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February 2015

Master's Thesis

**Constitutional Amendments in
Bangladesh: the necessities and the
interest of the regimes.**

College of Law

Graduate School of Chosun University

Department of Law

Mosmt Marium Khatun

Constitutional Amendments in Bangladesh: the necessities and the interest of the regimes.

방글라데시 헌법의 개정: 그 필요성과 정권의 이해

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Chosun Univeristy in partial fulfillment of the
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방글라데시 헌법의 개정: 그 필요성과 정권의 이해

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초록

신생 독립국가가 헌법을 새로 만드는 일은 통상 쉬운 일이 아니다. 헌법제정자들이 실제 헌법을 만들면서 많은 제약들에 직면하게 된다. 그 나라의 제헌 분위기, 열정 및 필요성이 고려되어야 한다. 동시에 정형적인 집행부, 개발행위 및 대외관계에 동일한 관심이 베풀어져야 한다. 개발도상국들은 대중과 대의원조국들의 대립하는 요구들 사이에서 어려운 선택을 해야 하는 문제와 임무의 복잡성을 더하는 정부의 책임이라는 문제에 직면하게 된다. 때때로 야당과 이익단체들은 서로 다른 요구들을 한다. 새로운 국가의 정부는 이 다양한 요구들을 고려하고 조정해야 하며, 프로젝트의 전개과정을 유지하는 동안 나라를 계속 통치해야 한다. 모든 표준 의할 때, 이 일은 정부가 직면하게 되는 가난, 과별간 갈등 및 다른 제약과는 다른 것이다. 결과적으로 방글라데시의 헌법은 수차례에 걸쳐 수정되어졌다. 이 논문은 헌법개정을 위한 역사적 배경, 필요성 및 정권의 이해관계들을 논의하고자 한다.

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Constitutional Amendments in Bangladesh: the necessities and the interest of the regimes.

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Abstract

The framing of constitution is usually a formidable task for newly independent countries. In this exercise, legislators are confronted with several constraints. The mood, aspirations and needs of the nation have to be considered. At the same time, equal attention must be paid to the practical issues of routine administration, development activities and external relations. Developing countries are confronted with difficult choices as there are often conflicting demands from the public and donors of external aid, and the responsibilities of the government add to the complexity of the task. Sometimes, there are different demands from opposition political parties and pressure groups. The governments of new states have to consider and accommodate all these divergent demands, and continue to administer the country while maintaining the progress of development of projects. By all standards, this is a task clearly beyond the means of governments which are confronted with poverty, factional conflicts and numerous other constraints. As a result, the constitution of Bangladesh was trimmed several times. In this thesis, the historical background, the necessities and the interests of the regimes for the changes are discussed.

Keywords: Constitution, Amendment, Regime, Parliament, Referendum, Verdict, Martial Law, Emergency, Political parties, Election Commission, Caretaker Government.

Introduction

Modern Bangladesh was born as an independent nation in 1971 after achieving independence from Pakistan through one of the most brutal blood-baths in modern history¹. The country constitutes with the major portion of the ancient and historic region of Bengal in the eastern part of the Indian subcontinent, where civilization dates back over four millennia, to the Copper Age. The history of the region is closely intertwined with the history of Bengal and the history of India.

The area's early history featured a succession of Indian empires, internal clash, and a tussle between Hinduism and Buddhism for dominance. Islam made its appearance during the 8th century when Sufi missionaries arrived. Later, Muslim rulers facilitated the process Islamism by building mosques, madrassas and Sufi Khanqah.

The borders of modern Bangladesh were established with the partition of Bengal and India in August 1947, when the region became East Pakistan as a part of the newly formed State of Pakistan following the Radcliffe Line. However, it was separated from West Pakistan by 1,600 km (994 mi) of Indian Territory. Due to political exclusion, ethnic and linguistic discrimination, as well as economic neglect by the politically dominant western-wing, popular agitation and civil disobedience led to the war of independence in 1971.

And after becoming a free and sovereign nation, every country should have a written guideline to run the country, to set and define the objectives of the nation, to define the form of the government, the power of the governments, the rights of the citizens, the relation between the state and the people, which is called the constitution.

A Constitution is the strict guideline to any country, as the entire legislative, executive and judicial functions of the State are guided and regulated by the Constitution. To

1 Huq, Abul Fazl, *Constitution-Making in Bangladesh*, Pacific affairs, 1973., pp. 59-76.

accommodate its populace's hopes and aspirations with socio-economic changes, the constitution and its development, as the supreme legal framework of a country, is a continuing process. A constitution is also a basis of establishment and development of national institutions².

‘A constitution is a body of fundamental rules, written or unwritten, which determines the organization or structure of the government, distribute powers and determines the relationship among the organs of the government.’

What we want to put into a constitution really depends on what we consider fundamental and sufficiently important issue. It may contain not only purely legal rules but also a statement of political faith, ideal and aspirations. Constitutions vary greatly in length. For example, the American Constitution, with 4400 words is the shortest one in the world today, while the Indian Constitution, running into 395 articles and 12 Schedules is the world's longest.

Before the Constitution came into force on the 16th December 1972, Bangladesh was governed, *de jure* from the 26th March, 1971, *de facto* from 16th December 1971, by three constitutional documents³:

- I. The Proclamation of Independence, 1971
- II. Laws Continuance Enforcement Order, 1971
- III. Provisional Constitution of Bangladesh Order, 1972

2 Khan, Maimul Ahsan, *Inexistent Rule of Law in Bangladesh - Constitutional disaster & 'legal' impunity: Constitutional amendments in perspective*, Article2.org; Jun – Sep. 2014, 13, 02-03.

3 Mahmudul Hasan *Constitutional Law of Bangladesh*.; 3rd edition, appendix A, Mullick Brothers.

I. The proclamation of independence.

Following the military crackdown on March 25, 1971 the Awami League leaders who could flee to India assembled in Kolkata. With their prompt initiative a formal Proclamation of Independence was drafted and adopted on 10th April, 1971. Under this Proclamation the representatives constituted themselves into a Constituent Assembly for Bangladesh and declared Bangladesh as a Sovereign People's Republic. Bangabandhu Sheikh Mujibur Rahman was made President and Syed Nazrul Islam Acting President. They thereby confirmed the declaration already made on March 26, 1971. And now it remained no longer a mere declaration; it became a formally approved document which acted as interim Constitution. It provided for a Presidential system of Government giving the President the absolute power in views of the war situation.

II. Laws Continuance Enforcement Order, 1971.

On 10th April 1971, along with the Proclamation of Independence, Law's Continuance Enforcement Order was issued. This Order provided that all laws that were in force in Bangladesh on March 25, 1971 and were subject to the Proclamation of Independence, continued to be in force with such consequential changes as were necessary.

III. The Provisional Constitution of Bangladesh Order, 1972.

On December 16, 1971 Bangladesh achieved its full formal independence. The State administration was being run according to the Proclamation of Independence. On January 10, 1972 Bangabandhu Sheikh Mujibur Rahman returned to Bangladesh and took up the post of President. On 11th January 1972, the President promulgated the Provisional Constitution of Bangladesh Order, 1972. By virtue of this Order the entire character of the government was changed. The Presidential form was substituted by a form aiming at a Westminster type Parliamentary system.

History of Constitutional Development of Bangladesh

The first step in making the Constitution of independent Bangladesh was the promulgation of the Constituent Assembly of Bangladesh Order on March 22, 1972 as envisaged in the Provisional Constitution of Bangladesh Order, 1972. This Order defined the Constituent Assembly and its functions in details.

Constitution Drafting Committee

The Constituent Assembly held its first session on 10th April 1972. A thirty-four member Draft Committee headed by the then Law Minister Dr. Kamal Hossain, was set up on the very day the Constituent Assembly convened. The committee was dominated by Awami League members, excepting a lone opposition member from Ganatantri Party. The Committee was asked to submit its report to the Constituent Assembly with a Bill of the Draft Constitution. The committee had its first meeting on April 17, 1972. In this meeting a resolution was adopted which invited proposals and suggestions from all sections of the people. In response to this invitation, 98 memoranda were received. The Drafting Committee had 74 meetings to draft the constitution and on June 10, 1972 it approved the draft. Lastly on 11th October the full draft of the Constitution was finally approved⁴. Though suggestions were asked from the people, there were no questionnaire issued by the committee, and also the time given (three weeks) for suggestions were too short. Opposition parties were highly vocal against the government but no proposal was proposed by the then ruling party members⁵

The second session of the Assembly commenced on October 12, 1972. On this day Dr. Kamal Hossain introduced the draft Constitution as a Bill. After seven days general

⁴ *Report of the constitution drafting committee, P. 1.*

⁵ *The speech of the Prime Minister, Sheikh Mujibur Rahman, in the constituent Assembly, November 4, 1972. The Bangladesh Observer, November 5, 1972.*

discussion over the Bill commenced on October 19 and continued till November 3. During this long discussion 163 amendments were proposed. Among these 84 amendments were adopted 83 of which were moved by Awami League Members and one was by Suranjit Sen Gupta. But most of the amendments were linguistic errors of the Bill. The third reading on the Bill was held on November 4 and on that very day Assembly adopted the Constitution for Bangladesh.

Constitutional Journey

The Constitution of Bangladesh embarked on its eventful journey from 16th December 1972. Since then 14 amendments have been made to Constitution. And, indeed, they have basically changed many of the important characteristics of the Constitution. Of late the verdict of the Appellate Division on the Fifth Amendment to the Constitution again modified the characteristics of the Constitution.

Salient Features of Bangladesh Constitution

Original Constitution of Bangladesh was adopted and enacted on November 4, 1972 and came into effect on December 16, 1972. The salient features of Bangladesh Constitution as exists today are as follows⁶:

- 1. Written Constitution:** The Constitution of the People's Republic of Bangladesh is a written document. It contains Articles from 1 to 153, a Preamble and 3 schedules.
- 2. Rigid Constitution:** No provision of it can be amended by ordinary law making procedure; amendment can be passed only by votes of not less than two-thirds of the total number of MPs.
- 3. Preamble:** The Constitution of Bangladesh starts with a preamble which is described as the guiding star of the Constitution. This very preamble contains the legal as well as

⁶ *The Constitution of the People's Republic of Bangladesh.*

moral basis of the Constitution; it also identifies the objectives and aims of the State. The preamble is a part of our Constitution and cannot be amended without a referendum.

4. Supremacy of the Constitution: Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it conforms with the Constitution both in letter and spirit. The supremacy of the Constitution articulated in Article 7(2) -- “This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic” is the cornerstone of the Constitution of Bangladesh.

5. Unitary System of Government: Article 1 of the Constitution provides that Bangladesh is a unitary people's republic as opposed to federal republic. No division of power has been provided for in the Constitution unlike in federal constitutions. All the legislative, executive and judicial power are vested in a single set of authorities.

6. Unicameral Legislature: Article 65 of the Constitution provides a unitary, one-house Parliament vested with all the legislative powers of the Republic. There is no other co-ordinate or territorial law-making body. Laws made by the Parliament are equally applicable to the whole territory of Bangladesh.

7. Fundamental Principles of State Policy. Part II (Art.8-25) of the Constitution contains a list of ‘Fundamental Principles of State Policy’. Article 8 provides for 4 fundamental principles of state policy. Observance of these principles is deemed essential for the welfare of the people.

8. Fundamental Rights: Part III (Art.26-47A) of the Constitution provides for 18 fundamental rights. The enjoyment and enforcement of these rights have been guaranteed in the Constitution.

9. Parliamentary Form of Government: Constitution provides for a parliamentary form of government. The executive authority of the Republic is vested in the Prime

Minister. Only that party forms the Cabinet which has a majority in the Parliament. It continues in office so long as it continues to enjoy the confidence of majority members of the Parliament. The President is only the constitutional head of the state and does not possess much power to affect the working of the Cabinet.

10. Independence of Judiciary: The Constitution devised a scheme of independence of judiciary

11. Ombudsman: Provisions for the establishment of an ombudsman were inserted in Article 77. The role of an ombudsman like a citizen's defender or watch-dog has been successful in some countries.

12. State Religion: Article 2A says that the State religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic. In the Constitution of Ireland, Sweden, Norway, Denmark, Switzerland and Brazil, we find acknowledgement of Christianity and Jesus.

13. Emergency Provisions: Emergency provisions have been provided in its Part IXA which enable the executive to meet any emergency situation. The truth is that there was no Article or provisions for emergency in the constitution as originally enacted in 1972.

14. Provision for Preventive Detention: The provision for preventive detention has been embodied in its Article 33. Exigent to mention here that preventive detention is, by nature, repugnant to democratic ideas, and no such laws exist in the USA or UK in times of peace.

15. Law-making Power of the President : Article 93 empowers the President to legislate by ordinances⁷.

⁷ Government of the People's Republic of Bangladesh, *Constitution of the People's Republic of Bangladesh*, Preamble.

Constitutional Amendments

Definition

According to the article 142(1) notwithstanding anything contained in this constitution:

- a) Any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of parliament.
- b) So, to adopt with the changing situation or to make contemporary the provision of amendment is inserted. Because, the law maker of the constitution does not know or assume what will happen in future. So, to improve existing law/arrangement this provision is inserted.

Amendment of Constitution

An amendment is a selection that is added to a law or rule in order to change it. A constitutional amendment is a formal change to the text of the written constitution of a nation or state. Two-thirds vote is required to amend the constitution.

Main objectives of Amendment

- To establish more transparency, accountability, predictability and participation in the governance system.
- Enhancing and expanding protection of human rights.
- Strengthening good governance through constitutional amendment.

Bangladesh Constitution has been changed 15 times so far in different government regime. There are continuous controversies and debates on some aspects of the present Bangladesh Constitution, especially every government came to power and amend the constitution according to their will and interest. The details and specific proposal has not been published by any governments, so people are not aware of the benefits and loot falls of those amendments. Detail discussion will follow here a summary of all the amendments.

Summary of 15 Amendments:

Amendments	Date	Summary of Substance
1 st Amendment	15 th July 1973	To make the way for prosecution of genocide, crime against humanity and war crimes committed in the liberation war of 1971.
2 nd Amendment	22 nd September 1973	Inclusion of emergency provision, Suspension of fundamental rights and preventive detention.
3 rd Amendment	28 th November 1974	To give effect to the boundary-line between Bangladesh and India.
4 th Amendment	25 th January 1975	One party dictatorial system was substituted for a responsible parliamentary system.
5 th Amendment	6 th April 1979	Legalizing all the actions taken by the first Military Authority.
6 th Amendment	10 th July 1981	To make way for the Vice-President to be candidate in presidential election.
7 th Amendment	10 th November 1986	Legalizing all acts done by the second Military Authority
8 th Amendment	9 th June 1988	Setting up six permanent Benches of the High Court Division and making Islam the state religion.
9 th Amendment	11 th July 1989	Direct election of President and Vice President simultaneously.

10 th Amendment	23 rd June 1990	Period for reservation of 30 women members seats in the Parliament was extended for 10 years.
11 th Amendment	10 th August 1991	Legalizing the appointment of Justice Shahabuddin Ahamed Chief Justice of Bangladesh, as Vice President of Bangladesh and his all activities as the Acting President and then the return to his previous position of the Chief Justice of Bangladesh.
12 th Amendment	18 th September 1991	Reintroducing the Parliamentary system
13 th Amendment	28 th March 1996	Provision for Care-taker Government.
14 th Amendment	16 th May 2004	Re-introducing reserve seats for women in Bangladesh.
15 th Amendment	30 th June 2011	Abolition of the caretaker government

First Amendment

This amendment was made to face a special situation. There was no special law the country to prosecute those who committed war crimes, crime against humanity, genocide and other crimes under international law during ‘the liberation war in 1971. Again, the provisions of fundamental rights in the Constitution did not allow their separate trial. By this amendment a new clause in Article 47 was inserted (clause 3)

which allowed the parliament to make any law for the trial of war criminals. By inserting a new Article 47A in the Constitution certain fundamental rights were made inapplicable to those who would be tried under that law. The rights which were made inapplicable to them were following.

1. Right to protection of law⁸.
2. Protection against trial under *ex post facto* law⁹.
3. Right to a speedy and public trial by an independent and impartial tribunal¹⁰.
4. Right to enforce fundamental rights¹¹.

So, it is seen that that amendment was very necessary to ensure the punishment of the war criminals.

It is worthy to mention here that under the authority of this amendment the parliament passed within a week the International Criminal (Tribunal) Act for the trial of 195 prisoners of wars, although it was succeeded.

Critical Analysis of First Amendment

- The amendment deprived the victim's right to appeal to the highest court for protection against decisions of the trial courts.
- The first amendment also could be considered as undemocratic as the constitution did not give the power to the legislators to amend an article or a part thereof by adding clauses. Thus, the fundamental right of the people was started to be neglected from the very first amendment of the constitution¹².

⁸ *Constitution of the People's Republic of Bangladesh*, Article 31.

⁹ *Constitution of the People's Republic of Bangladesh*, Article 35 (1).

¹⁰ *Constitution of the People's Republic of Bangladesh*, Article 31 (3).

¹¹ *Constitution of the People's Republic of Bangladesh*, Article 44.

¹² Muhammad A. Hakim and Ahmed Shafiqul Huque, *Governmental Change and*

Second Amendment

Background

The original Constitution of Bangladesh had two most significant, negative features—first, the absence of provision for preventive, detention and second, absence of provisions for emergency and suspension of fundamental rights. During the British colonial role and then 23 years constitutional history of Pakistan the arbitrary application of preventive detention’ law’ and emergency was so bitter that it left a good teaching to the AL that such provisions which are contradictory to the concept of nourishing living democracy, would never allow to build normal democracy system. After partition the two Governor-Generates of Pakistan Golam Muhammad and Iskander Mirza used the power of emergency to perpetuate their rule and thereby destroyed all the political institutions. The emergency imposed by Ayub Khan in 1965 was not lifter till 1969 when he was forced to leave power. During this continued emergency opposition was suppressed and hundreds of citizens were put into prison for years together without trial. This bitter experience led the AL to make an avowed commitment since the formation of United Front in 1954 to repeal not only these black laws but also to remove any scope or prerogative enabling an individual to retard the process of democracy.¹ With this experience and commitment in mind, the AL government in Bangladesh did not want to leave any scope: for such exercise of power by the president. As a result, in the original Constitution of Bangladesh no provision of emergency or any of for preventive detention was inserted. The decision was praiseworthy and conducive to the nourishment of living democracy. But sooner than 9 months had passed provisions for emergency and preventive detention were inserted in the Constitution by the 2nd Amendment to the Constitution.

Constitutional Amendments in Bangladesh, South Asian Survery 2: 2 (1995).

Subject matter of the Amendment

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

1. A new part IXA was added to incorporate (Article 141A, 141B, 141C) emergency provision¹³.

2. Article 33 was substituted so as to empower the parliament to pass law relating to preventive detention.

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

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

Though the usual interpretation of the term law’ used in this Article means a positive law passed by the parliament in its ordinary legislative process and not necessarily an amendment Act in its constituent amending power, an apprehension arose that the court might declare even an amendment Act purporting to amend, the; provisions of fundamental rights illegal.

Critical Analysis of Second Amendment

➤ This second amendment was the first destructive blow on a democratic constitution. It was an irony of fate for Bangladesh that the party which led an indomitable movement for 23 years against all black laws and oppression there under has now, only to consolidate their power, proceeded for more harsh laws and political

¹³ *Constitution of the People’s Republic of Bangladesh*, Article 141A, 141B, 141C.

repression sacrificing the lofty idealism embodied in the Constitution by this very party.

➤ After getting the absolute majority in the Parliamentary election in March 1973, many flaws of the Bangladesh Awami League party became vivid. For example, Price hike of the daily commodities, economic mismanagement, social and political violences, corruptions in the government levels and administration were very common. All these led to increase in the criticism of the socio-economics policies of the regime and people were looking for a system which would be fair enough for the mass people¹⁴.

➤ This amendment was a repressive measure to punish the people with different opinion by the regime, as the fundamental rights of the people were curtailed by the government. The second amendment was a pretext of the declaration of the state of emergency. And also the popularity and acceptance of Bangladesh Awami League fall drastically.

Third Amendment

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

Critical Analysis of Third Amendment

➤ Third amendment is so far criticized by the opposition parties of Bangladesh Awami League by marking it as the inclination of then ruling Bangladesh Govt. towards India. Surrendering of Berubari to India, a former East Pakistan territory is a sign of that inclination.

➤ The people of Berubari became the citizen of India overnight, neither a

¹⁴ R. Jahan, *Bangladesh in 1973: Management of Factional Politics*, Asian Survey, Vol. 14, No. 2 (1974).

referendum was asked nor any type of information was disseminated to the People of Berubari¹⁵.

Fourth Amendment

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

Background

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

On 28th December, 1974 emergency was declared throughout the country suspending fundamental right guaranteed in the Constitution. While justifying such an action it was mentioned in the government hand on that a group of people who were opposed to the independence and Emergence of Bangladesh as a sovereign state were active in various subversive-activities and they were joined by others who failed to attain power through constitutional means. It also disclosed that some collaborators were subverting the state and were engaged in activities which were creating impossible conditions in the country for attaining normal political stability and orderly economic progress. Though the emergency was proclaimed with a view to bringing the

¹⁵ Muhammad A. Hakim and Ahmed Shafiqul Huque, *Governmental Change and Constitutional Amendments in Bangladesh*, South Asian Survey 2: 2 (1995).

deteriorated economic situation under control by arresting and punishing the hoarders, black marketers, smugglers, armed bandits etc. It was not the real reason behind. The main aspect of it way to create conditions which would be congenial for a smooth ushering of a stem which Mujib by that time had already decided to introduce the party dictatorial system in the Constitution. Accordingly, on 25th January, 1975 only 27 days after the emergency was proclaim the country went through the most significant and rascal change in the Constitution.¹ The infamous Fourth Amendment. Bill to the Constitution was introduced in the parliament and the parliament passed the Bill into an Act at a speed unprecedented in the history of law making. Within half-an hour the crucial Bill which was of the greatest importance was passed through- and no discussion or debate-was allowed. “The way the Bill was adopted demonstrated the omnipotence of Sheikh Mujib’s leadership. A constitutional dictatorship was established which formally buried parliamentary democracy and the growth of constitutionalism in Bangladesh”.

Subject matter of the Amendment

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

- 1. In place of parliamentary system the so-called presidential system was introduced.**
- 2. The 4th Amendment made the impeachment and removal of the President unprecedented difficult.**
- 3. The 4th Amendment turned the Parliament into a powerless secondary rubber-stamp body.**
- 4. The Amendment took away the power of the High Court Division to enforce fundamental rights.**
- 5. The Amendment completely curtailed the Independence of Judiciary**

6. The Amendment introduced one-party political system.

7. The Amendment buried the whole concept of local government

Critical Analysis of Fourth Amendment

➤ Firstly, an essential element of the presidential system is the principle of separation of powers. And the separation of powers must be a balanced separation as opposed to absolute separation of powers. To maintain the separation of power as a balanced one there must be the principle of checks and balances which prevent any organ of the government from becoming arbitrary and dictatorial. But the presidential system as introduced by the 4th Amendment was adopted without any of these two important principles. In true presidential system, as there is the doctrine of separation of power, no minister can be a member of parliament. But in the 4th Amendment it was provided that the President could appoint Ministers from among the members of the parliament or from outside [Art. 58(3)]. There was left, therefore, no separation of power¹⁶.

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

“(b) Bangabandhu Sheikh Mujibur Rahman, Father of the Nation, shall become, and enter upon the office of the President of Bangladesh and shall, as from such commencement hold office as President of Bangladesh as if elected to that office under the Constitution as amended by this Act”,

Thirdly, as the whole system was changed it was essential to hold a new general

¹⁶ *Constitution of the People's Republic of Bangladesh.*

election. But like the life of the President the life of the parliament was also given an auto-extension by operation of law. A special prevision was made in UK 4th Schedule which read:

“Notwithstanding anything contained in the constitution, the parliament functioning immediately before the commencement of this. Act shall unless sooner dissolved by the President; stand dissolves in the expiration of the period of five years from such commencement.

Thus completely in an extra-constitutional way the lives of both the President and parliament were extended. These two incidents may be termed as a silent coup d’etat¹ in the constitutional history of Bangladesh.

Fourthly, the earlier provision was that no person could hold the office of the President for more than two terms. Likewise in US presidential system no person can be President for more than two terms. But under the 4th Amendment no such restriction was mentioned meaning that under the new system the president could hold the office of the president for an unlimited number of terms¹⁷.

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

¹⁷ Mahmudul Hasan *Constitutional Law of Bangladesh*., 3rd edition, appendix A, Mullick Brothers.

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

If is also worth mentioning here that to impeach the President under the US Constitution a resolution thereto must be moved in the House of Representatives by one or more members. If the resolution is supported by majority members of the House, it then goes to the Senate for trial. When the trial is held it is the Chief Justice of USA and not the regular speaker who presides so that an impartial trial may be held. If the charge is supported by votes of two-thirds of the members present, the president shall vacate his office.

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

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

It was provided in the original Constitution that the President, within 15 days after a Bill was presented to him, should assent to the Bill. Without giving assent he could return the Bill to the parliament for its reconsideration. If he failed to do so the Bill was deemed to have duly assented by him after the expiration of 15 days. Thus like the US Constitution the original constitution of Bangladesh armed the president with suspense veto as opposed to absolute veto.

But under the 4th amendment the President could now withhold assent to any Bill passed by the parliament. Thus the President was now armed with absolute veto and-

once he vetoed a Bill that Bill could never come out as a law. The President was, therefore, given an unfettered legislative power; he was placed above the parliament, and as a result, virtually “the importance of parliament was entirely gone and it was turned into a secondary rubber-stamp body in the new political system”.¹

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

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

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

Secondly, in the original Constitution, the interval between the two sessions of parliament was 60 days. But the Second Amendment extended this period to 120 days and by 4th Amendment the provision was made that “there shall be at least two sessions of parliament in every year” (Art. 72). Thus the role of the parliament was reduced to a minimum. Of course, there are countries where sessions are held only

once or twice a year. In Britain parliament session is held only once a year; usually in November the session starts and it lasts for the whole year except some recesses and two weekly holidays. In India under Article 85 of the Constitution parliament session may be held only twice a year but usually parliament holds 3 sessions per year (Budget session, Monsoon Session and Winter Session) and the average number of sitting days in a session is 35.1 Thus making provision for at least two sessions a year by the 4th Amendment was nothing undemocratic. However, the intention behind was to keep parliament away from its functioning, for no session in the first parliament in Bangladesh did last for more than 7 days in average.

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

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

Fourthly, under the original constitution Article 76 provided for the parliament to appoint certain standing committees at the first meeting of each session. By the 4th Amendment this provision of ‘at the first meeting of each session’ was deleted. It reduced the importance of parliament even further. Because now the parliament was

not bound to appoint committees at its starting, it now had the option to pass away most of its life without framing standing committees. These undemocratic provisions still exist.

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

➤ The original Constitution of Bangladesh provided for 18 fundamental rights and the High Court Division of the Supreme Court was empowered to enforce these rights. Article 44 guaranteed the right to move the High Court Division of the Supreme Court and this court could enforce these rights under the authority of Article 102. But this power of the court was taken away by the 4th Amendment which provided in Article 44 that “Parliament may by law establish a Constitutional court, tribunal or commission for the enforcement of fundamental rights.” Thus unlike earlier now no one had the right to go to the Supreme Court to have his fundamental rights enforced. It was a constitutional court or tribunal which would enforce fundamental rights. But the constitutional trickery done by the makers of the 4th Amendment was a terrible one.

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

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

immediately.

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

Thus the fundamental rights as enumerated in the Constitution lost their all significance and sanctity. In almost all legal systems with constitutional supremacy the Supreme Court is regarded as the guardian, guarantor and protector of fundamental rights. But this traditional jurisdiction of the Supreme Court – the role of a-sentinel on the qui vive for fundamental rights was snapped away. It is unprecedented in the history of the sub-continent that the jurisdiction of the Supreme Court to enforce fundamental rights was taken away.

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

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

- a. Appointment Procedure.
- b. Security of Tenure; and
- c. Adequate. Remuneration and Privileges.

a. Appointment procedure:

As to the appointment procedure it was provided in the original' Constitution that the Chief Justice would be appointed by the President and other judges would be

appointed after consultation with the Chief Justice¹⁸. But by the 4th Amendment the provision of “consultation with the Chief Justice” was withdrawn. Obviously the purpose was to make appointments on the basis of political consideration and favoritism not of qualification and merit. The appointment now depended completely on the sole wish of the President. Such an unchecked nomination of judges by the executive is not recognized in democratic countries; an objective assessment from the Chief Justice or consultation with the Judiciary is essential so that men of keen intellect, high legal acumen, integrity and independence of judgment from among the lawyers can be taken to ensure independence and impartiality of the judiciary on the one hand and to develop, on the other hand, the standard of judicial; review, But the 4th Amendment did away with all these making the higher judiciary completely subservient to the executive.

Present Position: These undemocratic provisions still exist.

b. Security of Tenure

Security of tenure is the most important condition for maintaining the independence of judiciary. If the judges do not feel secured in discharging impartial judgment the independence of judiciary is gone. For better security of tenure judges should be appointed for a definite period and the power of transfer and removal must be a difficult one to obviate the abuse of power and its capricious operation by the executive. It was provided in the original Constitution that a judge could not be removed unless the parliament passed a resolution supported by a majority of not less than two-thirds of the total members of parliament on the ground of proved misbehavior or incapacity [Art. 96(2)]. So the original Constitution provided for full security of tenure and the judges were fully independent in discharging their functions. In the 4th Amendment deleted the provision of impeachment and provided that the President

¹⁸ *Constitution of the People's Republic of Bangladesh*, Article 95.

could now remove a judge including the Chief Justice simply by an order on the ground of misbehavior¹⁹. Now the incapacity or misbehavior need not be proved: President's subjective intention became everything to remove a judge. Thus the President became both the appointing and removing authority of the judges.

Present Position: This undemocratic provision was repealed and the provision of the original Constitution was restored by President Justice Sayem on 28th May, 1976 by issuing a proclamation. Afterwards President Zia on 22nd April, 1971 introduced the provision of Supreme Judicial Council. This provision still exists and it is a healthy provision for the security of tenure of judges.

Subordinate Courts

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

1. District judges would be appointed by the recommendation of the Supreme Court.
2. Other judicial officers including Magistrates exercising judicial functions would be appointed by the President after consulting the Public Service Commission and the Supreme Court (Art. 115)

Again, as the security of tenure of judges in the lower courts it was provided that the control (including the power of posting, promotion and grant of leave) and discipline of judges and magistrates would vest in the Supreme Court (Art. 116). Thus both the appointment procedure and security of tenure in subordinate judiciary were more or less democratic and healthy²⁰.

¹⁹ *Constitution of the People's Republic of Bangladesh*, Article 96.

²⁰ *Constitution of the People's Republic of Bangladesh*, Article 115 and 116.

But the 4th Amendment made both the elements executive depended article 115 was amended to the effect that “appointments of persons to offices in the judicial service or as Magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf.” Likewise, article 16 was amended 10 the effect that “the control (including the power of positing promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President.”

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

one can easily understand how illusory then to say that all persons employed in the judicial service and all Magistrates shall be independent in the exercise of their judicial functions” (Art. 116A). It was really the greatest Constitutional bluff on the part of the maker of 4th Amendment.

Present Position: The undemocratic provisions introduced by 4th Amendment relating to appointment of judges and Magistrates of the subordinate judiciary still exist. Even the 12th Amendment did not correct it.

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

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

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

“direct that there shall be only one political-party in the state. Once the President made an order for one party under Article 117A—

- i) all political parties of the stale would stand dissolved and the president would take all necessary steps for the formation of the National Party.

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

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

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

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

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

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

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

Thirdly, members who got directly elected by the people were now liable to lose their membership by operation of law, if they did not join the National Party. So the

people's aspiration and mandate came to be trampled and demolished under one man's (President) order.

Fourthly, the National Party was not in a real sense a political party. It was more than a mere political party. Because it became an integral part of the Constitution; its declaration and organization were to publish through extra-ordinary gazette notification. It was, therefore, a part of the government.

Formation of One Party

In accordance with the provision of “the Article- 117A as introduced by the 4th Amendment the President declared the formation of a new National Party for the country under the name and style “Bangladesh Krishak Sramik Awami League” (BAKSAL) on February 24, 1975²¹. As a result existing political parties instantly stood dissolved. In June the government promulgated the Newspaper (Annulment of Declaration) Ordinance which allowed only 4 newspapers¹ to continue publication and banned the rest. But all these 4 newspapers were to be owned and managed by the state. It brought the whole news met completely under the absolute control of the government. Thus a new system was introduced where no political opposition or press freedom was visualised.

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

➤ Local government is one of the most important institutions of democracy. Modern state administration is almost unthinkable without devolution of power to the local governments. Due to increase of population as well as to huge expansion of governmental activities certain matters of policy and administration concerning

²¹ *Constitution of the People's Republic of Bangladesh*, Article 117A.

national and international interests are reserved for central administration and the rest, wide range of governmental functions are vested in local authorities. In modern state administration the bulk of public services are actually provided by local authorities rather than by Central departments. It may even be said that, at least from day to day a citizen would seem rather more likely to be directly affected by actions of his local authority, than in respect of activities of central government.² Local Governments are elected with a view to ensuring governance from the grass-roots level and participation of the local people in the development and formulation of solution of their own problems and needs. In developed countries like US, UK there an extensive network of local governments, the history of which dates back many centuries. Local governments in democratic countries are given the responsibilities for the welfare of their communities in providing for policing, highways and public utilities such as gas, water and electricity. The system of local government helps in different ways brings transparency and efficiency within the state administration. First, it helps solve local problems locally and relieves the central government much of its responsibility to deal with trifles and local matters. It, therefore, allows the central government to employ more methodic and prodigious effort to solve national and international problems; second, it relieves much of burden of local responsibilities which people usually expects from MPs. It therefore, allows them to concentrate more in national legislation, committee functioning and controlling the central government; Third, it decentralises administrative functions, responsibilities and powers and as a result channel-based corruption and red-tapism by the bureaucracy become impossible; Fourth, as it allows MPs employ more times in committee functioning the central bureaucracy will come under the direct control of parliament. Fifth, it allows the government to reduce its size; Sixth, if local government are institutionalised, they will help develop leadership from the grassroots level giving gradually a strong-base in democracy.

Our Constitution-makers have provided for accountability of both the central government and bureaucracy which is to be ensured through the proper functioning of parliament and its committee system. Similarly with regard to local administration, the express intention of the Constitution-makers was also to make them, accountable to the elected functionaries. Provisions were made in Articles 59 and 60 of the Constitution to devolve the responsibility for both development activities and administration into the hands of the elected representatives of the local government bodies. The Constitution-makers envisaged the newly independent Republic to be a democratic order in which, effective participation by the people through their elected representatives in administration at all levels shall be ensured'(Article 11).

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

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

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

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

the consent of the governed. A governmental system with liberal democracy must have the following elements.

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

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

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

- People have, the right to organise themselves into political parties.
- There is the right to criticise the government.
- There is the right to freedom of thought and press.
- There is a national-tribunal-or court-which exercises the independence to

enforce basic rights and freedoms of the people.

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

Fifth Amendment

Background

In a military coup led by a group of army officers Mujib was killed brutally along with his family members on 15th August, 1975. With his killing his new system of one party BAKSAL had gone. The first martial law regime got its firm start in Bangladesh governance which continued till 6th April, 1979. Though martial law was declared on 15th August, 1975 the Constitution was not abrogated; it was kept alive in subordination, though it was the supreme law “which allowed no means of

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

Changes made by the 5th Amendment:

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

1. Part VIA of the Constitution dealing with one party system as introduced by the 4th Amendment was omitted.
2. The independence of judiciary which was completely destroyed by the 4th Amendment was restored partially (Articles 96 and 116).
3. The jurisdiction of the High Court Division of the Supreme Court to enforce fundamental rights was restored to its original position as was in the original constitution (Article 44 and 102).
4. Provision of Supreme Judicial Council in respect of security of tenure of the judges of the Supreme Court was inserted (Article 96).
5. The provision of absolute veto power of the President introduced by the 4th Amendment was abolished (Article 80).
6. Provisions of referendum in respect of amendment of certain provisions of the Constitution was inserted and to that end a new clause IA was created in Article 142²².
7. Religious words “Bismiliahir Rahmanir Rahim” was inserted in the beginning of the Constitution i.e. above the preamble.
8. In the original Constitution it was provided in Article 6 that the citizens of Bangladesh would be known as ‘Bangalees’. But this was changed and it was provided now that citizens would be known as ‘Bangladeshis’.

²² Karzon, Rahman SH and Faruque, Abdullah Al, *Martial Law Regimes: Critically situating the validity of the Fifth and Seventh Amendments*. Bangladesh Journal of Law, 2:2 (1998).

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

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

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

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

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

Merits of the Amendment

To compare with the 4th Amendment the 5th Amendment introduced some important democratic provisions to pave the way, albeit in a limited sphere, for constitutionalism. Firstly, dictatorial one party system which had been a permanent block to constitutionalism was abolished and multi-party democratic system as was adopted in the original Constitution was restored which again opened the door of liberal democracy and constitutionalism

Secondly, all fundamental rights which were reduced into meaningless versions of the Constitution were now again given their full life and enforcement by reverting Article 44 of the Constitution to its original position of 1972.

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

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

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

Critical Analysis of Fifth Amendment

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

provision undermined the spirit of representative government in Bangladesh, for these reserved seats of women members in the parliament works as a balance of power and the ruling parties in the parliament use them as tools to satisfy their undemocratic political purpose.

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

➤ Thirdly, a new Article 92A was created by this Amendment and this Article curtailed the parliament’s power over the financial matter and the President was given power to get money from the Consolidated Fund and to expend it without the parliament’s approval.

➤ Fourthly, religious words ‘Bismillahir Rahmanir Rahim’ were inserted in the beginning of the Constitution i.e. above the preamble. This was done necessarily with a political end. It was a constitutional tricks played by Zia especially to get quick blind support from a large section of people who are religious but politically unconscious. Likewise one of four major fundamental principles of state policy ‘secularism’ was omitted and in its place principles of absolute trust and faith in the Almighty Allah was inserted²³. This was also done with the same political end.

²³ M.G. Kabir, *Religion, Language and Nationalism in Bangladesh*, in R. Ahmed ed., *Religion, Nationalism and Politics in Bangladesh*. New Delhi: South Asian Publishers,

➤ Fifthly, in the preamble the words, ‘historic struggle for national liberation’ were replaced by words ‘historic war for national independence.’ Thus the spirit of the struggle which continued for long 24 years against Pakistani colonialism and exploitation, the growth and role of political parties and political leaderships, the role of cultural workers, intellectuals, teachers, students and professional groups and that of common people were undermined, ignored and concealed. The army factor in the 1973 liberation struggle was only brought into prominence though the war, in most cases, was fought by the common people²⁴.

Nature of the Governmental System after the 5th Amendment

The above discussion makes it clear that the 5th Amendment actually modified and somewhere liberalized the relations among the institutions of the government introduced by the 4th Amendment. It did not change the fundamental structure of the constitution as introduced by the 4th Amendment. Nor did it make the whole system a democratic one to pave the full way for constitutionalism. And also that cannot be expected particularly from a military government who comes to power completely in an illegal way. The governmental system as it stood after the 5th Amendment was neither a true presidential system as is practised in the USA nor a parliamentary one as is practiced in the UK. Neither was it the same presidential system as is practised in France where the Prime Minister and his cabinet are collectively responsible to parliament.² The presidency as modified by the 5th Amendment was much more powerful than the presidency under the French Constitution. It was really a class apart, an all-powerful executive ridden presidential system which armed the President with all devices to administer his dictatorial rule. This model bore similarities to that of

1990.

²⁴ *Proclamation Order No. 1 of 1977.*

Ayub Khan of Pakistan. The executive authority was vested with the president, who was directly elected by the people for a period of five years although without a limit to the number of terms in office. Once, elected it was quite impossible to remove him from office, for the impeachment procedure as introduced by the 4th amendment was unprecedentedly a difficult one. The amendment also did not reveal any of the extraordinary constitutional devices like emergency, ordinance making, preventive detention etc, through which the president was capable of exercising almost dictatorial power. The President was also the chief legislative initiator though his power to address and power of dissolution of parliament. Also the power of the parliament was kept restricted in many important cases. Zia's system was, therefore, neither a fully democratic responsible government; nor was it an ever hated one party dictatorship as introduced by Mujib. It was a multi-party president system blended of democratic and autocratic features

Sixth Amendment

On May 30, 1981 President Zia was brutally killed in an unsuccessful army coup. On his death justice Abdus Sattar, the then Vice-President assumed the role of Acting President. Under Article 123 of the Constitution the presidential vacancy caused by death was to be filled by an election within 180 days of the vacancy occurring, Acting President Sattar was nominated by BNP as a presidential candidate in the election. But a constitutional problem arose respecting the method of Sattar's nomination, for the Constitution did not permit him to contest the election as he was holding an office of Profit. Under Article 50 of the Constitution the President could appoint Vice-President any person qualified for election as a member of parliament Under Article 66 (dd) a person would be disqualified for election as a member "of parliament if he was holding an office of profit in the service of the Republic other than an office which is

declared bylaw not to disqualify-such holders. There was no law stating that the office of Vice-President.was not an office of profit. On the other hand, under Article 66(2A) some persons were exempted from holding an office of profit—such as Prime Minister, Deputy Prime Minister, Minister, Minister of State and Deputy Minister. It was, therefore, clear that the office of the -Vice-President continued to be an office of profit and this debarred Sattar from contesting in the election. To overcome this problem, on July I, 1981 a Bill called the Sixth (Constitution Amendment) Bill was introduced in the House. On 8th July the Bill was passed which now enabled Sattar to contest the election without resignation from his office. This Amendment amended Articles. 51 and 60 excluding, inter alia, the office of President, Vice-President. Acting President free from being office of profit. This Amendment was, therefore, made to face a real situation. No sinister-looking political purpose worked behind it.

Seventh Amendment

After the brutal killing of Zia the presidential election was held on 15th November, 1981. Justice Abdus Sattar, the then Acting President arid nominee of the ruling party BNP won a landslide victory and became the next President of Bangladesh to Zia. But in the early hours of 24th March, 1982. 128 days after the presidential election was held, a military intervention led by Hussain Muhammad Ershad, the then Chief of Army Staff took place. This is known as the bloodless coup of March, 24. Through this coup Ershad seized power ousting Sattar. Martial law was declared for the second time in Bangladesh; parliament was dissolved; the Constitution was suspended and political activities were banned. Ershad first assumed the office Chief Martial Law Administrator and he nominated Justice Ahsan Uddin Chowdhury as a phantom president. Later on Ershad assumed the offices of both CMLA and president. Ershad kept martial law in force for four years and seven months beginning from 24th March, 1982 to 11th November, 1986. On 11th November, 1986 the Seventh Amendment to

the Constitution was passed in the third parliament. By this Amendment Ershad's seizure of power in 1982 and his long term action as CMLA were legitimized. In the Fourth Schedule to the Constitution a new paragraph 19 was added which provided, inter alia, that all Proclamations, Proclamation Order, CMLA's Order, Martial Law Regulation Order, Ordinance and other laws made during the period between 24th March, 1982 and the date of commencement of the Constitution (7th Amendment) Act, 1986 had been validly made and. would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

Critical Analysis of Seventh Amendment

- This amendment allowed General Ershad's take over the power of the state through a unconstitutional manner and validated all the actions taken by his Government. The elected Government of Bangladesh was overthrown by the elected members of the parliament, though the previous elected government was highly corrupted and failed in many ways²⁵
- The indemnity of illegally assumption of power was initiated by Gen. Ziaur Rahman through 5th Amendment and it was continued and practiced well by Gen. Ershad through 7th Amendment. And the irony is, both these amendments were declared as the glorious chapter of Bangladesh by the military regime. But the leader of the opposition and other Democratic parties called it as the 'Black Chapter'.

²⁵ S.S. Islam, *Bangladesh in 1986: Entering a New Phase*, Asian Survey, Vol. 27, No. 2, February 1987.

Eighth Amendment

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

1. The word ‘Bengali’ was replaced by the word ‘Bangla’ in Article 3 of the Constitution.
2. The word ‘Dacca’ was replaced by the word ‘Dhaka’ in Article 5 of the Constitution.
3. A new Article 2A was created where it was provided that ‘the state religion of the Republic is Islam but other religions may be practised in peace and harmony in the Republic.’
4. Two sub-clauses [30(1) & 30(3)] of Article 30 were omitted.

Now, therefore, there remained no bar for the state to confer title, honour or decoration.

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

Critical Analysis of Eighth Amendment

➤ It is needless to say that this Amendment was done not to face any real situation; a sinister-looking political purpose of Ershad worked behind this Amendment. Though Ershad legalised his seizure of power and longtime actions as CMLA through an elected parliament, he was not treated as legitimate ruler by the opposition. The opposition from the very beginning began to look upon Ershad’s attempts with suspicion. There were continued movements against his regime. On the way to subdue this continued movement, he first, as a follower of Zia, took the

religion ‘Islam’ as a handy weapon to use it as a posture of his activities so that he could gain the support of the largest section of illiterate population who are religious but politically unconscious. To that end in view he inserted ‘Islam’ as the state religion in the Constitution through the 8th Amendment. As a commentator says, frustrated by the failure to acquire legitimacy through electoral process, the regime resorted to widen its support-base by exploiting the religious sentiment of the country’s overwhelming majority of Muslim population. Because of the marginal representation of opposition in parliament and its leader known throughout the country as ‘loyal opposition leader’ the bill caused more uproar outside, the parliament than inside it²⁶. Almost all major opposition parties, including the ones propagating Islamic dogmatism opposed the Amendment Bill. It was opposed on such grounds as:

- (i) the bill was politically motivated;
- (ii) the amendment would constitutionally divide, the. nation, into majority and minority;
- (iii) it would have bad impact on the communal harmony in the country ; and above all,
- (iv) the parliament itself was illegal and therefore, had no more right to amend the constitution.

The Eighth Amendment Case

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

²⁶ *The Bangladesh Observer, 12 May and 9 June, 1988.*

Background of the Case

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

To be mentioned here that the Dhaka Bar Association led by the Supreme Court Bar Association began to protest the mode of decentralization of the HCD from the very day the-Martial law Proclamation was made to this effect. The Supreme Court Bar Association construed the bifurcation plan of the HCD as totally unjustified and a design to destroy the institution of the judiciary. In protest they boycotted the courts for-months, passed resolutions and staged demonstrations, openly accusing the Chief Justice of violating the provisions of the Constitution by constituting the benches and session outside Dhaka. The Court of Chief Justice was boycotted for years and the Chief Justice did not sit in any court for nearly three years. The judiciary was

paralyzed which diminished the image and prestige of the judiciary as a whole.

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

The constitution (8th amendment) Case

By two writ petitions the amended Article 100 and the notification of the Chief Justice were challenged as ultra vires. A Division Bench of the HCD dismissed the petitions summarily. Leave was granted by the Appellate Division to consider the Constitutionality of the Amendment.

After a sound hearing the Appellate Division by a majority of 3 to 1 struck down the 8th Amendment as far as it related to the creation of permanent Benches outside Dhaka by substitution of Article 100. The ground shown by the court was that the impugned amended Article 100 changed the character and nature of the function and jurisdiction of the HCD as envisaged in the Constitution. Such an amendment changing the basic structure of the Constitution was ultra vires and therefore not tenable in law.

This was a historic judgment in the sense that it was the first time since the birth of the nation that the Supreme Court of Bangladesh was striking down an amendment to the Constitution made by the parliament, the supreme and sovereign law making body under the Constitution. The judgment aroused serious controversies on the issue of parliaments' authority to amend the Constitution and whether the Supreme Court

could restrict the amending power of the parliament. And whether four or five judges sitting on a Bench could be wiser or have more authority than the 330 members of parliament elected by the people.

Ninth Amendment

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

1. Provision for direct election for the Vice President.
2. Provision for the election of the President and Vice-president simultaneously.
3. Both President and Vice-President were to hold office for a term of five years.
4. No person was to hold office as President or Vice-President for more than two terms; whether or not the terms were consecutive.

The Amendment, therefore, sought to democratise the executive. But it carries no importance now for the 12th Amendment which reverted the governmental system to a parliamentary one has made all its provisions ineffective.

Critical Analysis of Ninth Amendment

➤ Ninth amendment was amended by a parliament which was not elected by a free, fair and impartial election, and also it was useless after the country started its journey to a parliamentary system through the Twelfth Amendment of the constitution.

Tenth Amendment

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

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

Critical Analysis of Tenth Amendment

➤ Women Seats are distributed among the parties according to the majority of the winning constituency by a particular political party. So, the ruling regime had a desire to capture the women reserved seats which would play an important role during vital decision making process. But the desire did not come true as the ruling party was ousted by the mass movement.

Eleventh and Twelfth Amendment

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

came out at 18th September. Thus the Twelfth Amendment came to be effective on 18th September, 1991. A fresh start of constitutionalism had begun in Bangladesh.

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

Subject -matter of the Eleventh Amendment

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

President during the period between the 6th December, 1990, and the day of taking over the office of the President by the new President Abdur Rahman Biswas, duly elected under amended provisions of the Constitution.

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

Changes Introduced by the Twelfth Amendment

It was the Twelfth Amendment which, like an unexpected beginning, reintroduced parliamentary system in Bangladesh paving die way for a fresh start of constitutionalism. After 16 years of existing dictatorial presidential system introduced by the 4th amendment in 1975 parliamentary system was reverted to for the second time by this Amendment. Except for a few Articles the spirit and language of the Twelfth Amendment are similar to those replaced by the Fourth Amendment. The fundamental changes to that end introduced in the constitution are following:

A. Position of the President

1. The President is now the titular head of the state while the Prime Minister is the chief executive as per the provisions of Articles 48 and 55 of the amended Constitution. The posts of Vice-president and Deputy Prime Minister have been abolished.
2. In the original Constitution the President was to be elected by members of parliament in a poll by secret ballot as provided for in the Second Schedule of the Constitution. But the Twelfth Amendment did not restore that Second Schedule. Now after this Amendment as per Article 48 the President is to be elected by the members of parliament in accordance with the law meaning that parliament may by law make provision for election by open ballot which actually imposes a bar on the exercise of personal freedom of members of parliament in electing the President.

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

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

- (i) to appoint Prime Minister who appears to him to command the support of the majority of the members of parliament; and
- (ii) to appoint the Chief Justice.

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

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

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

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

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

B. The “Prime Minister and the Cabinet

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

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

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

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

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

It is noteworthy that this provision of appointment of ministers from among non-parliamentary members is not recognized in true parliamentary system. But this is justified in the sense that it enables the government to utilize the service of technocrats. Because in most developing countries there is a shortage of capable and skill persons among members of parliament.

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

C. The Issue of Floor Crossing and Ministerial Responsibility

Compared to the provisions of Article 70 as it stood before the Twelfth Amendment, the Twelfth Amendment has introduced more stringent measures to prevent floor crossing. Two sub-sections have been added to Article 70. Section 70(2) now prevents forming any dissident group within the party. And section 70(3) provides that if an

independent member joins any political party he will come under the preview of anti-defection provisions.

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

E. Chapter III dealing with the provisions of local government of Part IV of the Constitution which was omitted by the Fourth Amendment has been revived by the twelfth Amendment.

F. Compared to the original Constitution and the 5th Amendment the Twelfth Amendment has made a sort of improvement with regard to the power of parliament in respect of international treaties. A new Article 145A has been created which now provides that all treaties with foreign countries shall be laid before parliament by the President. Earlier the President could refuse to lay before parliament any of such treaty on the ground of national interest.

It should be pointed but that in true parliamentary form of government as in practised in UK, India, and Australia etc. The power of dissolution is given to the King or President at his discretion and he uses this power in accordance with well-established traditions and conventions of parliamentary system. But as mentioned earlier this discretionary power of the President was misused during the Pakistan period which created cabinet instability and rendered government unworkable. Taking this bitter experience into consideration the framers of the constitution of Bangladesh provide for strict provisions without leaving any scope for the president to act arbitrarily.

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

Thirteenth Amendment

Background

On the way to restoration of liberal democracy from the bondage of military autocracy the historic 5th Parliamentary Election was a milestone which was held under the Acting President Justice Sahabuddin Ahmed in 1991. An unprecedented degree of enthusiasm was shown by all quarters. The election was nationally and internationally recognised as free and fair. Winning majority seats in parliament the BNP formed government. But from the beginning of the BNP government the opposition parties in the parliament began to create pressure on the government so that it includes provision for caretaker government in the Constitution. In 1993 first Jamat-i-Islam and the AL and JP submitted their respective Bills concerning caretaker government. Every Bill contained the same object-to make general elections free and fair and to make the whole process of election free from the government influence provision for caretaker government should be introduced in the Constitution. But this demand, of the opposition parties was treated by the government as unconstitutional and illegal. The Magura by election was the turning point for the movement of caretaker government. It was this Magura by-election in which the government party BNP took resort to an unprecedented-malpractice and rigging. This election manipulation of BNP government, as reported by most important dailies, defeated even the Ershad's election manipulation in 1988 and it has got a title of 'Election Magura' in the election politics of Bangladesh. Before this Magura incident all the opposition parties made walkout from parliament in protest of a statement made by Information Minister Nazmul Huda concerning. Hebron Killing' issue of Israel. And they made commitment that they would not return to parliament if the Information Minister did not expunge his statement. To this boycotting of parliament 'Magura election' malpractices provided an extra strength and now the opposition parties got their direct

way of demanding that they would not go back to parliament till a ‘caretaker government’ Bill was introduced in the House. The government did not pay a heed to this demand. On 28th December, 1994 about 147 MPs resigned in protest. When the government proceeded to hold by-election in 142 vacant seats the political impasse took more outrageous condition leading to continuous country-wide strike. On 24th November, 1995 the government dissolved the 5th parliament and the 6th Parliamentary Election was scheduled on 15th February, 1996. But since the government did not pay any heed to the demand of caretaker government by the opposition, all the opposition parties boycotted election. The ruling party BNP proceeded to contest the election with sudden hand-picked parties as the military director Ershad did. The announcement of the result of the election added fuel to the fire-like opposition movement. All the opposition parties launched their country-wide non-cooperation movement and demanded the fall of the government as well as the dissolution of 6th parliament. The whole politico-economic condition of the country was leading to a complete civil war. Lastly finding no other the way out BNP government introduced the Caretaker Government Bill (the 13th Amendment of the Constitution) on 21st March at the first session of the 6th parliament. The Bill was passed on 26th March, Then the 6th parliament after 7 days of its life was dissolved on 30th March and Justice Habibur Rahman was appointed, as the Chief. Adviser of the Caretaker Government as envisaged in the 13th Amendment of the Constitution.

The 13th Amendment of the Constitution

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

Composition of Caretaker Government

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

Qualification of the Advisers

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

- a) qualified for election as members of parliament;
- b) Not members of any political party or any organization associated with or affiliated to any political party.
- (c) Not, and have agreed in writing not to be, candidates for ensuring election of members of parliament;
- (d) Not over seventy-two years of age.

Status of the Members of the Caretaker Government

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

Functions

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

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

Evaluation of the 13th Amendment

In the constitutional development of Bangladesh the 13th Amendment of the constitution, in a sense, is a positive step for following reasons.

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

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

Thirdly, coming to power every government now will have to think that once parliament is dissolved or its term is ended, it will automatically find itself out of power and then the public will have the fullest opportunity and atmosphere to exercise their right to elect representatives and of government. On the other hand, no government now will be in a position to think for manipulation in the electrons; rather

it will think for doing material benefit to the people. There is therefore, possibility that the government will now be more responsive than in the past.

Critical Analysis of The 13th Amendment

➤ Firstly though the Chief Adviser of the caretaker government has been the status a Prime Minister, from legal point of view he has been made subservient to the President and he has not been given the full power as a Prime Minister in ordinary situation can exercise. According to article 58E the President is not bound to act in accordance with the advice of the Chief Adviser. Again, article 38B(2) stipulates that the non-party caretaker government shall be collectively responsible to the President. Thus President retains the power to cancel any decision of the caretaker government and even the caretaker government itself. Since the Chief Adviser along with all advisers of the caretaker government is non-political and non-partisan person and since he will exercise his powers only for three months to conduct a general election, no power-expectation will work within him, he should have been, for the sake of independent exercise of his function, given the same constitutional power as the Prime Minister does have.

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

➤ Thirdly, this interim caretaker government will be in power for 3 months only, they will not have any policy formulating functions and they will be in power without any prior experience of governing the country. So it is likely that this

government may create obstacle in the smooth functioning and developments of policies initiated by the previous government.

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

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

Fourteenth Amendment

Background

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

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

Insertion of new paragraph in Fourth Schedule

“23. Temporary special Provision regarding women members in the Parliament.

(1) for the residual period of the Parliament in existence at the time of the Commencement of the Constitution (fourteenth Amendment) Act, 2004 there shall be reserved forty five seats exclusively for women members and they will be elected by members of the Parliament in accordance with law on the basis of procedure of proportional representation in the Parliament thought single transferable vote.

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

Critical Analysis of the 14th amendments

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

Fifteenth Amendment

Till today, the constitution of the People's Republic of Bangladesh has been amended fifteen times. The constitution (Fifteenth Amendment) Act 2011 has been passed by the Parliament on 30th June 2011. 291 votes were cast in favour and 1 was against the bill. Major changes of the 15th amendment are listed below:

- 1) Caretaker system abolished
- 2) Islam as State religion, 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble and Removal of 'Absolute Faith and Trust in Allah' from the constitution.
- 3) Revival of Article 12 to restore Secularism and freedom of religion.
- 4) Denies recognizing the indigenous people, will be termed as tribal and ethnic minorities
- 5) The people of Bangladesh shall be known as Bangalees as a nation and citizens of Bangladesh shall be known as Bangladeshis
- 6) Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to end take-over of power through extra-constitutional means and highest level of

punishment would be awarded for those power capturers by extra-constitutional means and Basic provisions of the constitution are not amendable.

7) In the case of a dissolution Parliament by any reason, election should be held within 90 days of such dissolution.

8) Increasing the number of women reserve seats to 50 from existing 45.

9) The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President in consultation with the Chief Justice.

10) The portrait of the Sheikh Mujibur Rahman shall be preserved and display at the offices of the President, the Prime Minister, the Speaker, and the Chief Justice and in head and branch offices of all government and semi-government offices, autonomous bodies, statutory public authorities, government and non-government educational institutions, embassies and missions of Bangladesh abroad.

11) Incorporation of speech of Sheikh Mujibur Rahman on March 7, 1971, declaration of independence by Mujibur Rahman after midnight of March 25, 1971 and the proclamation of Independence declared at Mujibnagar on April 10, 1971.

Critical Analysis of the 15th Amendment:

➤ Article 7A.(1) says, “If any person reacts his confidence and trust in this constitution or takes attempt of doing so or conspire against it, his or her activities will be treated as acts of sedition, and the person concerned will be guilty of sedition”.

➤ About punishment, Article 7A.(3) says, “The person convicted under the provision of this article will be awarded the highest punishment prescribed for other offences by the existing laws.

➤ This article can close down the path of freedom of expression and the objective, independent, intellectual and constructive criticism of any article of the constitution.

- The government may take initiative of arresting and putting behind the bars all writers, speakers, editors for critical articles or discussion.
- Scope of awarding the highest punishment for this kind of activities.
- These articles have played a trick with the citizens. What is gives with one hand (7.1.all power belong to people), it takes away with the other (7A).
- There is no existence of such an **Antipeople** provision in the constitution of any democratic country in the world.

The second most dangerous aspect of the 15th Amendment is **Article 7B**.

- Article 7B says, “Notwithstanding anything contained in Article 142 of the constitution, the preamble, all articles of Part I, II, III and the provisions of articles relating to the basic structures of the constitution including article 150 of part xl shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.
- More than 50 articles of the constitution have been made “beyond amendment”.
- Making 50 basic structure of the constitution is totally illogical.
- A ridiculous provision forbidding the revision of the structures is absolutely undemocratic and contrary to the basic spirit of democratic State. No constitution in the world has such an instance.

Religion Clash with Secularism

- ‘Bismillah-Ar-Rahman-Ar-Rahim’ retained above the preamble and Removal of 'Absolute Faith and Trust in Allah' from the constitution.
- Article 2A. Says, “The State religion of the Republic is Islam, but the state shall ensure equal status and equal right in the practice of Hindu, Buddhist, Christian and other religions”.
- Article 8(1) says, “The principles of nationalism, socialism, democracy and secularism shall constitute the fundamental principles of state policy.
- Article 12 defines secularism”.
- And Article 38 declares the freedom of association. No person shall have the right to form association if it is formed for the purposes of destroying the religious harmony.
- Retention of Islam as the State Religion and restoration of Secularism at the same time cannot go together.
- The word ”equal status” and “equal rights” deserves concentration. The contextual interpretation of constitution suggests that State religion in Bangladesh is not to be taken as State’s Religion.
- The 15th Amendment could not satisfy any religious group as well as the believers of the secularism.

Contradictory Aspects

Article 6(2) says, “the people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies”.

Article 10 says, “A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.

Article 70(1) – (1) a person elected as a Member of Parliament in 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 the party, but shall not thereby be disqualified for subsequent election as a Member of Parliament.

- The 15th amendment is very difficult to understand as it contains a number of contradictory provisions.
- Article 6(2) created debate among the Bangalees and the tribes of our country.
- Most of the people want to get the single identity of our Nation.
- The presence of socialism and democracy as the fundamental State principle created a mix type of economy in Bangladesh.
- The World has turned from the socialism for many reasons. So insertion of socialism as a fundamental State principle is totally unnecessary.
- Restored the original article 70 of the constitution allowing MPs to remain absent from the House if she or he does not want to cast vote on any issue in line with her or his party’s decision.

Most Controversial Aspects

- The most controversial aspect of the 15th amendment is its deletion of caretaker government (CTG).
- The Appellate Division of the Supreme Court, in a verdict on May 10, 2011,

declared the system illegal.

- From the Constitution; 58B. Non-Party Care-taker Government, shall be omitted. The interim government system inserted.
- Elections under party governments have never reflected public opinion, nor have they generally offered an opportunity to confer legitimacy on those who wanted to rule. Bangladesh had a very bad and shocking experience of holding general elections under party governments.
- Abolition of the caretaker government system divided the nation and caused a tense situation in politics.
- On the caretaker issue, a problem has been created wholly unnecessarily. More than one opinion poll suggests that 90% of the people support a neutral non-party government during the elections. If the ruling party is in doubt it can go for referendum on this issue as is done in mature democracies.

Some Positive Aspects

- Article 18A. Says, “the State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens”.
- Article 19(3) says, “the State shall end endeavour to ensure equality of opportunity and participation of women in all spheres of national life”.
- Article 23A. Says, “the State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities”.

- Article 66 says about war criminals.
- the proposed bill to the environment and biodiversity conservation is a positive aspect of 15th amendment because environment issue is so much important issue in present world.
- The new Article 23A. by the addition of tribes, minor races, ethnic - groups and community preservation, and development is proposed.
- Convicted war criminals elections Satisfaction by making disqualified the enrollment of the war criminals in the voter list. It said in the case of enrollment in the voter list, if anybody was convicted under the Collaborator (special tribunal) Order 1972, he/she would not become voters.
- 15th amendment has some positive aspects like partly reflecting the cultural face of our freedom fight^{27, 28},

²⁷ *Constitution of the People's Republic of Bangladesh.*

²⁸ Mahmudul Hasan *Constitutional Law of Bangladesh.*, 3rd edition, appendix A, Mullick Brothers

Overall Critical Analysis about the Constitutional Amendments of Bangladesh

The most of the amendments of the Constitution of the People's Republic of Bangladesh was rarely aimed to fortify it; rather many of the amendments destroyed the basic features of the constitution and served the purpose of the ruling governments only. And none of the Amendments were asked for referendum from the people, which is a right for the people of any country.

The first three amendments do not appear to have altered the basic structure of the constitution .But the fourth amendment of the constitution clearly altered the basic structure of constitution,” the Appellate Division of Supreme Court observed in Hamidul Huq Chowdhory V Bangladesh case.

Analyzing the impact of the fourth Amendment, former chief justice Mustafa Kamal said that the amendment changed the basic structure of the constitution. He said the fourth amendment introduced a presidential form of government led by an all-powerful president, abolishing the parliamentary form of government²⁹.

After fourth Amendment, nobody even could contest for presidential or parliamentary election, unless otherwise he/she was a member of the only one national party named Bangladesh Krishak Sramik Awami League (BKSL).

The fourth amendment also empowered the president to issue an order to dissolve all political parties in the country, and take necessary steps to form the national party, including determining all matters relating to the nomenclature, program, and

²⁹ Kamal, M. *Bangladesh Constitution: trends and issues*.1994

membership organization discipline, finance, and function of the party.

But the ruling party, which amended the 4th amendment, could not enjoy the fruit of it as the Supreme leader of the party Bangabandhu Sheikh Mujibur Rahman was assassinated and the country went under Martial law.

Both the fifth and seventh amendments precluded judicial review of the actions of the two martial law regimes, which is a clear destruction of the basic feature of the constitution. The Fifth Amendment was recently declared illegal by the Appellate division of Supreme Court of Bangladesh and seventh amendment is also challenged in the Supreme Court which is under trial.

In the Eighth Amendment, the secular characteristic of the constitution was completely destroyed by declaring Islam as the state religion, and it was declared just to stay in power by exploiting the religious sentiment of the people of the country which was not attained ultimately.

Ninth amendment was amended by a parliament which was not elected by a free, fair and impartial election, and also it was useless after the country started its journey to a parliamentary system through the Twelfth Amendment of the constitution

Tenth Amendment enables the political parties to increase the numerical strength in the National Assembly by capturing the women seats according to the majority dependent distribution.

The Twelfth Amendments cancelled most of the changes made by the fourth amendment, and introduced a parliamentary form of Government although people are yet to get the benefit of this form of Government.

In the Thirteenth Amendment, although the Chief Advisor of the Care taker

Government has the similar status of a Prime Minister, he has to work under President and the President has the freedom to cancel any decision proposed and taken by the Chief Advisor, even he has the power to dissolve the caretaker government itself³⁰.

According to the Constitution of Bangladesh, the supreme command of the Defense of the Country laid to the President, and he exercise this power according to the advice of the Prime Minister, 13th Amendment remain silent about President's role and Chief Advisors' advice regarding the defense system.

Most of the advisors usually lack of political knowledge which may not be helpful to formulate policies during their short tenure of power.

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

The Fourteenth amendment act was passed in 2004 by the eighth parliament dominated by the BNP-Jamaat alliance, increasing the number of women's reserve

³⁰ *Constitution of the People's Republic of Bangladesh*, Article 58E, 38B(2).

seats in parliament from 30 to 45. The amendment however created huge controversy as it also increased the service age of the Supreme Court Judges by two years, bearing in mind to legalize the then chief Justice MA Hassan to lead the upcoming caretaker government that would help the Election Commission to hold the ninth parliamentary election. But this step was strongly refused by the oppositions to accept Justice Hasan as the caretaker chief and the political situation became very turmoil by the end of 2006, leading to a prolonged emergency situation in the country which ended through holding of the ninth parliamentary election on December 29, 2008.

The most controversial aspect of the 15th amendment is its deletion of caretaker government (CTG). The Appellate Division of the Supreme Court, in a verdict on May 10, 2011, declared the system illegal. From the Constitution; 58B. Non-Party Care-taker Government, shall be omitted. The interim government system inserted

On the one hand the court said- care taker government system is unconstitutional and undemocratic, and on the other it suggested holding the next two elections under the care taker government. Regarding this verdict, elderly lawyer and constitution expert Barrister Rafiqul Haque said – The Appellate Division verdict on the caretaker government system is contradictory. The court ruled that the verdict will have immediate effect. But it is also said that the 10th and 11th parliament elections will be held under the caretaker government. This is completely a self-contradictory verdict³¹.

By the verdict, appellate division is issuing instructions to parliament. At this, a question normally arises who is sovereign? Whether the country will run at the instruction of the parliament or Supreme Court? The court cannot formulate or amend the laws. The election could be held under the care taker government until and unless the parliament changes the care taker government system. Regarding this amendment

³¹ *The Daily Prothom Alo, fifteenth amendment and abolish of CTG, 1 July 2011*

Khandkar Mahbub Hossain, Supreme Court Bar Association president and senior advocate said-

“The verdict has undermined the role of parliament elected by the people. The Judiciary could be saved if the appellate Division gave a clear guideline. The scrapping of the caretaker government system without taking firm decisions on related issues might whip up agitations in the political arena.”

When the government passed the 15th amendment bill repealing the caretaker government provision, the full judgment was not published. Surprisingly, the possibility of having two further elections under caretaker government as mentioned in the short verdict, which was given before the fifteenth amendment was passed, but was not in the full judgments, which was given after the fifteenth amendment was passed! That means there has been a degree of inconsistency between the short order and the final judgment of the appellate division of the Supreme Court for mysterious reasons³².

³² Dr. Asif Nazrul “*The controversy over abolishing Caretaker system*” a column of The Daily New Age. 14 June, 2011.

Conclusion

A constitution is a sacred document made up after very long period of deliberations. It reflects the wishes of the people and provides courses of action for governing the country. It also sets the basic path of the country, the form of the government, the relation between the government and the governed. Amendment of the constitution is a time and circumstances demanded procedure which is done by the legislators to reconsider certain provision(s) of the constitution, and the ultimate objective is to improve the system gradually. So, the task of the amendment should be taken very seriously and sincerely and most importantly judiciously. The determining factor should be the interest of the public, and there should be a national consensus on the issues under consideration. That's why; amendments are not required and done frequently.

In Bangladesh, most of the Amendments were objected toward the preparation of individual or party position, legitimization of the military intervention in the politics and utilizing the political system for selfish ends. Consensus was rarely attained on major issues, so the polity has not got any benefit and its capacity has not been strengthened. On the other hand, frequent changes have further weakened the system and added confusion to the citizens.

There is lot of examples of referendum on nationally important issues which is also a sign of existing matured democracy in the country. Recently, Scotland held a referendum on whether to stay with the Great Britain or not. The people of Bangladesh also expect that there will be a referendum on the amendments of constitution which will make the constitution a more people's constitution and there will be active participation of the mass people.

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