Constitutional Amendment: A Jurisprudential Analysis of Political Rhetoric, Ideological Dichotomies, and Secular or Religious Adventurism

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Introduction

A State-constitution is the fundamental law of the concerned Statehood. The concept of the Law of the Land may sound similar to that of a whole body of State-endorsed rules and regulations based on some basic principles upon which a State operates its function through governmental agencies. A State-constitution is not merely a bunch of some principles, provisions, and legal norms or rules and regulations. It is rather a fundamental legal text based on which major national institutions can be established and developed. It is the most important Basic Law that establishes a legal framework for all other branches of law. In other words, it is the legal foundation for any Statehood to start with. However, to be regarded as a matured and documented constitutional text it must go through some crucial tests. A journey of a Basic Law for any State may suffer serious setback if it does not have a right kind of political, economic and ethical orientation. Moreover, main aims and objectives of the Basic Law of a State cannot be articulated with too many ambiguities.

Constitutional law as a whole is also valued for its rhetorical excellence and ornamental beauties in its expression that needs to be admired by all concerned parties, including the conflicting political forces. In a black letter view, constitutional law is a legal text either compiled in one legal text or may be scattered around in number of documents and conventions. Whatever way you write or compile a State-constitution it would require some changes from time to time to meet the necessity of the time and to fulfil the demands of its constituencies.

A constituent assembly may write or rewrite a "constitution" for a concerned State many times that makes no difference at all until it is adopted by the highest legislative body of a State. Once the text of the constitution is adopted by the lawmakers through acceptable political and legal procedures, then as a fundamental law it has binding force for all citizens and foreigners living within its jurisdiction except people with diplomatic immunities. Irrespective of its rigid or flexible character, any constitutional amendment requires serious political maturity, economic farsightedness, and legal acumen. Our 1972 constitution has been acclaimed as one of the remarkable achievements for the entire nation,

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which paid very high prices for its political independence in terms of human lives and destruction of the entire country. The frequent changes we brought to our rigid constitution were either unsustainable or marred with vindictive partisan politics. In October, 2011, we got a renewed version of constitution with the 15th amendment that claimed to be a fulfilment of a political promise of returning to the original 1972 constitution.

Constitutional amendment may sometimes bring a supposedly serious impact on the ongoing legal, political, and economic narratives of the time, by touching the very core of the fundamental principles of the governance and State system of the concerned nation. More importantly, the entire fabric of constitutionalism may be directly affected by such amendment of the constitution by pushing its "overall operational scheme" into a wrong drive.

For example, the British and Pakistani constitutional laws were standing in the ways of freedom of the Bengali nation. After we achieved our hard earned political independence, we were keen to achieve our economic prosperity and overall emancipation with the help of a legally sound constitutional framework to be implemented and followed by the ruling elite first. However, very often our politicians and business lobbies have failed us miserably. At the outset of almost every constitutional amendment we were promised to be better served by our politicians and by the representation of the ruling class. Constitutionally, lawmakers are the people's representative in the Parliament empowered with the legal authority to change the constitutional system or any of its provision.

However, why the apex court were so intimately involved in bringing about some of the latest constitutional amendments which made conscientious circles of the country wonder. It appears that we have been too much involved in a circular type of logic of changing the constitutional principles back and forth without giving a deeper thought about the hopes and aspiration of the masses, who should have gotten the first priority in delivering modern amenities of life such as safe food, drinking water, decent shelter, enlightened education and proper health care, and first and foremost a constitutional guarantee to life, liberty, and happiness.

In this article we will put our latest constitutional changes into test of hallmarking of Basic Law and its characters in terms of empowering people *vis-à-vis* providing an upper hand to the vested interests of strong political and business lobbies. Our major way of looking at our constitutional changes would be their comparison with some similar constitutional changes of some foreign countries. Why the 15th constitutional amendment has provoked so much political and religious controversies would be one of the main questions we will address in this article. The analytical approach will not be deviated from any jurisprudential prism of examination to find out how successful we are in bringing about desired and necessary constitutional changes textually and also in real dynamics of our polity and expected economic betterment of

the nation. The secular, nationalistic, and socialist character of our constitution has never been above many political and cultural controversies. The issues of constitutional continuity, inconsistency, and absurdity have been hunting this nation almost through its four decades' of history. How far and how much those controversies were and are necessary for building a prosperous and forward-looking nation is the main question this research article likes to bring under the radar of the jurisprudential scrutiny.

Constitutional Amendment: American XV to Our 15th

The XV amendment to the American constitution has been regarded as anti-slavery and anti-racial constitutional provision making all American citizens equal in the eyes of law in regard to voting as well. This amendment prohibits governmental agencies to discriminate any American citizen based on race, religion and color. This American constitutional amendment was ratified on February 3, 1870.[1]

The final House version reads: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on the account of race, color, nativity, property, creed or previous condition of servitude." Likewise, the final Senate version read, "No discrimination in the exercise by any citizen of the United States of the elective franchise, or in the privilege of holding office, shall in any State be based upon race, color or previous condition of said citizen or his ancestors."

For the American constitutional development, the Bill of Rights as an addition to the original constitution should be regarded as a collection of ten amendments combined. An apparent reading of the Bill of Rights may indicate that it was primarily concerned about the constitutional protection of white American farmers and deprived the African Americans and women from those rights. That was the reason why many cases were fought at the American Supreme Court to determine the scope of original jurisprudential intent behind those ten amendments or the Bill of Rights. The constitutional principle of equality has been upheld by many decisions of the court, which were taken as the extension of the original lawmaking process.

What many American lawmakers and judges have appreciated is that the State agencies or governmental authorities even may turn into oppressive over the legitimate interests and rights any time, especially at the turn of any historical event. So it is important that citizens get adequate legal protection from the intrusive intervention of the State in the personal affairs of the citizenry.

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1 "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation."

In our case, most of the times our lawmakers and judges tend to make our Statehood stronger at the cost of the fundamental rights of the citizens. A glaring evidence of this thesis is our constitutional amendments, especially the 15th amendment. In fact, 15th amendment of our constitution is a collection of more than a dozen of traditional constitutional amendments similar to that of the Bill of Rights of the US Supreme Law. The major difference is that they move toward diametrically opposite direction. Unlike the American Bill of Rights, our 15th constitutional amendment has indulged in the protective measures of the so-called Basic Structure and State ideological principles rather than being worried about the protection of the fundamental rights of the people. The "doctrine of the Basic Structure" applied to any State-constitution is a complicated one, if not a confusing idea as well.

> "This issue leads us to the controversial 'Basic Features Doctrine' which originated from a series of Indian Supreme Court decisions starting with Shakari Prasad v Union of India (1951) and culminating in the monumental decision of Kesavananda v The State of Kerala (1973)."[2]

However, none of these cases or many other cases of same nature in different countries could establish the exact range or scope of the Basic Structure of any State-constitution which should be taken as unchangeable. Moreover, there is a consensus that every State-constitution needs to undergo a continuous process of amendment to make it relevant to the changes of the time and the attitudes of the societies and people. But the amendment process of the constitution should not be a subjective process as we have been witnessing in our constitutional history.

Like ours American constitution is also rigid one.[3] It was not easy to bring such a constitutional amendment for which ratification of three-fourths of the States of the US was necessary. Still then, in some of the States of the US, voters and candidates are required to be Christian and/or free men to exercise their political rights. It took more than one hundred years for the Americans to realize that all men are equal at least in terms of political rights, not to speak of economic, social, and religious rights. After that the

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2 Kevin Y. L Tan, *An Introduction to Singapore's Constitution* (Talisman, Singapore, Revised Edition, 2011) 11.

3 Without the agreement between at least three-fourth States of the US Federation no constitutional change or amendment is possible. The Federal Congress alone cannot amend the US constitution. Two-third members of the Federal Congress may try to bring an amendment, but then it needs to be approved in the highest legislative bodies of two-thirds of the States of the US. Article V of the US Constitution says: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;..."

Americans needed another one hundred years to realize that by nature all human beings are equal irrespective of gender, color, and adherence to any religious or non-religious faiths.

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes ..."[4]

Any Statehood at the time of its emergence attracts many concerned constituencies to stand for its causes to be upheld in course of time. Unlike many ideologically biased States, our State from its inception declared its goals to be materialized through economic emancipation of the masses. With the advent of Islam in Bengal we were fortunate enough not to wait for many more hundreds of years to realize the universal truth of being all men and women are equal by their very essence of creation, survival, and efforts to excel as human beings.

However, the character of the ruling class has never been changed so dramatically that could be named as revolutionary changes that we have witnessed during the early centuries of Islam in transforming Arab, Persian, African, and even Turkish societies. With the hard-earned but illogical emergence of independent Pakistan in 1947 made Muslims of this land quite hopeful for their own future prosperity. Unfortunately since its creation, Pakistan opted for a path of militarism and fascism similar to that of Israel. For the Pakistanis, we Bengalis only deserved a system of White-minority rule in pre-Mandela South Africa or occupational regime of Israelites over Palestinians. Our liberation war against Pakistani military was very similar to that of Algerian liberation movement against French colonial regime in 1950s. Massacre of Bengalis in their homeland can only be compared with the Serbian genocide perpetrated against the Muslims of Bosnia. The hope was running very high that after independence from Pakistan, we as a nation would secure a strong and matured Statehood that will reshape the psyche of our ruling elite. We as a proud nation has been yearning for ruling elite that would be dedicated to the interests of the masses rather than engaging amassing their own fortune by accumulating powers and wealth of all kinds in the hands of tiny section of people.

However, after four decades' of its own history of independence it has been proved clearly and loudly that still the character and psyche of our ruling elite deeply influenced by the British colonial legacy with a Pakistani-type mentality that exists across the board of all political spectrum of our

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4 David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, (Sixth Edition, New York, 2005) Vol. II, 644.

national politics. As a result, during last four decades we have amended our constitution fifteen times based on a circular type of logic and arguments about which we will discuss below.[5]

Ideological Dilemma with Constitutionalism

After 15th amendment of our constitution we are now again a 'Socialist State,' which in reality has no characteristic of Socialist or Marxist Statehood. In 1972 we became socialist under the influence of the former Soviet Union. Our own Communists and Socialist leaders had played a very influential role to make us declare a Socialist State with a strong "Secularist Character" of Soviet-type which was not even adopted in India as yet. Constitutionally India became "Secular" in 1976. Bangabandhu had to reiterate repeatedly that our "Secularism" was not anti-Islamic type. And to prove that he had to attend OIC meeting in Lahore in 1974 and met Zulfikar Ali Bhutto, who was the main architect of genocide in Bangladesh in 1971.[6]

Danger of Constitutional Adventurism

At the initial stage of our independence, we constitutionally had adopted socialist economic policies to be implemented for the entire nation for all sectors of economy including service sectors. Karl Marx himself advised the communists and socialists not to go for nationalized policies when and where the country is not quite advance in industrialization. Our nationalized economy put our entire economy in shamble and disarray. Coupled with the endemic corruption, a full-scale command economy pushed us toward a widespread famine where there was no scarcity of food and other necessary supplies.

Noble laureate economist Amartya Sen has proved beyond any doubt that it is not the scarcity of food, but the misuse of power and mismanagement in governmental system which ultimately creates famine as a national syndrome. Based on his research on Bengal famine of 1943 Professor Sen found that the disastrous famine had been orchestrated by London and Bengal was the main exporter of food grains for English people at the time.

> "[F]or example, horrors like terrible famines can remain unchecked on the mistaken presumption that they cannot be averted without increasing the total availability of food, which can be hard to organize rapidly enough. Hundreds of thousands, indeed, millions, can die from calamitous inaction resulting from unreasoned fatalism masquerading as composure based on

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5 See, for details, Moudud Ahmed, *Bangladesh: Constitutional Quest for Autonomy* (University Press Limited, 1991) 7-11.

6 "This brings us to the expression 'socialism' and 'socialist society' used in the preamble. Apparently these expressions are vague, but the vagueness disappears when we pay attention to the fact that the framers not only used these expressions but also Stated the mode of achieving it by using the expressions 'through democratic process' and providing in the substantive part of the Constitution an 18th Century tripartite form of government." Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, Second edition, 2009) 49.

> realism and common sense...The Bengal famine of 1943, which I witnessed as a child, was made viable not only by the lack of democracy in colonial India, but also by severe restrictions on reporting and criticism imposed on the Indian press and the voluntary practice of 'silence' on the famine that the British-owned media chose to follow." [7]

Thus behind every severe famine there are two main contributors that play role from the above and the grass-root people suffer most leading to death of innumerable people unaccounted for in the pages of human history. From the Scottish potato famine of 1840s up to the famine of 1974 in Bangladesh we do not see any similar phenomenon other than what Professor Sen has established for us with full clarity. Thus strategic economic mistakes and mismanagement have many things pertinent to do with the constitutional development of a State. This is also one of our constitutional queries in the process of returning to the 1972 Constitution of Bangladesh.[8]

It was a political reality that some very influential circles of ruling elite demanded the restoration of the 1972 constitution. However, that was a political demand to be resolved through political means or through the avenues of Parliament. The Supreme Court was not supposed to be involved in that power struggle between the conflicting political parties and forces. None of the political parties initially demanded the revocation of the Non-party Care-taker system that had politicized our judicial system from top to bottom.

The Supreme Court declared the 13th amendment of our constitution anti-constitutional and completely illegal that could not be accommodated within the Basic Structure of the 1972 Constitution on 10 May 2011. In 2010 the 5th amendment of the constitution also had been declared illegal by Justice Haque, who was a yet to become CJ of the country. Logically if you declare 5th amendment of the constitution illegal, then 4th amendment should automatically need to be restored or reinstalled. However, being a High Court Judge Mr Khairul Haque practically avoided that fundamental structural issue of our constitution in 2010 and then in 2011 becoming the CJ ordered to reprint our State-constitution keeping that in the lines of his verdicts. That was the biggest judicial adventurism our beloved country has ever witnessed since its liberation in 1971 and the adoption of the 1972 constitution.

In contrast to all that in the cases of Nobel laureate Prof Muhammad Yunus, the same court acted differently and he was deprived of all kinds of remedies to his grievances against the governmental decisions. On April 8, 2011 the High Court outrightly rejected two writ petitions submitted by Nobel laureate Muhammad Yunus, who was practically removed forcefully from the post of MD of the world-famous Grameen Bank, which has

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7 Amartya Sen, *The Idea of Justice*, (Allen Lane, 2009) 47, 339.

8 *The Constitution of the People's Republic of Bangladesh*, Government of Bangladesh, 2011, Preface-II

become a Bangladeshi brand of banking around the world. The Appellate Division of the Supreme Court of the country upheld the decision of HC of removing Professor Yunus from all activities of the Grameen Bank that was founded single handedly by him. This is another judicial adventurism we have witnessed that did not follow any Rules of Natural justice we find in numerous jurisprudential studies without which judicial remedies to any conflicts or problems are just other forms of coercive methods of gruesome impediments to our fundamental freedom, dignity, and human rights.

> "The government wants to run it [Grameen Bank] its own way. The government is perhaps looking for an opening to introduce its own ideas into the operation of the [Grameen] Bank..... Under the present law the board, majority members of which are representatives of the borrowers, make all the decisions. In order for the government to make decisions, board structure has to be changed, i.e. the ownership structure must be altered. Perhaps the government is hoping that the Commission will come up with such a recommendation. If the ownership of the Bank changes, the board changes; and as a result, everything else changes. Grameen Bank changes."[9]

Blame Game Does not Work for Millions of People

We tend to blame everybody except ourselves for our miseries and failure at national levels, including dysfunctional Parliament in particular and constitutional system in general. If some political and economic reforms and constitutional amendments could make us functional and dynamic as a nation, then the entire world would take it as the biggest success story to be emulated for others, especially countries with endemic corruption and economic and environmental failures. That is why our disaster management and even the constitutional patterns of care-taker system of governance made some Bangladeshi examples so loud and famous world-wide.

However, our problem is that we somehow have made those examples also a kind of infamous for our national pride and glory, which Pakistani military could not shatter because of our Bengali resilience to thrive and survive against all kinds of odds coming from outside. Americans claim themselves as the most resilient nation and people on earth because of their survival through Civil Wars (1860-64), Great Depression of 1930s, World War II, so-called Communist Aggression and so forth. The introduction of the "New Deal"[10] under President Franklin D Roosevelt

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9 Muhammad Yunus, *'Future of Grameen Bank: My Fears'* (Yunus Centre, Dhaka, 31 May 2012) 15.

10 During the presidency of Herbert Hoover (1874-1964) the American Great Depression was clearly visible and felt by the New York Stock Market Crash on October 29, 1929 and the then president believed that the free market dynamics would be able to take care of the sufferings of the stock-holders and home-owners, who had no idea how to get out from the impact of the immense economic sufferings they were in. Because of the Great Depression one of every four

pulled back the US from deep recession where livelihood of a vast majority of the Americans was in jeopardy. The main objective of the "New Deal" programs was to provide employment to the ordinary Americans by making the economy vibrant under the dynamics of free-market economic system. The promotion of the causes of economic recovery and putting Americans working forces back to work was apparently a great success during the Cold War era. The criticism of the "New Deal" policies had been regarded as unpatriotic until the civil liberty movement of 1960s in the US. Along with President G Washington and Abraham Lincoln, President Franklin D. Roosevelt (1882-1945) still has been regarded as one of the three most influential American Presidents.

President Roosevelt served 12 years (1933-45)[11] as an American President that could be regarded as unconstitutional as one American president can hold the office of the president only for 8 years. Such an apparent violation of the constitution served well to the programs of the New Deal and American involvement in the World War II. However, many analysts believe that those programs introduced by the President Roosevelt had ultimately led the Americans to the Civil Liberty movements during 1960s. In reality as well, during the peak years of the Cold War (1960s-70s), American administration was under tremendous pressure from within to go for wide ranging pro-people reforms. On the contrary to the popular desire, American administration opted for further facilitation and expansion of corporate interests that were detrimental to the interests of small businesses and regular people in the street. During the same period (1950s-60s) we have built a new history for us by initiating a pro-people movement for our own liberty and freedom that yet to be flourished under a prudent and sustainable constitutionalism.[12]

> "As part of the New deal, Congress passed the Social Security Act of 1935, requiring employers of eight or more employees to pay a federal excise tax...The statute does not apply, as we have seen, to employers of less than eight...The 5th Amendment[13] unlike the Fourteenth has no equal

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Americans was caught by unemployment. President Franklin Roosevelt (18-1945) was determined to ease the sufferings of the ordinary Americans, who were either unemployed or lost most of their savings. A detailed ten-facet programs were introduces that got the name of New Deal.

11 He was elected for the fourth time as a War-time American President in 1944. He died just before the end of the World War II.

12 See, for details, Carlos Santiago Nino, 'Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America' in Vicky Jackson and Mark Tushnet (eds.), *Comparative Constitutional Law* (Foundation Press, Second Edition, 1999) 229.

13 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put

> protection clause...[T]he question with which I [Justice Sutherland] have difficulty is whether the administrative provisions of the act invade the governmental administrative powers of the several States reserved by the Tenth Amendment."[14]

Delegation of legislative power is a complex and complicated constitutional issue. However nowhere in the world the highest legislative body delegates it lawmaking powers to the judiciary unless the issue is completely an internal affair between the judges or of solely a matter of procedural character. In other words, making substantive laws is the function of legislative body or a designated body appointed by the Parliament.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[15] Judiciary as a whole either interprets or extends the meaning of law for the purpose of delivering justice. Moreover, it is not at all a convention anywhere in the world that the apex court of a country would try to intervene the legislative authority of the Parliament, which on its part cannot invite a judge or a group of Judges to write or rewrite any article or part of it in the name of political correctness. The core principle here is to keep the judiciary independent and above all kinds of partisan politics.

> "The Supreme Court or the Judges do not make law and it is not their mandate to do so. The Supreme Court has the authority given by the Constitution to declare any law to be *ultra vires* the Constitution. The Court may travel to the extent of recommending that Parliament should consider enacting a particular legal provision to cater for a given problem which has been brought to its notice, but that does not extend to law-making power."[16]

This is a constitutional principle known to the entire world and many modern countries follow the system of Separation of Powers to avoid unnecessary conflicts between the three branches of State and government. By intervening in the lawmaking activities of the legislature, judiciary may invite intervention of executive power into the judicial activities and the process of deliberation of justice. This is the grave mistake J Haque done that led the entire country in chaos and confusion. The attempts of J Haque to rewrite the constitution were successful in the sense that the ruling party with a brute majority brought such changes in the constitution that is neither functional nor sustainable.

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in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14 David M. O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* (New York, Sixth Edition, 2005) Vol. I, 632, 633, 635.

15 This is the Text of the tenth amendment of the US Constitution. The Amendment X has always been regarded as the integral part of the Bill of Rights that was ratified on December 15, 1791 as one of the principles of the US federal system.

16 *Constitution of Bangladesh 13th Amendment Act case*, September 2012, Appellate Division, *The Lawyers*, Special Edition, Volume IX (A), p. 366.

Fear Factors across the Boards

We need to fear the conspirators and terrorists, who may put our freedom and liberty at great risk and even in complete jeopardy. In this respect Bengalis are at same level with the Americans. But American leaders with few exceptions can find their fault lines of economic downfall that started in 2008 and moral decadence that had started much earlier. More importantly a very few of us are capable of finding any direct relationship between the moral decadence and economic crisis of unmanageable proportion that we have never experienced before both at national, international, and global levels. Not only that we have been just putting our figurers against others disproportionately and unfairly. Below is one of the glaring examples of that miserable State of our mind and intellect in evaluating others and demonizing your ideological opponents and adversaries.

> "Long before he announced his presidential run this year, Newt Gingrich had become the most prominent American politician to embrace an alarming premise: that *Shariah*, or Islamic law, poses a threat to the United States as grave as or graver than terrorism. "I believe *Shariah* is a mortal threat to the survival of freedom in the United States and in the world as we know it," Mr. Gingrich said in a speech to the American Enterprise Institute in Washington in July 2010 devoted to what he suggested were the hidden dangers of Islamic radicalism. "I think it's that straightforward and that real."..."Stealth *jihadis* use political, cultural, societal, religious, intellectual tools; violent *jihadis* use violence," Mr. Gingrich said in the speech. "But in fact they're both engaged in jihad, and they're both seeking to impose the same end State, which is to replace Western civilization with a radical imposition of *Shariah*."..."The left's refusal to tell the truth about the Islamist threat is a natural parallel to the 70-year pattern of left-wing intellectuals refusing to tell the truth about communism and the Soviet Union," Mr. Gingrich said."[17]

Mr Gingrich was one of the most influential American Speakers of the Congress in the recent American history and such a poor judgment of him about Islam, Islamic Law, and Muslims simply is a reflection of utterly poor understanding in American mind that has been overshadowed by vulgar consumerism and sexism of the recent Western culture about which Muslim in general are very fearful with. This cannot be brushed away just by saying that it is an arrogance and ignorance of both conflicting sides across the board.

> "Constitutional interpretation and law, Justice Felix Frankfurter observed, "is not at all a science, but applied politics." The Constitution, of course, is a political document and as a written document is not self-interpreting; its interpretation is political. *How* the Constitution should be interpreted is thus as controversial as the ongoing debate over *who* should interpret it.

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[17] Scott Shane, 'In Islamic Law, Gingrich Sees a Mortal Threat to U.S.', The New York Times (online), 21 December 2011 <http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html?pagewanted=all&_r=0>

> For much of the nineteenth century, theories of Constitutional interpretation were generally not debated. The Court's interpretation of Constitution, of course, remained politically controversial. Yet, the great debate between Jeffersonian-Republicans and Federalists centered on disagreements over fundamental principles of Constitutional politics (the power and structure of the government and guarantees for civil rights and liberties) rather than competing interpretive theories. Their struggle was over rival political philosophies and interpretation of political systems created by the Constitution. That struggle continues except that contemporary debates, within the Court and the legal community, tend to be more complex and linked to rival theories of constitutional interpretation that aim to justify or criticize the Court's exercise of judicial review." [18]

During 1930s and 1940s there had been a deep-seated fear in the minds of many million Americans that the US as a State of federal kind may seize to exist sooner than later. With the beginning of the Cold War and establishment of NATO, many more millions found them as victors of the World War II and hoped for a far stronger leadership for the US at global levels. American dream to champion the causes of peace and security at world-stage had continued to materialize either through McCarthyism or by rehabilitating uncounted number of people those who were confined in concentration camps because of false accusations of disloyalty to American or subversion to it.

For example, most of the Japanese Americans were accused of treason against America without any hard or soft evidence to substantiate the process of State-sponsored illegal persecution. Just after the outbreak of the World War II more than 110,000 Japanese Americans had been transferred from the so-called security zones in California to concentration camps and they were completely deprived from any right whatsoever. Their homes, jobs, and other valuable belongings were taken away by governmental orders endorsed by the American President himself in 1942.

How that terrible thing could happen in a State, which ushered a sense of universal human dignity, freedom, and civil liberties since its inception? In fact some founding fathers of American Statehood and its noble dreams were very concerned about the safeguarding system of individual liberty from the State-sponsored intrusion to the personal lives of the people. Until World War II, it has been proved that there exists institutional discrimination to only African American in the US system of legality and morality. But after the war that sort of discrimination had been extended to the suspected communists or any other kinds of "non-patriotic Americans." Governmental agencies themselves became the source of discrimination and intimidation threatening all kinds of civil liberties and individual freedom.

McCarthy died at the age of 48 on May 2, 1957 because of an acute hepatitis because of his Boris Yeltsin-type of excessive alcoholic drinking.

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[18] O'Brien, above n14, 67, 68.

However, McCarthyism thrived in dormant and surfaced as *islamophobia.*[19] Apparently the fear of Racism, McCarthyism, Communism, and Islamism is over from the political horizon of the American domestic and foreign policies. In reality adoption of the Patriot Act and many others demonstrate that American government is very fearful of their own citizens, whose rights were protected by the constitution and many of its subsequent amendments, especially the First Amendment. President Thomas Jefferson very eloquently and unequivocally declared that the First Amendment of the US constitution was meant to create a firewall between all natural rights of citizens and the coercive methods the State machinery can adopt against the wrongdoers. [20]

> "Although the use of secret evidence predates 9/11, it has been strengthened in the post-9/11 world. No one can possibility defend himself or herself when the evidence is kept secret. But this is what many Muslims continue to face in America. The USA PATRIOT Act with many unconstitutional clauses was passed the day it was introduced, leaving no lawmaker any time to read its 342 pages. That Act established guilt by association, detentions without a hearing, and secret hearings. Some sunset clauses of the act have been renewed without much debate."[21]

No jurisprudential theory agrees with a principle of collective punishment that is either a medieval or tribal custom should be rejected at all levels of judiciary and system of governance. Punishment must be personalized thoroughly; otherwise it would be a violation of fundamental right enshrined in any State-constitution as well as a gross violation of human

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[19] Eklemeddin İhsanoglu says "The Organization of Islamic Cooperation (OIC) considers *Islamophobia* to be a new form of racism, one characterized by xenophobia, negative profiling and stereotyping, with strong similarities to apartheid. Like apartheid, the challenge for the international community is to dismantle the phenomenon and arrest its spread before it gets out of hand and jeopardizes global peace and security. Soon after I took over as secretary-general of the OIC in 2005, I made it a priority to take effective steps to counter Islamophobia." Eklemeddin İhsanoglu, 'The scourge of Islamophobia: a looming threat to international peace and security' Turkish Review, 24 November 2011<http://www.turkishreview.org/newsDetail_getNewsById.action?newsId=223148>

[20] "Jefferson simply quotes the First Amendment then uses a metaphor, the "wall", to separate the government from interfering with religious practice. Notice that the First Amendment puts Restrictions only on the Government, not the People! The Warren Court re-interpreted the First Amendment thus putting the restrictions on the People! Today the government can stop you from Praying in school, reading the Bible in school, showing the Ten Commandments in school, or have religious displays at Christmas. This is quite different from the wall Jefferson envisioned, protecting the people from government interference with Religious practice." Available http://www.free2pray.info/1separationchurchState.html accessed 24 Dec 2014

[21] Abdul Malik Mujahid, 'Islamphobia Statistics USA'(Sep 8, 2011) < http://www.soundvision.com/info/islamophobia/usastatistics.asp> accessed 24 December 2014

right. There is a consensus that the USA Patriot Act stands against many core constitutional principles of the US constitution that can easily be regarded as one of the greatest landmarks of State legal system.

Constitutional Legacy cannot be Built by Overnight

It is quite easy to blame communism, capitalism, secularism or Islamism for our own failure to establish a culture of constitutionalism, rule of law, and maintaining a decent standard of fundamental constitutional rights and human rights. Human dignity is an integrated whole that cannot be violated and should not be degraded under any circumstances. Demonizing others is an easy job, but showing respect to others in accordance with a universal standard of human dignity and also giving appropriate emphasis on the implementation of humane laws and avoidance of ill-motivated and misconstrued laws is an essential necessity for bringing about a prudent constitutional framework.[22]

The text of the constitution should not be taken as similar to some revealed religious text or cannot be used only for some partisan purposes. If political pluralism cannot be transformed into legal pluralism with a faster space of mobility to face the burning issues of common people, then constitutional pronouncement may remain in the orbit of political conflicts and rhetoric of demagogues with substantial consequence of reformative essence.

Chinese One-Party rule in substance is no less representative and progressive than the multi-party politics of India with dynastic tendencies and religious fanatical phenomenon. China is indeed a capitalist country with a socialist political culture and legacy. Important is its pro-people character that may be undermined by bad system of governance with emerging corrupt culture of accumulating wealth in the hands of few. Capitalist competitive economy may lead to disastrous consequences without adequate protection of Public Good without which common people may find themselves in the vicious circles of poverty, ignorance, and arrogance.

The British colonial legacy and Pakistani military adventurism were not supposed to be our constitutional culture. Unfortunately intellectually we are still party to the English, Pakistani and Indian dynastical politics from where we could not retreat in any significant way. Thus invention of Non-Party Caretaker system was neither absolutely unnecessary nor unexpected. Similarly reminiscence of Ayub Military regime (1958-69) of Pakistan in Ershad autocratic rule (1981-90) in Bangladesh could not be avoided because our constitutional history by that time had eroded almost completely.

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22 Article 27, see above note 9.

Politics of Alliances May not Follow the Rules of Ideological Prudency

The system of governance under BAKSHAL introduced in 1974 by the adoption of fourth constitutional amendment was apparently an alliance based on ideological orientation and economic commitment. However, that had been proved to be disastrous for the entire nation and our beloved leader Bangabandhu, who could easily put himself above all political alliances and wild quest for so-called "Scientific Socialism" led by the left-leaning younger generation of socialist leaders. Pro-Soviet orientation did not prove to be that harmful for India, while for us same policies made us completely disoriented in formulating national policies.

Until 1990 our Statehood was under the process of bewilderment. We even could not decide what form of government we should follow. Bangabandhu Sheikh Mujibur Rahman and Shahid President Zia both were assassinated in 1975 and 1981 while they were President of the country. General Ershad's rule had also been bearing the witness that the Presidential form of government cannot empower common people of the country to establish that "All powers in the Republic belong to the People"[23]. Thus most of the principles, policies, provisions, and norms have either served as the ornaments for the politicians in general and Parliament Members in particular or just political jargon written in the text of the constitution, the Supreme Law of the Land. However, violation of many major constitutional principles is quite a common phenomenon in many countries.

> "The political current of the 1940 and 1950s further aggravated the division within the court. Commencing in the early 1940s, political excitement flooded the country with frightful warning about fascism and communism. In 1940, Congress introduced the first federal peacetime sedition act known as the Alien Registration Act or Smith Act since the Alien and Sedition Act of 1978. The Smith Act of 1940 was more liberal in nature than the Sedition Act of 1978. It was considered a crime under the Smith Act to support or to belong to any organization that advocated the forceful oust of the government. Later on, loyalty oaths and Statements of non-communist connection from public and private sector employees was required by the Congress, with the Labor-Management Relations Act of 1947. All the way through the 1950s, the paranoia over communists' continued. Congress enacted the Internal Security Act of 1950, also known as the McCarran Act, over the veto of President Harry Truman. Under this act, every member of the communist party was required to be registered with the U.S. attorney general. Hearings and investigations of individuals' reliability was held by Senator Joseph McCarthy's subcommittee and the Special House Committee on Un-American Activities as well as several legislative committees." [24]

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23 Article 7(1), the *Constitution of the People's Republic of Bangladesh*. See above n 9.

24 O'Brien, above n 4, 401.

Post-1990 Bangladeshi Constitution: Where to Find the Check and Balance!

After the collapse of the autocratic rule of General Ershad in 1990, a consensus had emerged in our political circles that country should follow a Parliamentary form of Government to bring a check and balance at the highest levels of our system of governance. However, partisan politics made the Head of the State a complete incapacitated institution and the constitutional provisions supported such an imbalance system of rule in the country.

Post-Cold War period has made the world politically uni-polar. Credibility and acceptability of the autocratic dictators had been decreasing dramatically in many region of the world. However, some military dictators were desperate to keep their marks in the national and regional political landscape. Thus the emergence of General Musharraf of Pakistan and General Moinuddin Ahmed of Bangladesh as military dictators was not an isolated phenomenon. In the mid-1990s Bangladeshi President Abdur Rahman Bishwas could resist a direct military takeover of civilian powers of government, while President Satter (1981) and President Yazuddin (2007) could not do anything to keep a civilian government running in its formal shape.[25]

In a country like ours difference between a military-backed government and the so-called democracy-laden full-fledged civil administration is rather very marginal except their apparent pattern and shape. This is true for many other Muslim countries, including Pakistan. In fact, Pakistan born in 1947 failed to fulfil any of its pious and Islamic wishes as its foundational fault-lines were very massive from the very beginning. Our history of independence and its aftermath could be very distinct and different. There were always some high hopes to build Bangladesh as a prosperous nation-State, which has been changing its different facets and essential features very fast in the areas of separation of powers in the domestic politics and collaboration and cooperation with neighboring States and beyond.

> "NEW DELHI, Reuters - The Gandhi dynasty that has ruled India for most of the 64 years since independence has kept the world's largest democracy in poverty, leaders of a protest movement said on Monday as they prepared renewed rallies to target the government on corruption...India's fast-growing economy is Asia's third largest but many of the country's 1.2 billion people suffer from inadequate nutrition and have no electricity."[26]

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25 In November 2006, President Yazuddin made himself as the Chief Adviser of the then intrim government by misusing a constitutional provision. "Referring to the turn of events in 2006 he [Mr. Ajmalul Hossain] suggested that because the political party in opposition did not wish to have an election under the last retired Chief Justice, they took their agitations to the streets and as a result there was a Care-taker government supported by the army for two years which destroyed the fundamental rights and rule of law". See above note 17, 364.

26 December 26, 2011, "Gandhi clan blamed for keeping India in poverty", http://www.stabroeknews.com/2011/news/world/12/26/gandhi-clan-blamed-for-keeping-india-in-poverty/ (accessed 24 December 2014)

Bangladesh is fortunate and unfortunate at the same time of being a neighbor of India, which has been shining globally and bullying almost all its neighbors because of its vested interests in the region. Imaging India as a member of BRICS or BASICS, we have failed miserably to plan or craft our national legal system and/or destiny because most of our influential leaders take our bi-lateral relations with India for building and establishing their career as political leaders or ministers of Bangladesh. As a counter-balance to that some other politicians have adopted similar strategy toward other influential players of the sub-continental politics and beyond. Thus discovery of non-party Care-taker formula of government as a means of transferring State powers at the highest level of our Statehood is not simply a home-grown one, but a tool to capture and recapture of State-powers by this or that alliance.

> "Despite the regime's warm relationship with India, serious human rights violations have long taken place in and around the border between Bangladesh and India. The Indian Border Security Force (BSF) regularly shoots unarmed Bangladeshi territory. In 2010, the BSF reportedly killed 74 Bangladeshi along the India-Bangladesh boarder, 50 of whom were shot and 24 tortured before being killed. An additional 72 were injured, 40 of them in shootings, and 32 were allegedly tortured. The BSF is also reported to have abducted 43 individuals that year." [27]

After three year of rule Awami League-led government's foreign Minister Dipu Moni says she does not believe that her government has been orchestrating India-Centric foreign policy of Bangladesh. "India is our next-door neighbor. Geographically, economically and politically it is very important for Bangladesh but that does not mean we neglect other countries and forums... US and Europe are the biggest export destinations while Bangladesh is the major importers of Chinese and Indian goods...Middle East and South East Asia are major source of Bangladeshi manpower recruitment and my ministry is party to all these issues."[28]

If foreign minister of our beloved country needs three years to realize that in this age of globalization we simply cannot afford to be dependent on one of our foreign partners to protect our national interests, pride, and glory for the benefits of our common people, then we can imagine of our terrible misjudgments about our partnership with our mighty neighbor.

Non-Party Care-taker Government Formula: Doctrine of Necessity

Who makes an issue of the Doctrine of Necessity relevant and legal? If we take our adopted Caretaker Government under 13th constitutional amendment in 1996 a valid and legal one just because of Doctrine of

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[27] Md. Saidul Islam 'Trampling Democracy: Islamism, Violent Secularism, and Human Rights Violations in Bangladesh' (2011) 8(1) *Muslim World Journal of Human Rights* 25.

[28] 'No India-centric policy: Dipu Moni' (29 December 2011) <http://bdnews24.com/details.php?id=214843&cid=2> accessed on 24 December 2014

Necessity then why some Justices of the High Court or Appellate Division of the Supreme Court of the country should reverse that because of some political pressure of the ruling party?

> "Shahabuddin Ahmed J. (as his lordship then was finished) [has said that] ...the word 'amendment' or 'amend' has been used in different places to mean different things; so it is the context by referring to which the actual meaning of the word 'amendment' can be ascertained. My conclusion, therefore, is that the word "amendment" is a change or alternation, for the purpose of brining in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation destruction or a change resulting in the loss of its original identity and character. In the case of amendment of a constitutional provision "amendment" should be that which accords with the intention of the makers of the constitution."[29]

By citing the meaning of amendment from CJ S. Ahmed, Justice K. Haque then came to a different conclusion and determined that he could change the constitution by using the power of the High Court. [30]

A possible answer might be that in 1996 the then sitting government did not ask any opinion from the Apex Court of the country. In reality the country was paralyzed because of the demand of the Care-taker Government by the same forces, which later in 2011 found it prudent and rational to declare it unacceptable, irrational and even illegal because of its anti-democratic and anti-constitutional character. However, reversal of this constitutional provision had been achieved with the help of courts, especially with the active participation of some judges, who maintained some clear-cut ideological and direct connection to the executive power of the country. However, even in our present-day constitution clearly stipulates in its 142 Article that any provision of the constitution can be amended with an approval vote of two-thirds members of the Parliament, which must be presumed to be sovereign in its lawmaking efforts. No judge should be indulging in making laws if that is not directed by the Parliament. Article 107 (1) has unequivocally stated that the Supreme Court can make some procedural laws with a prior approval of the Parliament and President concurrently. Without such an approval the Apex Court cannot harbor any idea of making law. The Supreme Court can make a procedural law subject to such a prior written approval and that law is binding on subordinate courts. [31]

Now it has been revealed that the judge who spearHeaded arguments against the Care-taker formula being anti-constitutional had done so

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29 Cited by A. B. M. K. Haque from a previous judgment of Justice S. Ahmed. This judgment of Justice Haque has been widely known as the abolition of the 5th Amendment of the Constitution. See, *The Constitution (5th Amendment) Act's Case,* 14 BLT (Special Issue) 2006, High Court Division, 119-120.

30 Ibid.

31 Article 107 (1) of the *Constitution of the People's Republic of Bangladesh,* See above n 9.

because of his special interests in some political circles, which even provided him questionable financial benefits from public money. The tool of the Doctrine of necessity may easily be used by the judges, but they cannot replace the role of lawmakers just by arguing that some laws or constitutional amendments do not fit within the Basic Structure of the constitution. We can start controversy and disputes over many constitutional principle, norms, and provisions any time making them as issues of political expediency.

> "In Bangladesh in contradistinction to U.S. Constitution, although President is the Head of the State and also the Supreme Commander of the defense services but he is not the executive Head of the government while the U. S. President is the executive Head of the Republic and also the Commander-in-Chief of all the forces. This is one of the distinguishing features of the constitutional position of these two countries. This was the position in the original Constitution of Bangladesh but the Constitution (Fourth Amendment) Act, 1975, made the office of the President executive Head of the Government. Although, since August 20, 1975, the Constitution was freely changed and badly mauled many a times but the position and status of the President was never changed rather, strengthened from time to time, obviously to suit the usurpers." [32]

Justice A. B. M. Khairul Haque's arguments cut our constitution from either side. He apparently disliked our 4th constitutional amendment, but decided to reward the people who were behind it. Similarly Justice Haque does not want to give any share of executive power of our State to our President, who already lost all kinds of powers because of our abnormally bad and imbalance constitution. By analyzing the legal theory of Hans Kelsen our Justice Haque agrees that the change of *grudnorm* is very important for constitution and "if the revolution is successful, it will create a new legal order. If it fails, it will be an illegal act, constituting an offence of treason." [33]

First of all this is a very superficially reading of Kelsen's legal theory, which is a very complex one with many universal essence in it. For Kelsen even the Statehood we have been yearning for being based on nationalism is detrimental to the process of emergence of genuinely jurisprudential thoughts with deep-rooted universal ideals. That was one of the reasons why Kelsen left war-ravaged Europe and settled down at the University of Berkeley to teach his universal ideals of jurisprudence. For Kelsen jurisprudence devoid of universal values may serve as a barbaric tool in the hands of the rulers, who may become the real dictators and traitors. Unfortunately Justice Haque has been accusing us all for treason about which we can get ample reflection in the 15th constitutional amendment.

In the Article 7A of the 15th amendment we can observe that it stipulates very harsh type of punishment for those who dare to raise their voice

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[32] *The Constitution (5th Amendment) Act's Case, Citation: 14 BLT (Special Issue),* High Court Division, 2006, p. 127.

[33] Ibid, 169.

against this inconsistent constitutional provision based on the arguments of Justice Haque.

> "Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."[34]

It is unbelievable and completely irrational for any constitution to impose punishment for treason against the critics of any constitutional provisions, which are neither the words of God nor Holy Scriptures. This is an utter infringement of fundamental rights provided by the constitution itself.

Advantage of Judicial Activism and Danger Out of It

An over-zealous judge may turn into an activist judge willing to make laws non-functional or dysfunctional. By performing ones duties as a judge with diligence one may never become an 'activist Judge,' who may find too many reasons to go beyond his jurisdiction or assigned job. More importantly, judges may think rightly or wrongly that they do not have correct or appropriate law in their hands to deliver justice, and they may very frequently like to create laws in the name of judge-made laws, which can easily be overshadowed the entire lawmaking process including the adoption of a constitution and its amendments.

Judicial remedies are the ultimate tools to redress our grievances against each other and even against the government. In any corrupt society, judicial activism may stand in the ways of deliberation of justice, while in any matured democratic system and where the standard of rule of law is quite high, Judge-Activists may serve as a vanguard for the entire justice system, including the systems of administrative remedies of addressing the complains of the people against governmental agencies.

However, if a Chief Justice of a country takes an utterly partisan position and wishes to depend only on one segment of people of politicians or political party, then it may erode the civility and decency of a nation. More importantly country and its people may enter in chaotic political situation, including civil war-like atmosphere. To avoid such a dangerous eventuality with some hesitation, Bangladeshi political parties agreed constitutionally to make retired Chief Justices as the Head of the Care-taker government between two governments directly headed by political parties with their serious political biases. Such a process made the higher judiciary of the country completely polarized in political lines and ultimately lawyers with criminal records got the opportunity to take oath as judges of the highest courts of the country.

With such a politicized and divisive higher judiciary one cannot use the doctrine of Judicial Activism and the Doctrine of necessity to safeguard the interests of common people on behalf of whom judges need to act to

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[34] Article 7A, *Constitution of the People's Republic of Bangladesh*, (the Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh ,October 2011) 158.

protect peace, decency, civility, and justice for all members of a society and State. Rather it has created a danger of corrupting the entire judiciary by political pressure or otherwise. Moreover, if some judges act like politicians to make themselves popular rather than safeguarding the interests of the society and citizenry at large as a legally obliged duty of the judiciary, then a judicial anarchy may reign to obstruct the emergence of good legislative process of enacting good laws, which have always remain the pre-condition of all kinds of administrative and judicial remedies of legal conflicts and problems.

> "The Court, however, seemed more confident in asserting its authority regarding issues that did not directly concern the legality or efficacy of the emergency regime....The Appellate Division's approach stands at odds even with its previous style of legal interpretation involving issues of fundamental rights and constitutionalism.....Appellate Division either ignored or seriously under-read the colonial pattern of the emergency, while it over-emphasized the government's declared objective of restoring democracy....Why is it that the Appellate Division through the emergency regime played an executive-minded role?"[35]

Moreover, repeated attempts of Justice Haque to rewrite our constitutional principles by using the power of the judiciary has been proved to be the most dangerous attack on the legislative process of enacting and amending the constitution of the country. It is essential to appreciate that even the Apex Court of the country should act within the boundaries of legislative authorities.[36] On the other hand, legislative power should not overstep into the boundaries of the judiciary. More importantly, under no circumstances, executive powers should be given any leeway to be tyrannical in nature.[37] Violation of such kind of golden rule may lead to disastrous consequences that we can now witness from our constitutional amendments through judicial intervention to other branches of State. At present, we got a State-constitution with full of contradictory pronouncements, inconsistencies, and if not absurd combination of too many ideologically based demagogical stands that cannot be reconciled in any constitutional system.

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35 Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing, UK, 2011) 201-203.

36 For the judges, not only legislative boundaries play crucial role, the ethical values and boundaries are also of immense importance for establishing rule of law in any country or society.

37 In fact, in American-type of presidential from of government there exists a danger of emergence of a tyrannical power at the top as we had witnessed at the time of military occupation of Iraq or Afghanistan by Washington on behalf of NATO. The House of Representative and Senate time to time try to restrict the powers of the American President, who ultimately can defy all other powers in a very subtle ways. However, check and balance of using State powers at the highest levels of any country play the instrumental role for establishing a system Rule by Laws rather than a governance of whims of some individuals and very often wicked leaders.

For example, Article 2 of 15th amendment of our constitution declares that we give the understanding of God awareness as State importance and the Supreme Law of the Land starts with the pronouncement of "the name of the Creator, the Merciful" in its Quranic version as BISMILLAH-AR-RAHMAN-AR-RAHIM. Moreover our State religion has remained Islam as Article 2A titled "The State Religion" declares that "The State religion of the Republic is Islam ..."[38] Such a constitutional principle as it stands for today is supposed to guide other State-Principles inserted in or reverted to our Supreme Law of the Land. Unfortunately that did not happen with our constitutionalism as we have taken or borrowed other conflicting ideologies as our State Principles at the same time.

A deeper reading or a contextual understanding of our constitution as it stands after 15th amendment may easily give us an impression that Islam inherently rather is detrimental to the religious rights of other religions or followers of other ideologies. That is why we also needed to say that we as a "State shall ensure equal status and equal rights"[39] of practice of the minorities such as Hindus, Buddhists, Christians and so-forth. This is neither a cohesive idea about a constitutional principle or polity for a Muslim-majority country with a very good track record of communal harmony and very moderate adherence of Islamic heritage.

It goes without saying that religious freedom may be at stake only under One-Party dictatorship or under a totalitarian ideological political regime based on extreme form of atheism. Even a modern-day communist country also tries to protect religious rights of masses. Only some fanatical groups or fascist political forces tend to disregard or suppress religious rights of people. As a Muslim-majority country we take it our solemn responsibility to honor and protect the rights of the followers of other religions and as a Bengalee Nation.[40] we can really feel proud of our long history of religious tolerance for all people who follow other patterns of human behavior that as Muslims we do not subscribe to ourselves.

> "Nearly 75 years ago the Bengali speaking people of the British Indian Empire, at least the vocal and vociferous section of it, vowed to unsettle a settled fact and to a large extent succeeded in unsettling it. The Bengali speaking people were to live together ever after, presumably happily too. In 35 years' time a vocal and vociferous section of the Bengali speaking people, *albeit* a minority section of the Bengali speaking people, would have nothing to do with a future in which it did not have the right to lose itself in the great identity of an Indian nation."[41]

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38 Article 2A, *Constitution of the People's Republic of Bangladesh*, see above n 9.

39 Ibid.

40 Constitution also could not deny that fact that "[T]he unity and solidarity of the Bengalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bengalee nationalism." Article 9 of the *Constitution of Bangladesh*.

41 Abdur Razzaq, *Bangladesh: State of the Nation*, (University of Dacca, First Edition, 1981) 2.

Modern individualism is a new comer to the greater Bengal, but its negative effects have appeared to be dangerous to the ethos of Bengalis nationalism and popular democracy is yet to be respected and protected with full vigor and attention. Maybe then only we can improve our standard of civility and living standard compatible to present-day situation of the world. Islamic religious values should play a positive role in this respect as well. Islamic ideas have never been a threat to other religious people in this land, but ruling parties or elites of all kinds, including our own home-grown politicians and many religious leaders are the real danger to our long-lasting history of religious co-existence and communal harmony.

In any patriotic force Islamic egalitarianism can easily serve as the best positive form of "secular" constitutional principle. Unfortunately, we decided to bring "secularism" with an obsolete form of socialism as State principles, which are now the worst kind of ideological rhetoric causing mistrust and distrust between the overwhelming majority Muslim population and the minorities, whose rights of religious freedom is very precious for all of us as Muslims.

A good Muslim must respect and protect the religious rights of the followers of other religions. This is a fundamental teaching of Islam that has become a populist and political doctrine in many regions of the world and we are integral part of that communality. On the other hand, it is a hallmark constitutional test whether or not we are good and law-abiding citizen of a country. Why, then, we have been creating so much of controversies over the delicate issues related to Islam, constitution, religious and fundamental rights about which ideological dichotomies are now less complicated than ever before?

In a number of ways we can articulate that "Secularism" under a genuine and fair rule of law and justice system with democratic rules in place from top to bottom of a cultural and civilized society may not necessarily pose any serious threat to the fundamental or religious rights of common people. However, without some kind of matured and institutionalized democratic system in place and by keeping the ruling party or class above all kinds of law, if we would like to exercise all-pervading secular system to control a big religious community like ours, we definitely invite trouble for community peace, political stability, and ongoing progress of the concerned people who wish to see the reflection of their hopes and aspiration in the ruling system or system of governance of a country.

If we recognize the fact that a peaceful democratic secular system is not too bad a system to preserve peace and stability between the people of different religions and faiths, the secularists of all kinds, including the arrogant and combative ones, need to realize that for Muslims it is a precious religious duty to observe a set of universal peaceful values down to the earth and to propagate those for the preservation of our planet, environment, mental peace and tranquility and human dignity with their own legitimate ownership, possession, and belongings.

> "In spite of secularism, democratic governments in Western countries have done a great deal to promote justice, development and general well-being. This because the greater the accountability and freedom of expression, the higher the probability that the political authority will fulfill its obligations consciously towards the people. Free discussion of problems enables their correct diagnosis, and accountability motivates the political authority to adopt effective remedies for solving them before it is too late."[42]

What many Muslims tend to ignore that the God-Almighty does not give any authority to any political power to impose any religious faith on any individual or group unwilling to accept the omnipotence of the Creator of the Universe. The scope of freedom of expression in Islamic jurisprudence is much wider than any secular concept of liberty. Only difference is that Islam put a lot of emphasis on human decency making it as an integral part of collective dignity. Islam does not sacrifice the societal interests and rights of the poorer segments of population to the vested interests of tiny minority, which ultimately controls national resources and misuse and abuse them as much as it can. However, Muslims have failed to resist their moral and material decadence in the face of Western colonial aggression.

> [I]n the West it was the corruption and despotism of the Church that led to the success of Voltaire's call to 'crush the infamous thing' and which shook confidence in the metaphysical beliefs that the church stood for. Voltaire wrote in his *Treatise on Toleration* that he would have borne with the absurdities of dogma had the clergy lived up to their sermons and tolerated the differences. [43]

Across the board Muslim societies have been suffering from similar type of problem of hypocrisy. Most secularists and their religious counterparts in the Muslim world do not live up to their words. In fact, rarely there is any model to be followed by the younger generations, who have been pushed to the cycle of poverty, anarchy, and fanaticism. However, the Quranic principle and teaching is very clear that says that do not preach any ideology, which you are not abiding by yourselves. Like their religious counterparts, most secularists, atheists, and communists simply spread hatred around the world by preaching their absurd ideologies and do not appreciate that Islam as a great universal religion has too many good things to offer to the entire humanity. For some fringe Muslim groups we should not be putting a blanket of fanaticism over the entire Muslim population of 1.6 billion people. Religious principles or values and cultural attire should not be confused. But that is the phenomenon we have been becoming victim on daily basis in the Muslim communities.

> Islam and culture has become so enmeshed in traditional Muslim societies that converts can feel a good deal of pressure to conform to Middle Eastern customs and mores, but this demands much more adjustment on the part

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42 M. Umer Chapra, *Muslim Civilization: The Causes of Decline and the Need for Reform* (The Islamic Foundation, U.K., 2nd impression, 2008) 61.

43 Ibid,119.

> of American women than men, ...To be sure, there are Muslim beliefs and practices that do not accord with American customs and values, and that cannot be dispensed with without fundamentally compromising Islam....This is one of the most important implications of the Quran's forbiddance of associating manmade constructs with God, for when this is done truth is obscured and religious thought and practice in unnecessarily constrained.[44]

Traditionally we believe that judicial activism is limited to a wider interpretation of laws and their application or implementation through the process of administration of justice. In reality, an activist judge along with his or her interpretation of relevant laws bring many subjective understanding of cultural and religious issues, which may or may not be relevant to a particular events of deliberation of justice. This is the reason why judicial activism may easily turn into a double-edged sword to the interests of the litigants, victims, and society. Elaborating some instances from the American history we find various conflicting descriptions of such a scenario.

> [A] judicial branch that is composed of judges not subject to meaningful checks and balances leads to situations in which individual judges (acting by themselves or with other judges) behave tyrannically...Under this new all-powerful model of judicial supremacy, the Supreme Court – and by extension the trail-blazing Ninth Circuit Court and even some bold and arrogant district judges – federal judges have been able to redefine the Constitution and the law unchecked by the other two co-equal branches of government.[45]

In American system of law and governance we can really see some good scope of judicial supremacy over two other branches of State with some interval from time to time and case to case. But in our Parliamentary system law does not give any kind of scope for judicial supremacy over Parliament, which acts as the highest authority to make, amend or nullify any law. As a CJ Mr. Haque demonstrated his skill and ability to manipulate his judicial authority in practical terms and took direct attempts to rewrite a constitution with his contradictory opinion about Non-party Care-taker Government under the 13th amendment of the constitution adopted on March 28, 1996. Technically and practically that constitutional amendment had been adopted based on all-party consensus within the Parliament.

For the then CJ a Non-party Care-taker government was an anti-constitutional law and practically was not a Law at all *ab initio*, but he recommended that after his retirement another two subsequent Parliamentary elections could be held under Non-party Care-taker government. Apart from its self-contradictory position, the judgment practically put the then CJ Mr. Haque in a position to become the Head of the Care-Taker government to run the country and to conduct the Parliamentary elections to bring his own favorite people to the power.

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[44] Jefferey Lang , *Losing My Religion: A Call for Help* (Amana Publications, USA, 2004) 340, 342.

[45] Shane, above n 17.

This is not only a reflection of "judicial arrogance" but also a sheer greed on the part of CJ to come back again at the helm of power and wealth to make sure that our fragile State machinery and their wheels should be under the complete control of one-type of crony-like circle forever.

Why Separation of Powers We Need Most?

Separation of State-powers at the highest levels of any Statehood and system of governance is needed to ensure non-interference of one branch or organ of a State in the activities of others. Otherwise smooth functioning of any of the three branches of State is not possible. However, coordination has to be synchronized between executive, legislative, and judicial branches of any State in such a way that one branch cannot claim any formidable supremacy over others all the time. A tyrannical pattern of legislative process, dictatorship on the part of the executive branch, and continuous supremacy of the judiciary over others may erode the process of transfer of power from one government to another up to a level that even the democratic election may prove worthless for the protection of national interests and individual rights. What happens when a judge reverses a constitutional amendment in a pretext that he can write a better constitutional principle or provision?

> It is, however, too apparent that the purpose of the mandatory provision of Article 142 had been completely frustrated. This was done in order to defraud not only the members of Parliament but also the people of Bangladesh. This is only too obvious. The very purpose, for which the provision for a long title as provided for in Article 142, had not been adopted in order to hide the real intent and purport of the 5th Amendment Act.
>
> As such, we are of the opinion that this Act enacted by practicing fraud upon all concerned with regard to its real intention. On this ground also the enactment of the Constitution (5th Amendment) Act, 1979, is invalid and void.[46]

Why did Justice A B M Khairul Haque think that no other justice of the High Court or Appellate Division of the Supreme Court in the future would be able to use the same logic to declare the 15th amendment also as null and void? Maybe he also feared that eventuality to his own verdict and that might be the reason why he became the Chief Justice by superseding a number of his senior colleagues and immediately declared that Parliament should act according to his directives or simply may take the court order as the part of the constitution.

> Secularism was one of the ideals for which the struggle for liberation was fought and own and the framers of the constitution in their wisdom in order to dispel any confusion, upheld and protect the said ideal of secularism as spelt it out in Article – 12 of the Constitution as one of the fundamental principles of State Policy.[47]

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[46] Above n 32, 195.

[47] Cited from In the Supreme Court of Bangladesh, Appellate Division, Civil Petition for Leave to Appeal Nos. 1044 & 1045 of 2009 from the judgment and order dated 29th August passed by the High Court Division in Writ Petition No. 6016 of 2000, p. 121.

This is again a very subjective reading of our history of liberation and the constitutional legacy. Judges of no class or level should indulge in such kind of rhetorical history that should not serve as the basis of the rewriting of constitution by the Supreme Court Judges. This is the function of the lawmakers and Parliament, which cannot be replaced by any other organ of the State or government. Why we are committing such gross mistakes at the helm of the Court as well? Prior to Justice Haque no other judge has ever dared to do such indecency and audacity with the role and function of the Parliament.

> Regarding the submission of the petitioners that because of the Fourth Amendment, Fifth Amendment was [in violation] of the Basic features of the Constitution, there was no challenge of the Fourth Amendment in the Supreme Court as were done in the case of the Eighth Amendment as well as in the present case.....Moreover, by the above Order not only the office of the President with all the powers provided by the Fourth Amendment were kept very much intact but by inserting Article 92A, undemocratic provisions, the Parliament was made subservient to the President for all practical purposes with the view that in an unlikely event, even if the Parliament fails grants or to pass the budget under Articles 89 and 90, or refuses or reduces the demands for grants under the above Article 92A the President, without any worries about the funds, could dissolve the Parliament at his pleasure.[48]

For all that odds in the constitution the founders of the BAKSHAL were supposed to be blamed first. But Justice A B M Haque only attacked Shahid Zia, who had just followed and/or used the 4th amendment of the constitution. In fact, distribution of powers between the Head of the State and Head of the Government has always remained very problematic one and this constitutional problem had ultimately paved the way to the adoption of the formula of the Care-taker Government because of the violent demand of the then opposition party, Awami League in 1996. The same party with a brute majority in the Parliament abolished the Care-taker system by adopting 15th constitutional amendment in 2011. The main arguments behind such a U-turn has been shown from the judgment written by Justice Haque, who claimed that constitution must be written in accordance to his verdicts. Such example is unprecedented in the entire human history, not to speak of constitutional development of all countries around the world.

Controversy over the supremacy of the Judiciary knows a long history. However, no jurist or judge of high repute had ever claimed that the judiciary's main function is to replace the work of the Parliament, which usually is the legislative job for the entire nation or State. Moreover, laws take specific measures so that judges cannot overstep the boundaries of the legislature and executive powers of a State unless that is about to die a natural death. For the judges it is rather very difficult to go too far from their designated boundaries fixed, regulated, and determined by the State-

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[48] Ibid,137-8.

laws, conventions, and customary provisions maintained by the political, social, and cultural dynamics of concerned societies.

Since the time of the American New Deal of 1930s every now and then we can witness a kind of judicial supremacy in America. But it has never been that ugly as it was when Mr. Haque served as our Chief Justice, who claimed that as a CJ he maintained an unchallenged right to take the constitution back to 1972 about which he himself was not at all clear that we can easily observe by reading his judgments. Chief Justice Haque loves to argue in his judgments, verdicts, and opinions that the US also has been doing that along with countries like U.K., India, and Pakistan. Unfortunately that was either misreading or over-reading of the American constitutional system.

> The long, difficult process of amending the Constitution with its requirements for two-thirds majorities in Congress and for three-fourths of the States to concur was designed to make changing the Constitution very difficult...If five justices decide we cannot say "one nation under God," cannot pray in schools or at graduation, cannot display the Ten Commandants, and cannot criticize politicians with campaign ads just before an election, then we lose those rights. If they decide that the First Amendment protects virtual child pornography on the Internet against Congressional prohibition, then that becomes the law of the land....[E]Executive and legislative branches can explicitly and emphatically reject the theory of judicial supremacy and undertake anew their obligation to assure themselves, separately and independently, of the constitutionality of all laws and judicial decisions.....the executive and legislative branches can use their constitutional powers to take meaningful actions to check and balance any judgments rendered by the judicial branch that they believe to be unconstitutional...the executive and legislative branches should employ an interpretive approach of originalism in their assessment of the constitutionality of federal laws and judicial decisions.[49]

These are somehow self-contradictory assessments of Newt Gingrich, the former Speaker of the House of Representative, who had acted cynically against President Clinton's administration to shut down the entire American federal government. The former Speaker had serious trouble with the overwhelming power of the American President and the Judiciary because of his White Supremacist attitude toward politics. In American laws we can easily find right and rational answer to these controversies we talked about above. For example, when the judges abolished death penalty in California, immediately a referendum did reverse that judicial decision. Former Chief justice did not like the constitutional provision of referendum and thus our 15th constitutional amendment abolished the system of referendum all together[50]. This can be regarded as judicial and

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[49] Newt Ginrich, < http://www.newt.org/sites/newt.org/files/Courts.pdf >

[50] By referring Article, 7 B we can cite here that "The Preamble is a part of our Constitution and cannot be amended without a referendum. The framers of the Constitution took pains to State clearly the philosophy, aims and objectives of the Constitution and to describe the qualitative aspects of the polity the Constitution is

executive tyranny at the same time. Maybe as a complex federal State America needs some kind of judicial supremacy time to time and we should be fearful of judges like Khairul Haque, who had never stood up against any sitting power or leader, but acted as an agent of executive power to suppress opposition or dissenting voices.

> Like Richard Nixon, who surrendered the Watergate tapes that he must have known would cost him the presidency. Or Harry Truman, who returned the nation's steel mills to their owners after the Supreme Court ruled that he had no power to seize them, even during a wartime strike. Or Franklin D. Roosevelt, who tried to get Congress to expand the court but complied with rulings that dismantled New Deal social welfare programs. Or Al Gore, who accepted the Supreme Court decision that doomed his presidential hopes. Governors and prison wardens in death penalty States do not throw the switch after a court orders a stay of execution. Police may fume about judicial interference but dutifully inform arrestees of their right to remain silent and consult a lawyer...Gingrich's position is not without historical precedent. His favorite example is Abraham Lincoln's response to the Supreme Court's 1856 Dred Scott decision, which denied legal rights to former slaves and barred Congress from outlawing slavery in the U.S. territories. In his debates with Stephen Douglas during the 1858 Illinois Senate campaign, Lincoln denounced the ruling and said he did not consider it a binding precedent for other cases. Though it's not clear whether Lincoln told his administration to disregard the ruling after becoming president in 1861, Gingrich says he effectively ignored it by issuing passports to African Americans and ordering restrictions on slavery in the territories.[51]

Americans have been facing serious problems with the State powers exercised by their President as they were ruled by many powerful and practically tyrannical Presidents. Our problem is now quite different as we have been trying to follow a Parliamentary form of democracy without having enough knowledge about and expertise with it where a system of check and balance must be in place all the time, otherwise we may also end up with civil war, which we cannot effort to have anymore. By keeping our Titular Head of the State so weak and powerless we have invited a Care-taker system of governance between the gaps of elected governments. Still we are clueless and careless about the issue of giving at least some genuine powers to the institute of the Head of our State to bring about some kind of balance within the exercise of executive power. Similarly we need to bring some balance of using powers within the system of Parliamentary democracy and between the different levels of judicial system.

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designed to achieve. In this situation, the preamble of the Constitution, in its role, cannot be relegated to the position of the preamble of a Statute." See above n 6, 48.

51 Bob Egelko,'History (not Gingrich) Says Presidents Obey Courts' on Bob Egelko, Sfgate (December 25, 2011)

<http://blog.sfgate.com/nov05election/2011/12/25/history-not-gingrich-says-presidents-obey-courts/ >

Why Our Head of the State is so Powerless Constitutionally as well?

How to read constitutional provisions of presidential power in the words and spirit of the Supreme Law of the Land? Constitutionally our President will sign every law to make it a legally-binding Act. As the Head of the State he is legally bound to do that and if he does not do so then we have to take it for granted that he already gave assent to the bill passed by the Parliament.[52] Here our president is like a Titular King with no power at all. In any constitutional monarchy a Titular Head of the State has many ceremonial powers.[53]

Ceremonial powers given to the Head of the State by the State-constitution are of great importance from the stand point of public opinion and morality. Head of the State with his grand standing can influence positively many activities of governmental institutions, including the Head of the government. In our case also president is empowered to appoint the Prime Minister[54] and the Chief Justice of the country.[55] These are practically completely ceremonial powers with no choice a Bangladeshi President can really make constitutionally. In both these cases our president apparently may appear to have some original powers bestowed by the constitutional provisions. But in reality the President has no choice of his own as any dissatisfaction of the ruling party may lead to the impeachment of the president, especially when the ruling party maintains a two-third majority in the Parliament.[56]

The constitutional paradoxes and absurdity in many ways we inherited from the British Indian legacy. For example, Article 49 of our constitution provides an unlimited power to the Head of the State to suspend and grant pardons to any criminal convicted and sentenced "passed by any court, tribunal or other authority."[57] In reality what has been happening is that in all cases of clemency (prerogative of mercy)[58] declared by the President

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52 "The President within fifteen days after a Bill is presented to him, shall assent to the Bill or, in the case of a Bill other than a Money Bill, may return it to Parliament with a message requesting that the Bill or any particular provisions thereof be reconsidered, and that any amendments specified by him in the message be considered; and if fails to do he shall be deemed to have assented to the Bill at the expiration of that period." Article 80 (3), see above note 9.

53 See for details above note 6, 294-302.

54 The appointment of the Prime Minister, Article 56(3), see above note 9.

55 The appointment of Chief Justice, Article 95, see above note 9.

56 An apparent reading of the articles of 48 to 54 our constitution may sounds that our president can exercise many powers. However, putting those powers together in the context of the whole constitutional framework we can easily find our president with no real power except to obey the Head of the government.

57 Article 49, see above note 9.

58 Though the Article 49 of the constitution confers the clemency power as a Prerogative of mercy to the President, yet Article 48 (3) clearly stipulates that the President can exercise that power only "with the advice of the Prime Minister". Such

needs a prior written approval of the Prime Minister. Thus the power of the presidential clemency is nothing but the fulfilment of the wishful desires of the Head of the government. President can only declare clemency or forgiveness to any convicted criminals based upon instructions given by the Prime Minister[59] or any influential political circle with clout defy any decision of the courts, including the highest judicial authorities of the country.[60]

> In fact, we are all constantly making choices, if only implicitly, about priorities to be attached to our different affiliations and associations. Often such choices are quite explicit and carefully argued, as when Mohandas Gandhi deliberately decided to give priority to his identification with Indians seeking independence from the British rule over his identity as a trained Barrister pursuing English legal justice.[61]

Unlike the British constitutional system, the President of our country has to observe a strict constitutional obligation in regard to the appointment of the Prime Minister, that is, he needs to command the support of the

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an advice of the Prime Minister to the President is a mandatory and somehow arbitrary power of the Prime Minister.

59 "In the exercise of all [President's] functions, save only...the President shall act in accordance with the advice [written mandatory direction] of the Prime Minister." Article 48 (3) of our constitution explicitly stipulates that "the President shall act in accordance with the advice of the Prime Minister."

60 "But the bigger truth is that President Zillur Rahman exercised this extraordinary authority on the advice of Prime Minister, Sheikh Hasina. And the two ministries--law and home assisted the premier in formulating her advice to the president to this effect. Whatever the fact, it is Bangabhaban that has had to face sharp criticism for all the instances of presidential clemency occurring during the tenure of the present government. President Zillur Rahman, who assumed the presidency in February 2009, pardoned in November in the same year sentences Shahadab Akbar, son of deputy leader of Parliament Syeda Sajeda Chowdhury. Shahadab was sentenced to 18 years' imprisonment and fined Tk.1.6 crore in absentia in four cases filed by the Anti-Corruption Commission and National Board of Revenue during the tenure of the last caretaker government. The presidential pardon drew widespread criticism. The criticism, however, did not lead to a careful exercise of the presidential power of pardon in subsequent times. In September, 2010, the president granted pardon to 20 death row inmates of the Jubo Dal leader Sabbir Ahmed Gama killing case. Most of them were Awami League adherents and activists. The clemency again triggered huge hue and cry. Again, in July 2011, he granted controversial mercy to AHM Biplob, the son of ruling AL leader Abu Taher of Laxmipur and a death row inmate in the much-talked-about Nurul Islam murder case. Biplob appears to be a most fortunate man as the president has granted him mercy for the second time in seven months. This time, Biplob's life sentence in each of two murder cases has been reduced to a 10-year imprisonment. Zillur's predecessor lajuddin Ahmed had pardoned in 2005 Mohiuddin Jhintu, who was president of the then ruling BNP's Sweden chapter." See Shakhawat Liton, 'Presidential Clemency: Controversies can be costly', *The Daily Star* (online), February 28, 2012 <http://archive.thedailystar.net/newDesign/news-details.php?nid=224232

61 Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books, 2006) 30.

majority of the members of Parliament in appointing the Prime Minister. Article 55 (2) stipulates that the executive powers of the country will be exercised by the Head of the government *i.e.* Prime Minister. But then the same article 55 (4) clearly States that all executive actions will be exercised or "taken in the name of the President."

Article 55 (6) says that "The President shall make the rules of allocation and transaction of the business of the Government." Such a constitutional provision is a total absurdity in the constitutional system and framework we have tried to create for ourselves since our birth as an independent State. The gap between the written words of the constitution and the real dynamic of exercising State powers is so vast that there exist no legal means to bridge between them. And when the *modusoparendi* of a State-constitution suffers a lot of absurdities like this, then hypocritical behaviors of the State machinery and the players behind the system in the name of politics and rule of law cannot bring any decency and prosperity for the masses. Only a tiny fraction of politicians or businessmen can reap quick economic dividends out of running the State affairs in the name of people or religion.

In our present constitutional system the Head of the State in reality cannot exercise any power at all without prior endorsement or approval of the Head of the Government, who can practically dictate everything to the President of the country. Even President's speeches to the Parliament cannot include or delete a single word from the written scripts practically prepared by the office of the Head of the State, the Prime Minister. Under these circumstances how to understand article 48 (5) that read:

> The Prime Minister shall keep the President informed on matters of domestic and foreign policy, and submit for the consideration of the Cabinet any matter which the President may request him to refer to it.

This can be regarded as an ornamental beauty artificially designed to make us look good about the status of the Head of the State, who must take the "precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law."[62]

This constitutional provision can be interpreted in contradictory ways. On the one hand, one may take the post of our State-presidency above all kinds of national laws; on the other hand, we can consider the presidency as the source of law as well as the most important institution symbolizing the spirit of law. In our context, we should consider our President as a Titular Head of the State with no effective lawmaking power other than just to sign the laws passed by the Parliament. Presidential decrees can be regarded as an exception to the regular lawmaking process in accordance with the constitutional system. However, even in

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62 Article 48 (2), see above note 9.

proclaiming decrees, President as Head of the State completely relies on the written directions of the Prime Minister.[63]

Under this constitutional dubiousness, we have ended up with a serious constitutional crisis over the powers and functions of the President during Care-taker government. By using this pretext, Justice Khairul Haque declared a short order making 13th amendment of the constitution illegal[64] and prospectively kept a provision of holding 10th and 11th Parliament elections under a Care-taker government as instituted by the 13th amendment.

> The election of the Tenth and the Eleventh Parliament may be held under the provisions of the above mentioned 13th Amendment on the age old principles, namely, *quod alias non est licitum, necessitas licitum facit* (That which otherwise is not lawful, necessity makes lawful), *salus populi suprema lex* (safety of the people is the supreme law) and *salus republicae est surpema lex* (safety of the State is the Supreme law).[65]

Such an explanation of constitutional principles and provisions is unprecedented, unacceptable and devoid of minimum jurisprudential wisdom. Here CJ tended to use different legal theories and maxims in a concocted way that cannot be justified in any kind of jurisprudence whether it is Western or Eastern. Here CJ is not only rewriting a constitution, but also puts provisions to be implemented and changed in the future by taking away the original jurisdiction of lawmaking power of the Parliament. Moreover, this a concoction and misappropriation of the Doctrine of necessity[66] that is designed to save a State and its legal system or even the entire society by bringing peace and stability through executive powers or orders, which should not indulge in the activities of the judiciary, and judges on their part should never entangled with the executive or legislative powers of a State and government.[67]

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63 Article 70, see above note 9.

64 Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 OF 2005, *The Constitution (Thirteenth Amendment) Act,1996* (Act I of 1996) is prospectively declared void and *ultra vires* the constitution.

65 See above note 17 at p.16, See also in the *Sangkhipto Adesh* (Short Order), 10/05/2011, delivered by the A B M Khairul Haque CJ on Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005. (Under Article 103 (2)(a) of the *Constitution of the People's Republic of Bangladesh* and from Judgment and order dated 4.8.2004 passed by the High Court Division in Writ Petition No. 4112 of 1999.)

66 Lord Mansfield in *R. v Stratton* observed: "The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, and an act which would otherwise be illegal becomes legal if it is done *bona fide* under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the society and to prevent the dissolution ..." Cited in: see above note 6, p. 75.

67 Above note 52, 75.

Whatever way we look at our constitution or analyze its key provisions we find that our present constitutional system is, in fact, instituted a dictatorship of the Prime Minister, who by using Article 70 of the constitution can make a tyrannical rule easily achievable and maintainable inside and outside of the Parliament.[68] The13th amendment of the constitution was a sort of temporary remedy to the complete tyrannical rule of the Prime Minister.

Thus Justice Khairul Haque led an important role to pay the ways keeping the Prime Minister above the laws and making the powers and functions of the Prime Minister unaccountable to anybody, including Parliament or the whole nation. As a CJ, Mr Haque, did not find any necessity to save us from political crisis, rather with his directed amendment of the constitution we were forced to undergo a complete uncertainty and political chaos and instability.

Some Major Features of the 15th Amendment of the Constitution

Not the Parliament of the country, but some renowned judges of the apex court of the country had initially prepared the background of the enactment of the 15th constitutional amendment of the country. Declaring the 5th constitutional amendment anti-constitutional, we pushed our entire constitutionalism toward many inconsistencies and absurdities. If we take the 5th constitutional amendment as an anti-constitutional one, then we need to take 5th constitutional amendment as a valid one even today.

In the judgment on the Moon Cinema Hall's Case Justice A. B. M. Khairul Haque writes:

> It is surprising that although the Fourth Amendment was dismantled brick by brick but the office of the President was kept very much intact. More surprise, by inserting Article 92A by the above Order [Second Proclamation Order, No. IV of 1978], the Parliament was made subservient to the President, at the apex of the power, for all practical purposes, because in an unlikely event, even if the Parliament refuses to pass the budget, under new provision, the President without any worries about funds could dissolve the Parliament [of Bangladesh] at his pleasure. In this way the President of Bangladesh in 1978 became the most powerful Chief Executive in the world virtually without any checks and balances either from the Parliament or from anybody else which would have envied even by Oliver Cromwell, the Lord Protector of England in 1653.[69]

Justice Haque had been harboring with ideas to abolish the 5th amendment of our constitution, but found it impossible to declare the fourth constitutional amendment valid and democratic and thus to be restored. However, his worries about the absolute powers in the hands of the Chief Executive of the country make no sense as under present

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68 Article 70, see above n 9.

69 Above note 32, 87- 88.

arrangement. Head of the Government could easily exercise more powers than the then President of the country.

The Appellate Division of the Supreme Court of Bangladesh by referring to this dilemma of our constitutionalism cites: "This provision of secularism explained and expounded in Article 12, is one of the most important and unique basic features of the Constitution. Secularism means both religious tolerance as well as religious freedom...Secularism was one of the ideals for which the struggle for liberation was fought and own and the framers of the Constitution in their wisdom in order to dispel any confusion, upheld and protect the said ideal of secularism as spelt it out in Article – 12 of the constitution as one of the fundamental principles of State Policy." [70]

In many ways this is a gross misreading of our constitutional development and misunderstanding about the fundamental principles of State Policy. Whatever the reason we got secularism as one of the four founding principles of our 1972 Constitution. But keeping Islam as State religion and bringing back Socialism and Secularism as fundamental State policies with the help of Chief Justice of the country and also by adopting 15thconstitutional amendment has created an unprecedented constitutional fallacy that needs a detailed clarification, which is absent in our constitution. Islam as a religion can easily tolerate a sophisticated "State Secularism" with a moderate voice of tolerance and neutrality for all religions, castes, creeds, and political ideologies and economic systems. However, many renowned Muslim authors believe that such kind of confusion and conflicts between Islam and Secularism is completely uncalled for.

> [T]his setting in contrast, the secular State with the theocratic State is not really an Islamic way of understanding the matter, for since Islam does not involve itself in the dichotomy between the sacred and the profane, how then can it set in contrast the theocratic State with the secular State? An Islamic State is neither wholly secular. A Muslim State calling itself secular does not necessarily have to oppose religious truth and religious education; does not necessarily have to divert nature of spiritual meaning; does not necessarily have to deny religious values and virtues in politics and human affairs.[71]

In reality as well, for many Muslim countries, having Islam and Secularism as State ideology means almost nothing for real dynamics of politics and the economic and social affairs of the concerned countries. Bangladesh being a very moderate Muslim country can have both secular and Islamic character at the same time. In this respect, the 15th amendment of our constitution is not that of a big contradiction. But making socialism again as one of the founding stone of State Policy or part

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[70] Cited in Civil Petition for Leave to Appeal Nos. 1044 & 1045 of 2009, 120-1.

[71] Syed Muhammad Naquib Al-Attas, *Islam and Secularism* (Malaysia , reprint on July 24, 2010) XV, XVI.

of the Basic Structure of our constitution at this stage of our economic development and global order make us a political dysfunctional community and even hypocritical as we are living through a State-sponsored wild capitalism pushing more people of our society below poverty line with an abject poor condition of living.

The 15th amendment of our constitution and its incorporation in 2011 October version made the entire constitutionalism non-functional and gives us signals of its future debacle at any time soon. As our constitution with all its amendments and appendix has been compiled as one text in one volume, so obviously it is a written constitution. However, any of its serious reading is bound to be confusing because it has been done in a way that neither the 1972 constitution was resorted nor any major changes brought by the undemocratic government could be completely removed. Its religious and secular character in combination is also not befitting with the demand of our time, attitude, psyche, and necessity. It is now a collection of mere political and rhetorical speeches with no real consequences for any of our major problems and issues that we need to address immediately.

For example, our main concern should be now to address the problems related to endemic corruption, poverty, mismanagement of public trust and property. Extreme political partisanship is now another dilemma we need to solve without much delay, otherwise the entire nation may fall apart and cannot be repaired or revived so easily. When we need mostly a consensus State policy compatible with our social and cultural ethos, at that moment we are harboring a policy of capturing State powers again and again in the name of ugly partisan politics.

When we are in need of a check and balance in exercising and executing State powers, we are moving toward absolutism with all powers in the grip of a tiny group of people Headed by handful families, who treated us as their captives. The moment when we are demanding and asking for more political freedom, cultural liberty, and honest and transparent judiciary, right at that time politicized judicial system has been engulfing all of us and provides no hope for any decent livelihood and legal remedy to any legitimate grievances of our people with no economic emancipation at sight. In papers we are talking about democracy and independence of judiciary, but in reality we have been intimidating our judges and influencing their expressed and unwritten or incomplete judgments to be used for "unholy" purposes.

In the name of apex court's judgment or verdict, our Parliament had adopted the 15th constitutional amendment for a sweeping change of many articles and provisions of the constitution. Unfortunately we cannot find even the text of the whole judgment or verdict of the court as it had not been written and another constitutional amendment is looming on the political horizon of the country. This is a very unacceptable political and legal situation for any nation or country, which is willing to move forward with hope and prosperity.

Another serious dangerous situation has been created by the 15th constitutional amendment which is that, by manipulating the courts, government can bring some hazardous swiping changes in constitution or any other law of the State. Continuity and consistency of any legal system is of paramount importance. That was the reason why after our political independence, our sovereign authorities recognized the validity of many laws passed by the British and Pakistani governments applicable to our motherland. It was necessary for maintaining continuity in our legal system for avoiding some abrupt changes in laws leading to uncontrolled chaos and confusion. Article149 of our present constitution also tells us that "all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution."[72]

However, by this time we as a newly born nation were supposed to bring about many legal reforms, necessarily to make our legal system functional and effective leading to the desired economic empowerment of the people. Unfortunately, our lawmakers have failed to give adequate attention to their vital role of lawmakers and thus failed us to become a prosperous nation that was and is a precious goal of every conscious and patriotic man and woman of the country.

Thus any change in the constitution or any law should be taken seriously. Here manipulation may lead to dangerous consequences for the political and economic development of the country. In the name of returning to 1972 constitution, the adoption of the 15th amendment of the constitution virtually poses an unprecedented challenge to the entire legal framework through which we have arrived to the present-day. Instead of going for any further development in our constitutional dynamics, we tried to turn the clock back to 1972 political mechanism of absolute authoritarian form of ruling system that is no more suitable for the demand of the time. The change of any out-dated laws we inherited from the British or Pakistani legacy is not an isolated task to be tackled with. Here we need a comprehensive approach to craft laws meeting the demand of our time.

As a result of the 15th constitution amendment we got a number of new provisions in Article 7A, which tell us that any person or group of people aspiring to change any constitutional provision of our present constitution should be liable for an offence to be persecuted and "sentenced with the highest punishment prescribed for other offences by the existing laws."[73] In the same article it has been stipulated that any attempt "to subvert the confidence, belief or reliance of the citizens to this constitution or any of its article"[74] may also lead to similar type of persecution.

Imposition of punishment in that manner is called a blanket system of persecution. These constitutional provisions are capable to suspend the

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72 Article 149, see above note 9.

73 Article 7A, see above note 9.

74 Article 7A (b), see above note 9.

entire Part III of the constitution (Fundamental Rights) without proclamation of any emergency. In other words the fundamental rights stipulated in our present constitution are too ornamental to be applied for the masses and governmental agencies can persecute any person or group of people by showing an excuse of violation of Article 7A of the constitution. In the past, we were told that constitutional principles cannot be applied in the court of law because of their very nature of formality, rather than making them a question of legality. Now we have made the Articles from 26 to 47 (Part III, Fundamental Rights) simply words for the words sake. Such a mere superficiality of many fundamental rights prescribed in the constitution may lead to serious constitutional crisis at any time.

Squabble Between the Speaker of the Parliament and a High Court Justice

On June 5, 2012, a High Court Justice informally accused (criticized from a position of High Court Justice) the Speaker of the Parliament for an act of sedition because the Speaker had criticized his hasty Court Order of the removal of Sharok Bhavan from the vicinity of the Supreme Court Building. The Speaker of the Parliament had only raised the question of impossibility of the implementation of the High Court Order that had been characterized as sedition against the State. In the lawmaking process and implementation of law through the court deliberation of justice a jurisprudential question has to be remained at the center of both lawmakers' and judges' active consider. Neither the law nor any judgment of court should be driven by some absurdity or impossibility that cannot be enforced naturally or without much public uproar.

By informally accusing the Speaker of the Parliament of a sedition act under the 15th amendment of our constitution, the concern High Court Justice had created not only a public uproar country-wide, but a number of members of the Parliament (MPs) demanded the removal of the concerned justice through an investigation by a Supreme Judicial Council, which could remove the concerned justice from his job.

> The speaker, Abdul Hamid, on Monday [June 18, 2012] accused Justice AHM Shamsuddin Chowdhury of violating the constitution by making 'discourteous' comments on him and Parliament. In his ruling in the house, the speaker asked the chief justice to take action regarding the High Court judge's conduct in order to stop recurrence of such incidents. Parliament would accept whatever 'well-thought-out' action the chief justice may take as regards the judge's 'violation of the constitution', the speaker said.....'I doubt whether conscious people can make remarks in the way an honourable High Court Justice on June 5 made about me violating the Article 78(1) of the constitution.[75]

[75] "Speaker says HC judge violated constitution", The New Age, June 19, 2012

The Speaker's ruling has categorically acknowledged and declared that the concerned Justice had violated the Article 78 (1) that clearly stipulated that "[t]he validity of the proceedings in Parliament shall not be questioned in the court." [76]

However, Speaker has requested the MPs not to demand a formation of Supreme Judicial Council (SJC) to deal with this serious constitution issue to avoid further chaos and confusions between the legislature and the Judiciary. This ruling maintains binging authority for all MPs and successfully blocked to the formation of a SJC. Though political and legally it sounds right, but jurisprudentially it creates a flawed arrangement that tells us that people with special privileges and status can violate constitution and may keep themselves above the laws. In fact, this has not been that unpredicted that our Parliament and judiciary would clash because of number of unrealistic provisions inserted in the 15th amendment of the constitution. How frequently we would witness this kind of conflicts and clashes to be seen.

What we often tend to forget is that, in the final analysis, legislative branch should not try to take away the job of judiciary under any excuse. Similarly judiciary should not try to intervene into the activities of the Speaker such as his/her rulings in the Parliament. From this perspective, the above discussed ruling of the Speaker is a correct political solution. However, allowing the judiciary to take away the lawmaking powers of legislative body is indeed a very dangerous phenomenon about which we try to highlight in our discussion. It is true that in the process of delivering justice, judicial organs also can make some laws, which we call judge-made law or case-made precedents. But that is not the main function of the judiciary. The lawmaking process conducted by the judiciary is merely a by-product of its main and fundamental duty of administering justice for all in accordance with the Laws.[77]

Conclusion

A State-constitution is almost a sacred document to be honored and followed by all citizens and foreigners living under its jurisdiction. The constitutional framework envisioned and established by the Supreme Law of the Land provides guidance and orientation to all other branches of law of the country necessary for administration of civil and criminal justice system. And that is the precondition for a smooth transfer of State-powers from the hands of one government to another and it is the key to rapid economic development and prosperity for a nation.

How good or bad and how practical or impractical is our 1972 is practically an irrelevant for even a prudent academic discussion. However, dramatic change in the form of government in 1974 and introduction of one-party rule in the name of "dictatorship of liberators and proletariat"

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[76] Article 78 (1), see above note 9.

[77] "Subject to any law made by the Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any other court subordinate to it". Article 107(1), see above note 9.

was a serious blow to our normal and progressive constitutional development. In fact, that unwise change in our constitution led the nation to a devastating famine and anarchy, and subsequently to the military rule and dictatorship. Press and judiciary have been made subservient to the executive authority of the government, which has increasingly become corrupt, non-transparent, and extremely partisan in running the entire country. Ongoing political corruption led the country to continuous political instability and economic backwardness.

Introduction of a constitutional system of care-taker system as an intermediary between the two elected governments was not a necessity at the time of its inception. However, voters took it as a norm to change the government with the help of ballots and thought that bullets or other coercive method were no longer needed to replace a ruling party by another one that might be chosen by the voters through general election. A faulty care-taker government led to an emergency in 2007 and two years of practically illegal government under which a national election was held in 2008. A brute majority in our Parliament has always been proven destructive to our political and economic system.[78] However, bringing the judiciary to very close to the executive branch of the government has proven even more dangerous leading to constitutional changes through the corridors of the Supreme Court of the country.

The lessons of the theory of separation of powers have been ignored in our constitutional system. The necessity of the smooth transfer of power from one government to another has been interrupted quite often. While no real check and balance of power at the highest levels of governance should be ignored completely for a continual effort to achieve the goals of good governance, most of our constitutional amendments avoided the functional formulas of the Doctrines of Separation of Powers. As a result, sometime our Heads of the State or government have been enjoying an absolute power and thus they became autocrat rulers. Such kind of abrupt and inconsistent changes of political atmosphere may allow vicious circle to capture political power leading to unnecessary adventurism, endemic corruption and indecencies in the rules of business of transferring power from one government to another. As a result patriotic forces may easily force aside from the mainstream of politics and thus irrational and unwise constitutional amendments had become the norm of our legal and political history.

Usually a State-constitution is the strongest and clearest reflection of power struggle between different political forces within the country and also a crystallized form of legal text of many political, cultural, social, and economic issues about which major political and religious forces maintain the boundaries of agreements and disagreements. From these two major standpoints, our 1972 Constitution could have a far stronger legitimacy and reflection of more clear-cut consensus of our vital national interests and national security.[79]

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78 Since 1990 we have been hoping that a Parliamentary system of democracy would bring political stability to our country in general and constitutional system in particular. Unfortunately, our political leadership with partisan politics has been failing us miserably in this regard as well.

79 National security issues should not be confused with the ruling party's political ambitions and constitutional adventurers. With the constitutional system and

However, the Constituent Assembly that was formed hurriedly by the representatives elected for the Pakistani legislative bodies (federal and provincial) made the entire process of writing and adopting the constitution questionable and complex. Moreover, a legal analysis is bound to reveal the fact that our 1972 constitution had been marred with the ongoing Cold War world-wide and its dynamic in our sub-continent. As the fundamental legal text it was indeed an outcome of Soviet Socialist influence and strategic policy implementation of New Delhi, which still then was regarded a tested ideological ally of Moscow.

Kremlin's ideological imperatives in newly born independent country, Bangladesh, were not at all similar to that of the Indian political policy implications in our country. Moscow was in great illusion that New Delhi had been working for socialization of economic policies of Bangladesh and for the actualization of secularization process in Bengali communities. That assumption might have been true for West Bengal, but was merely a speculation for Bangladesh for simple reason that just under the surface, Indian politics all along was contaminated seriously with communal factors based on Caste system. Pakistani communal influence in the country's political affairs was no less dangerous phenomenon than the Indian Caste-based religious fanatical extremism, which has been a proven threat in the ways of progress in both sides of Bengal (East and West).

As a newly born independent country with a very fragile economy, Bangladesh was supposed not to be used as a test case of too many ideological and class-struggles. The 1972 Constitution rather was supposed to make boundaries of our ideological struggles and economic experiments quite limited to make the political and social shock therapies bearable for the masses. Unfortunately our politicians were hyperactive in adopting experimental policies raging from the vital questions of legality, morality, ethics, nationality, and economics to ideologies of all kinds. In that perspective only, the adoption of a number of our constitutional amendments, including 15th, proves that basically our policymakers and lawmakers still bonded with some circular impulse, if not cynical, leading to a compulsive syndrome of making a "literal jurisprudence" somehow adaptable in a highly volatile political partisanship with no orientation of political expediency and economic reality or prudency.

In technical terms, as our constitution stands for so far with its 15th amendment, may be taken as a return to 1972 Constitution. However, with sea changes in world politics along with a rising tide of new Cold War between East and West, return to the "literal constitutionalism" of 1972 adopted four decades ago means very little to the present-day political dynamics and economic reality faced by Bangladeshis and people living in

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power sharing methods at the highest levels of governance we have in place now hardly we can expect a smooth transfer of powers from one government to another. Hoping for an overall economic emancipation cannot be achieved as we have envisaged in the preamble of our constitution that says that "[i]t shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation – a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizen [;]. (It has been cited from the Preamble of the Constitution of the People's Republic of Bangladesh.

the neighboring Indian-States who are equally vulnerable to the environmental disasters, endemic corruption, abject poverty, and artificial scarcity of resources, backward-looking thoughts, and prejudices of many kinds not conducive to sustainable economic growth.[80]

When Banghabandhu Sheikh Majub could not face the mounting demands of the "original jurisprudence" of 1972 Constitution, adoption of the Special Powers Act 1974 and One-Party rule under the 4th amendment of our constitution were the inevitable consequences. Prudent political dynamism and economic vision for national prosperity could avoid all the constitutional amendments related to Care-taker Government with its assertion and deletion, which has made our constitutional rhetoric too absurd to be implementable and possibly too prone to be amended through a circular lining rather than a push forward to any kind of original jurisprudential intent compatible to real political, social, cultural, and economic realities.

> Court-curbing legislation is not a very viable weapon. Rather than limiting judicial review, Congress has given the Court the power to set its own agenda and decide major issues of public law and policy – precisely the kinds of issues that Congress then seeks to deny the Court review. The Court has also suggested that it would not approve repeals of its jurisdiction that are merely attempts to dictate how particular kinds of cases should be decided...For much of the Court's history, the work of the justices has not involved major issues of public policy. In most areas of public law and policy, the fact that the Court decides an issue is more important than what it decides. Relatively few of the major issues of public policy that arise in government reach the Court. When the Court does decide major questions of public policy, its rulings decide only the instant case and not the larger surrounding political controversies.[81]

Any Statehood initially may appears quite progressive and attractive to millions of political and religiously motivated activists, who later on may turn the entire State machinery to an oppressive and fascist one, especially under a continuous economic uncertainty and political instability. It may be caused mainly due to a faulty and unsustainable constitutional system. That is the reason why we need to examine meticulously the credibility and impartiality of our constitutional principles, policies, and strategies, which needs to be cohesive and functional. So far, our constitutional system remains dysfunctional irrespective of the character of political forces that rules us practically mercilessly and ferociously showing little respect to the dignity of the people in the streets, destitute, and living with a lot of untold sufferings to be addressed at State or public levels.

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80 See, for details, Arundhati Roy, *Aranney Juddah (Neamul Hoque trans,* Samhati Prokashan, Dhaka) 17, 115 [trans of: *Walking with Comrades and Other Essays* (Penguin Books, 2011)]

81 O'Brien, above note 4, 195, 198.