinions. It was also appealing to the emerging business class.

In the civilian front, Zia consulted Justice Satter who was his special Advisor and Mashiur Rahman, leader of propeaking NAP. General Nurul Islam, General Mohabbat Jan Choudhury were his military confidants. He also had extensive discussion with constitutional experts from out of the country. His decision to retain the presidential system was now confirmed as he contested and won a presidential election in June, 1978. After thorough



discussions with the relevant people he took steps through Second Proclamation Order, No.4 on 18th December, 1978, known as Fifteenth Amendment Order which introduced constitutional reforms putting a formal ending of Mujib's political order. The amendment did not change the fundamental structure of the constitution as amended under Fourth Amendment but modified and somewhat liberalized the nature of the political order of Bangladesh. The main emphasis was to modify the executive-legislative relations in order to bring a more democratic but effective political order. The proclamations began with the words that "the President and CMLA in response to the popular demand to repeal the remaining undemocratic provision" decided to bring constitutional reforms in exercise of his mandate from the people in the election to the office of President. This was done also in accordance with the pledge made through "Third Proclamation of 29th November, 1976, read with the Proclamation of 20th August, 1975, and 8th November, 1975."

The executive-legislative relations created under the Fourth Amendment was modified although most of its powers were retained. The executive authority was still vested in the President, who was directly elected by the people, for a period of five-years without limit to the terms of the office. He was the Commander-in-Chief of the armed forces, Chief Executive and Chief Legislative initiator through his power to address the Parliament and power of its dissolution. He was to make important appointments like Vice-President for a term of five year who could be removed only by the President and important but non-controversial appointments like

members of the Election Commission whose neutrality were crucial in maintaining and conducting a free and fair election, and members of the Public Service Commission. The national and international policies were to be formulated by him to be laid before the Parliament for its approval. Once elected--he was likely to remain in office as the powers of the Parliament to impeach or remove the President were adequately restricted.

Ziaur Rahman also did not repeal any of the extraordinary constitutional devices through which the President was capable of exercising almost dictatorial powers. The President was armed with emergency powers, preventive detention as well as the special powers act. According to emergency provisions--the President, if satisfied that a "grave emergency existed" threatening the "security or economic life of Bangladesh", was entitled to declare a state of emergency during which period--the Articles. 36,38,39,40 and 42, which were to restrict the state power, and all fundamental rights would be abolished. The High Court was forbidden even to issue writ or habeas corpus during the emergency period.

Incorporation of emergency provisions, especially among the new nations or emergent nations is quite common. When the society is in a flux--traditional authority has been undermined but has not been replaced by an effective administration--the rulers' exigencies of emergency powers are not without precedents. Most constitutions are armed with such provisions so that in case of a grave situation which cannot be brought under control within the framework of limited government--the executive can act effectively. The Weimar

Constitution of 1919 had to incorporate it when the nation was confronted with civil-war like situation between the left-wing and right-wing extremists. It is considered to be a political necessity against forces detrimental to constitutional government. As K.C. Wheare pointed out that "a first force which works against constitutional government is war. In time to war or rumors of war, the government claims full freedom of action; it does not want to be bound by to the limited government which we call constitutional."<sup>60</sup> It is, then, not difficult to understand why in Great Britain the parliament delegated sweeping powers including preventive detention to the government under the Defence of the Realm Acts. The U.S. Government does not recognize it but practice it in times of emergency.

The contention of the issue is how and why these sweeping powers are used. Both in Britain and France the Parliament is automatically convened by right and remain in session through out the emergency . Unfortunately, in many emergent nations where emergency powers of the President is independent of the Parliament and as such have been used even during normal times. In Bangladesh, the President's emergency powers is not independent of the Parliament but President with a weak representative assembly is capable of using this power in an unfettered manner. In Bangladesh, the emergency powers have been misused both during Mujib and Ershad's period. Ziaur Rahman, however, after the civilization of his rule did not use this extra-constitutional powers frequently but nonetheless it remained to be a powerful

weapon to deactivate the opposition.

Another undemocratic provision known as preventive detention, which was incorporated in the original 1972 constitution, was kept in tact. Under this Act, an individual could be detained without trial on the basis of suspicion that he may be involved in subversive activities. Such Act violently violated the democratic spirit. Originally introduced by the British under the Defence Act of India, 1939, the preventive detention is, however, unfortunately needed by the governments of most emergent nations, in order to preserve responsible and representative government. Again like emergency power, why and how it is used is the main issue. If it is not used without restraints there can be serious abridgement of fundamental rights and threats to constitutional government. The democratic constitution of India contains such provisions. But Indian Government has used this power with utmost restraints. It has been used "primarily a psychological deterrent in the fight against subversive activities through out India.<sup>61</sup>" In Bangladesh, however, such provisions were used quite frequently by the President for self-aggrandizement purpose. Similarly the special powers act was also retained.

The proclamation further amended Article. 58 under Fourth Amendment in the following manner: clause (1) there shall be a Council of Ministers consisting of a Prime Minister, one or more Deputy prime Ministers and other Ministers to aid and advice the President in the exercise of functions; (2) the question whether any, and if so what, advice was tendered by the Council of Minister

or a Minister to the President shall not be inquired into in any court; (3) 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; (4) the President shall appoint the Deputy Prime Ministers and other Ministers from among the members of Parliament or from among persons qualified for elections as such members: provided that not more than one-fifth of their number shall be chosen from among persons qualified for election as members of Parliament; (5) the Ministers shall hold office during the pleasure of the President; (6) the President shall preside the meetings of the Council of Minister or may direct the Vice-President or the Prime Minister to preside at such meetings; (7) a Minister may resign his office by writing under his hand addressed to the President.

The Council of Ministers under fifth Amendment contained some of the features of a parliamentary government. There was a provision of a Prime Minister who, according to parliamentary convention, appeared to have the majority. Choosing a prime Minister by the President was delegated to his absolute discretion under the Fourth Amendment. (Article, 58 (3). Under the modified form, though it appeared to be left to parliamentary convention, the President had enough elbow room in the appointment of a Prime Minister. In this respect amended constitution of 1973 of Pakistan President's Powers are more restricted as the nominee is required to have a vote of confidence from the National Assembly within sixty days and before oath taking.(Article.90 Clause 3.) The

nominated Premier under Fifth Republic of France and Chancellor under the Basic Law, 1949, are also required to demonstrate that they do indeed command the majority of the legislature. Appointment of a Prime Minister by a neutral and indirectly elected President is altogether different from the similar procedure followed under a partisan and directly elected President. Thus, although the familiar parliamentary provisions of Council of Ministers headed by a Prime Minister was incorporated, Zia's Cabinet, in view of President's powers and influence, was more like a presidential cabinet than a parliamentary one.

Article. 58(3) under Fourth Amendment was modified to make the Cabinet more representative. Under Fourth Amendment, it provided that President could appoint Ministers who were not members of the Assembly, if deemed necessary. Non-member could speak and take part in the proceedings of the Assembly but could not vote. Nonetheless, it widened presidential powers with regard to appointment of the cabinet to such extent that it deviated from genuine presidential system. Under the modified form, no more than one-fifth of the cabinet was to be chosen from among the non-members but qualified to be the members of the Parliament. Appointment of Ministers from among the non-Parliamentary members was, however, justified that it enabled the government to utilize the service of the technocrats. In most developing countries, there is a shortage of capable and skilled persons. From that point of view-such provision was a positive addition but it was somewhat an abridgement of parliamentary system. It was more skin

to the features a found in the Ayub constitution of 1962 and Fifth Republic of France.

Two other provisions were also fundamentally different from those of a parliamentary system. The Council of Ministers is to be presided over by the President (Article 58 (6) and they hold office during the pleasure of the President (Article 58(5)). In effect, then, the Council of Ministers did not have any decision making power but merely a deliberative and consultative body like that of the Fifth Republic, and by not making it collectively responsible to the legislature which is found in both Fifth Republic and amended 1973 constitution of Pakistan (Article 90(4) the members of the Council of Ministers were nothing but President's agents masquerading as a westministers type cabinet. They were not responsible to the parliament even for their day-to-day administration since the parliament could not bring down the cabinet through a vote of no -confidence. Neither the President nor the Council of Ministers were, thus, responsible to the parliament.

The President's power with regards money matters was also increased through the Fifth Amendment and undermined parliament's traditional control over the purse of the government. Legislature's unfettered control over government's expenditure has been the surest way to restrict the powers of the executive. This is applicable under both presidential and parliamentary system. Especially in a presidential system- the legislature is overzealous in protecting its right in order to check the

independent executive. The financial powers of American Congress is a well known phenomenon. But unfortunately, such fundamental requirement of a constitutional government, was tempered with, initially by the political leaders of Pakistan. Governor-general Ghulam Mohammad, who was known for his contempt of democratic process, tried to formulate a system synthesis of American and British system. The draft constitution prepared by Sir Ivor Jennings in 1955 introduced a novel idea about a strong executive whose powers would limit the powers of the representative body by encroaching on its traditional financial powers. Accordingly if the national Assembly failed to pass an appropriation bill before the beginning of the financial year the President could by certification with some limitation continue in operation for that financial year.<sup>62</sup> President Ayub under 1962 constitutions had financial powers over the legislature. The National Assembly of Pakistan was allowed to debate and vote only on that part of the appropriation bill which reprinted new expenditure.<sup>63</sup>

The insertion of article 92.A armed the president with the financial powers through which he could control the parliament. It provided authorization of expenditure in case parliament " failed to make the grants"(art.89)" and pass the law (art.90) before the period expired for which grants in advance were made under art.92 or " has returned or reduced the demands for grants " or a request of the President for reconsideration "the President may, by order, authorize withdrawal from the Consolidated Fund Moneys to meet the necessary expenditure in the annual financial statement for that



year."<sup>64</sup> The President could, however, run his administration through his power of certification for no more than one hundred and twenty days. Within this time-limit, the President could easily, either through coercion or persuasion, bring the legislative assembly in line to get the budget passed. This was a serious abridgement to the practice of constitutionalism. Insertion of article 142.clause 1 (A) provided the referendum process which allowed the executive to by pass the parliament and directly appeal to the electorate on critical constitutional issues. Regarding the treaties with foreign countries - which were to be laid before the Parliament for their approval-President now acquired the right to decide which ones were not to be laid before the Parliament for the sake of national interests. (article 145 A). For vital interests - Zia assured his judgement to be superior to that of the peoples representatives.

In the final analysis - Ziaur Rahman's political order emerged to be a presidential system with a strong executive. It was certainly not a parliamentary system as the practice of overriding priministerial advice, lack of collective responsibility to the legislature, restricted financial powers of the legislature undermined parliamentary system and favored a presidential leadership. Number of supporters of Ziaur Rahman have tried to compare it with the Fifth Republic of France. The Fifth Republic, originally constituted to be a hybrid of presidential and parliamentary system - but eventually emerged to be a presidential system. There are some similarities between Fifty Republic and the

Constitution of Bangladesh as amended under Fifth Amendment. But in view of the unfettered constitutional, extra constitutional powers of the executive - Ziaur Rahman's President was much more powerful than the President of the Fifth Republic of France. The executive created under the Fifty Amendment bore more similarities with that of the executive created under the 1962 constitution of Pakistan. Like Ayub - he was also motivated by his strong desire of national consolidation, economic development and the need for a strong executive. The overriding executive leadership at the cost of a weak representative body contained the seeds of constitutional autocracy. All it needed was a twist in the electoral process of the country which is fully utilized by General Ershad in subsequent years.

#### Executive Under General Ershad

Ziaur Rahman's rule was suddenly ended on May 31, 1981 in an attempted coup, creating a serious power vacuum in the country. There were apprehensions about the viability of country's infant political system in case the army decided to take power. The army has had a steady and continued emergence in managing the political affairs of the country since August 1975. The militaristic nature of Zia's rule was removed following the parliamentary election and lifting of martial law in 1979 but even during his civilian rule real power base remained with the army. Zia never pretended that the political system, the Bangladesh Nationalist Party, which was his vehicle, and the National Assembly, were fully fledged". We have to build democracy in this country"<sup>65</sup> he used to say. His

political system was based on civil-military bureaucracy in which army's continued role was assured.

Contrary to the apprehensions of a military take-over, the transition to civilian administration was rather smooth. There was neither a Martial Law following Zia's death nor any army personnel were seen in the streets. The country was simply under a state of emergency. The constitution was quickly amended (Sixth Amendment) to pave the way for Justice Sattar--the Acting President, to contest the presidential election held in November, 1981. The Chief of the Army Staff, General Ershad, excepting a controversial interview to Holiday, a national weekly, in which he expressed army's apprehensions in case the presidential election was won by the Awami League, stuck to his support to the continuation of constitutional process. It was, however, quickly clarified and Ershad categorically stated that "he did not himself seek power, and the Army did not want to govern."<sup>66</sup> It should be pointed out that Army supported BNP and played a crucial role in winning the election for Justice Sattar. The real drama began to unfold after BNP had won the election. Within three days of his victory-- President Sattar was confronted with "bitter realities of power in his country."<sup>67</sup> On November, 18, 1981, a group of Generals went to the President's office and demanded "a share of power without responsibility" while President Sattar declared that "army's job is to defend the frontier. No other role is possible for the army in a democratic country."<sup>68</sup>

Army Chief General Ershad told the Indian reporters on

November 12, 1981 that army did not want any civilian responsibility but he made clear: "what we want is that we must be heard. The government must take our views into consideration."<sup>69</sup> Ershad's concept of a share of the army having a role in the country's political affairs were expressed when he bluntly told that army's role must be institutionalized.

During this period, November-December 1981 to March 24, 1982, President Satter and the General had a series of discussion to explore ways and means of having some sort of military-civilian partnership modelled on Turkish and Indonesian system. At one stage, it was speculated that Ershad wanted to be the Vice-President without having, however, giving up his position as Chief of the Army Staff which was unacceptable to civilian President Sattar. In the meantime, President Sattar in order to accommodate army's demand set up a National Security Council consisting of President, Vice-President, Prime Minister and three Chiefs of Staff. There was no definite or clear cut role for the NSC. In some quarters, it was supposed to be a kind of 'super cabinet' but in reality it was not that powerful. We may add here that in Pakistan, President Ziaul Hoque tried to set up a NSC but the National Assembly tured down Zia's proposal and it was never set up in Pakistan.

Sattar's half-hearted measures, however, could not satisfy army's desire for effective power-sharing. Ershad came to the conclusion, which he had candidly admitted, that "we considered Zia, who was an army man, would look after our interests. But he

was also a President. Zia knew our needs. Obviously Satter (if he was elected) won't have the same knowledge."<sup>70</sup> Naturally, therefore, it was upto the Generals themselves to ensure army's role in the political system of the country. As such, the top Generals used to meet regularly at Ershad's official residence to discuss the fast changing political dynamics of the country. In fact, they were making preparations for a military take-over. The usual allegations of corruption and inefficiency against the civilian Cabinet of President Satter used to be aired at these meetings of the Generals. Again President Sattar, to meet the allegation of corruption, changed his Cabinet from an unwieldy one into a 12-member Cabinet. But very soon, it became clear that army's appetite for power could not be satisfied unless Satter was removed from power by a military coup.

During this period (December 1981) Satter told a visiting constitutional expert who was pleading him to arrive at a compromise and avert the impending imposition of Martial Law, where upon President Satter was reported to have said: "How could I avert Martial Law ? Ershad wants to be a military President and also perhaps, in due course, wants to be assassinated."<sup>71</sup> In any case, it became clear before the end of the year 1981, that Bangladesh was heading towards another period of army rule and Martial Law. Thus began a new era of constitutional development in Bangladesh.

The coup came after a series of meetings with top Generals and it was not a surprise coup. It was more of praetorian type in view of the almost non-existent resistance from the political

institutions of the country. For example, inspite of Sajeda's Chowdhury's recent claim in the Fifth Parliament that she had handed over a letter supporting Satter's constitutional government,<sup>72</sup> activities of the AL had indicated its tacit approval in favour of the coup.

Soon after coming to power by a bloodless coup on March 24,1982, Ershad gave definite assurances to his army colleagues that he would introduce necessary changes in the constitution by which army would be given some role in country's political order. He even suggested that in order to ensure effective sharing of the powers by the armed forces, the constitution should have specific provisions for military participation in the government.<sup>73</sup>

He was looking for a model like that of Indonesian and Turkish Constitutions. In the constitutions of these two countries army has a constitutional role in country's political system. As such, Ershad sent a two-men secret team to Indonesia to study what is known as 'dual role' of the army in Indonesian political system.

In Indonesian Constitution--the army has been given a share in country's political order. This process was started by President Suharto soon after he came to power in a military coup in 1966. After the parliamentary election of June 5,1971, seventy-five out of 460 seats of the Assembly were given to the armed forces. The Indonesian army also plays a positive role in development work: there is elaborate process under which army makes active contribution in development work.

Ershad wanted similar provisions in the constitution of

Bangladesh. He proposed a bicameral legislature in whose upper house he wanted to give one-third representation from the army through a system of election guaranteeing army's representation. At a meeting of his inner council consisting of the top Generals Ershad presented a written constitutional proposal outlining his idea of army representation but curiously enough majority of members of his Junta thought that such proposal would certainly be not acceptable to the people of Bangladesh.

Ershad, then, decided to follow similar process introduced by his predecessor, Zia, to civilianize his rule. He declared himself to be the President of the country on December 11, 1983, held a referendum, formed his own political party, and tried to hold presidential election before calling the parliamentary election. But unlike Zia, who was successful in achieving a centrist consensus--Ershad's attempts were looked upon by the opposition with suspicion. The opposition suspected that by holding the presidential election he was trying to consolidate his power, then amend the constitution ensuring continuing dominance of the army, and refused to hold dialogues with him. Eventually parliamentary election was held in 1986 followed by a presidential election.

Subsequently, President Ershad tried once more institutionalize army's role. He brought an amendment in the Assembly to give army representation in the District Council but there was so much uproar by the opposition that he had to drop the idea although Ershad himself never gave up the idea altogether.

As regard the type of executive, Ershad found Zia's all-

powerful presidency with a rubber-stamp legislature for his authoritarian rule most suitable. He ruled Bangladesh for about nine-years without making any major constitutional amendments as done by his two predecessors--Sheikh Mujibur Rahan and Ziaur Rahman.

Ershad's disservice to the constitutional government in Bangladesh was not in the form of introducing any new type of authoritarian executive--as he had already a ready-made one under Zia's executive system. But his disservice to democracy was that he destroyed electoral process of the country. Under him the election process in Bangladesh became a total farce and mockery. He ruled the country without any meaningful election without which no form of democratic executive can function.

Through an unprecedented electoral malpractice, he kept the Parliament in line creating an all powerful and autocratic executive. As a matter of fact, the Nineth Amendment which allegedly introduced to further 'democratize' the system, generated more skepticism than enthusiasm. Article 51(2) was amended to make president's unspecified terms of office into fixed two-terms whereas according to amended Article.49, instead of President nominating the Vice-President, the Vice-President was to be directly elected as a running mate of the President. Curiously Article.51.A(2) which specified the fixed two-terms of office for both President and Vice-President made clear that such provisions would not debar them from contesting the election. Under the circumstances and existing electoral system both President Ershad



and Vice-President Moudud were assured of fresh chances of office for two consecutive terms. The executive now bore more resemblance with that of the U.S. but in the absence of a powerful and independent legislature, which acts like a 'watch-dog', the existing 'constraints' on the executive were nothing but a charade. This point became more credible as a new clause 72.4(A) was added which stipulated that "if any contingency as mentioned in Article.53(3) arises at anytime when the Parliament stands dissolved or is not in session, it shall notwithstanding anything contained in this constitution, stand summoned to meet at the Parliament House at noon on the day following the day on which such contingency arises and the Parliament so summoned to meet shall stand prorogued or dissolved as before, as the case may be, after it has made necessary provisions for the discharge of the functions of the President". Such provision, under the existing circumstances made it easier for the President to maintain unconstitutional rule under the grab of constitutional government. Some BNP leaders even filed cases in the High Court against this Article.

Bangladesh entered into a new era of constitutional development with the downfall of President Ershad on December, 6,1991. Although he was the longest ruler in Bangladesh since independence, he has had difficulties legitimizing his rule. His hand picked political party, fraudulent parliamentary elections of 1986 and 1988, presidential election of 1987 were looked upon as attempts by Ershad to create a democratic veneer in order to

continue his autocratic rule. Unlike Zia, he lacked personal popularity and continuence of his rule depended on army support. The opposition was fragmented--the two main opposition parties--BNP led by Zia's widow, Begum Khaleda Zia, and the AL, led by Sheikh Hasina, daughter of Sheikh Mujibur Rahman--failed to forge a common platform and create a momentum.

In November, 1987, however, Ershad's rule was seriously challenged by the opposition but Ershad managed to survive by using the familiar devices found in the Third World countries like state of emergency and suspension of fundamental rights etc. He, however, was compelled to dissolve the parliament but he had to, according to the constitution, call an election within 90 days. The parliamentary election of March, 1988 was a watershed in Ershad's rule. In the face of mass boycott by the voters --the government resorted to such unprecedented election manipulation that a British newspaper openly termed it as "lies and cheating in the Dhaka poll booth."<sup>74</sup>

The political turbulence continued and came to a head in November, 1990. The three main alliances--seven party alliances, eight party alliances and five party alliances, and Jamaat-i-Islam bridged their differences in order to outset Ershad. One of the main issues was to decide whether Bangladesh would have a parliamentary system or presidential system. On November, 1990, all three alliances forged a common platform and came to a historic joint decision declaring their intention of establishing a sovereign parliament and demanded a free and fair election under a

neutral care-taker government. As usual Ershad responded with familiar actions by declaring a state of emergency, suspending fundamental rights etc. but the democracy movement gained momentum. Finally when the army, whose area commanders and top Generals held a meeting while Ershad anxiously waited for its outcome, decided to withdraw their support--the President had no other alternative but to resign on December 6,1990 to a care-taker neutral government headed by Chief Justice Shahabuddin.<sup>75</sup>

The constitutional lacuna was overcome through a cumbersome process. As the House could not be convened (shortage of time and the fact that most of the MPs were in hiding) Vice President Moudud first resigned to the President who appointed Chief Justice Shahabuddin as Vice-President and then himself tendered resignation to the Vice-President. The Vice-President then took over the office of the Presidency as Acting President. A peaceful transition to an interim government was, thus, possible. There was, however, one loophole as to find ways and means for the return of the Acting President to his former office. Before agreeing to take over the care-taker government, Justice Shahabuddin had extracted a promise from three-alliances that after the transfer of powers to the duly elected civilian government he should be allowed to assume his office as Chief Justice. The care-taker government's main task was to hold a free and fair parliamentary election and if required, a presidential one.

A free and fair election took place in Bangladesh on February 28,1991. One of the main issues of the election was to choose the

form of government. The Awami League wanted a mandate from the electorate in favour of parliamentary form whereas BNP remained mostly evasive on that issue excepting a few sketchy statements by Begum Zia about its preference for a presidential form of government, somewhat like the one left behind by her late husband and practiced by Ershad for last nine years.

The election result was, however, startling. Belying its organizational strength--BNP emerged to be the single largest majority by bagging 140 seats out 300 whereas Awami League captured 88 seats. BNP was still no position to form the government as it lacked the required 151 seats. After hectic lobbying by many including some officials both military and civil, an uneasy partnership was formed between Jamaat-I-Islam and BNP. Begum Zia was now able to form the Government as the Acting President did not lose time forming a Cabinet based on the consent of the legislature. Subsequently--the indirect election of 30 women members by the members of the parliament took place. According to the agreement of its coalition with Jamaat (decided on March 12,1991) only one panel of BNP candidates took part and won all 30 seats. The quid pro quo with Jamaat was not fully implemented excepting allotting two women's seats to Jamaat--BNP emerged to be the majority party on its own strength.

Having settled down with a majority--BNP now was confronted with the constitutional issue which was plaguing the country since Ershad took power in 1982. It became a very delicate dichotomy for BNP and its leader Khaleda Zia to justify the system of government

against which she agitated during the rule of Ershad. The Awami League, Five-Party Alliances as well as Jamaat-i-Islam--all wanted to switch over to parliamentary system in order to put an end to future autocratic rule in the country whereas BNP was toying with the idea of introducing a genuine presidential system with checks and balances in order to ensure democratic but effective executive. As such--for a short period of time--the correct interpretation of a sovereign parliament became an issue of intense debate. One of the BNP MPs, Nazmu Huda, propagated that a parliament free from executive manipulation is a sovereign parliament--including the one under Ershad.<sup>76</sup> This interpretation was, however, not correct.

The Parliament, under Zia-Ershad constitution, was in many ways subservient to the executive and as such not sovereign. The AL and other political parties stressed and emphasized that the accountability of the executive to the representative legislature is synonymous with the sovereignty of the parliament. From purely theoretical point of view, the latter explanation is incorrect as there can be sovereign parliament without the executive being responsible to it. The legal status of the U.S. Congress is a case in point. But since accountability of executive to the parliament was a part of the Joint Declaration--the BNP was accused of going back on its agreement. In fact, the AL and other political parties interpreted sovereign parliament feature synonymous with parliamentary system since it is one of the fundamental characteristics of Westminster type government.

So the Awami League, during the first session of the Fifth Jatiyo Sangsad, which met in March and lasted 41 days, notified the Constitution Eleventh Amendment Bill on April 14. The Bill stipulated the validation the tenure of the Acting President and ways and means of his turn to the Bench as well as provisions to switch over to parliamentary form of government as existed before the Fourth Amendment. Still undecided BNP agreed to form a Private Members Bill Scrutiny Committee to examine the technical aspects of the Bill. The first session prorogued without having settled the most fundamental issue confronting the nation. The country was, thus, griped with a fluid situation.

All throughout April, BNP dragged its feet. Begum Zia was aware that majority Bengali intelligentsia, urban middle class, lawyers, small traders and businessmen were in favour of a parliamentary form of government. Whereas a presidential form of government, supposed to be ensuring effective and stable executive, was preferred by the civil-military bureaucrats and big industrialists. Quick and effective decisions needed for a stable political order and industrialization become sluggish, according to these groups, under a parliamentary system.

The issue came to a head on June 6, 1991, when the Acting President Justice Shahabuddin in a nation-wide broadcast reminded the Three Alliances about their commitment and responsibilities. The Acting President, whose integrity as head of the care-taker government was beyond any doubt, had already urged the parliament members to resolve the constitutional issue in his inaugural

address. The fluid situation was further exacerbated as the Prime Minister reacted angrily to the speculations of a Cabinet dissolution. She was confronted with the realities that although her government was a *de facto* government but the Acting President still held constitutional and legal powers of an all-powerful executive. The widening gap between the P.M. and the Acting President was, however, bridged due to the intervention of the Chief of the Army Staff, Major General Nooruddin. The decision to opt for a parliamentary government was taken on the night of June 7, 1991, after she had an extended meeting with her 'kitchen cabinet'. The final decision was taken on June 8, 1991, at the meeting of BNP's Central Committee. The parliamentary party of BNP also gave their concurrence for a switch-over on June 9, 1991 and formed a committee to draft an amendment bill featuring parliamentary form of government with restricted provisions for floor-crossing to ensure a stable government. Given the history of BNP's defection--Begum Zia's eagerness to incorporate such restrictive provisions was quite understandable.

The following reasons, thus, can be attributed to Begum's Zia's change of mind regarding the form of government: (1) demand by all opposition parties excepting Freedom Party and Jatiyo Party; (2) demand by a large section of rank and file within her own party; (3) bleak chance of winning of presidential election because of strong opposition from the Awami League as well as the entire ulemma community; being a woman, it would have been difficult for her to be elected against the stiff opposition of the

religious community as well as the Awami League; (4) realization of the fact that Ershad was still a force which became obvious during her tour of country-side after the Gorki of April, 30, 1991.

Accordingly, two bills--Constitution (Eleventh Amendment) Bill, 1991 and Constitution (Twelveth Amendment) Bill 1991, were introduced in the Parliament by the Government on July 2, 1991. The former sought to ratify and confirm all acts, actions and things done by Justice Shahabuddin as Acting President and the exercise and performance of powers and functions of the President by him since his appointment on December 6, 1990 and to pave the way for his return to his former office, an assurance, given to him by the Three Alliances. The later contained provisions for the change of government. The Opposition amendment bill was introduced on July 4, 1991, thorough a Private Member's Bill by Deputy Leader of the House--Abdus Samad Azad. There were some misgivings about numbering of the opposition bill as Sheikh Hasina claimed that AL's amendment bill for a switch-over to a parliamentary form government was notified earlier. The issue was, however, settled by terming it simply as Constitutional (Amendment) Bill, 1991. The provisions regarding the Acting President were incorporated in the same bill. The provisions were similar to those of BNP's bill excepting the language.

The bills introduced, to change the form of government, by the Treasury and the Opposition were remarkably similar. From the Preamble to Article.10--the language was same. BNP bill proposed changes in Articles. 11.48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59,



60, 70, 72, 73A, 88, 109, 112, 119, 123, 124, 125, 141A, 141C, 142, 147, 148 and 152. The Opposition agreed on the amendment proposals except it did not propose amendments to Articles. 70,109,125,141. It, however, proposed Amendments to Articles. 92A and 145A on which BNP's bill was silent. Excepting those six Articles-both agreed on the other proposed amendments.

Four other single-clause bills were introduced in the Parliament by Workers' party leader Rashed Khan Menon seeking effective participation by the people through their elected representatives in administrations at all levels, laying of all treaties with foreign countries connected with national security in a secret session of Parliament and ensuring fundamental rights as guaranteed in the Constitution.

As pointed out earlier, the bills presented by BNP and the AL were, however remarkably similar as far as the form of the government excepting: (1) the authority for conducting presidential election; (2) the provision of referendum regarding certain changes in the Constitution; (3) the power of the President to dissolve the Parliament; (4) restriction of floor-crossing, (5) appointment of non-MPs as members of the Council of Ministers. In order to resolve the areas of differences, a 15-member committee comprising members from both treasury and opposition was formed on July 9,1991. It worked for 18 days and had 36 meetings. It's fundamental objective was to work as a liaison committee between the leader of the House and leader of the Opposition. The committee finalized it's report and came to an

unanimous decision on July 28, 1991. This was an epoch-making incident since both the major parties came to such consensus in law-making thorough mutual give and take. Let us now examine the various provisions which were amended through select committee's untiring efforts.

Regarding the authority for conducting presidential election, the AL was in favour of reviving the Second Schedule in which the President was to be elected by the MPs conducted by the Election Commissioner through a secret ballot whereas BNP favored addition of Fifth Schedule providing the authority to the Speaker through open ballot. In this regard the AL's proposed amendment provided one of the cardinal principles i.e. to ensure the neutrality of the Head of the State of a parliamentary government. This is an well established practice found in both old and new former dominions of Great Britain, who adopted the parliamentary form of government. The use of discretionary powers by a neutral Head of the State is crucial in maintaining the purity of the system. BNP's proposal obviously created an open invitation for the election of a partisan president. The Selection Committee decided not to have any Schedule and to retain Article. 119 of the existing constitution. This was suggested by Moudud Ahmed of Jatiyo Party which stipulated that the election of the President would be conducted by the Election Commissioner but the procedure of the election was to be decided by enacting an ordinary law. Subsequently, a law was enacted which stipulated that though the presidential election was to be conducted by the Election Commissioner, it was to be done

through open ballot.

Secondly, the provisions of referendum regarding certain changes to the Constitution, the AL's bill wanted to do away with the protective provisions by omitting Articles.141(1A), (1B) and (1) which according to the AL were undemocratic since they were inserted in the Constitution by the Second Proclamation Order No.IV of 1978, later ratified by Fifth Amendment and had curtailed the sovereignty of the Parliament. But BNP only dropped Articles. 48,56,58 which dealt with the provisions regarding the executive while retaining Article. 8 which contained fundamental principles of State Policy and Articles. 80,92A which upheld the sovereignty of the Parliament in legislative matters. The government side insisted that such protective clauses like referendum clauses should be kept in order to avoid any constitutional coup like that of 1975 which changed the fundamental character of the Constitution itself.

It should, however, be pointed out that from strictly theoretical point of view--the sovereignty of parliament is somewhat circumscribed if the constitutional provisions require participation of outside body or bodies of a federation. But there are many examples like the German Basic Law of 1949 which forbids the parliament to amend any of the Articles dealing with the provisions regarding territorial change of the federating units, the right of the Lander to participate in legislation, the guarantee of human rights, and of the status of Germany as a 'democratic and social state'. (Article.79(3) Without having a

referendum, the Constitution of Fifth Republic of France also forbids the Parliament to make any change in the republican form of government (Article.89) without some complicated procedure. As such BNP's argument for retaining such provision was not without justification.

Article.141(c) provided referendum for certain protective clauses which under the amendment bill were Articles.8.80. BNP wanted to add a new clause (1D) after Article.141(1C) which laid down that whatever was the result of the referendum it should not be deemed as 'vote of confidence' or 'vote of no-confidence' of the executive. Obviously, this sub-clause was brought with the intention of ensuring the continuity of the executive.

Finally, in a compromise formula, the Select Committee sought to protect only the Preamble (containing Bismillah-ar-Rahmaner Rahim) and Article.80 through guarantee clause. The government had earlier sought to protect Articles. 80 and 92A under these guarantee clause. These two Articles empowered the President to return a bill passed by a Parliament for reconsideration, and to withdraw money from the consolidated fund of the Republic for 60 days if the Parliament failed to make the grant. The opposition felt that such clauses should be dropped to protect the parliamentary system which the bills sought to establish.

The third point of difference was regarding the power of the President to dissolve the Parliament in case the P.M. loses the confidence of the majority members of the House. In a parliamentary government-effective and stable executive is ensured

70 of 1972 constitution which provided that a member was to lose his seat in the Parliament if he resigned or voted against the party which nominated him to the election but he was not debarred from contesting subsequent parliamentary election. Original Article 70 was substituted by Act. II of 1975 which interpreted voting against the party as being synonymous with being abstain. The Amendment Bill of the AL kept Article. 70 intact and considered it enough restriction against floor-crossing.

BNP's proposed amendment of Article. 70 was more restrictive and authoritarian. It stipulated that a member would lose his seat if the leader of the party informed the Election Commission in writing the fact that he has resigned, has been expelled, or acted and voted in Parliament against the party or formed any group with other members within the party which nominated him to the election. Being abstained from voting or absented himself from any sitting of Parliament, ignoring the direction of the party were also to be considered as voting against the party. Sub-clause (2) added further restrictions in the form of punitive punishment debarring a member whose seat has fallen vacant from contesting parliamentary election for five years. In order to prevent defection or group-floor-crossing, sub-clause (3) provided that if at any time--groups were formed by the members of a party--the matter would be referred to the Speaker who shall within seven days of the formation of such a group would convene a meeting of all members of the affected party and then Speaker would put the matter to a vote of the members of the party as to which group would represent the original

party and Speaker's decision the result of such would be final.

We may ask why was BNP so anxious to prevent formation of a group within the party. If we like in the past history of BNP we find that it is one of defection by its members and forming groups such as 'BNP (Huda)' BNO (Obaet)'. Begum Zia had bitter experiences of party defections and disintegration. So she was naturally anxious that such phenomenon should not take place particularly when her party had become the ruling one and she was the Prime Minister. She was also aware of the recent political development in the neighboring Indian Parliament when Chandra Shekhar, who belonged to Janata Party under V.P. Pratap Singh, had defected from his party and formed a dissident group, which was successful in getting electoral support of Congress (I) and formed a new Cabinet with Chandra Shekhar as the Prime Minister. Obviously, Begum Zia would not like to see such a phenomenon in her party.

Lastly, it was provided that if an independent member was to decide after being elected to join a party, he would be deemed to be a member of that party.

While it was understandable that in a country like Bangladesh where party discipline is rare phenomenon--provisions to check floor-crossing might have been an imperative but sub-clause(2) debarring a member, whose seat has fallen vacant, from contesting the parliamentary election, was considered to be a violation of fundamental rights. Deputy leader of the House and member of the Select Committee reportedly said that a Martial Law was preferable

than the amendment regarding floor-crossing as proposed by BNP.<sup>77</sup> A compromise formula was worked out by the Select Committee by omitting sub-clause(2) while retailing the other proposed amendments intact.

Lastly point of difference between BNP and the AL was regarding the appointment of non-members as Ministers of Council. The proposed amendment of Article. 56(2) by BNP favored inclusion of no more than 20% non-MPs in the Cabinet. Awami League considered such provision undemocratic and insisted that only the members of the Parliament were eligible to be appointed as Cabinet Ministers. If any non-MPs were inducted as Ministers --they must be elected in the House within six months of their appointments.

After much deliberation by the Select Committee the inclusion of non-MPs in the Cabinet was reduced to ten percent. It should be pointed out that appointment of non-MPs as Cabinet Ministers is not complete violation of parliamentary principle. British parliamentary system which is considered to be the finest and purest, there is well-established conventions that a Cabinet Minister must be either member of the House of Commons or Lords. But there have been exception. Sir Ivor Jennings pointed out that: "It is a well-settled conventions that these ministers should be either peers or members of the House of Commons. There have been occasional exceptions. Mr. Gladstone once held office out of Parliament for nine months. The Scottish Law Officers sometimes, as in 1923 and 1924, are in Parliament. General Smuts was Minister without portfolio and members of the War Cabinet from 1896 until

1918. Mr. Ramsay MacDnald and Mr. Malcolm MacDonald were members of the Cabinet though not in Parliament from the general election of November 1933 until early in 1936. The House of Commons is, however, critical of such exceptions.<sup>78</sup> In a country like Bangladesh where there is a scarcity of expertise, this has been a right step in the right direction. This provision enables the government, should it wants, to use the services of the technocrats. As such the Committee agreed to retain the provision. The percentage of such ministers was reduced from 20% to 10% but both sides agreed that it would help the government to recruit technocrats for efficient running of the government.

The Select Committee accepted one of the bills of Rashed Khan Menon regarding foreign treaties connected with national security laid under Article.145A. Under the previous constitution, President could withhold the laying of any treaty before the Parliament which he considered against the national interest to do so. According to the amended provision-- foreign treaties connected with national security would now be placed before a secret session of the Parliament.

Lastly, the constitutional lacuna which would have created as soon as the constitution (Eleventh Amendmend) Bill, 1991 was passed and operational as it was not subjected to any referendum -- the Select Committee inserted a provision in the AL Bill that the Acting President would be returning to his former office after the election of a new President and the latter's entering upon the office. The decision of the Select Committee was unanimous on this



issue except Moudud Ahmed of Jatiyo party, who thought that return of Justice Shahabuddin to his former office would affect the independence of judiciary.

Bangladesh's quest for a parliamentary form of government was fulfilled when both the 11th and 12th Amend Bills were passed after a brief deliberation in the Parliament on August 7, 1991. The AL tried unsuccessfully to make the repeal of Indemnity Ordinance of 1975 which blocked the trial of the killers of Sheikh Mujibur Rahman, a precondition to the passage of 11th and 12th Amended Bills. But when the Acting President threatened to quit if the bills were not passed within due time, the AL, in order to avoid political suicide and political crisis voted for the Bills en masse. The events moved quickly since then. The referendum bill as to whether the President should assent or not to Twelveth Bill was passed on August 8, 1991. The election of the President Bill providing the election through open ballot was adopted on August 15 amidt Opposition's walkout. The referendum regarding the change of government provisions took place on September 1 and the presidential election was held on October 4, 1991. (i.e. within 180 days of the vacancy of President's office). A new era of constitutional development began in Bangladesh.

#### EXECUTIVE UNDER THE PRESENT CONSTITUTION

The executive which emerged in Bangladesh as a result of the acceptance of Twelveth Amendmend is that of a parliamentary executive. It has retained all the features of a parliamentary

system which we have discussed earlier. But on a closer scrutiny it would be obvious that the system provides unusual powers and position of the Prime Minister. It is true that in a parliamentary system Prime Minister enjoys unique power and position as long as he or she has control and confidence of the ruling party. Through personal contacts with his or her Cabinet colleagues, junior ministers and back-bench MPs a Prime Minister usually keeps command over the party. But if the party itself for some reasons goes against the Prime Minister then his or her position becomes untenable. There are many instances where the Prime Minister had to quite office when he/she lost the confidence of his or her own party. The Prime Minister Bob Hawke of Australia had to quite his office after two terms as a result of a revolt in his party against him. And another instance is that of the 'Iron Lady' in England Margaret Thacher quitting her office when she lost the confidence of her own party.

Bangladesh's constitution sought to ensure P.M's dominance by providing constitutional measures which would not allow her party members to vote against the P.M. in the Parliament by statutory provision. Therefore, what could happen in Australia or in England would not be possible in Bangladesh because of the punitive clauses against the members of the Parliament. Even if the members revolt against the P.M. in their party meeting or outside the Parliament that would have no effect on the tenure of the P.M. as long as they donot vote formally in the legislature. And the present constitution provides adequate provisions voting against the

Parliament itself. It is in this way the dominance of the P.M. is ensured. Lack of democratization within the political parties in Bangladesh makes this possibility even more formidable. We may add here that similar provisions were in the original version of 1972 Constitution as introduced by Mujib. Begum Zia further restricted the independence of the MPs by provisions against grouping within party.

Further measures have been taken to ensure the dominance of the Prime Minister. The mode of election of the president has been made in such a way that unless a person is nominated and approved by the Prime Minister--he or she cannot be elected as President. Thus the scope for a neutral Head of the State is absent. A neutral Head of the State is regarded as one of the sound characteristics of parliamentary system. The relations between the Prime Minister and the President is one of not equal but almost of subordination. As such the power of the dissolution of the Parliament by the President under the present constitution becomes meaningless.

Similarly the power to declare emergency in the country is also entirely depended on the initiative of the Prime Minister and the President would have no role in it but to accept the written wishes of the P.M. This is comparable to the 1973 Constitution of Pakistan as introduced by Z.A. Bhutto where it was alleged that the division of powers between the President and the Prime Minister "was ludicrous, meaningless and downright comic."<sup>79</sup>

Mujib was so confident about his dominance both in his party

and in the Parliament that there was no need for him to provide statutory provisions restrictions powers of the President. But it seems that Begum Zia has no such elusion about her hold either in the party or in the Parliament. So, this is the background of the present day executive in Bangladesh providing for a strong executive. Finally, we may add that provisions for preventive detention, special powers acts which have been in existence in Bangladesh since 1973-1974 have been kept in tact. The position of the Prime Minister in Bangladesh today is almost as strong as it was under Mujib as well as under the 'military presidents.'

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## LEGISLATURE

Of all the three organizations of a modern state namely executive, judiciary and the legislature, the last one is regarded as the most important one because it consists of the representatives of the entire population. As the central principle of representation is to secure a responsible government -- the importance of legislature can hardly be over-emphasized.

Though its origin lies not "in the legislation, nor even in the supply of finance" but in the King's need for "some process, however rough and ready, by which he could obtain the consent, or at the acquiescence, of the influential sections of the people to his acts of governance;<sup>1</sup> it became increasingly identified with the law-making functions.<sup>2</sup> And during the 18th century, Americans, in their fight to safeguard their interests against the royal governors, emphasized on the policy-making functions of the legislature. But basically it remained identified with the law-making functions as the general idea was that peoples' representatives should make the rules under which they would live.

There remained, however, two problems with the representative legislature. One is related with the relationship between the representative principle and the ideals of democracy and liberalism. There are instances when an executive may like to make a direct appeal to the people, on a particular issue, by bypassing the representative body. In such cases -- the executive may easily claim that their actions are more in line with

liberal democracy as they put peoples' sovereignty over its representative body. And the other is related to as where to draw boundary lines between the executive and the legislative spheres.<sup>3</sup> The later issue poses a serious problem in present-day executive-legislative relations. The increasing state activities of twentieth-century call for greater initiative and dynamism from the executive which, somewhat compels the later to interfere in the domain of legislative sphere. The line between the two spheres, as a result, is becoming blurr.

This phenomenon has been termed by Lord Bryce as the "decline of legislatures".<sup>4</sup> Since the glorious revolution of 1688 -- the powers and supremacy of the legislature were in ascendancy. But thanks to the changing role of the state -- the executive's ascendancy became more visible from the late 19th century. Sir Ramsay Muir, in his brilliant study of the British Parliament, has pointed out very candidly the ineffectiveness of the legislature in performing its designated role.<sup>5</sup> Sir Muir, however, over-emphasized the decline of the British Parliament but there is no denial that the British Parliament or the Mother Parliament's role has changed in view of the emergence of an assertive, structured and well-disciplined party-system in Great Britain giving rise to the dominance of the executive. As Sir Ivor Jennings has pointed out that the 'transcendent and absolute' power of Parliament has now shifted in the hands of the Government and ultimate control on the executive is with electorate or the public opinion.<sup>6</sup> Similar trends were visible

in West European countries where emergence of well-disciplined parties gave rise to strong executives.

Another ominous development which affected legislatures' decline was the rise of Nazism, Fascism, and finally totalitarianism. Under these systems, the legislatures were turned into "rubber stamp" legislatures which were nothing but the "parodies of deliberative bodies".<sup>7</sup> In most newly independent Third World countries, similar trends were discernable.

In spite of such development "once the idea of *direct* popular government was rejected as impractical, representative assemblies were the only known device by which executives could be restrained (liberalism) and restrained on the basis of the peoples' will (democracy).<sup>8</sup> The legislature has, thus, emerged to be the symbol of liberalism and democracy though its functions and roles have undergone profound changes. As such, though there has been recent development of "decline of parliament" and rise of cabinet dictatorship, no one can deny or challenge the importance of the legislature not only in the parliamentary system but even in a presidential system as it exists in the U.S. Today, Dicey's concept of a legislature, through which the people govern themselves, has somewhat declined but in its new role, it provides twin purpose of securing popular representation and government's accountability. Through the popular representation -- it provides conflicting interests which are negotiated and compromised, and on the other hand, provides a forum where

government's accountability is secured and its actions are evaluated.

Legislature, in a modern state, thus, engages itself not so much with the initiation of legislation but it does discharge a number of other highly important work such as control over the finance, extraction of information about the working of the executive branch of the government and ventilation of public grievances. It uses various techniques and *modus operandi* to perform these non-law-making functions such as, adjournment motion, question-answers, investigation by its committees etc. As such, inspite of its drawback -- existence of a healthy and effective parliament has become *sine qua non* with a constitutional government.

The genesis of Legislative Council in the Indian sub-continent could be traced in the Indian Council Act of 1861 with the expansion of Governor-General's Executive Council in which some elements of Indian representation through nomination was ensured. The need for such representation was felt after the First War of Independence in 1857. Such Legislative Councils were in no way 'miniature parliaments' and their functions were strictly limited to legislation initiated by the executive.

Some sort of element of indirect election was introduced under the Act of 1892. The functions of the provincial assemblies were enlarged as they were allowed to discuss the annual statement of revenue and expenditure without, of course, voting rights. They also had some limited rights to address the executive. Concept

of territorial representation was ruled out and there was no approach to a parliamentary system since an official majority was always kept in tact.

Subsequent constitutional reforms in the form of the Acts of 1909, 1919 and 1935 broaden the functions and representation in the Legislative Councils both at the Centre and the Provinces. But not until the Act of 1919, did the British conceive the idea of a responsible government or the method of direct election. It should, however, be pointed out, that all throughout the British period, the linchpin of Indian Constitutionalism was the practice of constitutional autocracy, dating back to 1786, in which the powers and functions of the representative assemblies were circumscribed by an all powerful executive.<sup>9</sup> This phenomenon had far-fetched repercussions on the constitutional development in India and Pakistan, especially in Pakistan. Moreover, limited representation in these Legislative Councils further diminished their status and prestige. Full-fledged parliamentary government and the principle of the supremacy of the parliament was, however established for the first time in India with the passage of the Indian Independence Act of 1947. Thus, the British efforts of introducing some representative institutions after the popular uprising of 1857 which began by setting up Legislative Councils in a rudimentary form finally culminated in the creation of two sovereign legislatures -- one for India and the other for Pakistan when the British liquidated their empire in 1947.

It is evident from the foregoing discussion that growth of

healthy and effective legislatures were retarded as long as British colonial interests needed to be protected in India. They, however, being the innovator of parliamentary system, in which government's accountability was to be checked by an independent legislature, were quite aware of the necessity of having such an institution. The establishment of two sovereign parliaments through the passage of Indian Independence Act of 1947 demonstrated their intentions. As a matter of fact, the institutional structure left behind by the British were truly parliamentary in nature in which sovereignty of the parliament was ensured.

The Constituent Assembly in Pakistan, which was set up by the Act of 1947, had special legal standing. It was entrusted not only with the task of framing a Constitution for the country but it was also to act as a Parliament. The magnitude of its sovereignty was such that Jinnah, the Government-General, had specified that its legislative acts were transformed automatically into legislations without the assent of the Government-General. This was a clear deviation of parliamentary principle and not a pragmatic approach. But development of such phenomenon in a Muslim majority country was hardly surprising since Muslims are known to be more emotional than pragmatic. Another reason was the organizational structure of Muslim League. The party had weak institutional base and suffered from ill-discipline. Only the towering personality and popularity of Jinnah put life and breath into party's activities. And since

Jinnah was the President of the Constituent Assembly besides being Governor-General (another deviation of parliamentary principle) -- it was assumed that Parliament would not pass any law or act otherwise which would be looked upon by Jinnah unfavourably. This legacy was discernable during the post-independence era of Bangladesh. As mentioned earlier in our chapter on executive, the framers of 1972 Constitution framed the Constitution which was identified with Sheikh Mujib. Subsequent constitutional development in Bangladesh also could not break-free from such impractical characteristics. One forgets that constitution of a country is the supreme law of the country which cannot and should not be altered so easily and it needs to be worked under various circumstances and various personalities. A constitution should reflect the hopes and aspirations of the country as well as the socio-economic and political realities.

It was then not a surprise that sovereign Legislature of the interim Constitution of Pakistan soon started having rough sailing soon after Jinnah's death. The decline of parliament began with Governor-General Ghulam Mohammed's misuse of discretionary powers. Arbitrary dismissal of Nazimuddin Cabinet soon after the passage of budget in 1953 and dissolution of the 'sovereign' parliament in 1954 aptly demonstrated its impotency.

The working of the Legislature under 1956 Constitution of Pakistan was also not impressive. It was adorned with all



parliamentary trappings, and as such, had legal sovereign-status. But thanks to the institutional weaknesses, party-factionalism, interference of the Head of the State -- it soon degenerated into an arena of jockeying for power. The dominance of the Executive, thus, overshadowed the Legislature. As G.W. Choudhury tersely says that even "before given a formal burial in October in 1958 -- it (the Legislature) had become a mere shadow."<sup>10</sup>

The status of Legislature under Ayub's 1962 Constitution was even more pathetic. During 1956-58 era-Legislature, though weak was, however, able to make the Executive somewhat accountable but the Legislature under Ayub was nothing but an appendix of the Executive. Unlike the independent Legislature of the U.S. presidential system -- the President under 1962 Constitution was an integral part of the Legislature. Moreover, his most comprehensive and effective veto power regarding legislation, power of referendum, and above all, his financial powers over the budget, which in any system, whether parliamentary or presidential, is the prerogative of the legislature, restricted it's functions and powers to such extent that by all canons of definitions it had become executive's domain. As a matter of fact since 1955, systematic efforts were made in Pakistan to curtail legislature's independence so that executive could function in an unfettered manner, and at times, even arbitrarily. The draft constitution prepared by Sir Ivor

Jennings for the Government of Pakistan in 1955 is a glaring example of such intentions of the constitution makers of Pakistan.<sup>11</sup>

From the foregoing discussion, it is amply clear that like that of the British Raj, Pakistani ruling elites were equally keen to circumscribe the powers of the peoples' representative body vis-a-vis the executive. Such phenomenon emanated from the Pakistani leaders' deep-rooted distrust in peoples' ability for self-rule.<sup>12</sup> Another factor, which was widely acclaimed in the then East Pakistan, was the apprehension of the West Pakistani ruling elites that an independent legislature with majority representation from the Bengalis (on the basis of its numerical strength) would be a threat to the power elites composed of mostly West Pakistani bureaucrats and military officials.<sup>13</sup> Althroughout Pakistani era, Bengalis' thus, pinned their hopes on the establishment of a sovereign parliament in which the government of the day would be accountable. Such political order, according to the Bengali intelligensia could rectify the situation in which they suffered from acute economic deprivation and political domination.

In the backdrop of such polarization which culminated into a full-fledged civil war between West Pakistan and the then East Pakistan -- Bangladesh was born in blood and tears. After it's birth -- the leadership was eager to frame a constitution in which their long cherished dream of enshrining the principle of supremacy of parliament. It was quite understandable why the

working of legislature during Pakistan era had made profound impacts on the minds of the Bengali intelligentsia who had spearheaded the independence movement in late 1960s. The commitment of the AL-leadership was total in this respect. Mujib, in particular, being a populist leader, was eager to establish peoples' supremacy to demonstrate his complete faith in peoples' sovereignty. We shall note later how Mujib's faith in peoples' assembly declined and how he interpreted the sovereignty of the parliament. His cardinal mistake was that he thought that his will was synonymous with the will of the peoples' representative assembly. In the light of such political development, let us now examine the Legislature under 1972 Constitution -- first it's institutional organization, and second it's powers and functions vis-a-vis the executive.

#### **Structure of Parliament Under the Original Constitution of 1972.**

The Constituent Assembly of Bangladesh was formed in March, 1972, through a Presidential Ordinance known as "Bangladesh Constituent Assembly Order". The CA was consisted of members of National Assembly and Provincial Assembly who were elected between December, 1970 and March 1, 1971. This sovereign body was entrusted with the task of framing the Constitution of the Peoples' Republic of Bangladesh but was not to operate as a Legislature. From the outset -- the sovereignty of the CA was set on a wrong footing. Unlike the First Constituent Assembly of Pakistan -- the sovereignty of the CA of Bangladesh had been

circumscribed by another Presidential Order namely Constituent Assembly Members (Cessation of Membership) Order which stipulated that if a member of the CA either resigned or expelled from the party which nominated him to the election -- his seat would be declared vacant. Since Awami League had captured most of the National Assembly and Provincial Assembly seats at the elections of 1970 and 1971 -- the CA *automatically* became subservient to the ruling party. A constitutional draft committee was formed during the first session of the CA and it proceeded with the framing of a sovereign parliament.

All legislative authority of the Republic was entrusted to the Parliament which is officially known as Jatiyo Sangsad.<sup>14</sup> Article 65(2) stipulated that Jatiyo Sangsad would be consisted of the President and one House. The issue of having a Second Chamber was not even discussed whose principle function is to put restraints on the working of the Lower House which is the real representative body. It is an essential feature of a federal states but also found in older Commonwealth countries. Bangladesh, being an unitary, homogenous, small and new country, opted for an Unicameral Legislature which was to represent the embodiment of the peoples' will.

Unlike the presidential system like that of the U.S.A. where there is a separation of powers between the executive legislature, parliamentary system calls for an intimate and inter-dependent relationship between the two. Since the President is the Chief Executive but at the same time not a

member of the Legislature -- he is to be made a constituent part of the legislative process. As such the 'King in Parliament' has a special connotation in the Westminster-type government. Interestingly, in 1972 Constitution of Bangladesh -- authority of Chief Executive was neither with the President nor with the Prime Minister and was kept vague, for the reasons explained in our chapter on Executive; even then, President was made an integral part of the legislative body keeping in line with the parliamentary system. He retained the right to address the first session of Parliament after election or could address and send messages where upon House was to discuss the matters referred to.

One of the symbolic importance of a sovereign parliament is the method of direct election on the basis of universal adult franchise. As such, the method of direct election was provided for the election of the members from territorial constituency. The House was to be consisted of 300 members, who must be of 25 years of age, a citizen of Bangladesh and a voter, and would be allowed to vote in Sangsad. A member was not allowed to represent two constituencies at the same time.

Usual provisions for disqualifying an individual were incorporated in the Constitution. The most unusual disqualification was Article.66(2e) which debarred a person convicted of any offence under the Bangladesh Collaborators' (Special Tribunals) Order 1972. This was incorporated in view of the situation arising out of the Bangladesh Liberation War,

1971. This particular provision was dropped by President Ziaur Rahman. The Parliament was empowered to authorise the Election Commission on the issue of disqualification and EC's decision on such matters was final.

In view of the backward situation of the women in Bangladesh, fifteen additional seats were reserved for the women elected by the elected members of the House. This provision was made for a period of ten years; the women, however, were not debarred from contesting the election from general constituency. Similar provision was incorporated in the 1956 Constitution of Pakistan. G.W. Choudhury argued that under such provision -- the women were granted double franchise. In reality, however, the situation was altogether different. Since fifteen women seats were elected by the sitting MPs -- the majority party was always assured of solid block of fifteen seats. Women, under the circumstances, suffered disadvantages rather than any gain. They were merely puppets in the hands of their male colleagues and not concerned with women's issues. On the other hand, male candidates from the general constituency did not consider it necessary to feel the pulse of the women voters. Subsequently, Ziaur Rahman raised the number of reserved women seats to thirty. The time period was also extended to further 15 years. Later President Ershad extended the period to another 10 years. Such trends only prove that convenient and favourable situation in favour of the majority party of the Parliament. The Quorum was fixed with no less than sixty members present and decision

by the Parliament was to be taken by majority members present and voting. (Article.75.1(b) & 2).

The CA of Bangladesh, however, spared from the vexing question of minority representation. The CA of India had to overcome various devices of communal and functional representation embodied in the Acts of 1919 and 1935. Similarly, the First and Second CAs of Pakistan had to deal with vexing issue of the quantum of representation from various units as well as minority representation. The question of minority representation, however, was done away in 1956. The Awami League was the champion of such abolition with twin objectives of (i) making parliamentary system free from any aberration called minority safeguard; and (ii) present an united front vis-a-vis West Pakistani ruling elitea.

So no provision of minority representation or safeguard was incorporated in the 1972 Constitution of Bangladesh. This was cardinal mistake since neither the CA nor the Constitution Draft Committee considered any provisions to safeguard the interests of the tribal population of Bangladesh who are ethnically, religiously and culturally different from the rest of the homogenous population of the country. Excepting the line voice of Chakma tribal leader Manobendra Larma, rest of the CA members were silent on this issue<sup>15</sup> (which was to manifest later.)

The usual provisions were incorporated in order to deal with the circumstances under which a member must vacate his seat. The most novel one was Article 70 which stipulated that if a member

resigned or voted against the party which nominated him to the election -- his seat would be declared vacant. He would, however, be not debarred from contesting the subsequent election. There is no doubt that stipulated Article circumscribed the independence and free spirit of the individual MPs. There is also no denying that every MP wants to keep his seat and does not vote against the government under the party-whip which is the usual parliamentary practice. But his main concern is his constituency and he must keep in mind the interests of his constituency. Only by keeping in touch with public opinion and propagating those views in the Parliament can he expect to keep his seat and at the same time do his job best by keeping the government aware of popular feelings. It is true that in England and other older Commonwealth countries, thanks to the party-discipline, MPs usually do not vote against their party but constitutionally they are not debarred from voting against the government, if necessary, for the reasons mentioned above. It is almost a truism that the leader of the parliamentary party must feel the pulse of the back-benchers in order to make the parliamentary system work as well as be in touch with the public opinion. That important channel of communication was blocked under Article 70 of 1972 Constitution of Bangladesh. The provision was, however, incorporated into the Constitution due to AL leader's experience of party defections and changing party allegiance, which caused acute political instability creating opportunities for army intervention, during the short-lived



parliamentary democracy during 1956-1958. <sup>16</sup> Attempt was made to create a stable executive at the cost of the independence of the MPs. In the context of existing party-system in Bangladesh such constitutional provision was probably necessary in order to prevent floor-crossing. Even in India, which is considered to be a beacon light of the democracies in the Third World Countries, a Constitutional Amendment (42nd) enshrined a provision, as late as in 1985, for similar reason. Such relationship between the party and the parliament in Bangladesh had serious repercussions on the working of the Parliament itself. The problem is still intriguing the political dynamics of the country which we shall discuss later. It seems the leaders of Bangladesh are still caught on a horns of dilemma over the issue.

The National Assembly or the Jatiyo Sangsad was sit for a maximum of five years, extendable by a year at a time during War by the Act of Parliament and must not be extended beyond six-months after the cessation of the War. It must meet at least twice a year with an intervening period of no more than sixty-days. It must be summoned within thirty days of the parliamentary election. <sup>17</sup>

The Jatiyo Sangsad would elect a Speaker and a Deputy Speaker, removable only through a resolution passed by two-third majority of the total membership. The Speaker would not vacate his seat when the House stands dissolved but do so upon the election of a new Speaker. <sup>18</sup>

In order to enhance the prestige, status and sovereignty of the Parliament -- a number of provisions were included. According to J. Blondel, there are four indicators which determine the high status of a legislature : (i) parliamentary immunity (the right to make statements in the House); (ii) parliamentary inviolability (the right not to be detained except in certain circumstances); (iii) procedural independence (the right to draft freely the Rules of the Chamber); (iv) freedom of meeting (the right to meet whenever members so decide). All four rights are given widely, though there are variations and interesting "silence" in a number of countries.<sup>19</sup>

The Constitution of Bangladesh, 1972, granted most of the 'high status' symbols. The House was given the power to frame its own Rules and Procedure<sup>20</sup>. This status is given most widely. The legislators in Bangladesh were allowed to enjoy, following the examples of majority countries, parliamentary immunity for their actions, statements, right of voting and other in connection with the conduct and business of the House. They were to enjoy somewhat restricted inviolability from arrest and the parliamentary proceedings could be not be challenged in the court.<sup>21</sup> Beside, an Act of Parliament would set up a Committee of Privileges of Parliament in order to ensure these rights. Salaries, allowances and privileges would be determined by the Act of Parliament, or until so by order of the President.

With regards to the fourth criteria i.e. freedom of meeting -- Constitution specified that the sessions of the Parliament and

power to summon, prorogue and dissolve the House was granted to the President. This was, however, not at all a serious abridgment to the maintenance of the status and sovereignty of the Parliament. In most of the representative government -- such power is exercised by the Chief Executive. The case of U.S. is, however, different.

As pointed out earlier, the function and role of legislature in a representative government have profoundly changed. Modern day executive needs to make quick decisions as well as implement them without abridgment of peoples' Fundamental Rights. Legislature initially tackles technical issues of modern life and finally resigned itself to passing broadly phrased laws whose executions are at the hands of the administrative branch. Legislature surrendered many powers to the administration but retained close check through it's standing and specially appointed committees as well as through it's power to criticize."<sup>22</sup>

The constitution-makers of Bangladesh incorporated devices and mechanism through which Jatiyo Sangsad would be able to fulfill its assigned task. One of those devices was incorporation of provisions to set up committee system in the Parliament. As "the increasing complexity of the modern government not only forced the legislature to leave the matters of policy formulation in the hands of the executive and be satisfied with it's role to review, examine, criticize, modify, adopt, and on occasion to reject proposals"<sup>23</sup> but time constraints as well as pressure of the work make these tasks quite formidable. As such

modern day innovation of committee system is considered to be valuable with regards to it's "inquisitorial functions".

The hard task of reviewing, examining, scrutinizing the policy formulation as well as control and supervision of the executive can be more efficiently done with the help of the committee system. Various standing and select committees facilitate to pass greater number of bills. It ensures that the bills have been given proper attention by the legislature. The committee system helps the legislature in ensuring public accountability of the executive which has turned out to be the its fundamental task. It also enables the House to use the best talents of the MPs in their respective specialized areas. As the committees are formed with MPs from both ruling and opposition parties, they learn the art of working harmoniously, how to negotiate and reach a compromise. The select committees through the publication of their critical reports may sometimes create such pressures that Government may be forced to review or modify certain policies.

In Great Britain evolution of committee system has greatly facilitated the Parliament in fulfilling its designated task. Its powerful Public Accounts Committee which scrutinizes public expenditure is always chaired by a powerful opposition MP and works in close co-operation with the Comptroller and Auditor-General. The committee is highly respected and has the power to summon any public officials for informations and answer for the economy of their respective department's expenditure.

Departmental select committees have been doing the important task of giving informations to the House for issues to be debated. Both public and MPs, thus, get better informed through such mechanism. Since 1982, departmental select committees have been allotted three days a year on the floor of the House for discussion and voting on departmental expenditure. Important point is that Government may not always change its policy due to the recommendations of the select committees but it formulates its policies with knowledge that it may be cross-examined by the committees.<sup>24</sup> In the United States, Congress through its powerful committee system keeps a close watch on the executive. In spite of some criticism of the committee system no one can deny its importance with regards to its role in facilitating the task of the legislature.

Keeping the importance of committee-system in mind and with golden vision of establishing an effective parliament, Articles. 76(1) and (2) were incorporated which stipulated that during the first meeting in each session of parliament, it would appoint standing committees of which prominent ones would be (1) a Public Accounts Committee; (2) a Committee of Privileges; (3) such other Standing Committees as the Rules of Procedure of parliament require to examine; (i) draft bills and other legislative proposals; (ii) to review enforcement of laws; (iii) matters referred by parliament relating matter of public importance, investigate or inquire into activities or administration of ministry -- furnish informations.

To ensure further accountability of the executive to the parliament, Article. 77 provided the provision of an Ombudsman. The office of an Ombudsman is quite effective as far as as the scrutinizing and investigating the executive is concerned. The concept is rather new in many Third World Countries and many have incorporated provision in order to create such a body. But in most countries, it has remained on paper. Recently Pakistan has established it which seems to be working in the right direction.

A complaint of malpractice against a particular ministry may be initiated by a legislator which creates a situation either in the committee or in the House as a whole that the Government is compelled to refer it to Ombudsman to further investigate the matter and report it to the House. In the U.S., committees of Senate and House of Representative perform such functions. If effective, it can make direct enquiries relating any maladministration.

The development of parliamentary Commissioners in the western countries took place during 1960s. First developed in Sweden, it has now been accepted by many western countries. The office of an Ombudsman has been established in Great Britain in 1967 with the passage of Parliamentary Commissioner Act. The Ombudsman now heads an office of 90 staff members. The parliamentary Commissioners, further investigate reports of maladministration by an individual MP and submit its report to the parliament which is then considered by select committees.<sup>25</sup> The Ombudsman, thus, is quite effective in checking any abuse of power by the

executive. As such inclusion of a provision to create an Ombudsman was the right step in the right direction.

Another familiar device of scrutinizing the executive is the creation of the office of the Comptroller and Auditor-General. In Great Britain office of the Comptroller and Auditor-General has direct responsibility to the parliament and he works closely with Public Accounts Committee. He enjoys complete independence and is not under the direction of either PAC or the House of Commons. Every government department and other public sector bodies have their accounts certified by the C & AG and the reports of these accounts are regularly presented to the parliament. He alone decides the subject and manner of his investigation. His status, close co-operation with PAC makes him more like an Ombudsman. His independence and co-operation are vital in checking the abuses of the executive.<sup>26</sup>

In order to have an effective scrutinizing of the public, accounts of the Republic, Article.127 of Bangladesh 1972 Constitution stipulated the office of a Comptroller and Auditor-General who would audit all expenditure of the government and lay the reports of public accounts to the President to be laid before the Parliament. The terms and conditions of his office were made to ensure the independence and impartiality of such an office. And for the efficient working of the House -- a Parliamentary Secretariat was provided by Article.79.

### **Legislative Procedure**

Though the legislative authority was vested in the Parliament<sup>24</sup> -- it does not initiate any bills. Due to the complexity of modern-day government-initiation of any bills is in the domain of the executive. Enactment of laws includes ordinary statues, resolutions as well as legislations effecting the amendment of the constitution.

In a parliamentary system, most bills are initiated by the ministers known as government bills. The bill is, however, initiated by the department concerned who in collusion with the Ministry of Law and draftmen prepare the proposals. Once accepted by the Cabinet -- the proposals are put into specific bills. The bills are introduced by the Minister concerned. At first stage there is no discussion unless the bill is ultra-vires of the Constitution. At the second stage -- it is either sent to the select committees or circulated for eliciting public opinion. After relevant amendments, if necessary, it is sent to the Parliament. Debates then take place on clause by clause. If passed by the Parliament, it is sent to the President for assent. President may sent it back to the Parliament within fifteen days with message regarding certain provisions for reconsideration. If the Parliament passes it again with or without amendments and sent back to the President, then he would assent it within seven days -- failing which it would be deemed to have been assented and the bill would become an Act of Parliament.<sup>28</sup> The President, however, does not have the authority to sent the Money Bill for reconsideration which would



be presented to him with Speaker's certification.<sup>29</sup> No money bill, or which involves expenditure from public moneys, can be introduced in the Parliament except on the recommendations of the President.<sup>30</sup>

The President has law-making authority under special circumstances provided that it could not be made under the Constitution by Act of Parliament, alter or repeal any provision of the Constitutional continuation in force of any provisions of an Ordinance previously made. Under special circumstances -- he is empowered to authorise expenditure from the Consolidated Fund whether it is charged by the Constitution upon that fund or not. But Presidential Ordinances must be laid before the Parliament within thirty days of its meeting and approved by it.<sup>31</sup>

Non-government member may introduce bills known as Private Members' Bills which may be either public bill of general nature or Private bill dealing with individuals of his/her constituency. The entire legislative process is conducted by the presiding officials i.e. the Speaker or the Deputy Speaker and subjected to committee system and strict Rules of Procedure.

#### **Financial Procedure**

Public accountability of the executive is the most vital component of a representative government. In between the election -- such accountability is ensured through the working of the peoples' representative body -- the legislature. As pointed out earlier, that though the effective governing has been passed from the legislature to the executive, it still zealously retains

its rights to make it accountable through its power to approve the financial policy of the government. Since the importance of public finance in national economy can hardly be overemphasized -- control of public purse is of extreme importance. It is the surest way by which the legislature can not only influence executive's policy formulation but able to exercise its effective check on the government's taxation and expenditure and thereby make it accountable to the people. It is a crucial mechanism through which the legislature keeps a vigilant check on the executive.

The financial procedure in the 1972 Constitution of Bangladesh was modeled after the House of Commons or more closely like those of Indian Parliament. According to these procedure -- the initiative or the proposal for revenue and expenditure originate with the executive but it is forbidden either to raise money through taxation or spend the revenue unless approved by the Parliament. It is the Parliament which had the sole authority to approve the Demands for Grants and Appropriation expenditure. The traditional parliamentary control over public finance was maintained through Article.83 which stipulated that no tax could be levied without the Act of the Parliament.

In order to strengthen Parliament's sovereignty and curtail the dominance of the executive -- Article 84.(1) and (2) made provisions of a Consolidated Fund in which all money was to be credited to Public Accounts of the Republic. Any matter relating payment into the Consolidated Fund or withdrawal of money from

the fund cannot be done without the Act of the Parliament or rules made by the President on that behalf.<sup>32</sup>

The Budget or the financial statement of the estimated revenue and expenditure is prepared by the executive at the end of the financial year i.e. in April-May for the new year beginning in June. It is presented in the Parliament by the Finance Minister outlining nation's financial position, its future developmental projects along with its estimated revenue and expenditure under various heads.<sup>33</sup>

The Budget or the financial statement distinguished between the money charged on the consolidated Fund and other expenditure.<sup>34</sup> The expenditure 'charged on the Consolidated Fund' includes salaries of the President, the Speaker and the Deputy Speaker, Comptroller & Auditor-General, Election Commissioner, members of the Public Service Commissions, Judges of the High Court and Supreme Court and other expenditure charged upon the Consolidated Fund by the Constitution or by Act of Parliament.<sup>35</sup> In this regards -- the 1972 Constitution of Bangladesh was kept in line with the 1956 Constitution of Pakistan which did not include the salaries of the Ministers and salaries and pension of the Civil Servants. Their salaries etc. should have been charged upon the Consolidated Fund in order to ensure the independence and impartiality of their services. These expenditure can be discussed by the House but cannot be voted upon.<sup>36</sup> This provision was kept in line with the traditional parliamentary procedure in order to ensure the

independence and objectivity of the Head of the State and other public officials.

According to rules of procedure -- there is no discussion on the Budget day but done in the following manner : (1) general discussion on the Budget as a whole; (2) discussion on Demands for Grants and Appropriations in respect of charged expenditure; (3) voting on Demands for Grants in respect of charged expenditure.

The Budget would show separately the other estimated expenditure to be submitted to the Parliament in the form of Demands for Grants which the House may approve, refuse or reduce.<sup>37</sup> No Demands for Grants could be submitted without the recommendation of the President. An Appropriation Bill would be introduced in order to appropriate money needed for both kinds of expenditure. The Constitution also empowers the Parliament to provide Supplementary Grants, Additional Grants and Excess Grants notwithstanding the Appropriation of expenditure as per stipulated provisions. These would be authorised by the President and laid before the Parliament.<sup>38</sup> Lastly -- keeping in line with the procedure in Great Britain, Provisions were incorporated so that the House could pass Votes on Account prior to the approval of Appropriation Act and Votes on Credit in case of unexpected expenditure and to make Exceptional Grants.

A few days after the presentation of the Budget -- the House permits general discussion on the Budget. The newspapers, media and other policy formulation think tanks inform the public and

the Government about the Budget in details through publications, holding seminars etc. before the general discussion takes place. During the discussion House gets a chance to discuss the expenditure charged upon the Consolidated Fund. The House as a whole tries to feel how well or how badly the Budget has been received by the people. No motion is allowed at this stage.

It is quite obvious that the financial procedure incorporated in the 1972 Constitution of Bangladesh followed the essentials of parliamentary control over the public purse. The executive was made totally depended (which is the central principle of an accountable government) on the Parliament with regards to public revenue and expenditure. Rules of Procedure further provided other devices and mechanism through which the House could closely scrutinize government's spending of public money.

Usually such devices become operative after the general discussion. Along with the details of the Demands for Grants for the ensuing year -- Budget estimates of the previous year with its revised edition are presented in the Parliament. The Demands for Grants are made in the form of a motion. At this juncture -- the House exercises its authority through three kinds of amendments called 'cut motions'. Refusal to supplies by the reduction of the Demand by Tk.1 is very rarely used. The second type is known as economy cut that the Demand be reduced by specific amount of money. The third kind called token cut is the procedure by which Demand may be reduced by Tk.100. The cut motions are usually moved by the opposition members but

government MPs also use this procedure in order to ventilate constituency grievances as much information and reforms of a particular Ministry may be gathered by the House. When the Finance Bill or Appropriation Bill is passed -- it becomes the Finance Bill of the ensuing year. The House also scrutinizes government's spending through post-auditing of Public Accounts. The parliamentary control over public purse is zealously retained and exercised by the Parliament in any developed representative government. It was heartening that 1972 Constitution of Bangladesh followed similar patterns. But whether they were actually operational or only remained on paper is another matter. We shall discuss this aspect of the House when we examine its actual functioning.

#### **Other Parliamentary mechanism or devices**

The eminent English writer, Bagehot, listed legislative action of the legislature to be the last one. According to him, the real function of the House is to (i) express the mind of the people; (ii) teach the nation what it does not know; (iii) make people hear what otherwise they should not.<sup>39</sup> Through these activities the legislature keeps the electorate well-informed and thereby executive remains sensitive to public opinion. After all -- the ultimate check on the modern-day executive is the sensitivity of the electorate.

The Rules of Procedure adopted on July 24, 1974, thus, provided further parliamentary devices in order to keep the executive under control. The procedures of a Parliament leave

profound impacts on the political life of any polity. The political behaviour, attitude, thoughts, actions of the parliamentarians are reflected in the Rules of Procedure; on the other hand, the traditions and conventions help the gradual evolution of parliamentary procedure. The parliamentary procedure in Great Britain is an example of the later-case.

Unfortunately, Bangladesh has had a very short parliamentary experience (1956-1958) as a part of erstwhile Pakistan. There was no great traditions or conventions to follow. But post-liberation leadership seemed to be eager to establish a genuine parliamentary democracy. As such a number of familiar parliamentary devices were provided in the Rules of Procedure.

Usual parliamentary day was to begin with Question Hour. The great English constitutional expert Sir Ivor Jennings considered parliamentary questions and their "attendant adjournment motions are of real and utmost constitutional importance".<sup>40</sup> According to Erskine May-Parliamentary-Question Hour is an useful tool in 'extracting information' and in 'pressing for action'.<sup>41</sup> The technique may not be of that of 'extreme importance' or unique in 'extracting information' or 'pressing for action' as considered by both Jennings and May but as most questions are meant to be on debating points -- it is extremely useful for the opposition to catch the government off-guard and expose its wrong doings. Ministers are extra-careful so that his individual ministerial responsibility is not challenged by the opposition for which government embarrassed. Though rare, but

there have been occasions when the government had to resign due to the embarrassment caused by individual Minister who was grilled and exposed by the parliamentary questionnaire. The fall of Macmillan Government of Great Britain in 1960s due to Defense Minister Profumo's scandal is a case in point. Moreover, the Question Hour provides a good opportunity for the backbenchers to demonstrate their talents with regards to discussing general policy and administration of the government. There are strict procedural rules for Question Hour. Written questions requiring fifteen days notice and Short-Notice questions (shorter than 15 days) have been provided by the Rules of Procedure of Bangladesh Parliament.<sup>42</sup> Question Hour assumes political significance if it is used properly and becomes an effective technique by the opposition to keep the government on its toes by ventilating grievances as well as protecting individual rights and liberties.

Question Hour is followed by supplementary question which are usually answered by the Ministers. As "the function of cross-examination is thrown-open" -- the backbenchers enthusiastically join in as "it is a public fight and anybody can join in. Each member of the opposition delights in making a Minister uncomfortable".<sup>43</sup>

Following the example of Great Britain -- Bangladesh Parliament does not allow interpellation -- commonly used in Continental Europe -- which is like a precursor to a motion of censure, but allows another important device to do its



supervisory function i.e. Adjournment Motion. This device is used by the opposition to discuss a specific issue of urgent public matter and brought after the Question Hour and before the beginning of the business of the day. It is only admitted in the House if the Speaker is satisfied that the matter is of real national importance and cannot be resolved through Half-an-Hour Discussion or by a Short-Notice Question. As such strict rules are followed in order to bring a Motion of Adjournment in the House.<sup>44</sup> The government runs the risk of its downfall if the Adjournment Motion is passed by the House.

As there is some associated tenseness with the Motion of Adjournment, -- the Jatiyo Sangsad, following Indian precedent,<sup>45</sup> allows Discussion on matters of public importance for short-duration. The procedure does not allow any motion before the House. Like Half-an-Hour Discussion it is initiated by the member and the Minister concerned giving the answer. The co-signers who request for such discussion take part in the discussion.<sup>46</sup>

To discuss the matter of public importance arising out of a question -- the House allows Half-an-Hour Discussion. There can no two-sittings of such discussion with three-days notice.<sup>47</sup> Calling attention to matters of urgent public importance can be raised, with permission of the Speaker, immediately after Question Hour and before the Orders of the Day are entered upon. Concerned Minister answers that query at a later hour or date. There is no provision for debate and there is one question in

one sitting.<sup>48</sup>

Another way to redress the grievances is Petitions by the subjects. Individuals and small groups may file petitions and make their needs known to the House through a MP. It can be submitted to the House with the permission of the Speaker. No petitions regarding the expenditure of the Consolidated Fund can be admitted without the recommendations of the President. The petitions are referred to the Petition Committee.<sup>49</sup>

And finally, in a parliamentary system -- if dissatisfied -- the House can remove the executive with the passage of no-confidence against it.

From the above discussion, it is aptly clear that Bangladesh Jatiyo Sangsad provided essential principle of parliamentary practices through which it would and if followed, could put effective check on the executive.

#### **Functioning of Jatiyo Sangsad Under Mujib (1973-1975)**

The life of a sovereign Parliament in Bangladesh was supposed to have begun with the convening of the Constituent Assembly consisting of the members of National Assembly and Provincial Assembly of the then East Pakistan elected in the elections held in December 1970 and January 1971 respectively. The CA which was entrusted with a the task of framing a constitution, was also to act as the legislature of the country. The later function of the CA was, however, remained inoperative while Prime Minister Sheikh Mujibur Rahman ruled the country through Presidential

Ordinances. The Constitution was adopted on December 16, 1972 and Sheikh Mujib, true to his pledge, held a general election on March 7, 1973 and got a fresh mandate to rule the country for next five-years.

On the outset, institutionalization of a democratic order and strengthening of Parliament as an institution seemed to be on the right track. But two factors raised suspicions and apprehensions about the smooth functioning of Jatiyo Sangsad :

(1) First, Article.70, as pointed out earlier, circumbered the independence and free-spirit of the MPs. It seemed quite appropriate in the context o existing circumstances to incorporate such an Article in the Constitution; but nonetheless it deviated from traditional parliamentary practice; (2) second was the election result of March, 1973 election. Out of 300 seats, the Awami League got 293 seats and the remaining 7 seats went to Jatiyo Samajtantrik Dal -- 2, Jatiyo League -- 1, National Awami Party (Bhasani) -- 1, and the rest were independents. Later, through Presidential Order, 50, fifteen reserved seats for women were created for ten years, deemed to have been effective from December 16, 1972.<sup>50</sup> These seats were bagged by the Awami League thanks to the mode of election of the women MPs. Thus, Awami League ended up having 297 out of 315 seats and only six MPs remained in the Opposition. As a result -- the Jatiyo Sangsad of 1973 in effect had no established constitutional Opposition which required at a membership of at least twenty.

This was a serious drawback as the role of the Opposition is supposed to be of extremely crucial in a parliamentary system. Without a responsible Opposition in the parliament, its functions are seriously hampered. According to Professor Morris-Jones "in the absence of a proper Opposition, with adequate strength and enjoying recognition, there can be, it is said, no healthy parliamentary Government, for the government will be uncontrolled and unresponsive".<sup>51</sup> The main task of scrutinizing, supervising, criticizing and examining the executive falls on a responsible Opposition. Unfortunately, in the 1973 Jatiyo Sangsad, there was no such phenomenon. But the example of Congress dominated one-party parliamentary system is often cited which has in no way hampered the functioning of Indian Parliamentary system. Indian success story is greatly a creation of the leadership quality of Nehru, the democratic structure of the internal organization of Congress Party and criticism/suggestions put forward by the parliamentary committees. The Nehru Government, inspite of having an absolute majority, treated and behaved with the Opposition as a parliamentary Opposition should be treated.<sup>52</sup>

No such attitude on the part of ruling party was discernable in the First Parliament of Bangladesh. During 1973-75, those lone six members of the 'Opposition' tried to take upon themselves the responsibilities of an Opposition. Ataur Rahman Khan was their unofficial leader. But it was feeble, frustrated and unable to offer an alternate government. The ruling party showed intolerance even to this feeble Opposition. Fact of the

matter is -- that it was not a constitutionally recognized Opposition and as such they were not treated accordingly by the Government. Moreover, Mujib's domineering personality and curtailment of freedom of the MPs allowed Government a free-hand in dealing with the Opposition. It was quite evidenced by the parliamentary activities of the First Sangsad.

As pointed out earlier, that Question Hour is an important part of parliamentary activities through which grievances are ventilated and individual rights are protected. In case of First Parliament, the Question Hour activity began from the second session. In all -- the House accepted 5288 starred and 22 unstarred written questions. Number of short-notice questions were 30 starred and 11 unstarred. Only one-third of the total questions were answered. Most of the questions dealt with constituency interests whereas only a few were relating national policy. Out of all the sessions of the First Parliament -- the Question Hour was most interesting during the second session when Ataur Rahman Khan raised issues relating printing of Bangladeshi currency in India to the Finance Minister. It was followed by supplementary questions which generated some interests in the House. A few questions were asked about the mysterious fire in the jute godowns in various parts of Bangladesh. The issues raised by the MPs and answers given by the Ministers were not tackled the way it should have been done in order to scrutinize the defects of the administration. During Question Hour debates are not supposed to run along party-line but most Treasury Bench

MPs were apprehensive and extra-careful not to step out of line.

Basically the Question Hour neither generated much interests nor any debates on public policies. Interestingly as the overall socio-economic problems as well law and order deteriorated the number of questions declined. During the eighth session, there was no Question Hour at all.

Similarly, the short-notice questions and supplementary questions could not also generate interest and public debate as it happens in most developed democracies where the "back-benchers" as pointed out before, "take a delight in heckling a Minister".<sup>53</sup> The back-benchers of Bangladesh First Jatiyo Sangsad refrained from such activities due to the similar reasons mentioned above.

Familiar parliamentary procedure of Adjournment Motion, used to call for the attention of government, was not allowed although there were daily reports in the newspapers about the deteriorating law and order situation, especially about the clashes occurring between Rakkhi Bahini and the radical forces. By late 1973/early 1974, the situation deteriorated to such extent that the Government had to deploy army to handle the situation. In all there were seven Adjournment Motions but none was accepted. Motions relating army's power and alleged use of excessive and repressive measures were not tabled in the House. It should, however, be pointed out that in modern parliaments Adjournment Motions are rarely allowed but that does not mean that its significance in calling the attention of the Government

of its misdeeds can be completely undermined. It does allow the House to be aware of the situation and public reactions of its consequences. Unfortunately -- the First Jatiyo Sangsad decided to turn a blind eye and tried to brush aside the issue of Government's arbitrary actions and infringement on civil liberties in the name of maintaining law and order. Four notices for Half-an-Hour were similarly ignored. Even the procedure -- an innovation of Indian Parliament -- used in place of Adjournment Motion which is associated with some tenseness, were properly used. There were only five such notices of which two were accepted for discussion. Interestingly one such discussion was on the glorious role played by Sheikh Mujibur Rahman in the Non-aligned Conference held in Algiers! The House also accepted 52 notices for calling Attention to Matters of Urgent Public Importance and discussed only 16. It is quite obvious that the House -- because of the 'brute majority' of the ruling party and its high handed attitude -- neither could criticise nor scrutinize and check the governmental arbitrary actions as well as stop the Government from infringing on individual liberties and civil rights. To quote K.C.Wheare, the House was unable to make the Government behave.<sup>54</sup>

On the contrary by September 1973, the Prime Minister further curtailed the powers of the Parliament through Constitution (Second Amendment) Bill, 1973, which increased the number of days in between the sessions from 60 days to 120 days and armed the executive with Emergency Powers and Preventive Detention.

It was neither sent for eliciting for public opinion nor to the Select Committee, as suggested by the Opposition. It was passed by a division vote of 250/0, and took only two hours in the midst of walk-out by Ataur Rahman and Janab Abdus Satter.<sup>55</sup> To begin with such a controversial Bill was introduced in the House without much commotions. According to Rules of Procedure, however, no bill is opposed at the First Reading stage. But in Indian Parliament, such convention was broken for the first time on November 23, 1954, when a voting by division was forced at the time when Preventive Detention (Amendment) Bill, 1954 was introduced in the House. It was, however, carried by 146-36.<sup>56</sup> Such was the difference between Indian Parliament vis-a-vis Bangladesh First Jatiyo Sangsad.

As we turn towards the legislative function of the First Jatiyo Sangsad, the picture is equally disappointing. The House usually spends bulk of its time scrutinizing, examining and modifying various bills mainly initiated by the Government which affect the national interests. There are times, though Government may not admit it, when it is forced to modify its policies due to Opposition's relentless scrutinization through committee system as well as parliamentary debates. As pointed out earlier, even in an one-party parliamentary democracy like India, recommendations and amendments suggested by parliamentary committees cannot be ignored by the Government if it wants to remain sensitive to public opinion. The Opposition members also force the Government to accept various amendments through



vigorous parliamentary debates.

Unfortunately, both the crucial factors through which parliament uses its control over the executive were highly underdeveloped. In the First parliament -- 110 acts were passed out which 91 were Presidential Ordinances. As pointed out before, that, according to Article.93(1) of the Constitution -- the President has law-making powers during extraordinary circumstances or when the House is not in session. But even at one glance, one is able to comprehend how the Parliament was by-passed by the executive. And even Constitutional Provision like the Representative of the People (Seats for Women), and Presidential Ordinances tantamounting abridgment of constitutional provisions of Fundamental Rights were incorporated in the Constitution through Presidential Orders, only to be laid before a tamed Parliament in order to have its seal of approval.

Accordingly, various controversial Ordinances were put before the Parliament in the Forms of Bills. The Printing Presses and Publications (Declaration and Registration) Bill, 1973, The Jatiyo Rakkhi Bahini (Amendment) Bill, 1974, The Special Powers Act, 1974, The Special Powers (Amendment) Act, 1974, The Special Powers (Second Amendment) Act, 1974, The Emergency Powers Bill, 1975, and the controversial Constitution (Fourth Amendment) Bill, 1975 were all passed without either eliciting public opinion or sending to the Select Committees. The Parliament's ineffective powers in scrutinizing these bills were evidenced by

short-length of time spent on them which were as follows : The Printing Presses & Publication (Declaration & Registration) (Amendment) Bill, 1974 took one hour and 45 minutes, participated by four Opposition and one Government MPs, walk-out by the Opposition; The Jatiyo Rakkhi Bahini (Amendment) Bill, 1974, took two and a half hours, participated by four Opposition and two Government MPs, walk-out by Opposition; The Special Powers Act, 1974, took four hours, participated by six Opposition and one Government MPs, walk-out by the Opposition; The Special Powers (Amendment) Bill, took three hours and ten minutes, participated by four Opposition and two Government MPs, walk-out by the Opposition; The Special Powers (Second Amendment) Bill, 1974, took 25 minutes, participated by two Opposition and one Government MPs, walk-out by the Opposition, and the controversial bill like the Emergency Powers Bill, 1975 as well as Constitution (Fourth Amendment) Bill, 1975 together took only half-an-hour. Bills of such nature which struck the very core of a democratic order had unbelievably smooth sailing. In comparison -- Indian Parliament took 57<sup>1</sup>/<sub>2</sub> hours, 52 hours, 52 hours and 39 hours to pass the Preventive Detention Bill, 1952, the Press (Incitement to Crime) Bill, 1951, and the Representation of the People (No.2) Bill, 1950 respectively. Similarly, compared to amendments accepted by the Government of Bangladesh the Indian Government accepted amendments demonstrating that even in a one-party dominated Parliament -- individual members brought amendments in order to make their

mark. 57

Lack of proper scrutinization of the Bills by the Parliament during Mujib Era was also due to the existing weak committee system. The Opposition was not strong enough to insist on having a powerful committee system. There were only seven Standing Committees including a Public Accounts Committee and only a few Select Committees on non-important bills. A Petition Committee was set up during the sixth session of the House but no petition was submitted. Only one report on the Rules of Procedure was submitted and accepted during the fifth session of the House. The Government took up all the time of parliamentary business. Unlike in India no specific period was set aside for Private Members Business as such during the First Parliament there was neither any Private Members Bills nor any Private Members Resolutions before the House. It, thus, undoubtedly demonstrated the commandeering situation of the executive over the parliament.

Decline of parliament was nakedly evidenced during the passage of The Emergency Powers Bill, 1975. A resolution which read as the following "that this Parliament approves the Proclamation of Emergency issued under clause (1) of Article.141A of the Constitution of the Peoples' Republic of Bangladesh by the President on 28th December, 1974" was moved by Shah Moazzam "that there should be no discussion on the resolution of the approval of the Proclamation of Emergency and that the rules be suspended". 58

Ataur Rahman pointed out that the motion was not being followed by proper Rules of Procedure. He as told by the Speaker that rules 130-144 would not be applicable in this case and special procedure will be followed and applied here. The Bill was introduced by Law Minister Monoranjan Dhar who declared that rules 78, 79, 82 and 91 of Parliamentary Procedure would be suspended in the application of the motion.<sup>59</sup>

Abdullah Sarkar raised objections and asked permission of the House for discussion; otherwise it was bound to be passed in on-democratic manner. The Chief Whip informed the House that no discussion would be allowed. The Bill was, however, passed without either any formal voting or participation by the MPs.<sup>60</sup> Janab Md. Abdullah Sarkar gave a notice of an Adjournment Motion, which, as expected, was not accepted by the Speaker.<sup>61</sup>

Similarly, a significant and crucial bill namely Constitution (Fourth Amendment) Bill, 1975, which completely changed the fundamental structure of the Constitution was passed in such hurried manner. Usually -- a bill is introduced in the House with seven or three days notice. In case of the above mentioned bill -- it was circulated among the members after their arrival in the House. Excepting a few associates of Mujib -- majority MPs were not even aware of the contents of the bill. The Prime Minister, upon his arrival in the House, exchanged pleasantries with some of the top ranking MPs of the Awami League Parliamentary Party. Not a word was mentioned about the bill or its contents.<sup>62</sup>

Janab Abdullah Sarkar again raised objections to the manner the bill was being introduced which deprived the House any opportunity to bring any amendments and demanded a discussion. Once again Rules 78, 79, 82 and 91 of parliamentary procedure were suspended to their application to the motion moved by Law Minister Monoranjan Dhar about the Constitution (Fourth Amendment) Bill, 1975. Voting was done in three minutes by a division vote of 294/0 in the midst of Opposition walk-out. The entire procedure took less than half-an-hour and was participated by one Opposition MP. Thus the seal of approval was given by the Parliament which turned the same body into a sham show. Such was the power of the Parliament in checking the arbitrary action of the executive!

Similarly, the First Jatiyo Sangsad also failed miserably in exercising its financial control over the executive. As pointed out earlier, one of the effective weapons available to the legislature to control and make executive behave properly is its power over financial matters. Judged by these criterion -- the First Parliament during Mujib Era could not discharge this vital role effectively for the reasons mentioned above. Passing of the Budget and its subsequent scrutiny remained in the executive's domain.

Subsequently, the legislature exercises its control through post-auditing of Government's financial accounts. An office of a Comptroller and Auditor-General was established by the Prime Minister through Comptroller & Auditor-General Order, 1972

(Presidential Order No. 15 of 1972). But unlike C&AG of Great Britain who is directly responsible to the House of Commons and works independently in close co-operation with the Public Accounts Committee -- the C&AG of Bangladesh was made responsible to the President. Article 6(1) stipulated that the C&AG would perform such functions and exercise such powers, and prepare such reports, in relation to the expenditure and accounts of the Government of Bangladesh as may be determined by the President, the reports would be kept in such form by the C&AG with the approval of the President; finally he would submit the reports relating to the accounts of the Peoples' Republic of Bangladesh to the President who would lay it before the Parliament.<sup>63</sup>

And the Public Accounts Committee was formed during the first session of the First Parliament on April 7, 1973 with Jahirul Quyum as the Chairman. Now not only the C&AG was made responsible to the President and not to the House -- the chairmanship of such an important committee also went to a Treasury Bench member. Both in Great Britain and India -- the Ministers are excluded from chairmanship of either PAC or the Estimates Committee. By convention, PAC, in those countries, is chaired by a top ranking Opposition MP. In England between 1959 to 1963. Harold Wilson chaired the PAC.

Obviously in such a set up in Bangladesh -- one could easily comprehend the effectiveness of Parliament's financial control over the executive. All throughout the First Jatiyo Sangsad --

the PAC met only thrice -- on 26.1.74, 2.2.74 and 7.2.74. PAC consulted the C&AG and discussed *modus operendi* etc. No audit reports were submitted and discussed in the House.

From the above discussion of the functioning of the First Jatiyo Sangsad, it becomes crystal clear that the Sangsad could not fulfill the glorious vision of its role i.e. check and control the arbitrary actions of the executive as envisaged in the 1972 Constitution of Bangladesh. Sheikh Mujib with his long standing commitments to parliamentary system had no doubt dreamt of institutionalizing the parliament. During the first session of the CA, he had reminded the Speaker, Shah Abdul Hamid of his role as a Speaker in a parliamentary democracy; and how fundamental was his neutral stance and objectivity in the evolution of parliamentary convention.<sup>64</sup>

But events turned out to be quite in the opposite direction. In the absence of an established constitutional opposition -- parliamentary leadership was heavily tilted in favour of the ruling party. The legislative strength between the Government and the Opposition was so huge that it could neither focus on the Government's blunders and arbitrary actions nor project itself to the electorate as an alternative Government. Moreover, the frustrated and feeble Opposition knew that a trial of strength through a vote of no-confidence was quite impossible due to the restrictive constitutional provisions. Government's attitude towards Opposition was also one of intolerance and indifference. The fact that there were no Private Members Bill

or Private Members' Resolution demonstrated that the wishes of the Opposition was not taken into account.

Unfortunately, Sheikh Mujib, unlike Nehru of India, who was in a similar situation, was unable to institutionalize his personal popularity. Moreover, mutually blind loyalty between him and his party members, which was a big boon during Pakistan era in building up the party solidarity, was considered to be an impediment once he became the Head of the Government. He could not rise above the party. His Government in effect became a party government and parliament being dominated by the party became a 'rubber stamp' one.

As pointed out earlier, that in such situation -- the internal organization of the party, existence of a strong parliamentary committee system go a long way in making the executive aware of the existing public opinion. None of these factors existed during Mujib Era. Moreover, the Prime Minister was cut off from the party channels due to the curtailment of freedom of the individual MPs. The lack of proper functioning of the PAC, C&AG's constitutional role and status, non-implementation of Article 77 i.e. establishment of an office of Ombudsman, committees to probe and investigate into departmental mal-administration as well as the legislative proposals all contributed to the decline of parliament during Mujib Era.

With regards to structure and procedural rule -- the First Jatiyo Sangsad was a sovereign one. But the criterions like the legislative functions, role of the legislators, formulation of



policy, control of finance, criticism and supervision of the executive, providing channels of ventilation of grievances and lastly Parliament's powers to remove the executive through a vote of no-confidence were all lacking during its functions. The fact that there were no Private Members' Bills and Private Members' Resolutions and there was no serious amendments to Government Bills and the way legislative measures were rushed through the Parliament proved that legislature's powers were formal and in effect Cabinet was the *de facto* legislature. Naturally the Cabinet became extremely powerful without any restraints on it.

The rising expectations and aspirations of the people during post-liberation period were not reflected in the Parliament. Instead of trying to accommodate various and conflicting interests of the people within the parliamentary politics, Mujib, the populist, decided to rule the country through a constitutional dictatorship. Absence of an Opposition made it an easy endeavour. The passage of Constitution (Fourth Amendment) Bill, 1975 was the monumental example of the impotency of the First Parliament of Bangladesh.

#### **The Status of Parliament under Fourth Amendment**

As pointed out earlier, the Constitutional Amendment in 1975 made structural and procedural change in the political order of the country. The parliamentary system was converted into one-party presidential system. It was modeled after the former Soviet Union in which Parliament was made an appendix of the

executive. The appointment and functions of the Prime Minister and the Council of Ministers and powers of dissolution were made subject to President's discretion. The Cabinet was responsible to the President and he could include any number of non-MPs into his Cabinet. This was justified that in a country like Bangladesh where there is a famine of skilled people -- the President could use the know-how of the technocrats. A new Article 73A, however, denied the voting rights of the non-MP Ministers. Besides vesting all powers -- legislative, financial etc. -- a number of provisions were also incorporated to make the Parliament completely subservient to the executive. A new proviso in Article 72, in clause (1) stipulated that the Parliament only needed to meet only twice a year. No minimum time period was mentioned which signified the non-utility of Parliament as an institution. Article 70, which had already curbed the independence and freedom of the individual MPs, was made more stringent with an explanation stating that an MP would now not only lose his seat for resigning or voting against his party which nominated him to the election; he would now lose his seat for (a) being present in Parliament abstain from voting or (b) absents himself from any sitting in Parliament ignoring the direction of the party which nominated him to the election.<sup>65</sup> As mentioned earlier in our chapter on Executive, now an addition of the words "or declare that he withholds assent therefrom" after the words "assent to the Bill", in Article.80(3) completely stripped Parliament of its share in the legislative process.<sup>66</sup>

Finally, Parliament's power to remove the executive through its power of impeachment, as it exists in a genuine presidential system like the U.S., was in effect taken away from it.<sup>67</sup> The legislature under Fourth Amendment, thus, became merely an ornamental institution with no powers to check or control the executive. It was mainly for a facade of democratic ideals without any effective powers. It was a total negation of the spirit of constitutional democracy.

#### **The Structure of Parliament under Ziaur Rahman**

As we have pointed out in our discussion on executive in Bangladesh that after the overthrow of Mujib regime in August, 1975, there was a period of political instability and vacuum. Between August, 15, 1975 and November 6, 1975 -- the status of the parliament remained ambiguous. When late President Ziaur Rahman, like many other military rulers started the process of civilinization, he began to reshape the political system in the country. The main changes as brought out by Ziaur Rahman under Fifth Amendment of the Constitution were related to the executive. He introduced novel variety of executive which we already have discussed. With regard to the legislature we find some consequential changes as a result of transformation of government from parliamentary form to presidential one. It was almost certain that changes in the role of legislature and the relationship between legislature and executive would also take place. Let us now describe the changes with regard to the legislature as brought out President Zia. As regards

composition of the legislature the number of reserved seats for the women were increased from 15 to 30 seats; and the period was extended from 10 to 15 deemed to have been effective from the day the Constitution was commenced i.e. December 16, 1972.<sup>68</sup> This reservation of seats for women was there under the 1972 Constitution.

As regards the relationship between the legislature and the executive, the 1972 Constitution provided that "The Cabinet shall be collectively responsible to the Parliament". 'Collective responsibility' of cabinet is a cardinal feature of any form of parliamentary democracy. It has acquired some definite meaning and connotation. It implies that a cabinet shall hold office as long as it enjoys the confidence of the majority members of parliament. It also implies that the cabinet would resign if a vote of no-confidence is passed. An this vote of no-confidence is linked with the power of dissolution.

Under Zia's new political order there was no provision that the cabinet should be "responsible to the parliament". The cabinet under Zia's political order were to hold the office "during the pleasure of the President" which is a usual and standard feature of presidential system. But as we have indicated that Zia's political order was neither full fledged presidential system as it exists in the United States nor was it parliamentary system. He amended the Constitution through a number of Proclamations which sought to restore some of the prestige and powers of the Parliament which were totally denied

under the Fourth Amendment. At the same time, he kept amended provisions of the Constitution which strengthened the executive organ of the government.

Some have compared Zia's system with French system under the Fifth Republic which can be described as a synthesis of a parliamentary and presidential system. Under the Fifth Republic the Prime Minister needs the confidence of the President at the time of his appointment but for his tenure he needs the confidence of the Parliament which is empowered to put a vote of censure and have the government defeated with the passage of censure by an absolute majority vote. The defeat of the government is not linked with dissolution of the House. The power of dissolution is exercised by the President after having consultations with the Prime Minister, and the Presidents of the two Chambers. In case of Bangladesh, the Prime Minister and the Council of Ministers were to be appointed by the President and to hold the office during the pleasure of the President. The power of dissolution lied entirely with the President. In a genuine presidential system like the U.S. -- the President can neither convene nor dissolve the legislature. As such parliament's existence in Bangladesh, under Zia, depended entirely on the pleasure of the President. He, however, provided that no-more than one-fifth of cabinet would be appointed from non-MP quota. This provision was somewhat in line with parliamentary democracy. The composition of Zia's political system and French one under the Fifth Republic is not without some justification.

But the French legislature under Fifth Republic is much more powerful than the parliament under Zia's system. The collective responsibility of the French cabinet to the parliament and the financial exercised by the later make it more effective as well as powerful than the legislature under Zia.

The most important changes that Zia brought out with regard to the role of legislature related to parliament's power over passing of the budget and financial matters. Under a new Article 92A, Zia provided that as in respect of finance :

- "(a) If legislature has failed to make the grants under Article 89 and pass the law under Article 90 before beginning of that year and has not also made any grant in advance Article 92; or
- (b) has failed to make the grants under Article 89 and pass the law under Article 90 before the expiration of the period for which the grants in advance, if any, were made under Article 92; or
- (c) has refused or reduced the demands for grants and a request for reconsideration of the demand has been made by the President in a message to it, the President may, by order, authorise the withdrawal from the Consolidated Fund moneys necessary to meet the expenditure mentioned the annual financial statement for that year for a period not exceeding one hundred twenty days in that year, pending the making of the grants and passing of the law".

In a presidential system as it exists in the United States an

"independent existence of a proud, zealous and watchful legislature is a very important feature."<sup>69</sup> Legislature is main source of restraining and controlling the executive. Again, if one makes a comparison with the financial control of the French Parliament over its executive -- one finds that Parliament is not entirely helpless. The Government can force a bill on the Parliament through a vote of confidence. The question of confidence is considered passed if there is no motion of censure within twenty-four hours. As such, Parliament can obstruct an unpopular budget by raising the motion of censure.<sup>70</sup> Obviously, unlike in Bangladesh, the French Legislature can use its financial control over the public purse and keep the executive under check. Curtailment of the powers of legislature in matters of finance was, therefore, a serious set back in the evolution of constitutionalism and democracy in Bangladesh.

Idea of curtailing financial powers of the legislature has a long history behind it in our sub-continent. During the British Raj, when parliamentary democracy was introduced under the Government of India Act, 1919 and of 1935, the Governor-General and provincial Governors had, what was known as, 'power to certify budget', even if it were not passed by the legislature. At the center, Government-General used to 'certify' budget almost every year during the British period till it was liquidated in 1947. This was almost an annual phenomenon during the British period.

As pointed out earlier, after independence in 1947, in

Pakistan, this idea of introducing restraints on the powers of legislature in financial matters was first originated during the era of "controlled democracy" of Ghulam Mohammad and Iskander Mirza in 1954-55. A British Constitutional expert, Sir Ivor Jennings was brought to find out some devices to reduce powers of the legislature in financial matters. In 1955, a draft constitution was prepared by Jennings which provided that if legislature would fail to pass an Appropriation Bill before the beginning of the financial year to which it would relate, the President might, by ordinance continue in operation for that financial year the Appropriation Act relating to the preceding financial year and the ordinance would have full force and effect as if it were an Act of Parliament.<sup>71</sup>

Sir Ivor Jennings's draft Constitution was, however, not accepted in 1955 but when Martial Law was introduced in Pakistan in 1958, and Ayub Khan subsequently introduced his version of 'control democracy' under the 1962 Constitution, we find legislative power in financial matters were severely curtailed. Zia seemed to have been influenced by ideas such as those of Ayub Khan as regards the powers of the legislature. He, no doubt, wanted to have some form of representative government but like the British Government in undivided India or Ayub Khan in Pakistan, he was anxious that peoples' representatives in the legislature should not have absolute power in certain matters. He wanted to prevent what he described to some political experts and political scientists -- 'paralysis of the administration'



and to ensure that he used to describe as 'political stability' and continuation of economic development.<sup>72</sup> An independent legislature under a genuine presidential system whose job is to criticize, supervise and scrutinize the executive without being responsible like the one found in a parliamentary system -- could be, according to Zia "obstructionist, can nullify the government, can be merely factious and self-seeking, and it can be corrupt".<sup>73</sup> And in a country like Bangladesh where economic development was of supreme importance, the country could not afford to have the luxury of such an 'obstructionist' Opposition. It needed quick decision and swift implementation of governmental policies. Like Ayub Khan and many other leaders of the Third World Countries, he believed that in a country like Bangladesh with widespread illiteracy -- an irresponsible Opposition, like the U.S. one where politicians are mature, needed guidance to perform their functions. Like the French Constitution under Fifth Republic, Zia seemed to believe that certain matters 'are inherently executive in nature' and as such defined a domain of the law to which power of the parliament should be restricted. Such conception of restraining powers of the people through their representatives in legislature betrays a lack of faith in the ability of the people to govern themselves. There is no doubt that Zia had faith in some form of controlled or guided democracy. There can hardly be a scope of independent and powerful legislature under such concept of restricted democracy.

Zia curtailed legislature's power (under another new Article 145A) relating to International Treaties. This particular clause provided that all treaties with foreign countries should be submitted to the President who should cause them to be laid before parliament but there was a significant sub-clause that "no such treaty should be so laid if the President would consider it to be against the national interests to do so."<sup>74</sup>

This provision that people through their representatives in legislative can not be trusted to ensure the "national interests" of the country is a gross violation of the faith in constitutionalism and democracy. There can not be any better custodian of national interest than the people. Nobody should consider himself better guardian of national interests than the people. We may here add that in a true presidential system as it exists in the United States President can not make any treaty without the approval of the Senate -- the Upper House of the U.S. Legislature.

With regards to the legislative procedure -- he omitted, through the Second Proclamation Order No. IV of 1978, the words "or declare that he withholds assent therefrom" of Article 80 Clause (3) which in essence was like a presidential veto under Fourth Amendment presidential system and made the procedure like that of a parliamentary one. But at the same time -- the initiations of legislative bills lied with the President who like the U.S. President's State of Union Message outlined major

policy initiatives of the Government. The U.S. Congress does not hold debate on Presidential message but legislations are proposed by the appropriate committee somewhat within the guidelines of the speech. The Congress, however, proposes bills independently as well. In Zia's system, Presidential speech, given at the beginning of each session, was debated like it is done in parliamentary system and Government Bills were initiated by the President through his hand-picked cabinet. He also denied the legislature of its power to remove the executive through impeachment as he kept the provisions under Fourth Amendment which in effect was non-exercisable.

The political order set by Ziaur Rahman was, thus, a curious mixture of parliamentary and presidential system. And the legislature under it had so many restrictions and curtailment of powers that its effectiveness in checking, scrutinizing and controlling the executive was undoubtedly questionable. Let us now examine the actual functioning of the legislature under President Zia.

#### **The Functioning of Second Parliament**

The parliamentary election of 1979 was held while the country was still under Martial Law. As a matter of fact, the Parliament itself was revived by a Presidential Proclamation. Bangladesh Nationalist Party which President Zia had hastily assembled to fight the election had the following manifesto; a new identity for the people of Bangladesh, presidential form of government with sovereign parliament, development oriented

economy, and a promise to withdraw Martial Law within a week of its first session.

The election was held on February 18, 1979. The composition of the House was as the following : BNP-250 (including the women's seats); Awami League-39 (Ukil); Awami League-2 (Mizan); Jatiyo League-2; Jatiyo Samajtantrik Dal-8; Muslim League-12; Islamic Democratic League-6; Gano Front-2.

From the composition -- it looked better than the First Parliament as the House now had a constitutionally established Opposition. It passed Acts out of which 27 were Ordinances in the form of bills and subsequently passed by the House. Interestingly -- the Second Parliament received larger volume of parliamentary activities. It received 49 Adjournment Motions out of which 29 were discussed and two were dealt with by the statements of the concerned Ministers. The motions were moved with regards to various issues ranging from foreign policy, law and order, high prices of the essentials etc. It accepted 5003 starred and 572 unstarred written questions as well as 21 starred short-notice questions. The concerned Ministers also dealt with a large number of supplementary questions. Nine Half-an-Hour discussion were accepted out of which only two were discussed. Out of two-hundred sixty-four notices for Calling Attention to Matters of Urgent Public Importance, 221 were discussed and other 28 were dealt with by the statements of the concerned ministries. Calling Attention to Matters of Urgent Public Importance for Short-duration volume as also larger than

the First Parliament.

More time was also assigned to Private Members' Bills and Private Resolution. Although most of them were not discussed due to shortage of time or adjournment of the House -- a tendency to pay more attention to the Private Members' business was discernible.

Zia also further developed the committee system. The House established seven Standing Committees, a few Select Committees on non-important bills, and thirty-six Departmental Committees in which the Ministers concerned were to be the Chairman including the technocrat Ministers.

During his period -- the Public Accounts Committee was initially chaired by Atauddin Khan, a Treasury Bench Member. It was formed on 30.4.79 and held only one meeting on 1.5.79 to discuss the *modus operandi*. Since the chairman took over a ministerial portfolio -- another PAC was formed on 14.3.80 with Ataur Rahman Khan as the chairman. This committee was subdivided into three sub-committees and prepared eleven commercial reports and five non-defence reports from 1972-1976 and submitted one preliminary report to the House which was partly discussed. An Estimate Committee was also formed for the first time with Abdur Rahman Biswas (Treasury Bench) as the chairman.

The House also passed the Ombudsman Ordinance of 1980. The act stipulated the establishment of the office of an Ombudsman -- appointed by the President on the recommendation of the Parliament.<sup>75</sup> But an office of such body investigating

departmental maladministration has not yet been set up.

Out of all the Acts passed by the Second Parliament -- the Constitution (Fifth Amendment) Bill, 1979, was the most controversial one. It was passed during the first session of the Second Parliament which was short and without any important parliamentary activities. The Bill which sought to ratify and confirm all Proclamations, Martial Law Orders and other laws made during the period between the 15th August, 1975 and the 9th April (both days inclusive) was introduced at short-notice. The Opposition raised objections to the Point of Order, Rules of Procedure as well as on the principle of the Bill etc. The debate on the bill were lively, and at times acrimonious, but in a familiar demonstration of the House's incapacity to influence the policy decision of the Government -- it was passed by a division vote of 241/0, without either sending it for eliciting public opinion or to the Select Committee. It took five and half hours with 22 MPs taking part in the deliberation. As usual the Opposition staged a walk-out. All throughout the sittings of the Second Parliament -- there were repetitions of the similar scenarios. The Opposition was able to make a lot of noise but its fundamental function i.e. check and control the executive was non-effective.

Though Zia somewhat liberalised the Parliament's role from that of under the Fourth Amendment like deleting the new Proviso of Article 70 under the Fourth Amendment of the Constitution and made conditions of the independence of the MPs less stringent.

The election was also made to be contested by multi-party system. But in assessing the effectiveness of the legislature -- one has to view the executive-legislative relationship which varies from country to country. Such relationship under Zia was neither parliamentary nor presidential. It was not even like that of Fifth Republic of France. One finds that due to certain constitutional provisions -- the role and the effectiveness of the legislature under Zia were seriously undermined. Absence of collective responsibility made the Question-Hour, Adjournment Motions etc. into a parody. Even the motion of no-confidence lost its significance. So the familiar parliamentary devices in controlling the executive did not mean anything. No wonder such large volume of Adjournment Motions etc. were admitted in the House. Other limiting factors as pointed out, were the legislative and financial control, especially the loss of the later deprived it from its designated rights which is so zealously retained by most parliaments of the world. Congress in the U.S. takes special interests in this respect and fulfills its task through the appointment of various committees.

The executive-legislative relationship was also not like the one found in a genuine presidential system. The chief instrument through which legislative controls the presidential executive is the committee system. It sets up committees to propose legislative bills somewhat along the presidential message to the House. In Zia's Parliament -- cabinet presided over by the President initiated the bills. Situation was somewhat like

France but at least in France -- the cabinet takes the responsibility (it may not be fair as they have to take the responsibility of an unpopular bill, initiated by the President). But in the Second Legislature -- the cabinet was not responsible and in case of "misbehaviour" on the part of the House -- the power of dissolution of the President could always make it behave. Similar situations could arise as far as the financial power of the President was concerned. Discussion on Budget, as such, became a routine matter in which neither the policies of the Government nor constituent interests generated serious discussion inside or outside the Parliament.

The Departmental Committees set up by the Second Parliament were also neither in structure nor in actions resembled the ones found in a genuine presidential system. In a genuine presidential system -- the Departmental Committees are chaired by powerful Opposition MPs. Not only the bills are referred to the appropriate committees -- most committees "question the executive, they investigate departments." In U.S. House of Representative and Senate Committees not only question the relevant Ministers and senior civil servants but call outside witnesses as well. Obviously -- the committees do a thorough and detailed investigation of the executive than an individual MP can do.<sup>76</sup> But the Departmental Committees in the Second Parliament were all chaired by Ministers including technocrat Ministers and voting. The natural corollary was the ineffectiveness of these committees. It was more a charade than



anything substantial. Moreover, none of these committees submitted any reports to the House.

Zia, thus, established a legislature whose activities and trappings gave it an aura of an effective parliament. But actually, the parliamentary activities, departmental committees and debates were designed to 'train' the parliamentarians while the chief executive maintained a tight control over it. As Zia himself stated in his 'inaugural speech that it takes long to learn parliamentary conventions and traditions. Each MP needs to have the knowledge about the structure and administration of the government before he can really fulfill his designed role. He hoped that through the experience gathered in the Second Parliament -- the Honourable MPs would be able to establish conventions and traditions which would help flourishing of democracy. He also lectured the MPs about their expected role as MPs of a 'sovereign parliament'.<sup>77</sup> Zia's Parliament was, however, not a 'sovereign parliament' but a 'lame and tame' one, tailored to fulfill the needs of an all powerful executive. It had very little control over the actions of the latter.

#### **Legislature Under Ershad regime**

When General H.M. Ershad dismissed the civilian Government headed by Justice Abdus Sattar in 1982 in a peaceful military coup, a period of Martial Law and suspension of the Constitution took place. Again Bangladesh entered into a period of Martial Law and suspension of the Constitution. Ershad was no exception to any other military rulers of the Third World countries in

making promises that democracy would be restored 'as soon as possible'. Like Ziaur Rahman he also started the process of civilization. He held Union Parishad election, a referendum in 1985, organized his own political party namely Jatiyo Party, and held both presidential and parliamentary elections. Unlike Zia, he, however, was unsuccessful in holding the presidential election before parliamentary one. The political parties were of the opinion that parliamentary election would be greatly influenced if the presidential election was held prior to the parliamentary one. Ershad had, however, already declared himself to be the President of Bangladesh in December, 1983.

During the process of civilization Ershad had not to undertake any major constitutional changes. He had Zia's version of restricted democracy almost ready-made. He inherited without any major changes, Zia's tame and lame legislature. He toyed with the idea of introducing an Upper House in the legislature where he wanted to introduce professional representation to the armed forces in the Upper House. As pointed out earlier, he sent some of his experts to Indonesia to study the Indonesian Constitution where army has a definite and statutory role in the Constitution. He also used to refer the example of Turkey where armed forces has some role in the political order.

But very soon Ershad had to give up the idea of Second or an Upper House with army representation. He could soon realize that the Indonesian and Turkish model would not be accepted in

Bangladesh; so he reconciled to the existing legislature as introduced by Zia. He, however decided to do away with the parliamentary trappings of Zia's legislature in respect of the appointment of the Prime Minister. He made the appointment of the PM and Council of Ministers an absolute prerogative of the President. Under Zia the procedure was same only the constitutional language gave it an aura of parliamentary tradition.

As pointed out earlier, Ershad had not to make any major changes in the composition or role of legislature. He inherited Zia's 'tame and lame' legislature; that was sufficient for continuation of his limited or controlled democracy usually practiced by military rulers when they lift Martial Law and begin to have the facade of a civilian government or 'controlled democracy' and constitutional dictatorship as one would like to designate such system.

Out of all the Parliaments since 1973 -- former President Ershad's two Parliaments -- 1986 and 1988 -- were the apogee of "rubber stamp" parliament. Although he was the longest ruler of Bangladesh but he had had difficulties in legitimizing his rule. The major political parties took hard-line approach in respect of the scheduled parliamentary election. However, the election was held on May, 1986. The composition of the House was as follows : Jatiyo Party-221 (including women's seats and 20 independent seats); Awami League-78 (including 4 independents); Jamaat-e-Islam-10; The Communist Party of Bangladesh-6; Bangladesh

National Awami Party(Bhasani)-5; Bangladesh Muslim League-4; Jatiyo Samajtantrik Dal (Shahjahan Siraj)-3; BAKSAL-3; Bangladesh National Awami Party (Muzzafar)-2; Jatiyo Samajtantrik Dal (Rob)-4; Bangladesh Workers Party-3; Independent-4 and 7 vacant seat which subsequently went to Jatiyo Party. So the total strength of Jatiyo Party was 228 in a House of 330 seats.

Though the Third Jatiyo Sangsad contained Largest parliamentary Opposition since 1973 until the election of 1991-- its role and functions were most disappointing. Not only the power and influence of the Parliament were curtailed, as explained before, but Ershad further damaged the status and prestige of the Legislature by widest-possible rigging of elections. In a Third World countries rigging of election is a familiar phenomenon but under Ershad it was the type of rigging of elections as one quite often finds in a new democracy of Afro-Asian countries. It was almost wholesale removing and replacing ballot boxes. Elections under Ershad became farce and mockery.

Now a Legislature can function and discharge its role and responsibilities only when it is elected freely and fairly. There are legislatures in dictatorial regimes. There was a legislature in Germany even under Hitler; similarly there were legislatures in the now demised Soviet Union and in East European communist countries but Legislative bodies were not really representatives of the people nor could they perform the

role and functions of a Legislature as expected in a democratic system, be it presidential or parliamentary. As such in the absence of a healthy political order-- the country was besieged with Political instability. Strikes, demonstrations, campus violence became a daily feature. In the midst of such turmoil the Parliament held its sessions, and there were only four sessions. First two sessions were short and without any familiar parliamentary activities.

During the Second session -- the Parliament met only for five hours and eight minutes. Members of main opposition parties namely the Awami League, Jamaat-e-Islam, the Communist Party of Bangladesh, Bangladesh National Awami Party(Bhasani), Bangladesh National Awami Party(Muzzafar), Bangladesh Workers Party, and a few independents were absent.(223 were present whereas as many as 106 were absent). Only Constitution(Seventh Amendment) Bill, 1986 and three Ordinances were laid before the House. The proceedings of the second session were almost caricatures of actual parliamentary activities. Again the rules (75)(1), 78, 79 and 82) were suspended as the Bill was introduced. It took four and half hours deliberation being participated by fourteen MPs mostly by Treasury Bench and was passed by a division vote of 223/0. There was no walkout, no suggestions to send the Bill to either a Select Committee or eliciting for public opinion. The Bill which ratified and confirmed all Proclamations, Martial Law Orders, and other laws made during the period between March 24, 1982 and November 10, 1986 had smooth sailing with some of the so-called

Opposition MPs giving support in its favour. In this regard the role of A.S.M. Rob of Jatiyo Samajtantrik Dal was significant for which he was, however, rewarded subsequently.

If one makes comparison between passing of the Constitution (Fifth Amendment) Bill, 1979, and Constitution (Seventh Amendment) Bill, 1986, one cannot but note that combination of curtailment of the powers of the parliament and malpractice of the electoral process had completely turned it into an impotent body. At least Zia's parliament used to make some noise whereas Ershad's one did not even dare to make such moves.

But the facade was maintained as the House received 2927 starred and 599 unstarred written, 13 short-notice questions, 8 Adjournment Motions out of which one was discussed. Discussion on Matters of Public Importance, Discussion on Matters on Urgent Public Importance for short-duration were accepted some of which were attended by the House. The House had only Standing Committees and no Select Committees. As many as 21 Ordinances were laid before the Parliament and all were accepted. Very little time was, however, devoted to private Members' Bills or Private Members' Resolutions which demonstrated Government's indifference towards the 'largest Opposition since 1973' as boasted by one prominent Jatiyo Party member.<sup>79</sup>

The functioning of PAC seemed to be on disarray during the Fourth Jatiyo Sangsad. The first PAC was formed during the Martial Law period on October 19, 1983 under the chairmanship of a Minister. A few meetings were held until he lost his

ministership. Next one was formed on March 9, 1985, which was chaired by A.K.M. Nurul Islam. C&AG prepared 126 audit and appropriation reports (1969-70 to 1979-80) to be handed over to the Committee. One ad hoc Committee under Nurul Islam prepared a comprehensive report of the auditing of all department and submitted to the president. Only the yearly report of 1985 was laid before the House by the Committee.

Parliament's decay was reflected by the patterns of politics in Bangladesh. The frustrated Opposition naturally took up the politics of the streets. Country-wide agitations, repeated strikes and demonstration forced president Ershad to dissolve his 1986 Parliament in December 1987.

According to provision of the Constitution-- a new House came into being in March 1988 which was boycotted by all major political parties. In the meantime, the time-limit for the reservation of seats for women had expired on December 16, 1987. There were debates and discussions within Ershad's ruling party whether such reservation was, at all, necessary or desirable. Mode of election election for the women's seats, their roles in the legislature had prompted a weekly to term these 30 ladies as 30 sets of ornaments of Parliament.<sup>79</sup> So the debate was intense as a faction of Jatiyo party thought that they would not require these solid bloc of thirty votes in the future Assembly, (thanks to ballot-box lifting at gun-point) especially, after the party's 'thundering victory' in March 1988 election in which Jatiyo Party got an absolute majority of 251 whereas combined

Opposition captured only 19; JSD(Shahjahan Siraj)- 3; Freedom party-2; Independent-25. It was alleged that the Government had to 'coax' a few independents to join the Opposition in order to have the semblance of a constitutionally established Opposition.<sup>80</sup>

The issue of reservation of seats for women was settled through the passage of the Constitution (Tenth Amendment) Bill, 1990 which stipulated that there would be similar provisions for the reservation of seats for women for a period of ten years beginning at the commencement of the next Parliament.<sup>81</sup> (Ironically, Begum Zia, who imprisoned Ershad for various corruption charges, could form the Government with the help of these women seats). The Jatiyo Sangsad of 1988, thus, had no reserved seats for women. A few were elected from general constituencies but not surprisingly they were all related to the stalwarts of Jatiyo Party.

The Fourth Jatiyo Sangsad passed three Constitutional (Amendment) Bills (Eighth, Ninth and Tenth), 92 Ordinances, Acts and performed voluminous parliamentary activities. It received 5016 starred, 987 unstarred and 15 starred short-notice questions, most of which were dealt with. It accepted and discussed five Adjournment Motions, accepted 9(nine) Half-an-Hour Discussion of which four were discussed. Out of 151 calling attention for public importance -- 36 were dealt with by the statements of the concerned Ministers while 50 were discussed. It also accepted 51 Discussion on matters of public importance



for short-duration of which 26 were taken care of. An impressive statistics.

The House also set up an impressive Committee System. At the first session--8 Standing Committees, Select Committees and 32 Departmental Committees with similar procedure as under Zia's system were formed. Private Members Bills were scanty. A few private Members' Bills were introduced and an innocuous Private Members Resolution was accepted. Interestingly there was one Private Member Bill similar to Government's Constitution(Tenth Amendment) Bill, 1990. Such consciensus or meeting of the minds between the Government and the Opposition was indeed a rare phenomenon in the history of Bangladesh's politics!

The PAC seemed to be 'active' during Fourth Jatiyo Sangsad. It was formed on June 15, 1988, with Shahjahan Siraj, an 'Opposition' Mp as its chairman. In order to facilitate its work, it was divided into four sub-committees on October. 14, 1988 which began auditing 1948-85. First report included 635 objections out which 277 were resolved; and the committees demanded reports from the relevant departments about the rest of the objections numbering as many as 358. Two reports, sent by House, were discussed and submitted during the Fourth Jatiyo Sangsad.

From the above discussion-- it seemed that the parliament under Ershad, especilly, the Fourth one was performing its designated task. But a deeper analysis reveals that the parliamentary activities performed by a legislature which was not

only constitutionally 'tame and lame' but its legislators whose very existence as MPs depended on the goodwill of the president were performing nothing more than a charade. It was evidenced from the ways important bills like Constitution (Amendment) Bills were rushed through the parliament and the quality of debates it generated. They seemed like prearranged shows in which no vital issue of national interests or policies were discussed.

In a parliament debates do not raise any direct issues of maladministration but they are supposed to raise new questions and serve the purpose of private Members' Bills with regard to specific matters of public importance. The new issues raised by the debates help check arbitrary policies of the executive. But during Fourth Parliament, its main task was to approve executive orders. The seventh session of Fourth parliament was a case in point in which executive decision to send a contingent of troops to Saudi Arabia, during the Gulf War of 1990, was unanimously approved. Both Treasury Bench and Opposition thanked the President for giving an opportunity to the parliament to discuss such a vital issue, which according to the MPs, demonstrated the fact that Jatiyo Sangsad was the centre of all national activities *as promised by the President.*<sup>82</sup> The other parliamentary activities like Adjournment Motions, Question -- Hour, even the question of motion no-confidence in the context of executive's non-dependence on the parliament for its tenure, became meaningless. On the other hand, like a genuine presidential system -- legislature did not have independent,

separate and powerful status as found in the U.S., which inspite of all its defects, has proved to be more effective in checking the arbitrary actions of the executive than parliamentary legislature.<sup>83</sup> So Ershad's legislature was merely a parody of true democratic one.

**Legislature Under the Revived Parliamentary system as introduced under the Constitution (Twelfth Amendment) Bill, 1992.**

After nine years of military rule of Ershad, a free and fair election was held in Bangladesh, perhaps since the creation of the country in 1971. As pointed out earlier in our chapter on executive, there were great debates and wide discussion over the issue of parliamentary vis-a-vis presidential systems -- whether Bangladesh should revert to parliamentary system as introduced under the original 1972 Constitution or should the all-powerful presidential system as introduced by late President Ziaur Rahman through Constitution (Fifth Amendment), 1979, should continue.

There was a famous three-party joint declaration in November, 1990, in which both B.N.P and the Awami League pledged for the restoration of parliamentary system. Notwithstanding the joint declaration, during the election campaigning of 1991 the B.N.P. did not make its stand clear on the issue of parliamentary vis-a-vis presidential system. The Awami League, however, firmly and clearly opted for parliamentary system.

The results of the 1991 election did not give any party absolute majority. B.N.P. emerged as the single largest party but

did not have enough seats to form a Government. Finally, an uneasy alliances was made between the B.N.P and Jamaat-e-Islam which enabled B.N.P to form the Government.

The great debate over the issue of parliamentary vis-a-vis presidential systems now shifted to the inside of the legislature. The Awami League was adamant to establish parliamentary system as it was in the original version of 1972 Constitution while the stand of the ruling party B.N.P. was not yet clear. The Prime Minister who is also all-powerful president of the B.N.P. was rather ambiguous over the issue; she seemingly was in favour of a strong executive as introduced by her husband President Ziaur Rahman. But many members of the B.N.P. were not happy over the all powerful Presidential System as introduced by Zia. The Secretary-General of the B.N.P. who is also a Cabinet Minister spoke in favour of parliamentary system in an interview with British Broadcasting Corporation, B.B.C. 84. It soon became clear that a large section of the B.N.P. was also in favour of switching over to parliamentary system. The leftist parties and as well as Jamaat-e-Islam also expressed their preference for parliamentary system.

As we have explained in our discussion on the Executive, there is a myth in the South Asian sub-continent among the urban elite, in particular, among the lawyers that only true form of democracy is the British Parliamentary System. It is not only common to the South Asian subcontinent but other newly independent Afro-Asian countries curved out of the liquidation of the British empire.

So finally bills were introduced in the Parliament to change the system of government in favour of parliamentary one. Though there was consensus over the parliamentary system there existed differences over the details of the parliamentary system for Bangladesh -- the A.L wanted to convert to the 1972 version while B.N.P. under Begum Zia was for a strong executive as it exists in Germany or as it existed in Pakistan under Bhutto's 1973 Constitution or still exists in Pakistan under Amendments introduced by President Zia-ul Haq. A constitutional deadlock was created and finally it was resolved thanks mainly to the Acting President Justice Shahabuddin.

We have already discussed the type of the Executive under the new version of parliamentary system as introduced by Twelfth Amendment of 1991. Let us now examine the structure and role of the Legislature as a result of the Twelveth Amendment of 1991.

#### **The Structure of the Parliament.**

The structure of the Parliament remained more or less same. It was composed of 300 seats with 30 additional seats reserved for women to be indirectly elected by the male members of the Legislature -- a method which is not favoured by many women as they feel, with some justification that women thus indirectly elected, do not really represent the women of the country. They would rather prefer to see women being elected from general constituencies, nominated by political parties or as independent candidates, or have separate women electorate for the reserved women seats. There are, of course, some women members including

the Prime Minister, Begum Zia and the leader of the Opposition Sheikh Hasina who have been elected from general constituencies as nominees of their parties.

The relationship between the Executive and Legislature under the new version of the parliamentary system of 1991.

In a parliamentary system, the cabinet, headed by a Prime Minister is the holder of real executive power as it originated in England and spread to other parliamentary systems such as in Australia, Canada, India etc. The expression "the cabinet shall be collectively responsible to Parliament" is in the new version of parliamentary system in Bangladesh, <sup>85</sup> We have already explained the meaning and connotation of this expression, familiar in all true form of parliamentary democracy -- it means that the cabinet shall hold office as long as it enjoys 'daily' confidence of the legislature.

Thanks to the growth of modern well-disciplined parties, the Prime Minister and any member of the cabinet or the cabinet as a whole remains in office as long as it enjoys the confidence of the majority party or majority coalition parties.

The president appoints as Prime Minister "the member of parliament who appears to him to command the support of the majority of the members of Parliament";<sup>86</sup> as mentioned earlier, President Ershad dropped the words "who appears to him to command the support of the majority of the members of Parliament." The restoration of this phrase is in tune with the spirit of the parliamentary system. But it is still a subjective

power of the President. It would be more effective if it were provided that a Ministry might not be formally appointed until it had received a vote of confidence within certain period, say thirty or sixty days. Such a provision is found in the French Fourth Republic Constitution. Similarly, it is provided in some form of parliamentary system that the President can not dismiss a cabinet unless an alternative one is selected by the legislature as it exists in Germany -- what is termed as 'constructive vote of no-confidence.'

Under the twelveth Amendment of 1991 the office of the Prime Minister shall become vacant (a) if he resigns or (b) if he ceases to be a member of the Parliament.<sup>87</sup>

It further lays down that if the Prime Minister ceases to retain the support of a majority of the members Parliament, he shall either resign his office or advice the President to dissolve the Parliament.<sup>88</sup> Is the President bound to accept the advice of a Prime Minister who has lost the confidence of the majority of the legislators? The Twelveth Amendment provides that the President shall dissolve the House only when he is satisfied that "no the member of Parliament commands the support of the majority of members of Parliament."<sup>89</sup> So the President is not absolutely bound to accept the advice of a defeated Prime Minister. The legislature, thus, has some role in the dismissal of Prime Minister and his cabinet.

But the independence and free choice of the members of Parliament are severely curtailed by Article. 70, which lays

down : (1) A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he 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
- (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. Same procedure is applicable to independent members who would join any of the parliamentary parties.<sup>90</sup>

Such stringent curtailment of powers of the legislators were provided under the Fourth Amendment which was severely criticized by the political parties of all shades including B.N.P. But this time it was argued that such provisions to curtail the free choice of a member of the parliament may not be in tune with true form of parliamentary system as it originated in England but thanks to lack of well-disciplined and well-organized parties in 'new' democracies, such provisions are found in the Constitutions of India, Pakistan and others. Crossing of the floor is a frequent phenomenon in 'new' democracies, so this restrictive clause is a painful necessity for preventing political instability. In India, however, the provisions are not so stringent. Moreover, existence of democratized political parties and strong parliamentary committees have successfully countered



the loss of freedom of individual member.

Can a group of the members of parliamentary party inside the parliament revolt and form a dissident group -- whether a group, not only an individual member has right to dissent? Under the Twelveth Amendment, even such group disloyalty or right of a group inside the legislature has also been prevented under the following provision: "If, at any time, any question as to the leadership of 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, convenes 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 (a) and shall vacate his seat in the Parliament."<sup>91</sup>

So once a Prime Minister is appointed, the legislature has, very little, if at all, any power to remove him. This is a departure from the true spirit and practice of a parliamentary democracy and curtailment of powers of the legislature over the power of making or unmaking the executive which is an important feature of parliamentary system.

As we have pointed out that control over public money is one of the most, if not the most important means available to a

legislature for controlling the executive branch. In England, the classic land of parliamentary system, the King used to summon legislatures whenever he needed money. While discussing the ways and means for a Parliament to control or restrain the executive, K.C. Wheare in his book, *Legislatures*, points out that debate on financial matters is a crucial weapon in the hands of legislature what he terms "making the government behave". So unqualified powers of legislature on financial matters is regarded as an important feature of the supremacy of the legislature.

We have already pointed out how late President Ziaur Rahman curtailed the powers of the legislature in financial matters by providing that if parliament in any financial year 'fails to make any grant' then President would have powers to draw from the Consolidated Fund, money which were necessary in Annual Financial Statement for that year for a period not exceeding 120 days in that year. We have criticized this curtailment of powers of the parliament over financial matters and pointed out that it was a legacy of the powers of the British Governor-General during British Raj and first Martial Law ruler of the sub-continent, Ayub Khan, also retained such powers in his 1962 Constitution.

It is rather disappointing to see that such curtailment of power with respect to financial powers has been retained under the Twelveth Amendment of 1991 which was framed by a Parliament elected through a free and fair election. Under the present provision Article 92 of the Constitution lays down :

"Notwithstanding, anything contained in the foregoing provisions of this chapter, if, in respect of financial year, Parliament --

(a) has failed to make the grants under Article 89 and pass the law under Article 90 before the beginning of that year and is not also made any grant in advance under this Article; or

(b) has failed to make the grants under Article 89 and pass the law under 90 before the expiration of the period for which the grants in advance, if any, were made under this Article,

The President may, upon the advice of the Prime Minister, by order, authorize the withdrawal from the Consolidated Fund, moneys necessary to meet expenditure mentioned in the financial statement for the year for a period not exceeding 60 days in that year, pending the making of the grants and passing of the law.

Late president Ziaur Rahman had also curtailed the powers of parliament with respect to International Treaties when he provided that International Treaties which President would consider not appropriate to be presented to parliament on the grounds of "National interest" as the President do so. We also made our comments on the curtailment of powers of legislature on this ground of "National interests".

Under the Twelfth Amendment, there is definite improvement with regard to powers of parliament in respect of International Treaty: Under a new Article. 145A, it is provided that all

treaties with foreign countries shall be submitted to the President who shall cause them to be laid before Parliament. But a safeguard has been inserted by providing "such treaty connected with national security shall be held in a secret session of parliament". This is quite understandable and is also justified because there may be some sensitive elements in an international treaty which should not be discussed in public but nothing should be withheld from the parliament itself. So we welcome this improvement in respect of making international treaties.

As in the past Parliament, powers have been given for regulating--

- (a) the raising and maintaining of the defense services of Bangladesh and of their reserves;
- (b) the grant of commissions therein;
- (c) the appointment of chiefs of staff of the defense services, and their salaries and allowances; and
- (d) the discipline and other matters relating to those services and reserves.

Until Parliament by law provides for the matters specified in clause (1) the President may, by order, provide for such of them as are not already subject to existing law. This is a normal function of Parliament in a democratic system.

Similarly, it is provided under Article. 63 that war shall not be declared and the Republic shall not participate in any war except with the assent of Parliament. These are some aspects of composition, functions, and role of the Parliament in the new

parliamentary system as introduced under Twelfth Amendment 1991.

**Functioning of the Legislature as introduced under the revised parliament system, 1991.**

As mentioned earlier, a free and fair parliamentary election took place on February 28, 1992. The distribution of seats among the political parties stood as follows: B.N.P. 170 (including 28 women's seats it got due to its alliance with Jamaat-e-Islam); Awami League and BAKSAL (which later merged with the AL)-92; Jatiyo party-35; Jamaat-e-Islam-20 (including two women's seats); Communist party of Bangladesh-5; Bangladesh Workers' party-1; Gonotantri party-1; Islami Oyyoko Jote-1; Jatiyo Samajtantrik Dal JSD (Shajahan Siraj)-1; National Democratic party-1; National Awami party (M)-1 and Independent-1. It was heartening to see that there was constitutionally established Opposition in the Fifth Parliament of Bangladesh.

The functions of the House have been lively since its first session. Number of important bills like Constitution (Eleventh Amendment), (Twelfth Amendment) and (Thirteen Amendment) 1991, were introduced and passes by the Legislature. Unlike the previous experiences -- important bills like Twelfth Amendment Bill, 1991, were sent to the Select Committee and it adopted only after a consensus was reached through the Select Committee. A Private Member Bill on judiciary has also been sent to the Select Committee; and a notice by the Government on a bill titled Anti-terrorist Bill was not allowed to be introduced which was later sent to a Select Committee. It seems that thanks

to the presence of the Opposition -- the Government is not having smooth sailing about its each and every action in the House as the previous executives did.

It has, however, be pointed out that the Government still has a tendency to by pass the parliament -- the latest one being the Upzilla Ordinance. An issue of such vital national interest was not discussed in the House; and was laid before the House in the form of a bill and had it passed thanks to the constitutional provisions of Article. 70. Likewise, the Government also bulldozed an unpopular bill titled Special Security Force, 1992 within hours and in the midst of Opposition walk-out.

The Fifth Parliament, however, is allotting more time to Private Members Business. But most private Members Resolutions get cancelled due to shortage of time. This tendency is not at all encouraging. In a democracy, Opposition is very much a part of the Government and it should not be brushed aside. To make the House effective both Opposition and Treasury Bench should work with hands in gloves. The Opposition, on the hand, is also not acting like a responsible Opposition. It seems that Opposition instead of making the House a public forum is using it to settle its past-scores. No wonder it has been termed by the international press as "haunted Opposition". <sup>92</sup> Instead of insisting on the repeal of Special Powers Act or exposing the Government about its mistakes or economic mismanagement to the public -- it is busy with issues like repeal of Indemnity Bill, 1975 and non-political issue like Golam Azam issue. It has been

evidenced by the fact that during the fifth session of the House -- out of 88 Adjournment Motions -- only 14 were relating Rohingya refugee problem whereas 44 were regarding Golam Azam issue.

On the whole, however, it should be pointed out that the parliamentary activities, the debates as well as sensitiveness to public opinion by the peoples' representatives have been moderately successful. The return of the AL to the House after its brief spell of boycott over the Ganoadalot issue and regular attendance in Parliament by the P.M. (she was previously criticized for her irregular attendance) are cases in point. Such susceptibility to public opinion would increasingly enhance its role as a public forum.

Recently, the Opposition has also successfully highlighted Government's alleged failure in foreign policy and providing security of life and property of the citizens of Bangladesh. There were full dressed discussion on both foreign policy<sup>93</sup> and deteriorating law and order situation.<sup>94</sup> Discussion on budget was lively, participated by 233 members with as many as 7000 cut motions before the House. The media, press and the public all seemed to have taken interest in the vital issue of developmental programmes as enumerated in the budget.<sup>95</sup> Attempts by an Opposition MP to censure an individual Minister for his alleged nepotism and corruption and proposed amendment to the Rules of Procedure that the P.M. faces the House once a week are right steps in the right direction. In

Great Britain -- it is a standard practice that the P.M. answers questions in the House twice a week encompassing his/her entire administration.

Most interesting development is the recent tabling of a motion of no-confidence on nine- counts against the Government by the Opposition <sup>96</sup> which has been accepted by the House. As we all know that thanks to the built-in-majority of the ruling party -- the motion of no-confidence is not a end in itself. But this is a significant parliamentary development since its inception. It will, at least, force the transparency of the government on matters of public interest both economic and political. <sup>97</sup>

But legislature's actual control over the executive is not yet satisfactory. It's committee system need thorough overhauling. It is commendable that it has been sending important bills to appropriate select committees but its standing committees, especially, the PAC and the Departmental Committees are not efficient enough to check the executive. PAC is still chaired by a Treasury Bench MP and the Departmental Committees are headed by the concerned Ministers including the non-MP Ministers. The fact that non-MP Ministers have been denied the voting right is not good enough to make these committees do their real job. Most Departmental Committees are busy with micro-level administrative management rather than initiating policy used for debates and scrutinizing departmental mismanagement. An office of Ombudsman needs to established.

The parliamentary democracy has, however, been established in



Bangladesh in 1991 with a sovereign parliament. In spite of a few constitutional provisions which curtailed some of legislature's powers and influences, people in general are hopeful about its successful working -- due to the presence of a powerful Opposition in the House. But in order to have the House to perform its main function its committee system, especially, the Departmental Committee system needs to be strengthened. To establish full parliamentary control over the public expenditure, its, PAC needs to be reorganized and needs 'a executive arm' similar to General Accounting Office attached to the U.S. congress. C&AG's office, keeping in line with the British system, should be made independent of executive branch and be made responsible to the legislature. Besides these development -- the factor which would make the legislature effective is democratization within the political parties. Unless the leaders are susceptible to public opinion -- the legislature's main task i.e., check the arbitrary actions of executive, would remain as elusive as ever.

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## JUDICIARY

An independent judiciary free from the control of executive is regarded as *sine qua non* of any form of democratic constitution. One of the fundamental objectives of a constitutional state is to preserve and foster basic rights of its citizens. The need for a judicial organ has been recognised from time immortal. As a noted legal commentator, Alan Gledhill stated that the judiciary is "weaker than either executive or the legislature and it does not make decisions on matters of public policy, does not control public purse, does not command police and armed forces; its rulings are liable to be set at naught by legislation, and for the execution of its judgement it must ultimately rely on the executive. It is even in danger of being influenced or flouted by the executive or the legislature. Yet the constitution makes the judiciary its guardian, and requires it to enforce restrictions, often inconvenient, on the powers of the executive and legislature."<sup>1</sup>

### **Necessity of Judicial Organs**

Considering that one of the primary objects for which a state was established, was the creation and protection of individual rights, the necessity of a judicial organ or organs as the means through which this object might be accomplished, has been recognised from early times. A society without legislative organs is conceivable, and, indeed fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized state without judicial

organs and machinery is hardly conceivable. In the absence of legislative organs the courts might apply rules derived from other sources, for example, from their own previous decisions or from customs, as they did, in fact, in many early communities, but it is impossible to imagine any satisfactory substitute for courts of justice. "It is indensable", said an eminent American jurist, "that there should be a judicial department to ascertain and decide rights, to punish crimes, to demonstrate justice, and to protect the innocent from injury and usurpation."<sup>2</sup>

In order to enable the superior courts of a democratic country to perform their basic role the tenure of their office as well as terms and conditions of their office are usually protected by statutes in the constitution itself. If, they are to hold office "court during the pleasure of the President" i.e. the executive, there cannot be really any independent judiciary. We, therefore, find that while most of the other public servants, civil or military, hold office 'during the pleasure of the President', the judges hold office while they are of "good behaviour" - i.e. not guilty of any crime known to the law - and their tenure is, therefore, not subject to the fluctuations of electoral results as are the other two branches of government.<sup>3</sup>

There are, however, few exceptions to this rule of permanent tenure of the judiciary such as in Switzerland and in cases of some lower courts in the United States. But generally speaking, we may say without fear of being contradicted that independent judiciary is secured in a modern constitutional state by providing elaborate provisions in the constitution itself



relating to its permanent tenure and unalterable terms and conditions - there may be changes in conditions such as salary, housing etc. favourably but not adversely.

#### Origin of the Power of Judicial Review

It is in the United States of America that the power of the judiciary to declare any law of the legislature or any order/action of the executive as unconstitutional or ultra vires originated. The power of judicial review was not originally provided in the United States Constitution but it grew out of a famous case - *Marbury v. Madison* in 1803 by Chief Justice Marshall.

#### What does the part of Judicial Review implies

An American scholar, Henry J. Abraham has explained it nicely:-

"Briefly stated, judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based on a law, or any other action by a public official that it deems - upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law as well as judicial self-restraint to be in conflict with the basic law, in the United States, its constitution. In other words, by invoking the power of judicial review - which, of course, may "approve" as well as "veto" - a court applies the superior of two laws, which at the level

of the federal judiciary of the United States signifies the constitution instead of legislative statute or some action by a public official allegedly or actually based on it."<sup>4</sup>

Another American author, Christopher Volfe, had given us a resume of what he calls the "rise of modern judicial review". He divided the evaluation of judicial review in the United States into three stages - the first stage which he calls 'traditional era' begun from the establishment of the United States Constitution in 1789 until sometime in late 19th century. During this period he is of the opinion that judicial review was simply giving preference to the rule of constitution over any legislative or executive act that conflicted with it.

Then he, gave the second stage of judicial review, when according to the author, the Supreme Court (with widespread support in the legal profession) adopted particular understanding of the property rights guaranteed by national law, that of "laissez-faire" capitalism. On the basis of that political philosophy, it struck-down many attempts to regulate economic affairs in the period from 1890 to 1937.<sup>5</sup>

The transition from the second to the third era of American judicial review was also partially obscured. That a dramatic change had occurred in 1937 no one doubted - it was a "constitutional revolution, ltd.," as the noted legal commentator, Edward Corwin, called it. In the years immediately preceding 1937, the Supreme Court had employed the due process

clause and the commerce clause to strike down a good deal of state legislation, and more important, significant chunks of the New Deal. In 1937, after Franklin Roosevelt's court-packing proposal - the court swang about and upheld controverted legislation, and, afterwards, its ranks swelling with Roosevelt appointees, it virtually abdicated serious review of economic regulations."<sup>6</sup>

The power of the judicial review in the United States has been resented, criticised and even attempts were made to curtail it or to modify it, in recent years. As a result of the power of judiciary, the judicial organ in the United States sometime is described as having three chambers :- (1) House of Representative, (2) Senate, and (3) the Judiciary. It is also alleged in certain quarters that a nine-man judicial body can frustrate peoples' will as expressed by the Congress. It is also alleged sometime as an instrument of conservatism, anti-liberalism but nothing has yet changed successfully affecting its authority or power.

On the contrary it has spread to constitutions of many other countries including those of Third World Countries - India and Pakistan are two such instances in our own sub-continent. It has usually been adopted in federal constitution where judiciary act as an umpire in any dispute over all authority between federal government and the federating units but even in non-federal countries like France under 5th Republic it has penetrated, though not in the same way as in the United States. So, we may

conclude this part of our discussion by pointing out that an independent judiciary with power to interpret the constitution and to protect the fundamental rights of the citizens is a common and striking feature of modern democratic state. Now we turn to examine the judicial system of Bangladesh since 1972.

### **Judiciary Under the Original Constitution, 1972**

In the preceding pages we have pointed out the importance of the judiciary in any form of constitutionalism or democracy. The most reputed sociologist of modern time, R.M. MacIver tells that in all the democracies judicial institution plays a significant part for the spirit of democracy lies in the fundamental law, the law that elevates community above the state. He rightly tells, "We do not define democracy by its spirit since democracy is a form of government but men have struggled for democracy not for the sake of form but for the way of life that it sustains."<sup>7</sup>

In our sub-continent we find that independence of judiciary occupies a principle which is cherished and valued by the people. It is perhaps one of the beneficent legacies of the British justice or rule of law as Dicey describes. "In undivided Pakistan, we find that while democratic institutions like legislature or executive had been subjected to many limitations and had to face strains and stresses under the form of direct military rule or indirect constitutional autocracy as introduced by Ayub Khan in the 1962 Constitution but judiciary had been, on the whole, the lesser casualties of the authoritarianism even

under the "controlled democracy". Even in Ayub Khan's 1962 Constitution, we find that judiciary was given a respectable place.

In Bangladesh when the people, the then East Pakistanis were struggling for a separate state of their own, independence of judiciary was stressed again and again. In the original 1972 Constitution, we find (under article 22) that independence of judiciary was emphasized clearly. It laid down that the state must ensure the separation of judiciary from the executive organ of the state - an idea originally conceived by the British. Oversight of an independent and effective judiciary can play havoc in restraining the arbitrary actions of executive in a country like Bangladesh with a legacy of strong executive. Two factors have created impediments in creating an independent and efficient judiciary : (1) the judiciary in Bangladesh has been intermittent and adhoc, i.e., like the other political institutions of the country, its gradual evolutionary process has been interrupted and disrupted by imposition of authoritarian rule in 1975 and Martial Law in 1975 and 1982. This was, however, not visualized by the framers of the 1972 Constitution.

On the contrary when Bangladesh was engaged soon after its liberation in framing a constitution the idea of an independent judiciary was almost a foregone conclusion. It was felt that for too long the people of Bangladesh had been deprived of their Fundamental Rights -- previously under the British and then under the Pakistanis. A new era was to begin as the Judiciary was

thought to be a vehicle of enforcing the Fundamental Rights as well as helping executive to carry out the social revolution within its constitutional ambit. Part VI of the original 1972 Constitution dealt with the judiciary. While there was unanimity about an independent judiciary there was, however, certain issues which had to be decided. Both in India and Pakistan Federal Constitutions, elaborate provisions were made to ensure an independent judiciary.

In a federal constitution judiciary has added role; a Federal Court is an essential ingredient in a Federal Constitution. It acts as the guardian of the constitution because in a Federal Constitution the task of umpiring the constitution is vested in judiciary. It acts in a dispute between Federation and Federating Units with regard to jurisdiction of the authorities of Federation and that of Federating units. Division of powers, both legislative, financial and administrative powers, is a fundamental characteristic of a Federal Constitution. Judicial interpretation in a Federal system has great impact on developing and unfolding a Federal Constitution as it has happened in the USA, Canada and in many other federal constitutions.

But Bangladesh has from the beginning been established constitutionally as an Unitary Government. It was therefore felt and not without justification that the country need not have two establishments as Supreme Court and High Court. In order to reduce the complexity and expenditure Bangladesh therefore opted for one Supreme Court with two divisions :- One Appellate and the

other High Court. The former was to act as the highest court and the High Court Division would exercise the function of the former Dhaka High Court of the Pakistan judicial system. Therefore the judicial system as introduced in 1972 constitution was simpler and less expensive as compared to the judicial system in undivided Pakistan :- there would be only one Chief Justice of the Supreme Court as a whole. The Chief Justice and the other Judges of the Appellate Division would sit only in that Division and the rest of the Judges were to sit in the High Court Division.

As we have pointed out in our introductory remarks on judiciary that independence of the judiciary can only be secured by the method of its selection, its tenure and other terms and conditions of the services. A judiciary cannot perform its independent role if its tenure is dependent on any of the two other branches of the government namely executive and the legislature. The usual provisions to ensure the independence of the judiciary are as follows :

- (1) The salaries and pensions of the judges of the Supreme Court, its officers and servants, and its administrative expenses, are not subject to the vote of the Assembly; they are charged on the Consolidated Fund;
- (2) Judges remain in office until a certain age. In the U.S. the judges are appointed for life but in Indian sub-continent -- that is not the tradition;
- (3) The remuneration and conditions of service of the judges of

the Supreme Court and High Court may not vary to their disadvantage after the appointment; their conduct may not be discussed in the legislature, except on a motion to remove a judge of the Supreme Court;

- (4) Immunity of the judges i.e. conditions for removal etc.;
- (5) An ex-judge forbidden to practice in bar but he could be appointed Attorney-General, Advocate-General, or provincial Governor.

These provisions ensure that a judge is dedicated to his office; his opportunities to other walks of life thus limited; his judgment is less likely to be influenced by considerations of personal advantage.<sup>8</sup>

Article 95 of the 1972 Constitution provided that the Chief Justice and other Judges were to be appointed by the President. Article 96 provides that the Judge shall hold office until he attains the age of 62 years. It further laid down that a Judge would not be removed from office except in accordance with a statutory provisions of Article 96 which stipulated that :

(2) A judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament. On the ground of proved misbehaviour of incapacity.

(3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a judge.<sup>9</sup>



So we find that the tenure of the office of Judges had been properly protected and Judges would in fact hold the office during the terms of "good behaviour". This is the usual expression for protecting the tenure of Judges.

As regards the jurisdiction of power of the court it was provided in Article 101 and 102 which laid down that the High Court Division shall have such original Appellate and other jurisdiction and functions as are or may be conferred by the Constitution.

Article 103 provides "The Appellate shall have jurisdiction to hear and determine appeals from judgment decrees, orders or sentences of the High Court Division." The usual criteria for an appeal to the Appellate Division from High Court Division were laid down in Article 103, sub-section 2.

Article 106 gives "Advisory jurisdiction" to the Supreme Court. It says if at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President. This 'Advisory jurisdiction' has never been used at all by the President in Bangladesh whereas in India as early as in 1950, President Rajendra Prasad sought Supreme Court's "Advisory jurisdiction" with regard to Hindu Penal Code which was pending before the Parliament.<sup>10</sup> The

Indian leadership, thus, from the beginning stressed on the importance, status and practices of their Court System; an element vital in establishing an impartial, objective, independent and courageous judicial institution.

A highly important role of the judiciary is to protect the fundamental rights of the citizens of the country by exercising what is known as *writs* jurisdiction including *writs* in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quowananto* and *certiorari* or any of them. In undivided Pakistan the Interim Constitution as under the Government of India Act 1935 as adopted under the Indian Independence Act 1947 the judiciary had no *writs* jurisdiction but on July 6, 1954 an amendment was made to the Interim Constitution by which the High Courts were given *writs* jurisdiction. As a result of this new jurisdiction the court could order in person, authority, government to do anything or refrain from doing anything for any purpose. It was rightly described as foundation of rule of law in undivided Pakistan.

In case of Bangladesh, 1972 constitution had provided much-desired *writs* jurisdiction but there was a saving clause under Article 47 :

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

(a) the compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof

whether temporarily or permanently.

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

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

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to

be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution:

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

#### **First assault on the independence of Judiciary in Bangladesh**

A dictatorial regime and independent judiciary are not compatible. In fact, they are anathema -

So when Sheikh Mujibur Rahman introduced through Fourth Amendment of the constitution a one-party dictatorship and buried the parliamentary democracy in January '75 judiciary was also a victim of authoritarianism. Major changes were made in part-VI of the constitution which dealt with the judiciary. The tenure, powers, functions etc. of the Supreme Court were drastically changed in order to bring it in tune with the dictatorial regime set up as a result of the Fourth Amendment, we have noted that under Article 22 of the original 1972 Constitution there was separation of judiciary from the executive.

Now the entire system relating to the judiciary of the country was mutilated for sake of newly-established dictatorial regime. The Article 95 were changed with the following words :-

"Chief Justice and other judges shall be appointed by President. The original provision was that while Chief Justice were to be appointed by the President, the other Judges would be appointed by the President after consultation with the Chief Justice." Now the words "after consultation" with the Chief Justice were removed.

Far more serious was the new system of removing the judges. We have pointed out that judges cannot perform their independent role unless they are assured of their permanent tenure. If the judges like other public servants were to hold office during pleasure of the President then there can not be any independence of judiciary. That is why, article 96 provided a very rigid procedure for removing any judges. But the Fourth Amendment, removed those safe-guards for the tenure of the judges and simply provided that the "judges may be removed from his office by order of the President on the ground of misbehaviour of incapacity." A provision was only added that the dismissed judge would be given reasonable opportunity of showing causes against his dismissal. Thus the permanent tenure of judges which is vitally needed for ensuring independence of the judiciary had gone.

The power and authority which were given to the Supreme Court in article 116 for the control and discipline of the Supreme

Court of the country including the power of posting, promotion etc. of Sub-Magistrate were taken away from the Supreme Court and were now vested in the President. Another unfortunate, curtailment of the power of the judiciary was with regard to Article 102 i.e. *writs* jurisdiction of the High Court division. In the original version of the Constitution the Supreme Court was given power for protection of Fundamental Rights by issuing *writs* but the Fourth amendment took away the power of the Supreme Court and provided for the creation of so called "Supreme Constitutional Court" for the enforcement of the Fundamental Rights. A author was pointing out :-

Mujib was aiming at establishing the old colonial system".<sup>11</sup>

Article 115 was amended by providing that appointments of personnel to offices in the judicial service or a magistrate exercising judicial function would be made by the President in accordance with the rule made by him on that behalf. The original provision that all these appointments were to be made in consultation with the Supreme Court had gone. Similarly the power and control and discipline of the lower courts which were vested in the Supreme Court was now vested in the President "in accordance with the rule made by him in that behalf".

After making all these restrictions about the tenure, powers and functions, and role of the judiciary, a new clause was added. Article 116A which laid down that "subject to the provisions of the Constitution all personnel employed in the judicial service

and all magistrate shall be independent in exercise of their judicial function". So we find that with the emergence of a one-party dictatorship under the Fourth amendment the independence of the judiciary had also gone.

#### **Judiciary under the First Marshal Law Regime in Bangladesh**

Judiciary and rule of law are complementary and go hand in hand. Now Marshal Law means, in a sense, negation of Rule of Law. Therefore, Marshal Law and independent judiciary can not co-exist. Bangladesh had a series of military coups and counter coups between August 15 and November 7 of 1975. During this period there was total chaos and confusion; finally after the coup of November 7, 1975, a somewhat stable regime emerged. Although a civilian justice Abu Sadat Mohammad Sayem became the President, the real power holder was the Chief of the Army Staff Major General Ziaur Rahman.

As it is customary that when the Marshal law regime is established in a country a provision is made for the continuance for all existing laws and order as long as they do not conflict with any of the Marshal Law regulations or orders. A number of Proclamations were made soon after the imposition of Marshal Law by the Proclamation of August 28th of 1975 which is known as Proclamation of Order No. 1 of 1975. The Second Proclamation was issued on November 6th, 1975 - these two Proclamations were made by Khandaker Moshtaque Ahmed who became the first Marshal Law Administrator after the overthrow of the Mujib regime. The Third Proclamation of November 8, 1975 was made by new Chief

Marshal Law Administrator and President, Justice Sayeem. Between November 8th, 1975 and 28th May, 1976 as many as eight Proclamations were issued. The proclamation of the 28th May '76 which is also known as "7th Amendment Order of 1976", some important provisions were made relating to the judiciary as well as power of the judiciary to enforce Fundamental Rights. Under this 7th Amendment Order of 1976 it was provided that there shall be a Supreme Court of Bangladesh which would consist of a Chief Justice and other judges. Chief Justice of a Supreme Court would be appointed by the President but other judges would be appointed by the President "after consultation with Chief Justice". Under this amendment the Chief Marshal Law Administrator, Justice Sayeem revived most of the provisions of original 1972 Constitution relating to the judiciary including its permanent tenure, status, powers, functions etc. The judiciary was also given the power to enforce Fundamental Rights. But as the country was under Marshal Law, Marshal Law courts also continued to exercise powers. It was only after the ending Martial Law by late President Ziaur Rahman in 1979 that judicial system was on the whole revived in accordance with the provisions of original version of 1972 Constitution. The Tenth Amendment Order of 1977 issued on 27th November '77 provided elaborate provisions relating to the judiciary under Chapter-I; Articles 94 to 130. Let us now discuss role of judiciary under Zia's new political order.



### judiciary Under Zia Regime

When late President Ziaur Rahman was engaged in reshaping or rather re-establishing democratic process in Bangladesh in 1977-78, he removed many of the undemocratic provision of the Constitution as a result of the Fourth Amendment made by late Mujibur Rahman in 1975. We have already discussed in preceding pages the curtailment of the role, status, tenure, powers and function of the judiciary under Mujib's Fourth Amendment.

It was, therefore, obvious that when President Zia was in the process of withdrawal of Marshal Law and restoring some sort of constitutional government he had to turn his attention to judiciary. In fact, the 10th amendment order of 27th November, 1976 (2nd Proclamation Order No. 1 of 1977) Chapter No. 1, one of the orders dealt with the judiciary. He restored more or less Articles 94 to 113 of the original version of the 1972 Constitution. But we must hasten to add that Zia in his version of limited or controlled democracy had made certain changes effecting the judiciary. For instance under Article 95 of the original 1972 Constitution it was provided that President would appoint other judges of the Supreme Court "after consultation with the Chief Justice". In Zia's version of the Constitution the significant words "after consultation with the Chief Justice" were dropped. It means that President alone would appoint Chief Justice and other judges. In a true democracy President usually appoints the Chief Justice but other judges are appointed by the President either after consultation with the Chief Justice or on

the recommendations of the Chief Justice. Similarly confirmation of a Judge or Additional Judge was made an exclusive prerogative of the President. Again, in a democratic polity the confirmation is usually done if recommended by the Chief Justice. But recently, non-confirmation of an Additional Judge of the High Court Division of the Bangladesh Supreme Court by the President inspite of Chief Justice's recommendation demonstrated executive's interference into judiciary.<sup>12</sup> To ensure judiciary's independence a Parliamentary Judicial Committee should be formed in order to investigate the reasons for the government's negative decision.

Similarly, with regard to the tenure of the judges of the Supreme Court the 1972 Constitution provided "a judge shall not be removed from his office except by an order by the President passed pursuant to a resolution of parliament supported by a majority or not less than two third members of the parliament on the ground of proved misbehaviour or incapacity". Zia on the contrary made the tenure of the judges dependent on a body called "Supreme Judicial Council" which would consist of the Chief Justice of Bangladesh and the two next senior judges. The functions of the Judicial Council under Zia's political order would include - (a) to prescribe a code of conduct to be observed by the judges, (b) to enquire into the capacity or conduct of a judge.

This Council, was to make any recommendation to the President about misconduct of any judge and then the President alone could

remove the judge. Again, we feel that this is a provision adversely effected the independence of the judiciary. If judiciary have to be separated from executive and if it were to function independently than President or executive should have not any say in the matter of tenure of the judges. In a democratic state a judge holds office, as we have pointed out in our introductory pages "during good behaviour", now under Zia's political order President who alone could appoint Chief Justice and other judges and was also given power to remove a judge though with the help of a judicial council. This, we feel, was a departure from the principle of separation of judiciary from the executive and it might have affected the independence of judiciary. As regards other provisions relating to the judiciary under the original 1972 Constitution, Zia retained almost identically all other provisions.

The writs jurisdiction of the court were also retained with same qualifying clause "as under article 47" was retained. So we may conclude that judiciary under Zia's political order were somewhat freed from the restricted clauses and provisions as were imposed under the Fourth amendment of Mujibur Rahman in January, 1975.

#### JUDICIARY UNDER ERSHAD REGIME

As we pointed out in our discussion on the legislature and the executive that President Ershad who overthrew a civilian regime and imposed Second Martial Law regime had to make very little changes with constitutional structure of the country. He

inherited an all-powerful execution in a presidential system and a "lame and tame" parliament from his Marshal Law predecessor, Ziaur Rahman.

Similarly, with regard to judiciary also he had not made any amendments or changes. Yet Ershad, through 8th amendment introduced in January '88 wanted to make some changes in judicial system of the country. Under this amendment it was provided that while Supreme Court would have its permanent sit at the capital city of Dhaka, the High Court division would have permanent branches at Comilla, Chittagong, Barisal, Jessore, Rangpur and Sylhet. These branches at the various district headquarters would be composed of such number of judges as the chief justice of Bangladesh would decide from time with Chief Justice would confirm such powers and responsibility on those branches. Further Chief Justice would regulate the rules and procedures of these branches.

This particular amendment of the 8th Amendment raised hue and cry among the lawyers of the country who challenged the amendment in the law court. The supreme Court verdict was such "fundamental" changes in the structure of the judiciary could not be made by 'ordinary' amendment. Therefore, it was declared invalid. Many have compared the decision of Bangladesh Supreme Court with that of Indian Supreme Court which in its historic decision of *Kesavananda* case in 1973 declared that no part of the Constitution could be amended by an Act of Parliament so as to alter the "basic structure and framework" of the Constitution.

This analogy is, however, not fully correct. The Indian Supreme Court, through the decision on *Kesavananda* case, tried and successfully established its role as guardian and interpretator of the Constitution. It upheld 24th Amendment that the Parliament indeed had the right to amend the Constitution and partially acknowledged 25th Amendment on the same basis but stressed that any amendment of the Constitution be subjected to judicial review.<sup>13</sup>

But the verdict of the Supreme Court on the Constitution (Eight Amendment), 1988, regarding the structure of the Court System, was more due to the pressure created by the lawyers of the country than Court's insistence on its role as the guardian and interpretator of the Constitution. This view is substantiated by the fact that the Constitution (Fourth Amendment), 1975, which changed the fundamental character of the Constitution in totality, was never challenged in the law court. The decision of the Supreme Court on the Eighth Amendment, however, challenged for the first time a politically motivated decision of the executive (as the 1972 Constitution had already provided that though the permanent seat of High Court would be in Dhaka but the judges of the High Courts were to sit in circuit in major cities of Bangladesh) and was successful in checking such arbitrary move.

#### **Judiciary under the new Parliamentary System**

As a result of the Twelveth Amendment of the Constitution in September 1991 country's executive system was changed from

presidential to parliamentary system. We have discussed it fully in our discussion on the execution and the legislature. The Twelveth Amendment have not made any change with regard to judiciary. Judiciary remains same as under Zia's political order which we have discussed above. While discussing judiciary under Zia we pointed out that Zia made significant changes in Article 95 regarding appointment of judges. Original 1972 Constitution have provided that President would appoint Chief Justice but other judges would be appointed by the President "after consultation with the Chief Justice". This significant words were dropped by Zia. A bill has been introduced in the parliament as a Private Members Bill to restore these words - "after consultation with the Chief Justice". The bill has not yet been passed at the time of writing our work. We feel that it is a desirable change and hope that it is approved by the parliament.

### **Fundamental Rights**

In the first section of this chapter of our work, we have shown, that one of the fundamental functions of judiciary in a modern democratic state is to protect and implement the basic rights of the citizens as usually given in the Constitution itself. In this connection, we have also referred to the *writs* jurisdiction of the judiciary which is considered as an effective weapon for enjoyment of Fundamental Rights by the citizens.

We now in the second part of this chapter will give a fuller

and comprehensive accounts of the Fundamental Rights as provided in the Constitution itself. We shall begin our discussion with the concept and evolution of Fundamental Rights as it has become a usual phenomenon in a modern democratic state.

Fundamental Rights enunciated in Part III, of the 1972 Constitution form an operative section of the charter. Before we discuss the rights enumerated in that section, let us give a brief resume of the origin of such rights.

The British Bill of Rights (1689), Declaration of American Independence (1776), and the French Declaration of Rights of Man (1789) have brought the idea of natural rights into the realm of constitutional realism. Since then most modern constitutions include a list of Fundamental Rights of the citizens which are to be kept free of government interference. These ideas are based on the concept of natural rights which evolved from natural law, preach that human beings are born with certain inalienable rights. These rights basically 'related to man's very being and dignity' existed 'prior to state' i.e. before the formation of political community as such cannot be encroached by the state authority. They are called 'subjective rights' and "are not conferred by the state, but are possessed by the individuals against the state".<sup>14</sup>

This seventeenth-century Lockean idea of natural rights - 'life, liberty and property' and the theory of 'social contract' not only kept these rights outside the purview of the government

- but introduced a new dimension which checked not only re-enforced checks against the Royal absolutism but successfully put restraints on the governmental authority - both legislature and executive. The very fact that the state is not allowed to encroach on the 'inner core of human dignity' - make the concept of natural rights synonymous with limited government whose fundamental task is to provide safeguards to protect the personal sphere of the individuals. The basis of all the basic institutions, civil and political needed for a free society are provided by the doctrine of natural rights of individuals enforceable through constitutionally enshrined mechanism.

The Lockean concept of right to 'life, liberty and property' transformed into civil liberties which granted many other rights to the citizens. As such the concept of rights of the citizens kept changing along with changing socio-economic needs of the society. In the twentieth century, the concept of human rights have gone through more radical transformation. They are now synonymous with freedoms suggested in Rooseveltian proclamation which are mostly economic and social in nature and need collective and governmental efforts.<sup>15</sup> Every state perceives the need to guarantee these civil, political and social rights vital for creating conducive conditions for the development of potentialities of human beings essential for democratic polity.

So, paradoxically, with the growth of state - it is the state which began to set limit or restrict some of the rights for the interest of the collective community. The concept of any



political authority in regulating the fundamental rights was the contribution of English jurisprudence, Blackstone, who categorised these rights into absolute rights and relative rights. Thus, he wrote that "The principal aim of society is to protect individuals in the enjoyment of these absolute rights ... the first and primary need of a human laws is to maintain and regulate these absolute rights but the civil liberty is not other than natural liberty so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the Public."<sup>16</sup> Thus state is not only entrusted with the task of limiting these rights in order to serve collective good but is also in the same token asked to provide mechanism to protect the 'subjective' or 'absolute' rights. This ancient doctrine of natural rights has now manifested in the Declaration of Human Rights by the United Nations on December 10, 1948.

Insertion of these rights and its catalogue vary from country to country. According to K.C. Wheare, an ideal constitution should "contain few or no declaration of rights, though the ideal system of law would define and guarantee many rights."<sup>17</sup> But such assumption or conclusion may not be applicable to all countries in general. The constitution of England is neither codified nor written but the natural rights of Englishmen have been declared in the form of Magna Carta (1215), Petition of Rights (1628), Bill of Rights (1689). English traditions, conventions, usage and the long history of the evolution of English Constitution

have molded English aware of individual rights which have been asserted from time to time are as sacred and inviolable than constitutionally written charters of many newly emergent nations. As Professor Dicey put it that in other countries "individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals."<sup>18</sup>

The Constitution of the United States pioneered the insertion of Fundamental Rights in the form of organic instrument. But initially, there was no Bill of Rights in the original Constitution of 1787 though there were certain specific limitations because it was assumed that the very nature of the Constitutional Government automatically guaranteed those 'inalienable rights'. Eventually the Bill of Rights was adopted at the time of ratification of the Federal Constitution in 1789. Since then, it is a common practice to include fundamental rights as operative part of the constitution.<sup>19</sup> This practice is all the more imperative in a country where there is lack of political maturity, strong public opinion and long tradition of authoritarian rule. Inclusion of fundamental rights is not enough, the mechanism through which remedies can be sought, have become essential.

According to Professor K.C. Wheare, insertion of fundamental rights can be an immensely difficult task for the framers of the

constitution. If they are not inserted, there is a possibility of non-acceptability of the constitution due to the alienation of certain sections of the society where it is also difficult to define the nature and extent of these rights if significant and realistic goals are to be achieved. He goes on to say that the absolute rights of the citizens are liable to create impediments for the working of an effective government. Hence in most constitution - declaration of rights are specified with certain qualifications."<sup>20</sup>

The framers of the Constitution of Bangladesh while inserting Fundamental Rights were faced with a peculiar dilemma. All throughout Pakistan period - (1956, 1962 constitutions) - the Awami League leaders, who were in the opposition, were critical of the restrictions on Fundamental Rights enunciated in the Constitutions of 1956 and 1962 as evidenced by Mujib's complaint in the Constituent Assembly of Pakistan, 1956, that the draft constitution had made a mockery of Fundamental Rights with the provisions of "subject to any reasonable restrictions imposed by law in the interests of the security of the state".<sup>21</sup>

But while Mujib and his associates were at the helms of the country, perhaps, could see the practical difficulty in administering a country, and could not provide anything spectacular in guaranteeing these rights of the citizens. As such the Fundamental Rights enunciated in Part III of the Constitution are heavily borrowed from the Constitutions of Pakistan (1956, 1962) and Indian Constitution. And as expected,

they are restricted with familiar qualifications.

Keeping in line with the constitutions since World War II, the rights granted were the usual liberties like equality of status, opportunity and religion before law, personal liberty of life, protection of law, safeguards against arrest or detention, trial and punishment, social, economic and political justice, freedom of expression. Bangladesh being a homogeneous country was spared from making elaborate provisions for minority rights as enunciated in the constitutions of India and Pakistan. Manobendra Larma of Chittagong Hill Tracts expressed dissatisfaction at the lack of such provision and said that the Constitution of Bangladesh did not reflect the hopes and aspirations of the tribal population of the Chittagong Hill Tracts. He proposed to incorporate in Article 47(A) that Chittagong Hill Tracts should be autonomous so that the tribal population could establish their political, economic, social and religious rights.<sup>22</sup> His plea was rejected because it was assumed to be against the principle of Bengalee nation. Subsequently, however, Bangladesh was confronted with severe minority problems.

Article 27 unmistakably established English idea of legal equality or of universal subjection of all classes of one law administered by the ordinary courts as well as equal treatment by law in all sphere of public life. The legal aspect of this doctrine is fundamental in any country which is governed by Rule of Law. It is manifested in Article 29 which guaranteed equal

opportunity in public employment. Article 28 stipulated no discrimination 'against any citizen on the grounds only of religion, race, caste, sex or place of birth' which indicated state's endeavour to grant social justice which was further illustrated in sub-clause 3 declaring non-discrimination with regard to access to public places. Keeping in line with the same objective - sub-clause 28(4) and 29(3)a allow the state to give special privilege in favour of women and children and give special provisions for the backward section of the society in order to make ideal of social justice truly meaningful. Article 34 abolished all forms of forced labour.

Right to personal liberty is synonymous with inalienable natural rights to life, liberty and property. As pointed out earlier, the concept of personal liberty transformed along with changing needs of the society and consequently right to property was restricted due to the collective benefits. This has been evidenced in Bangladesh Constitution wherein Article 42(1) gave right to property with qualifications as sub-clause (2) stipulated right to property save in accordance with law 'for the acquisition, nationalisation or requisition with or without compensation' - whereas both in India and Pakistan provided laws for compensation in case of acquisition or requisition. This provision can be considered a fundamental step towards the implementation of Directive Principle of State Policy. It was expected from the leadership of Bangladesh as evidenced in the

debates of Second Constituent Assembly in which "while the big landlords from West Pakistan defended landlordism, the members from East Pakistan sought to bring amendments providing for the abolition of feudalism and landlordism even without compensation."<sup>23</sup>

Inner core of Fundamental Rights - a person's right to life and liberty is enshrined in Article 32 qualified by 'in accordance with'. This right indicate the absence of arbitrary powers of the executive and individual right to liberty thus stipulate "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."<sup>24</sup> Thus, for protection of individual liberty - a citizen would have right to the protection of law, not be kept in custody without ground of arrest, not be denied the right to consult and be defended by a legal be, have to be produced before the court within twenty-four hours of arrest and not detained further without the order of the court.

Article 311, 33 (1), (2) are all in accordance with the law. Similar provisions are found in Indian Constitution (15-22) as well as Irish Constitution, 1937 (40-44).

The fundamental task of a democratic government is to bring a social equilibrium of various interest groups through negotiations and compromise. Only a mature public opinion achieved through participation and discussion is capable of bringing such equilibrium. Without the freedom of expression

i.e. freedom of assembly, association, speech, press - there can not be any mature public opinion which is regarded as the concomitant of any constitutional government.

The Constitution of Bangladesh provide such provisions i.e. freedom of movement, assembly, association, thought, conscientiousness and speech, profession, religion and protection of home and correspondence. They are, however, restricted by the interests of : (a) public interest; (b) public order or health; (c) public order and morality; (d) security of the state, friendly relations with foreign states; (e) decency; (f) in relation; (g) defamation and (h) incitement to an offence. Granting these political rights of the citizens in contradictory terms is a common practice of the modern constitutions. It is argued that granting these rights in absolute form in countries where public opinion is not articulated can pose serious problems. In a country like England where 'general principles of the constitution regarding individual right are due to the decisions of the judicial courts, imposition of such restrictions are not required.' But it cannot be denied that there can be enormous difficulty in enforcing such rights with restrictions.

Mere insertion of Declaration of Fundamental Rights, however, does not guarantee the rights of the citizens unless constitutionally enshrined mechanism is provided to make these rights effective. For the enforcement of these rights - Article (1), (2) gave power to the Supreme Court and High Court within

their respective jurisdiction to issue certain writ - like *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* to enforce these rights enunciated in the Constitution. The lone opposition member alleged that the Constitution had not sufficiently empowered the courts to enforce the provisions for Fundamental Rights; as such "rights were given to the people in one hand snatched those away from the people in ten hands".<sup>25</sup> Law Minister Kamal Hossain while defending the draft constitution bill which was ultimately adopted, said that by demanding such provisions the opposition was "undermining the supremacy of the Parliament and hence the people."<sup>26</sup>

In essence what was implied was that when all these rights are in accordance with law - its effectiveness is dependent upon the law of the land. As Professor K.C. Wheare, after pointing out the examples of a number of democratic constitutions, said, "it may be asserted that these and similar declarations in other constitutions of rights which may not be restricted except in accordance with the law, are in practice effective because the law confers no arbitrary powers upon the execution," whereas the Constitutions of Soviet Union (1936) and Yugoslavia (1946) which guaranteed unqualified rights but is not effective because "the law in Soviet Union or in Yugoslavia is not so restrictive of the powers of the executive."<sup>27</sup>

The opposition allegation is, however, applicable with regard to Article 47 (1) and (2) which is inconsistent with the concept



of Article 26. Sub-clause (1) of Article 47 stipulated that existing or amended laws regarding this part of the Constitution would be not regarded void even if they are inconsistent with provisions of Article 26 or took away or abridged any of the rights guaranteed by that part of the Constitution. Similar provisions are found in Article 31(c) of Indian Constitution. The framers were of opinion that abridgment of certain fundamental rights were necessary in order to give effect to any of the Fundamental Principles of State Policy contained in Part III of the Constitution.

More serious type of provisions which took away or abridged some basic Fundamental Rights are contained in Article 47 (2) which stipulated saving certain laws, specified in First Schedule made during the interim period and before the commencement of the Constitution. It made provisions for not only saving certain laws but provided saving of amendments of such laws with retrospective effect. Suranjit Sen Gupta pointed out that the Presidential Orders specified in First Schedule which have been incorporated in the Constitution were the Proclamations of Mujibnagar Government. They could be accepted, he continued, if they were passed in the Parliament. He further added that there is no such instance in this regard. Saving of certain laws made during the interim period and before the commencement of the constitution is not, however, uncommon as enunciated in Article 31(B) of Indian Constitution specified in the Ninth Schedule. But the nature and character of those laws

are different as they are mostly directed towards social justice. Whereas certain laws specified in the First Schedule certainly took away or abridged some basic Fundamental Rights Mr. Sen Gupta proposed that Order No. 9, 16, 50 and 67 should be discarded as they abridged rights of the government official, right of property which is usually settled through law courts and thereby giving government to patronize the party workers, power to government to harass and imprison political workers, provided new weapon against the service as they could be dismissed through screening. He compared them with those order with those kept in Pakistan Constitution which were later used to exploit the people.<sup>28</sup> There is no doubt that saving laws specified in First Schedule took away or abridged some basic fundamental rights. It should, however, pointed out that the Constitution did not include any emergency provision like that of Pakistan under Article 191 and Article 352 of Indian Constitution under which fundamental rights could be suspended.

We have already stated the rationale and background of incorporation of a lengthy list of Fundamental Rights in our Constitution - (Part. III of the Constitution.) After the bitter experiences of living under "controlled democracy", "martial law regimes" "constitutional dictatorship" people of Bangladesh after independence were naturally anxious to establish a "free life in a free society" and in order to achieve this goal, incorporation of Fundamental Rights in the Constitution was regarded as essential. The framers of 1972

Constitution seemed to prefer Fundamental Rights without any safe-guards in the form of preventive detention, or security act and suspension of Fundamental Rights during a period of any emergency. So we find that in the original Constitution of 1972 there was, for instance, no provision for declaring state of emergency under which Fundamental Rights remain suspended and so also the power of the judiciary to enforce Fundamental Rights.

The framers of 1972 Constitution must have been exuberant that they could *really* fulfill their promise and been able to enact a Constitution without any "black laws". Most of the top ranking Awami League leaders were victims of such undemocratic laws during the Pakistani period. It was still vivid in their memories how the then West Pakistani ruling clique used those "black laws" to thwart the legitimate demands of the Bengalis and retarded the democratic process of the country.<sup>29</sup>

So we find that one of the significant characteristics of the 1972 Constitution was the absence of any provisions of preventive detention in the Article.33. Preventive detention is usually considered as inconsistent with the spirit of Fundamental Rights. Under any preventive detention a person can be arrested even before he commits any breach of law. A person may be held under preventive detention to "prevent" a person from committing any act even before he commits it. This is against the spirit of Fundamental Rights. Both in India and Pakistan there are provisions for preventive detention. The framers of the 1972 Constitution of Bangladesh, were noted for

their enthusiasm for building a really "free society". There was, therefore, no preventive detention or security act. Similarly, the provision for emergency situation was also regarded as inconsistent with the spirit of a free society. So both preventive detention and emergency powers were abolished in the original text of the 1972 Constitution. As Law Minister, Kamal Hossain pointed out that only a few countries' constitutions are without such undemocratic principles and Bangladesh was one of them. Unlike the rulers of the then Pakistan, the Awami League seemed determined to create an environment conducive for a free and democratic society. 30

But unfortunately, their exuberance was short-lived and this situation did not last long. Within a year and a half emergency provisions were added in the Constitution. Soon Security Act, Special Powers Act and several other restrictive measures were also adopted. The net result of all these new changes and additions, such as emergency powers, special power act, preventive detention, had affected the original idealistic concept of a free society from the legacy of the Pakistani period. By 1974, the Constitution came closer to the Pakistani Constitution rather of 1956 than an unqualified document for a free society.

Why did these changes take place? The critics of the Awami League Government alleged that the regime took steps to revert to 'colonial instruments' for maintaining the consolidating their powers. The fast deteriorating law and order situation as

well as desperate economic conditions made the Awami League Government afraid of facing any serious challenges to its undisputed authority which was the case in 1971-1972. Moreover, the Constitution may have been ideal but the existing situation, immediately following the liberation war, was far from conducive for the working of such liberal Constitution.

First, the impacts of liberation war were far-fetched. There were multi-farious ramifications of a bloody and brutal war. 31 Second, the traditions, conventions, political culture needed for the effective working of a highly sophisticated form of government like parliamentary system, were totally lacking in post liberation Bangladesh since democratic system was never allowed to take any roots in the soil of the then East Pakistan. Lastly, the dominance of Awami League (which captured 297 out of 300 in 1970 election and 282 out of 289 contested and opposition including independents secured only 7 seats in 1973 election) and its charismatic leader Sheikh Mujibur Rahman, heavily contributed to the degeneration of real parliamentary system into a brute majority rule. The country, since the commencement of the Constitution till Fourth Amendment which turned the country into one-party dictatorship, had a facade of parliamentary form of government but in reality powers were concentrated in the hands of the Chief Executive, on whom, the Parliament had neither any control nor did it want to exercise such control.

The situation was rather paradoxical. The ruling party had

undisputed dominance in the Assembly but was unable to control the fast deteriorating law and order situation as well as desperate economic conditions. The Government was also afraid to face any serious challenges to its undisputed authority as pointed out earlier, which was the case in 1971-72. Under such circumstances, within nine-months of the commencement of the Constitution, Second Amendment Bill was passed in September 1973 which amended Article.33 and added a new clause to Article. 31 and a new Part numbered IXA providing Emergency Powers to be exercised by the President of the Republic.

The insertion of a new clause "Nothing in this article shall apply to any amendment of this Constitution made under Article 142 "to Article. 26 postponed the Fundamental Rights provided by sub.clause (1) and (2) of the same Article. Article. 33 was amended to include preventive detention which allowed a person to be held in detention for no more than six months without the recommendation of any Advisory Board. The new chapter Part.XIA added three more Articles -- 141 A, 141B, 141C. Keeping in line with the Article.352 of Indian Constitution and Pakistani Constitutions of 1956 and 1962, these Articles gave powers to the President, if satisfied, to declare emergency for no more than six months unless extended by the Parliament. In order to further prevent the misuse of the emergency powers by the President, as it was done by Gulam Mohammed in early 1950s during Pakistani period, a proviso to Article 141C, which was subsequently omitted by Act.II, 1975, maintained that the

Proclamation "shall require for its validity the counter-signature of the Prime Minister". The power to declare emergency, thus, effectively lied with the Prime Minister. No such proviso is found either in the emergency provisions of the Constitutions of India or 1956 Constitution of Pakistan. However, 1956 Constitution of Pakistan and Indian Constitution (1949) both provided clauses which made the Proclamation subject to the approval of the Parliament whereas the National Assembly of 1962 Constitution had no such power to limit the time period of such Proclamation. As such, it was an improvement to check the emergency powers of the President had the situation called for one. Article.141B. suspended Articles.36,37,38,39,40 and 42 during the emergency and in addition provided that though the laws made during these period would "cease to have effect as soon as the Proclamation ceases to operate" -- the acts of commission and omission will remain effective. Article.141C suspended the rights of any court to enforce the rights conferred by Chapter.III i.e. Fundamental Rights and any such cases pending before the court will also be suspended while the emergency would be in effect.

Thus, the Awami League, champion of unfettered democracy and self-acclaimed crusader against any "black laws", was ironically, found itself to include the very same "undemocratic laws" in their cherished and ideal Constitution. The lone opposition voice was that of Ataur Rahman Khan who said that since Article 63(3) already provided the President the powers to

act in any way to deal with "armed rebellion" meaning internal disturbances -- they was no need for a new Part providing Emergency Powers to the said office. According to Khan "it was being introduced so that Fundamental Rights could be suspended" and he was against any such security act.<sup>32</sup> Whereas Law Minister Monoranjan Dhar maintained that all democratic countries have emergency provisions in their constitution to deal with emergency situation. It was one of the rules of any constitution, he added. He was then more specific and said that the situation in Bangladesh was such that declaration of emergency and temporary suspension of Fundamental Rights, if needed, were not incompatable with the national interests of Bangladesh.<sup>33</sup> What Monoranjan Dhar forgot to mention was that though there are such provisions in the constitutions of advanced democracies like in Britain or the France but those provisions are accompanied with qualifying conditions. President of France, for example, under Article.8, is entitled to declare emergency, as done by President De Gaulle in 1962 during agricultural crisis but the Assembly which was in recess, immediately reconvened to monitor the activities of the executive as well as assess the situation. Thus the assemblies of those countries work as watch-dogs over the executives and keep the electorates informed. There was no such provisions in the newly added Part.XIA of the Constitution.

It should be, however, noted that in theory emergency provisions, security or preventive detention acts are



undesirable and cannot be supported in any scheme for a true free society. But it has to be admitted that in the Third World new democracies of Afro-Asian countries face many challenges and dilemmas which are not usually the case in well established democratic countries like England or the United States. While we cannot support any idea of curtailment of individual freedoms or powers of judiciary in protecting citizens basic rights, it cannot be denied that some 'safety bulbs' are needed in the turbulent and emerging democratic states of Asia and Africa. In these new countries the fundamental rules of the democracy are not yet fully established. The ruling regime considers any opposition to the government as opposition to the state itself. While the opposition seem to fail to appreciate that opposition to the government is not as same as opposition to the state itself. They fail to make the proper distinction between opposition to the government and opposition to the state. Unlike the developed democracies -- the political culture of our people and leaders are not mature and the political elites donot practice self-denying ordinances."<sup>34</sup> As long as the basic rules of the game of the democracy are not fully developed, some safety bulbs in the shape of provisions of emergency or preventive detention may be unavoidable, however, regrettable they may be. But it was an undeniable fact that all these security acts were incompatable with the spirit of a free, democratic society. Whether democracy is possible in a country like Bangladesh was one question -- the incompatability is

another. The fact of the matter is Fundamental Rights granted in the Constitution were effectively retarded by such acts.

The situation in Bangladesh, however, remained unchanged. In spite of the provisions of preventive detention and emergency powers -- the law and order as well as economic conditions continued to deteriorate. According to former State-Minister Tahedruddin Takur, from January 1973 till November 1973, -- number of dacoities committed were about 5000 whereas the number of illegal arms and ammunitions recovered were 4000 and 3000 respectively.<sup>35</sup>

Faced with increasing challenges - the ruling party, with the help of one party dominated Parliament, got a number of bills passed which were more stringent and detrimental for a democratic society. The Printing Presses and Publication (Declaration and Registration), 1973, the Jatiya Rakhi Bahini (Amendment) Bill of 1974 and the Special Powers (Amendment) Bill of 1974 were the most outstanding ones of such nature.

Following the liberation war, the President's Order No. 21 of 1972 constituted Jatiyo Rakhi Bahini to assist the civil as the military forces in the maintenance of internal security of the country. Section 8 of the said Order stipulated that "Part 8(1). The Bahini shall be employed for the purpose of assisting the civil authority in the maintenance of internal security when required by such authority as may be prescribed; (2) The Bahini shall render assistance to the Armed Forces when called on by the Government to do so in such circumstances and in such

manner as may be prescribed; (3) The Bahini shall perform such other functions as the Government may direct.

The origin and nature of such a force is shrouded in controversy. Whereas the Government claimed that it was created to maintain internal security, general belief was that it was constituted at the behest of India whose main job was to eliminate anti-government elements under the cover of a law enforcing agency. The initial operation of the Bahini without any prescribed authority and its subsequent activities enhanced people's suspicion and distrust. It was assumed that Bahini was somewhat like a private militia who acted to terrorise and intimidate any opponents of the regime. By 1974, the nature, origin and role of the Bahini had become a subject matter of bitter criticism by the press and media.<sup>36</sup> It became a symbol of a repressive regime.

On January 28, 1975, a Bill entitled "The Jatiyo Rakkhi Bahini (Amendment) Bill, 1974" was brought in the Parliament to amend and add a new Article. The amended section 8 A (1), (2), (3) and addition of Article 16 A gave sweeping powers to Rakkhi Bahini to "arrest without warrant, search any person, places, vehicle or vessel, and seize anything found in the possession of such or in such place in respect of which or by means of which he has reason to believe an offence punishable under any law has been committed."<sup>37</sup> There was no doubt that the Awami League Government vested somewhat unfettered authority to Rakkhi Bahini with the possibility of wide scope of its misuse by the Bahini,

especially, when they could arrest anybody if they had only "reason to believe" that the individual had committed a crime. This meant that a "crime" could be speculative but the punishment could be administered on that speculation.

Addition of new Article 16 A made the Bahini's position even more invincible since the Article stipulated that "a suit, prosecution or other legal proceeding shall lie against any member of the Bahini for anything which is in good faith done or intended to be done in pursuance of this order or any rule made thereunder."<sup>38</sup> In effect, there were further erosion of Fundamental Rights and personal liberty.

Within a week of the passing of the Jatiyo Rakkhi Bahini (Amendment) Bill namely the Special Powers Bill, 1974 was passed without much resistance. The Bill was brought in the Parliament for the same old law and order problem and sought to "provide for preventive detention and speedy trial of effecting punishment of certain offences of grave nature, such as offences against the state, robbery, dacoity, sabotage, hoarding and black-marketing, illegal possession of arms and explosive and substances and offences committed being armed with fire-arms and explosive substances."<sup>39</sup>

In order to check the so-called law and order situation - clauses one through fourteen stipulated detention without trial, Detention without warrant for a maximum period of hundred and twenty days which could be extended if recommended by an Advisory Board provided by the Act. A person under detention,

however, must be charge-sheeted within fifteen days of his arrest. Though a person could not be detained more than hundred and twenty days but in practice, the Government could easily rearrest the individual and keep him under detention for another 120 days and so on.

As pointed out earlier, Parliament of 1973 was dominated by the Awami League - a strong Opposition needed for the working of a 'living democracy' was missing. A handful of opposition MPs led by Aaur Rahman Khan raised their feeble voices against the passing of such an Act. They refuted Law Minister Monoranjan Dhar's arguments, who by citing the number and nature of the crime committed between 1973-74, tried to convince the House that it was needed to bring the runaway law and order problem under control. But the Opposition was not convinced. They thought that country's penal code was enough to tackle the internal situation of the country. It was assumed that the Act was being enacted so that the pro-Awami League smugglers could be protected. The fact that the Government urged the army-officials who were ordered to collect unauthorised arms and stop smuggling, not to disturb the pro-Awami League groups, raised legitimate questions about regimes' real intentions.<sup>40</sup> As such it was assumed that the Act was politically motivated and "it would be used against the workers of the opposition parties and would be misused by the Government."<sup>41</sup> According to Syed Kamal Islam Mohammed Shaleuddin, with such operative act in the country, there would be "no scope of rule of law and

constitutional politics."<sup>42</sup>

Furthermore, clauses 10, 11, 14, 15, 16, 17 contained provisions curtailing the freedom of the press, as the Government if satisfied, could forfeit alleged prejudicial documents, conceal or stop the publications of newspapers for printing prejudicial reports, whether before or after the commencement of the bill. The Government also kept the right to censor the newspapers through the security money of TK.25,000. Under the circumstances - the freedom of the press, one of the fundamentals of any democratic government, was severely retarded, especially, when the meaning and definition of words like "if the Government is satisfied" or "prejudicial" remained vague and subjective.

Another clause which aroused suspicion among the people was clause 18 which stipulated that "where security of Bangladesh, friendly relations of Bangladesh with foreign states, or public order it is necessary so to do, the Government may be order address to a Printer, Publisher or editor or Printors, Publishers or editors generally affecting the Security of Bangladesh, friendly relations of Bangladesh with foreign states, or public order, so on and so forth."<sup>43</sup> A number of factors were, however, responsible for the resentments and suspicions created by clause 18 of the Special Powers Act of 1974.

The root cause of such psychology was interlinked with Indo-

Bangladesh relations. By 1974, the bilateral relations between the two countries had been institutionalised through a number of treaties. Among the most notables were a 20-year treaty of friendship and co-operation, a one-year trade agreement, an interim agreement on the sharing of Ganges water. But inspite of such institutionalisation - the relations between the two countries, as pointed out earlier, had already started showing signs of stresses and strains, not at the super-structure level but at the grass root-level; reason being a general belief, right or wrong, that Mujib regime was too subservient to India. Especially, there was widespread resentment against the 20-year friendship and co-operation treaty. On the other hand, trade between Bangladesh and India was a disastrous failure. Structural imbalances and the lack of complimentary gave rise to widespread smuggling across the border. Raw jute, for example, Bangladesh's main export item found its way to Calcutta market through smuggling instead of state-to-state transactions. The result was scarcity and high price of essentials.<sup>44</sup> India's unwillingness to share Ganges water in the context of an interim agreement only added fuel to existing anti-Indian mood in the country. All these were considered India's evil design to make Bangladesh a 'colony' of India.

In the backdrop of such scenario, clause 18 prohibiting any references prejudicial to friendly country (meaning India in this case) became all the more controversial. Questions were asked about the necessity of such laws which persecuted and even could

imprison the newspaper publishers for five years, if they criticised 'the friendly country' for the sake of national interests. It was assumed that even news about smuggling could not be printed since it affected the relation with that 'friendly country'. As Abdullah Sarkar said that "it was a clear message to the journalists that they would be spared if they continue supporting the Government. But drubbing the Government in wrong way, even if the news were correct, could land them into trouble, thanks to the Special Powers Act of the Government.<sup>45</sup> The bill, however, was passed in the Parliament without any difficulties.

The severe and crushing blow to the Fundamental Rights came due to the passing of Constitution (Fourth Amendment) Act, 1975. Sheikh Mujibur Rahman, after declaring Emergency in December, 1974 and having lengthy discussion with the party, decided to bring fundamental changes in the constitutional order of the country in order to bring "the economic freedom of the masses in an exploitation-free society and to establish socialism and democracy of the exploited." Along with other changes, needed to establish a one-party authoritarian state, which we would discuss in our discussion on chapters on Executive, Legislature and Judiciary - the Amendment provided provisions which scrapped Fundamental Rights in one stroke.

The Amendment replaced Article 44 of 1972 Constitution which authorised Supreme Court to enforce Fundamental Rights under Article 102(1). The courts, under the said Article, were



empowered to issue writs, habeas corpus and give orders and directions to the authority whose actions were thought to be an abridgment of a citizens' Fundamental Rights. Under sub clause (4) of the same Article, the High Courts were given powers to issue interim order relating the implementation of any socialist programme, or any development work or being otherwise harmful to the public interest after the Attorney General has been given reasonable notice of application and he has been given an opportunity of being heard.

The new Article 44 stipulated that the Parliament may by law establish a Constitutional Court, tribunal or commission for the enforcement of the Fundamental Rights. It, thus, effectively took away the powers of the courts to enforce such rights which had been a part of traditional legal system inherited from the British.

Addition of Part VIA and incorporation of Article 147A provided provisions for the creation of one National Party which abridged one of the basic Fundamental Rights needed for the flowering and flourishing of a democratic polity - namely freedom of association and freedom to form a political party. Democracy means pluralism. It accepts the fact that the society is made up of conflicting interest groups.

Associations representing various interest groups are freely formed which are further manifested into political parties. The parties, in turn, play a vital role by giving leadership to these associations and bringing a social equilibrium by reducing the

conflicting interests and cleavages through compromise and negotiations.

But Article 117 A(1) of the Fourth Amendment entrusted the task of forming one, National Party, if he is satisfied, to the President of the Republic in order to give full effect "to any of the fundamental principles of State Policy." Sub-clauses (2), (3) and (4) stipulated that President by order would take necessary steps to form the National Party coinciding with the dissolution of all other political parties. The nomenclature, programme, membership, organisation, discipline, finance and function of the National Party were to be decided by the President by order. Sub-clause (4), for the first time in the history of the sub-continent, allowed the civil servants to become the members of a political party, namely, the National Party.

Each member of the Parliament was required to become the member of the National Party, once it was formed, within time fixed by the President. Otherwise his seat would become vacant. Nobody was allowed to contest election - either Parliamentary or Presidential, unless the candidate was nominated by the National Party. Nobody was to form or become member or take part in the activities of any other political parties other than the National Party.

In June, 1975, Sheikh Mujibur Rahman, after forming the National Party, promulgated the Newspaper (Annulment of Declaration) Ordinance which banned the publication of all other

newspaper excepting four national dailies which were to be owned and managed by the Government. The initial endeavour of the regime, namely, the Printing Presses and Publication (Declaration and Registration) Act, 1973 to bring the media under its control, thus culminated into the above mentioned Ordinance. The Fourth Amendment, thus, paved the way for a monolithic political structure wherein no political dissent or opposition was to be tolerated.

Subsequently, President Sayem, as Chief Martial Law Administrator, introduced multi-party through the Political Parties Regulations of 1976 (NCR No.XXII of 1976) and abolished one-party system. The political parties now required to get the approval of the Government before they could be registered. The regulation, thus, accepted the existence of multi-parties but they were to be "under the absolute control and supervision of the martial law government."<sup>46</sup> Subsequently, this act was repealed.

Late President Ziaur Rahman also made a few Constitutional Amendments but all the Security Acts, including the Special Powers Act, were kept intact; and they are still being continued. During the democracy movement of December 1990, all major political parties demanded the withdrawal of these black laws. But once in power, Begum Khaleda Zia, leader of BNP, declared that they would be repealed in due time.<sup>47</sup> The Constitution (Twelveth Amendment) Bill, 1991, introduced by major political parties are silent on this issue. BNP only

added a new proviso in Article 141A. Clause (1) in that Amendment Bill that "such Proclamation (i.e. emergency) shall require for its validity the prior counter signature of the Prime Minister"<sup>49</sup>, so that it exercised by peoples representatives.

The Leader of the Workers Party however, introduced amendment to Article 33 and suggested abolition of sub-clause (3) of Article 26 in order to guarantee Fundamental Rights. This proposed amendment has not been incorporated in the amended constitution under the Twelveth Amendment, 1991.

The general consensus seems to be that these laws are needed as pointed out earlier, in a new democracy like Bangladesh. But they should be used by the people's representatives. In order to do so, more qualified measures are needed, like assigning Parliament, during the emergency, as the role of a watchdog. No such role for the Parliament has been visualized in the future constitutional order of the country. The abridgment of Fundamental Rights, however, would continue as long as the Special Powers Act and other preventive acts are in operation. In order to make those rights effective, the Special Powers Act should be repealed and complete separation of judiciary from executive should be done without further delay by adopting the Judiciary Bill of 1991.

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## Conclusion

The constitutional government in Bangladesh, since its inception in 1972, has been subjected to severe stresses and strains. Theoretically, the country still possesses the original 1972 constitutional framework but in reality -- its history is marked with numerous breakdowns, suspensions, and amendments. The changes have been made to such an extent that it is not incorrect to say that we have had at least three different Constitutions since liberation -- 1972, 1975 and 1979. The constitution brought about through the Twelfth Amendment is a parliamentary form of government like that of the original Constitution but it is also vastly different from the one adopted in 1972.

In the preceding chapters of our work, attempts have been made to analyse the functioning of constitutionalism in Bangladesh by describing and analysing the three principle organs of the state:

- (a) Executive
- (b) Legislature and
- (c) Judiciary

We have discussed it both historically and analytically. While discussing legislature, for instance, we discussed the legislature under Mujib Era, then under Zia Era, and finally under Ershad. We have also referred to the interruptions and break-downs of the democratic process during several periods when legislature was either totally suspended or powers of the

legislature were curtailed.

Similarly, we have discussed the evolution of the executive system in our country under three different regime as well as during Martial Law Periods. With regard to judiciary we have stressed the fact that without an independent judiciary there can not be any form of democratic government or enjoyment of Fundamental Rights by the citizens.

It is, however, one thing to describe the structure and functions in theory of the three vital organs of the state; namely legislature, executive & judiciary; however in depth or enlightened it may be, it does not give the whole picture of political dynamics of the country. There may be an impressive list of the Fundamental Rights incorporated in the Constitution itself and judiciary having power to implement those rights but in practice these Fundamental Rights may be negated by some other laws of the country which may severely curtail the meanings and subsequent of the fundamental and basic rights of the citizens. If a country has preventive detention act, special security act, political party act etc. then it may be the case of giving the rights by one hand and taking them away by another hand.

Similarly, a legislature may have an effective role to play under the constitution but a legislature can not play its role unless certain conditions are fulfilled such as legislature must be elected by a free and fair election to be contested by more than one party or parties on adult franchise. History has not

yet furnished an example of a successful legislature without free and fair election. There are legislatures in dictatorial, quasi-dictatorial systems. Even in Nazi Germany under Hitler there was a legislature. In many of the Third World countries authoritarian or quasi-constitutional regimes also have legislatures but they are "rubber stamp" i.e. not the type of legislatures which one expects in a true democratic country.

Similarly, executive may be parliamentary, presidential, or any other form freely chosen by the people. Executive may be very powerful. A British Prime Minister backed by a majority in British Parliament sometime exercises greater power than many dictators. But the difference between British Prime Minister and a dictator is that former's powers are restrained by well established constitutional provisions or time-honored conventions. The British Prime Minister operates in a well-defined system of restraints and rules whether written or unwritten but in a dictatorial system the ruler exercises power even though it may not be unlimited without any constitutional restraints or conventions. So a glance of a country's constitution cannot confirm whether that country really enjoys constitutionalism or democracy.

A constitutional state may be, thus, threatened due to various factors discussed in our introductory chapter inspite of elaborate constitutional prescriptions directed against the arbitrary actions of the executive, independent judiciary, and an impressive catalogues of Fundamental Rights. The onslaught of

dictatorial regimes either military or Fascist on the post World War I continental countries like Germany or Italy could not be checked though these countries had ideal constitutional arrangements.<sup>1</sup>

The constitutional development in Bangladesh furnished such an example where the establishment of a constitutional government has been thwarted repeatedly inspite of ideal constitutional prescription in the original 1972 constitution. We have discussed the rise of not only a 'strong executive' but an arbitrary one at the cost of the parliament when the independence of the judiciary was tempered with.

Bangladesh came in to being with the ideas of democracy and freedom of the people. People of the country made sacrifices during the Liberation War to an extent that very few nations had to go through such colossal sacrifices.

But what has been the result of their sacrifices ? We have shown that immediately after the creation of Bangladesh a genuine parliamentary democracy was established in the country. But unfortunately within three years, the founder of the state, himself gave a burial of democracy and established a constitutional dictatorship. In the meantime, there was already preventive detention act, security act, emergency provisions etc., and then finally by the 4th Amendment constitutionalism or democracy was given a formal burial.

What went wrong in Bangladesh ? Eminent western constitutional experts have often expressed their apprehensions

about the suitability of western liberal constitutionalism or democracy as adopted by most post-colonial Third World countries. The problems stem from the "constitutional eclecticism" noted one constitutional expert, "the ready application to non-European societies of essentially European constitutional stereotypes. A certain minimum equivalence or identity of underlying basic societal conditions is a precondition to the successful reception or transfer of legal models from one system to another."<sup>2</sup> Apprehensions were also expressed as to whether a western liberal model, whose basis is the 19th century liberalism and property a rights, was capable of solving the *guartantic* socio-economic problems, thereby fulfilling the rising hopes and aspirations of the populace.

Was it then a mistake on Sheikh Mujib's part to introduce such liberal model in a society which was baptized in blood and born through a revolutionary war? The revolutionary war has its own pitfalls. It undoubtedly weakens one's esteem for authority. It also dramatically radicalizes the society. The society is in a flux. The post-liberation Bangladesh had similar situation as the country was confronted not only with the socio-economic problems but lacked proper authority as the traditional one was already destroyed. One could then easily propagate that under such circumstances a revolutionary government was more suitable than the western liberal model. But one has bear in mind that even in a post-liberation society like Bangladesh, Sheikh Mujib's charisma and personal popularity

worked like magic and had the weight of authority needed for the country.

Unfortunately, Sheikh Mujib, instead of institutionalizing his charisma, started a process of personalization. This is a familiar trend in many post-colonial countries where the leaders who won independence for their countries start thinking that they are invincible. Such notion is bound to have negative impacts on the values of constitutionalism.

Personalization of the governmental process by Sheikh Mujib thus, posed as a serious threat to the functioning of constitutionalism in Bangladesh as the attitudes and behaviour of the political leaders are more important in institutionalizing constitutionalism than the institutional forms and structures of the government. Willingness of the political leaders, especially, of the supreme leader, to operate within the framework of the constitution is vital. The successful working of democracy in India, to a great extent, has been possible due to the leadership quality of Nehru and others. Nehru and other Indian leaders' willingness to work within the framework of the constitution and their acceptance of rule of law, procedure went a long way in transcending any personal aggrandizement.

So we find that a deep trust in the notion of constitutionalism among the leadership is vitally important especially in a country like Bangladesh which has virtually no substantial, continuing, democratic experience. Even this trust

or notion, according to Professor Morris-Jones, "does not depend necessarily on the unconscious pursuit of liberty or other values connected with constitutionalism." He suggested that "the supports of constitutionalism are simply the persistence of established channels which enable private interest to bring their views to bear on government".<sup>3</sup> This view has been substantiated by the establishment of constitutional government in countries like India, Malaysia and others. It has also been challenged is Lipset's much discussed article, titled, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy" -- that successful growth of constitutional or democracy depends not only on these pre-requisites; on the contrary it depends on democratic spirit like toleration, compromise and mutual agreement.

This is not say that socio-economic challenges of post-liberation Bangladesh was a lesser threat to constitutionalism. Economic mismanagement and failure to accommodate new social groups into the political system did, indeed, pose serious threats to the functioning of constitutional government in Bangladesh. Equality, justice and fairplay were the name of the game. The original 1972 constitutional charter contained provisions to visualise that dream; and it is not an impossible task in the context of twentieth century constitutionalism to accommodate and provide both political as well as economic liberty. History furnishes such examples. Countries like Canada, the U.S., and India have marched steadily towards building a

'welfare state' within the ambit of liberal constitutionalism with the help of jurisprudence. The Basic Law of Germany had relied on its legislative majority in order to achieve that goal. <sup>4</sup>

Their constitutions were open enough to accommodate the rising socio-economic expectations of the new social groups; and the commitment of their leaders to the spirit of constitutionalism was total. McWhinney, thus, stressed that the "openness of constitutional to societal change" and "commitment to the spirit of constitutionalism" are keys to such transformation. Along with its actual functioning of constitutionalism is vitally important i.e., the establishment of a limited government with more and wider participation by the people, effective legislature and independent judiciary. But when we turn to Bangladesh scenario, we find that Mujib's personal style of politics and his overwhelming legislative majority had, instead of institutionalizing politics, created an executive without any checks either by the legislature or judiciary. Neither his legislative majority nor any jurisprudence acted as a catalyst in bringing meaningful socio-economic changes nor permitted channels to absorb new social groups into the political system.

The inevitable impacts were the perversion of political process as well as decline of civil and political institutions. We have already noted the decline of parliament and its inability to check the arbitrary actions of executive. We have



also noted how the 'political liberty' which is the core of constitutionalism was muffled and suppressed by the regime. The very essence of constitutionalism we lost if the right of the citizens to propagate free ideas and their freedom to organize opposition are taken away through various repressive acts and extra-constitutional means. When political institutions were undermined -- the opposition both inside and outside parliament become disarrayed and extra-constitutional means become the only method challenging the government while it practiced the facade of democracy. In case of Bangladesh, practice of such extra-constitutional measures were, thus, inevitable.

As noted earlier, Sheikh Mujib, then swiftly moved to establish an one-party dictatorship through the passage of Fourth Amendment Act. We have discussed in details the reasons for the development of such an unfortunate phenomenon. We would just like to add that with this fundamental change the institutional structure, without which practice of constitutionalism can hardly be done, was gone. Before the establishment of one-party dictatorship, the constitutionalism in Bangladesh had a tenuous existence. There were hopes that the feeble Opposition, given a chance, would be able to reorganize itself, and individual political liberty was not completely destroyed as the High Court Division of Bangladesh, in many cases, exercised its writ jurisdiction and guaranteed political and civil liberties of the citizens. Once one-party dictatorship was established -- the very essence of constitutionalism was

gone. "It was meaningless to speak of a living constitution" noted another constitutional expert, "when in fact the very basic characteristic of a constitutional order is no longer operative, that is to say, when its regularized restraint of governmental power in the interest of protecting a personal sphere of the individual citizen and his voluntary association is destroyed".<sup>5</sup>

The most serious assault, besides a total decline of legislature, on the constitutionalism under Fourth Amendment Act was the total eclipse of independence of judiciary -- from which the judiciary is yet to recover. We have already discussed the importance of an independent judiciary and its role in preserving the constitutional order of a given country. The onslaught on the judiciary, thus, was a serious development against constitutionalism in Bangladesh. As the terms and conditions of the judges were subjected to the powers of the President -- the institution became completely subservient to executive. A legal expert noted : "as long as the appointment of the judges are impartial, one can expect judicial impartiality also if the salary was charged permanently on the Consolidated Revenue Fund -- the Parliamentary control is also removed but if the appointment and dismissal are in the hands of the executive -- the judiciary is bound to come under political influence of the party in power. One has to consider the psychological effects on the judges -- the possibility that political power of dismissal might be used against him should a

judge prove an obstacle to the party in power".<sup>6</sup> Moreover, "one-party government with its corollary of one man rule, not only negates freedom of individual action which is the cardinal element in the whole concept of limited government, but also erodes the supporting mechanisms of constitutional government."<sup>7</sup> So formal burial was given to democracy or constitutionalism through the Fourth Amendment Act of the Constitution.

This was followed by coups and counter-coups leading to a period of chaos and confusion if not total anarchy; then followed a period of Martial Law. Martial Law, as we have already pointed out, means negatiation of the Rule of Law and Constitutionalism. The first Martial Law Administrator, late President Ziaur Rahman started a process of *civilization* and gave the country a new political order which had removed most of the undemocratic elements of one-party dictatorship established under the Fourth Amendment Act in January, 1975. But we have shown, that Zia's political system was not a true presidential system or parliamentary one. Parliament under Zia lost many of its powers, most notable, the power over financial matters. As we have already pointed out in our discussion on legislature that financial power of a legislature is the most effective means of restraining and controlling the executive branch. Similarly, under President Zia's political order judiciary also suffered some set-backs though not major ones affecting the role of judiciary.

There are wide acclaims in many quarters about President's

Zia's contribution to constitutionalism in Bangladesh. It is undoubtedly not an incorrect statement. But one has to bear in mind that various constitutional amendments, done during Zia's Martial Law period, were through Martial Law Proclamations and Ordinances. His version of Constitution, ratified through Fifth Amendment, was what he 'thought' was appropriate for the country. He indeed removed many undemocratic elements of the constitution as introduced under Fourth Amendment Act but he also retained many undemocratic elements to suit his needs. For example, though he somewhat freed the judiciary from the executive but retained executive's control, no matter how diluted, on the appointments and removals of the judges. The *status quo* is still maintained which is against the true spirit of constitutionalism. Again, though, Zia revived the multi-party system in the country, but his quest for power prompted him to encourage factionalism within the existing political parties -- splinter groups being co-opted by Zia's ruling party, BNP. This action of Zia retarded the growth of healthy political parties in Bangladesh. This was also a serious impediment as we all know that to have proper functioning of constitutionalism besides having vital formal institutions of the government like executive, legislature and judiciary, informal agencies like political parties, interest groups, electoral process, which help activate the formal ones, are also needed.<sup>8</sup>

Zia was followed by a weak and ineffective civilian

government for a very short period. The civilian government was, however, over-thrown by another military ruler, H.M. Ershad, in March, 1982 and then followed another period of direct Martial Law which was followed by a limited or controlled democracy. After nine years of authoritarian rule, Ershad was removed by a popular uprising in November-December, 1990, in which not only people of all sections of society participated; even some groups of armed forces gave support to the peoples' movement. As a result, Ershad's regime came to an end in December, 1990.

Ershad's nine years rule caused another severe blow to the already stunted growth of constitutionalism in Bangladesh. One of the unfortunate realities in the Third World politics is the illusion of election. Election rigging is almost routinely done in these countries which is widely ignored by international community. There is a common saying that it is almost impossible to have a free and fair election in Third World countries. During Ershad's rule, -- as pointed out earlier, elections became a farce and mockery; as a result growth of constitutionalism was seriously retarded due to the lack of impartial election, corollary of which was the *modus operandi* to have a peaceful transfer of power or orderly succession, became as elusive as ever. During his rule constitutional charter became merely a formal document and was subjected to his personal caprice. As discussed earlier, he amended the Constitution as many as four times according to the suitability

and needs of his political necessity. Whether it was introduction of Islam as state religion or extension of time-period for women's reserved seats -- all were done for his needs, whereas in most democracies, constitutions are amended to accommodate the hopes and aspirations of the people and not otherwise. Extension of time for women's reserved seats for another 10 years by Ershad is a case in point. An important constitutional issue which dealt with 49% of the electorate was decided not by the peoples' representatives but through discussion between the First Lady Begum Roushan Ershad and two factions of Jatiyo Party. Begum Ershad who had no *locus standi* in constitutional matters was in favour of 60 reserved seats for women<sup>9</sup> instead of 30 whereas one faction of Jatiyo Party favoured abolition of reserved seats and other advocated for the *status quo*. Ultimately reserved seats for women was retained with extended period of ten years. Such was the nature of constitutions politics in Bangladesh during Ershad era.

After the fall of Ershad regime, the country had its first free and fair election in February, 1991. It was designated as 'free and fair' election even by foreign observers who came to monitor the election. By the criteria of a Third World country, election of February, 1991, was free and fair although it has to be added that one particular party namely Jatiyo party was not given same opportunities and freedom of action, which were given to all other parties. It is true that Jatiyo party was associated with the Ershad regime; it could have been banned in

the law court if was found to be guilty of some serious crimes or irregularities. But as long as the party was not legally banned, the party, should have been given, we feel, the same sort of facilities and privileges as were given to all other parties by the caretaker government headed by the Chief Justice of the country. It would have been a fresh start towards the growth of our nascent constitutionalism.

### **What are the challenges and Dilemmas of Constitutionalism in Bangladesh.**

Like most of the newly independent countries of the Third World, Bangladesh also have certain short-comings for the successful operation of a constitutional government. We have referred to some of these in our introductory chapter on constitutionalism. In recent years a number of books written mainly by western scholars have elaborated and analysed the short-comings and dilemmas of democracy in newly independent countries of the Third World. An American team came to Bangladesh in early 1992 to evaluate the working of democracy in Bangladesh. Its findings may not be 100% correct but give a reader valuable guide to the understanding of the political process and dynamics of the country. Here we need to elaborate some of the problems faced by these countries. Any student of comparative government of the Third World is familiar with those problems and issues. We would prefer to mention some of the peculiar problems in case of Bangladesh. Constitutionalism or

democracy can operate successfully if certain fundamental rules of democracy are followed. These fundamentals have been nicely summed up by S.M.Lipset. According to Lipset constitutionalism or democracy is a political system which is characterised by a value system allowing peaceful 'play' of power, the adherence by the 'outs' to decisions made by 'ins' and recognition by the 'ins' of the right of the 'outs' -- there can be no stable democracy without these rules.<sup>10</sup> No realistic picture of the working of the democratic institutions in the new countries would prove the existence of such a value system.

Now we may raise the question whether the ruling elite or the people of Bangladesh have followed these rules or not? Unfortunately, our answer cannot be wholly affirmative. The governing party even when they are elected by a fair election, seems to fail to make a distinction between opposition to the state and opposition to the government. Any body who criticizes or opposes the government is usually branded as "anti-state" or "traitors". Government shows a tendency to by-pass the political institutions which weakens the stability of the political institutions. Government also applies 'black laws' like preventive detention, security act to put opposition groups or individuals into prison. It also shows a tendency to by-pass the political institutions whenever it gets a chance. Such actions weaken the stability of these institutions which are so vital in maintaining a constitutional order in the country.

Ruling elite also must perform and demonstrate its efficacy.



There would be erosion of legitimacy of any regime if it fails in bringing wide ranging socio-economic changes in the society. An army 'putsh' was possible in 1975, only when the civilian regime of Sheikh Mujib had alienated the key societal groups due to its miserable economic mismanagement, serious law and order problem and erosion of civil institutions. The present regime of Begum Zia still enjoys wide popular support. But its fate and along with it the fate of constitutionalism hangs in suspension. If the socio-economic conditions of the people are not improved and it does not demonstrate its efficacy and effectiveness -- people would not be able to identify with democratic values. People identify with democratic values if only they are benefited under such system. The government must become transparent in public matters, in economic and politics, in order to disseminate benefits to the people.

Another series impediment is the lack of societal consensus on fundamental issues. In this respect, the political elite of Bangladesh has failed miserably in bridging the gap and help installing democratic values among the populace. The role of the political elite in this regard is vitally important. As McWhinny points out that "a politically mature elite is to maintain a continuing societal consensus in support of the constitutional system by identifying points of social and economic tension, make appropriate balance and counter-veil interest and adjusting constitution accordingly. The problem solving capacity of the elite consists in its ability to recognize social conflicts and

make necessary political compromises and the correlative constitutional change before conflicts reach a pathological stage involving resort to extra constitutional, direct action.....The elite must anticipate and correct in advance the attribution or decay of the constitutional system.<sup>11</sup> Unfortunately this has not been the case in Bangladesh. A deep division in the society over the issue of the spirit of liberation war still lingers on in the country. A divided society can expect anything but a constitutional order.

Now we point out the role of the opposition in a constitutional government. This non-formal agency of constitutionalism can hardly be overemphasized. No constitutional order can be effective without the proper functioning of the opposition. What we need is a loyal opposition whose essential criterions have been furnished by eminent democracy theorist, Juan Linz.

According to Linz, such political forces would be characterized by:

(1) An unambiguous public commitment to achievement of power only by electoral means and a readiness to surrender it unconditionally to other participants with the same commitment.

(2) A clear and uncompromising rejection of the use of violent means to achieve or maintain power except by constitutionally legitimate means when faced with an illegal attempt to take power.

(3) A rejection of any nonconstitutional appeal to the armed

forces to gain power or to retain it against a loyal democratic opposition.

(4) A unambiguous rejection of the rhetoric of violence to mobilize supporters in order to achieve power, to retain it beyond the constitutional mandate, or to destroy opponents, including even a democratic or antidemocratic opponents. The defense of democracy must be carried out within a legal framework, more or less narrowly construed, without arousing popular passions and political vigilantism.

(5) A commitment to participate in the political process, election, and parliamentary activity without setting up conditions beyond the guarantee of the necessary civil liberties for reasonably fair democratic political process.

(6) A rejection of secret contacts with disloyal opposition and a rejection of its support when offered in exchange for tolerance of its antidemocratic activities.<sup>12</sup>

These are certainly stringent criteria but unless the opposition plays such constructive role the prospect of a proper constitutional government is deem. The opposition in Bangladesh seems to have failed to understand properly that a legally constituted government should be ousted only through ballot and not through violence on the street or through anomic movements. Constitutional government should be allowed to function and if necessary be thrown out by Constitutional means.

Another basic problem facing Bangladesh like many other Third World countries is the political ambition of army and

bureaucrats. In undivided Pakistan the army Generals and top bureaucrats constituted a ruling elite which practically sealed the fate of democracy in Pakistan culminating in the disintegration of the country in 1971. In Bangladesh, army who were junior personnels in Pakistan army, watched from close quarters the political ambitions of their bosses, namely Pakistani Generals, and Bangladeshi civil servants also watched the political ambitions of top Pakistani bureaucrats from similar closer quarters. These have had some impacts on the attitudes of Bangladeshi army and bureaucrats towards democracy. A country which was created in the name of democracy and freedom had already lengthy period of direct military rule and constitutional dictatorship. Bangladesh army had further justification for expecting political role because they played and acted a vital role in Liberation War in 1971. They raised the question "if our services were need during the war of liberation or during natural disastrous like cyclone and flood, why should we not have some role in governmental process during normal periods"?

As regards the civil bureaucrats they seems to have same tendency as Pakistani bureaucrats like Eskander Mirza, Ghulam Mohammad, Choudhury Mohammad Ali and who had a sense of superiority complex vis-a-vis popularity elected leaders, who according to them, are not as "civilized" or as "knowledgeable" as these experts are. These are some of the unfortunate legacies of the past which will take sometime to be wiped out and as long

as they persist, the fate of democracy or constitutionalism in Bangladesh likely to face some strains and stresses. Finally, the vast majority of the people are illiterate and live in abject poverty in rural areas without basic needs of a human-being. Extreme poverty and illiteracy on a vast scale are not conducive to the working of democracy in any country, so also in Bangladesh.

As pointed out earlier, constitutionalism in Bangladesh has been under stressess and strains since its inception on December 16,1972. The leaders of Bangladesh, beginning from Sheikh Mujib, have treated the charter formally whereas actual functioning was different. The leaders commitment towards a constitutional order is important. But we find that such commitment was not forthcoming in Bangladesh,s constitutional history. This was demonstrated by the way Sheikh Mujib became the president under a Fourth Amendment Act.

Similarly Mushtaq, whose oath taking was deviated from the constitutional provisions -- had those provisions postponed (Articles.48 and 55) through a Proclamation. Subsequently -- both Ziaur Rahman and Ershad suspended the Constitution and revived it section by section through proclamations after having necessary amendments, to suit their political needs. A number of proclamations were also made part of the constitutional charter of 1972. The Constitution which is the supreme law of the land has had empheral aberration not only due to the imposition of Martial Laws but also due to the personal caprices of the

reigning rulers. So we find that the inner core of constitutionalism i.e. the formal document was aberrated by all three major rulers of Bangladesh. Its second layer i.e. any historical jurisprudence which eventually become traditions and conventions of a country were also lacking; and lastly the outer layer i.e. non-formal agencies of constitutionalism like political parties etc. has had intermittent growth. As a result they failed to activate the functioning of the actual working of the governmental institutions.

Shall we then conclude with a note of despair about the fate of democracy or constitutionalism in Bangladesh? Here our answer is negative. People of Bangladesh have demonstrated in 1971 as well as in November-December, 1990 that they can and have had risen against authoritarian rules. They have faith in democracy and ultimately we hope democracy will prevail in Bangladesh. We must remember, as predicted by McWhinny that, respect for the constitutional rule of game, and respect in the spirit as well as letter by the political leadership are important. These are of ultimate rules of a constitutional system.<sup>13</sup>

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