

Democracy & Constitutionalism in South Asia: The Bangladesh Experience

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Today democracy is a universal aspiration. Even the military dictatorships and authoritarian communist regimes seek to cloak themselves with democratic trappings and pretensions. To judge by the list of countries those that have held some sort of ‘popular elections’ to validate their regimes, there are very few governments around the world that would not be termed democratic. Under the rules of electoral head counting it would perhaps be impossible not to accord democratic status even to states like Iraq or Pakistan or North Korea. The leaders in all of these countries and numerous others have sought to legitimize their rule through varying degrees of popular ‘mandates’ and ‘endorsements’. Yet very few of these countries would actually be considered democratic if they were subjected to the more rigorous tests of constitutionalism. Popular elections and renewal of popular mandates are essential, but not sufficient, conditions for democracy. At best, a free and fair popular election is one step in the process of a constitutional democratic government.

Constitutionalism, like democracy, is a dynamic and complex concept that is constantly evolving. Although there have been changes in emphases and its nuances, the core of constitutionalism has remained constant over time: constitutionalism is about creating a political framework for a society organized through law. It is about establishing substantive and procedural legal mechanisms, which are derived from and based upon popular consensus, for limiting governmental power. In other words, constitutionalism is the antithesis of arbitrary

governance. It is the opposite of despotic dispensation; it abhors tyrannical and capricious rule of an individual or group; and it is inimical to the exercise of governmental power for the benefit of individual or sectional interests, the denial of human and minority rights, religious and cultural freedom and the infringement of the freedom of political association.

Increasingly, constitutional government is being closely associated with democracy. In fact constitutionalism without democracy is difficult to conceive of since the legitimacy of government is derived from the will of the people; and only in a democracy can the expression of democracy be legitimately expressed and the popular will established. The critical test for constitutionalism is not only the rule of law -- which of course remains at its core -- but also whether government is accountable to the popular will and is amenable to institutional checks and balances created by the constitution. It is no less imperative that the mandate of the government is periodically renewed by free and fair elections based on universal adult franchise. While protecting the individual and group rights, constitutionalism must also ensure justifiable fundamental civil liberties and allow complete freedom for citizens to organize opposition to the government. In democracy, constitutionalism is also about recognition of the popular will, a respect for the constitution and constitutional institutions, and an abiding faith in the culture of the rule of law.

It is perhaps useful to remind ourselves that constitutionalism is not the same thing as having a constitution. It would probably be no exaggeration to say that most countries in the world are endowed with a constitution. But this is not to argue that all these countries are bestowed with a constitutional government. Constitutionalism is more than the letters that comprise a constitution; rather, it is the spirit, the procedure, the substance and the institutions that ensure that everyone is part of the rule of law and that no one is above it. Constitutionalism

not only sets limits on arbitrary power of the state but is also ‘a national manifesto, a statement of national ideals and aspirations, a fundamental law of the land, an abiding charter, a social contract and, above all, a confession of the political faith of a state.’

The half-century experience of Bangladesh, first as a province of Pakistan and subsequently as an independent country, underlines the disconnect between the possession of a constitution and the existence of a constitutional government. In fact, there has never been a dearth of constitutions. The problem lies elsewhere. For the better part of the country’s history both under Pakistan (1947-1971) and in Bangladesh after 1971, the constitutions became an instrument for the manipulation of state power to perpetuating the power of the dominant groups, and for providing a cloak of legitimacy for the unelected elite, especially the armed forces, who have seized political power. While constitutions of sorts have always existed, the entire process of constitutionalism has been distorted beyond recognition. The constitution, instead of providing a framework of governance that reflects popular will or a national consensus, has become an instrument for denying popular sovereignty; to subordinate the judiciary to the will of the executive; to negate the rule of law; and to relegate the legislature to carrying out the fiats of the ruling coterie. This has been the most persistent factor undermining constitutionalism.

Although Bangladesh came into being in 1971, the story goes back to 1947. The history of the constitutional development in Bangladesh (and earlier East Pakistan) has been told often enough and there are a number of excellent studies. The purpose of this paper¹ is to explain the failure of constitutionalism in Bangladesh, a country which -- except perhaps for brief interludes of constitutional governments -- has remained for much of its history under arbitrary and authoritarian rule, albeit often behind a constitutional and a democratic façade. Despite an on-

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going popular fervor and passion for democratic government, the Bangalis have been subjected to authoritarian rule for much of the last half century. The commitment of the Bangali to constitutionalism is well known. It is evidenced by periodic popular movement against authoritarian rule, and most dramatically demonstrated by the war of liberation in 1971. Ironically, however, the quest for constitutionalism appears to have been derailed from the very outset.

The central thrust of my argument is that in the period from 1947 to 1971, the constitutional debate became mired by an effort of the unrepresentative (those who were not popularly elected or did not enjoy a popular mandate) ruling elites to institutionalize their dominance of the government through the manipulation of the constitutional arrangements. Their efforts to alter the facts of the national reality took the 'spirit' out the constitution and made a mockery of constitutional governance. This was done first by denying the Bangalis their majority status (they constituted more than half of the total population of Bangladesh) by thrusting on them the principle of representational parity with other smaller groups which placed the minority groups at par with the majority and were given representational weightage far in excess of their numbers; and subsequently, and more blatantly under the authoritarian rule of the military, by contriving to keep the authoritarian and unelected leaders in power by denying the very principle of popular elections. Once the ruling elite in Pakistan were able to do away with the need for seeking a popular mandate by various political gimmicks in place of popular elections – no general election was held in Pakistan between 1947 and 1970 – the will of the majority ceased to count. I will also argue that it was this constitutional failure that led Bangladesh to secede from Pakistan. And yet devoid of any constitutional culture the country was back under authoritarian

rule after a brief period of constitutional government between 1972-75. Even though the constitution was never formally abrogated, it was nonetheless seriously mutilated and only the most superficial semblance of a constitutional façade was preserved. Successive military rulers, backed by unelected and self-appointed representatives, abused the constitution and acquired untrammelled power to govern without popular mandate or due constitutional processes.

For the sake of convenience and clarity, albeit at the risk of artificially compartmentalizing what is a complicated and interwoven story, this paper is divided into five periods: (i) 1947 to 1958, when the constitutional arena was dominated by an alliance of non-representative politicians who stymied the process of drafting a constitution and ruled the country arbitrarily; (ii) 1958 to 1971, the so-called ‘basic democracy’, an elaborate hoax designed essentially to keep the army dictator, Field Marshall Mohammed Ayub Khan and his civil-military bureaucracy in power by denying effective popular participation; (iii) 1972 –75 saw the culmination of the long struggle of the Bangalis for a constitutional government and the writing of the first constitution by a popularly elected representatives of the people of the newly liberated Bangladesh; and then again the promising experiment in constitutionalism was whittled away for reasons and in circumstances not yet fully explained; (iv) 1975-1991: the democratically elected government was overthrown and the constitution became virtually an instrument for perpetuating the military’s dominance of the government; and (v) since 1991: a popular movement swept away authoritarian rule and set the stage for the restoration of constitutional government. I

1. Constitutional maneuvering to deny popular rule: 1947 - 1958

The crisis of constitutionalism in East Pakistan dates back to the very birth of Pakistan. The Bangalis had voted overwhelmingly for Pakistan, but after the establishment of an independent

Pakistan it became evident that the Bengalis had a different conception and vision for their new country from that of the ruling Muslim League, dominated by non-Bangali migrants from India and the Punjabis. The Bengalis had conceived of Pakistan in terms of the Lahore resolution of 1940 which referred to Pakistan as constituting Muslim majority states in the northeast and northwest of India rather than constituting a single state. This issue of 'state' versus 'states' created a deep chasm. It is true that in 1946 the Muslim League had replaced 'states' for 'state' but it was strenuously opposed by the Bengali leaders. Quaid i Azam Muhammad Ali Jinnah, the founder of Pakistan, was able to persuade the Bengalis to accept the change only by arguing that any reference to 'states' at that delicate moment in their struggle for independence would rekindle the dormant British fears of a fragmented India and would thereby undermine the demand for Pakistan. The Bengalis were assuaged by Jinnah's categorical promise that the 1946 resolution was not meant to amend the Lahore resolution of 1940, and that the people of the new state would not only have the power to 'define the status of the constituent units' but also that the units would 'conform to the conditions of linguistic and cultural affinities'. Moreover, a few months prior to the independence, Jinnah again reassured the Bengalis that the Lahore resolution 'would be before the Pakistan constituent Assembly and as a sovereign body [the constituent assembly] it would be the final arbiter of the country's constitution.' The Bengalis were confident that with their numerical majority in the constituent assembly they would have nothing to fear -- and therefore plunged into drafting a constitution in 1947. But their efforts were frustrated. It took Pakistan nearly ten years and many concessions by the Bangalis, including giving up the majority status of East Pakistan, to find a formula acceptable to the ruling elite of Pakistan.

The crisis arose from two separate but interlinked fears of Pakistan's new ruling elites. First, the rulers who came to power in Pakistan in 1947 were mostly migrants from India and therefore largely alien to Pakistan; second, and no less important, their party (the Muslim League) had no grassroots organizations in their new homeland. Or put differently, the Muslim League was not indigenous to the provinces that came to constitute it: the party of Sind was the Sindh National Party; in the Punjab it was the Unionist Party; in the Northwest Frontier Provinces it was Ghaffar Khan's Red Shirts allied to the Indian National Congress; and in Bengal it was the Krishak Proja Party. Indeed the Muslim League had 'won' decisively in the 1946 elections for the constituent assembly but it had done so only by hanging on to the coat-tails of the regional parties; and in the NWFP where it had failed to enter into an agreement with the Red Shirts, it had failed miserably. In other words the leaders who came to power in Pakistan had left both their homes and their constituencies behind in India.

It could not have escaped the consciousness of the Muslim League's leaders that they were not really the 'home team' in the areas that came to constitute Pakistan. They were, as it were, playing an away match in Pakistan. The leaders were all too well aware that in their new country they had neither the constituency nor the secure popular base from which they could seek re-election. This is a rather obvious point, but its significance is not always fully appreciated. This particular accident of history proved a major obstacle to the healthy development of constitutional government in Pakistan and persistently frustrated the Bangali aspirations of exercising their democratic rights in shaping their new country according to their vision. Not surprisingly at the very outset a wedge developed between the popular and representative 'vernacular' leaders wielding power in provinces, and the unrepresentative politicians in control of the federal government in Pakistan.

The Muslim League certainly had no organizational structure in either wing of Pakistan to mobilize the voters; and under the circumstances, it was apparent to the League's leaders that they could not risk a general election to secure a fresh mandate. Relief came from an unexpected source. The League's leaders found an ally in the conservative Punjabi socio-economic establishment. The concerns of the Punjabis were somewhat different from the migrant leadership but the solution to their problems required coming together as fellow travelers at least for part of the journey. The Punjab was the dominant province in West Pakistan; and in terms of size, population, and resources it was bigger than its neighboring provinces by a factor of several times and second only to the Bangalis in East Pakistan. The Punjab also enjoyed an overwhelming preponderance in both civil and military services as well as in the business sector; and, unlike the migrant leaders who wielded power at the federal government, the Punjabi leaders were secure in their constituencies. However they were apprehensive that under a new democratic constitutional order, based on one-person one-vote, they would lose their privileged position in the civil service, armed forces and in the industries and commerce. Like the migrant leaders, they saw the Bangali leaders as a threat to their dominant position. The safeguarding of their privileged interests required the preservation of the status quo through a constitutional institutionalization of their dominant status. The smaller provinces – Sindh, Baluchistan and the NWFP - had no particular interest in supporting the Punjabi dominance; and hence this could only be done by the Punjabi leaders aligning with the leaders at the Center. The problems and aspirations of the two groups were obviously different and each had its own and distinct agenda. Yet political expedience made them fellow travelers for at least a part of the journey. For the Punjabis the new constitution would have to be devised in a way that would dilute the majority of the Bangalis in the parliament; and for the migrant leaders the general election had to be avoided

until such time as they were able to build their political apparatus and ready to face the popular electorate. The hope of the Bangalis to use their majority status to capture power through the electoral process began to fade.

Armed with the various emergency powers provided by the Government of India Act of 1935 that constituted the constitutional basis on which power was transferred by the British to the two successor states in 1947, it was not difficult for the federal government to stymie the demands for a general election. They interfered in provincial affairs with impunity. Constitutional practices were observed mainly in the breach. The elected governments that come to power in the Punjab and Sind following the 1946 election were dismissed and the provinces were placed under the direct rule of the federal government. The United Front government, a coalition of progressive and left leaning parties that had won a landslide victory in the provincial elections in East Bengal in 1954, was dismissed within a month of taking office. Popularly elected governments were put in abeyance; and increasingly the provinces were ruled by the civil servants and soldiers on behalf of the federal government. In time the civil bureaucracy and the armed forces became involved in politics and in the intrigues of the federal government; and it was only a question of time before the civil-military bureaucracy would usurp the power directly in their own hands. The fate of democracy in Pakistan was virtually sealed.

In the period 1951-58 the stage was dominated by four civil-military bureaucrats -- Ghulam Muhammad, Muhammad Ali, Major-General, Iskander Ali Mirza and General Ayub Khan -- all of whom made an utter mockery of constitutionalism and democracy. Their contempt for parliament and popular will was manifest: they interfered with the workings of the parliament; bypassed the ministers and gave direct orders to civil servants; sacked cabinets without ascertaining whether they

actually commanded the confidence of the Assembly; and even appointed their own nominees as prime ministers and then secured their support in the Assembly through patronage and coercion. But it must be recognized that what gave these civil-military bureaucrats the ability to interfere was the manifest weakness of the constituent assembly. The constituent assembly was elected indirectly on a narrow franchise; it had been elected for the specific mandate of drafting the constitution for the new country; and once the new constitution was adopted a general election would be held to select the new government. India had become independent at the same time and under identical transitional constitutional arrangements. The Indian Constituent Assembly framed and adopted the constitution in 1950 and held its first general election shortly thereafter. The process in Pakistan proved tortuous, and in the process both constitutionalism and democratic institutions were undermined.

Many of the members of the constituent assembly, who had become prominent during the Pakistan movement and became the leaders of the new country, had come from provinces that did not belong to Pakistan and were therefore considered refugees in their new homeland. They not only lacked a popular base in Pakistan but even the legitimacy of the constituent assembly of which they were members began to be questioned. A number of the members of the constituent assembly who had been elected in 1946 had died; and others who had been elected from constituencies now in India, had failed to secure a new constituency in Pakistan. By the mid-1950s the popularity of the Muslim League had dwindled; and in every province where elections were held, the ruling party was routed by the electorate. Yet the constituent assembly continued to extend its term on the pretext that the task of constitution making was incomplete; and the federal government hung on to power even though it had long lost its mandate. The leaders were unwilling to risk a general election in which

their own position might be threatened. On the other hand it was not surprising that those politicians with a popular backing pressed for a general election to bring the constituent assembly more in line with the popular will.

The strategy was obvious. Many of the veterans of the Muslim League feared the prospect of facing an electorate and thus sought safety in an alliance with the Punjabi civil-military bureaucracy that had the backing of the Governors General. The interests of the unrepresentative politicians and those of the Punjabi socio-economic elite converged. The former did not want to surrender their political power, whilst the latter wanted no disturbance to their dominance in the economy, military and the civil bureaucracy. An unholy alliance was born; and their self-interest dictated that regional and vernacular leaders who had mass support in their respective provinces were kept out of power by thwarting the general election.

Stonewalling the demands for a general election was comparatively easy. No general election was allowed in Pakistan in its first 23 years – until 1956, on the pretext that a constitution had to be framed first; and then when it became impossible to prevaricate further, the civil military bureaucrats showed that clubs are trumps. Martial Law was proclaimed in October 1958 and the constitution was abrogated. However, devising a constitution that would reduce the majority status of the Bangalis -- an essential precondition for the Punjabi acceptance of the constitution -- proved much more intractable. It required the Bengalis to not only acquiesce in their own political demise, but it also had important implications for the minority provinces in the western wing. As might be expected, it took Pakistan ten years to frame its first constitution.

The prime challenge to the framing of a constitution -- the Punjabi fears that Bengalis would use their majority to dominate the federal government -- could be addressed in one of two ways.

The first would be to adopt a bicameral legislature similar to the U.S. model in which the power of the lower chamber, based on population, could be checked by an upper house with equal representation for each of the five provinces. The Bangalis might have acquiesced to it, but curiously the opposition came from the Punjabis. They were afraid that the smaller provinces in West Pakistan, who also resented the Punjabi domination, would join hands with Bangali leaders and challenge the privileged position of the Punjabi. The alternative would be to adopt a unicameral legislative based on parity between the two wings. This was clearly iniquitous and unwelcome to the Bengalis as it robbed them of their majority status. It also made the Punjabis jittery since they feared that Bengal would be able to dominate the central government by allying with other smaller provinces. Punjab demanded and obtained what was clearly a preposterous notion: not only must there be representation parity between East and West Pakistan, but also that all the four provinces of West Pakistan be merged into one unit. In such a schemata, Punjab, with 76 percent of popular representation for the western wing of Pakistan, would control the entire West Pakistan and would then contend with Bengal at par. Past experience had shown that this would not be too difficult; the migrant and non-Bengali leaders who claimed domicile in East Pakistan were only too eager to be co-opted; and others could be won over either through coercion or corruption.

This was precisely the constitutional arrangement that eventually emerged, and it finally secured Punjab's domination of the federal government. The scheme was extremely unpopular outside the Punjab. It was seen as a blatant attempt to advance specific and sectional interests at the expense of a general constitutional principle and national consensus. But, in the end, it was a *fait accompli*. The Bangali leaders swallowed the bitter pill since the alternative was the prolongation of the constitutional deadlock. Half a loaf was better than none. Even though the constitution fell

far short of the ideal, they hoped that its adoption would at least pave the way for a general election. The constitution was adopted on 23 March 1956. But elections remained elusive.

As the country began to gear itself for its first general election, all the fears and paranoia of the different interest groups resurfaced. The old civil-military and political faction alliance clearly perceived the threat to its position. General Ayub, the army commander-in-chief, who had long harbored political ambitions, felt particularly threatened by an election. Ayub's tenure in the army had been extended twice up to the early months of 1959, and it was apparent that should a popularly elected government with a Bangali majority emerge, the further extension of his tenure would be questionable. Ayub was a clever manipulator, and he joined hands with all those groups who had much to lose if an election were held. Major General Mirza, the incumbent President, too, would have no hope of continuing in office if an election were to be held. The two turned to each other and on 7 October 1958, Mirza used the emergency powers given to him under the constitution to abrogate the constitution itself; dismissed the cabinet, banned the political parties and canceled the election scheduled for early 1959. Ayub appointed himself as the Chief Martial Law Administrator (CMLA) and Mirza continued as the President. But two conspirators and master intriguers could hardly be expected to occupy the same stage. Three weeks later, Ayub dismissed Mirza and exiled him to London.

The experience of 1947 to 1958 had shown that no amount of constitutional engineering could allow groups and parties that did not enjoy popular support to stay in power. But from Ayub and Mirza's vantage point it was seen differently. The constitution had failed to safeguard their group interests and therefore had to be discarded. The challenge for Ayub and his cohorts was to devise a constitutional mechanism that, while providing the semblance of constitutionality, would at the same time be capable of denying its essence, namely popular sovereignty and the subordination

of the government to the rule of law. Ayub was pathologically uncomfortable with the popular will, and over the next decade his entire energy was devoted to finding ways of excluding popular participation and yet finding a way in which his government could shore up some popular support and endow him with legitimacy. He entered into an alliance with the civil-military bureaucracy and the unrepresentative political elites; and for the next ten years he worked with them to establish a system of government that would create a network of clientage and secure a 'popular' mandate. Political parties and leaders with large popular followings were difficult to manipulate and therefore could not be co-opted. Every trick in the book was used to give Ayub's seizure of power a constitutional façade and a cloak of legitimacy. In that naked pursuit of power Ayub undermined many of the political and constitutional institutions.

II

Ayub Khan and the great hoax of 'Basic Democracy', 1958-71:

Ayub's two main sources of authority were the civil service and the army; but if his regime were to survive in the long run, he needed to obtain legitimization through popular endorsement of his regime. Political parties were anathema to him and therefore, before he could launch himself into national politics, he realized the necessity of creating a local political base which could be controlled through the government apparatus. This also fitted with his simple-minded belief that the people of Pakistan were too unsophisticated and illiterate to exercise their democratic rights. His solution was the establishment of a system of local bodies that came to be known as Basic Democracies (BD). While this system received favorable comments at the time, it was a shrewd device that remained under the firm control of government officials while giving the impression of establishing popular institutions.

The system was intended to perform multiple functions: it would secure a clientage for the regime, undertake developmental works, and serve as units of local government. And after the introduction of a constitution in 1962, the BD would have important constitutional functions: it would form an electoral college for presidential and assembly elections and would act as an arbiter in case of conflict between the President and the National Assembly. It was a five-tiered institution (the highest tier, the Provincial Council, was abolished in 1961) with the Union Council in the rural areas (Town Committees in the towns) as the basic unit. Two-thirds of the Union Council members -- who popularly came to be called the BD members -- were elected by adult franchise for a period of five years while the remaining one-third of its members were official nominees. They elected their own chairmen. At the next level was the Thana Council, one half of which was made up of the chairmen of the Union Councils within the jurisdiction of that Thana, while the other half consisted of officials nominated by the official head of the subdivision -- or in his absence, by his deputy, the circle officer. The third tier, where the bulk of the patronage lay, was the District Council. It was presided over by the Deputy Commissioner and had a 'safe' membership: half were officials and the rest were 'non-officials' appointed by the Deputy Commissioner. The Divisional Council was composed on the same basis as the District Council except that its members were drawn from all the districts within the Division and were presided over by the Divisional Commissioner.

Despite much publicity and support from the government, the BD system failed to establish itself as a popular institution. The majority of those who found a niche in the system were neither 'political' nor 'professional' but rather businessmen, contractors or landowners and plain 'touts' who jumped onto the bandwagon having seen the opportunity of securing government patronage in the new institutions, particularly under its works program. The system both failed to generate popular enthusiasm and failed to provide the new cadre of leadership that could bridge the gap

between elites and the masses. At all levels, the official stranglehold were such that BDs dared not take initiatives lest it should antagonize the '*sarkar* (the government).' Most of the members of the new Basic Democracy institutions, particularly in West Pakistan, lacked the level of education or training which would have enabled them to conduct business. Inevitably, they looked to government officials to lead; and the budgets and most of the items on the agenda originated from official suggestions.

Even though the system eventually collapsed, it served Ayub well in the short term. He had created a local base whose support the government could be sure of. And by confining the exercise of mass adult franchise to the local level, Ayub had for the moment fragmented his political opponent and diverted popular participation away from the national level. This new system also made party politics obsolete. Given the small numbers of voters involved in the BD elections, what mattered most was personal contact, influence and money rather than any party affiliation or adherence to a political philosophy. Consequently, in the 1965 Presidential election, Ayub won handsomely in both wings. The BD system gave Ayub a base from which he was able to call for referendum on 17 February 1960 to demonstrate the support for his regime. Armed with 'overwhelming popular backing', Ayub proceeded to the second phase of the institutionalization of his regime: the introduction of a constitution by a 'firman' or decree.

Like the Basic Democracy scheme, the constitution devised by Ayub Khan was custom made to serve his requirements. The constitution that he imposed on the country neither reflected a popular consensus nor always accepted the recommendations of his own constitutional inquiry committee. The demands for a federal parliamentary system of government -- direct election by adult franchise, granting of fundamental rights, and the existence of political parties -- had commanded sufficient

support as evidenced by the findings of the constitutional Commission, but failed to find favor with Ayub. The constitution, established by Ayub's fiat on 8 June 1962, provided for a government candidate for the presidency. Unlike other presidential systems, however, Ayub was not willing to tolerate a parliament that could curb or restrain the President's authority. Under the constitution the President was elected for a fixed term of five years by an electoral college formed by the 80,000 Basic Democrats (in a country with a population of over 80 million); and the President's tenure was not dependent upon the confidence of the National Assembly (NA). The central and provincial executive was responsible to the president and held office so long as they remained in his good favor. The Assemblies could discuss, but had no control over recurring expenditures, which accounted for over 90% of the national budget, and their control of the purse was limited to voting for new expenditures. Ayub also made sure that his constitution would not be tampered with easily. The constitution could only be amended if a bill was passed by two-thirds majority and was approved by the President. But if the President disagreed, the bill was referred back to the NA for reconsideration and it could only be sent again to the President if it was backed by three-quarters of the NA. And that was not all. If the President still refused to give his assent, the bill could be put to a referendum of the Electoral College whose verdict would be final, as would be the case for any other conflict between the President and the assembly. The emergency powers equipped the President with the power to rule the country through 'ordinances,' the validity of which could not be challenged in the court of law. The president could proclaim an emergency if there was a threat to external or internal security of the state and the proclamation would remain in force for as long as the president desired. The National Assembly could not challenge the 'ordinances', but if it approved the ordinance it became an Act of Parliament. Otherwise it would remain effective as a presidential ordinance.

Ayub's constitutional engineering bore the imprint of a soldier's battle plan. He achieved the objectives he had set out to win. His military coup was timed to pre-empt a general election that threatened to remove the initiative and decision-making power from the civil/military/political bureaucracy to the leaders of a genuinely broad-based political party. The BD system and the assemblies had provided a democratic façade for his regime, and the effective denial of universal adult franchise rendered the popular politicians impotent. The *status quo ante* 1958 was restored and the civil-military bureaucracy was once again ascendant whilst the unrepresentative rumps of the old Muslim League were back in the ministerial chairs not through any popular elections but at the pleasure of a dubiously 'elected' President.

The systematic undermining of constitutional rule and democratic institutions by Ayub had a shattering impact on the Bangalis. Not only was the majority of the population excluded from effective participation in the government, but also as Ayub Khan's ability to control the state through the civil-military bureaucracy became ever stronger, the Bengalis began to despair the possibility of ever re-establishing a constitutional government. The Basic Democracies scheme, devised to recruit the base of popular Bengali support for the regime and not to make the Bengalis equal sharers of power in the central decision-making process, deliberately isolated and disenfranchised the Bengali counter-elite and its most active group of supporters.

The political impact on the Bangalis was devastating. The destruction of democracy deprived them of a voice in the governance of the country, especially as the Bangalis were scarcely represented in the higher wrung of the civil services or the armed forces. The popular Bangali leaders, especially Hussein Shaheed Suhrawardy and Sheikh Mujibur Rahman, bore the primary wrath of Ayub Khan as they commanded large popular support and were capable of mobilising a popular movement to oust the regime. Both the leaders were imprisoned; Suhrawardy died shortly

afterward in dubious circumstances; and Sheikh Mujib remained in prison for most of the period on trumped charges of treason. The political disenfranchisement of the Bangalis, coupled with economic neglect, convinced them that the solution to their constitutional problem lay in securing greater provincial autonomy, freed from excessive control and manipulation by the federal government. In articulating his six-point manifesto, Sheikh Mujibur Rahman, the leader of the Awami League, was articulating what was obvious to many thoughtful Bangalis: there could be no safeguards to protect the interests of the majority of the people in a constitutional dispensation which institutionalized the control of the federal government and was not accountable to the popular will. In the six-point manifesto announced in 1966, Mujib declared that the provinces would have control over all subjects except defense, foreign affairs and, with some restrictions, currency. Bangalis were more concerned with establishing self-government for the provinces rather than capturing national power through the removal of Ayub Khan. The manifesto caught the imagination of the Bangalis. According to Professor Rehman Sobhan, a close confidant of Mujib and one of a small group of intellectuals who helped to shape the manifesto: *'Mujib was far from convinced that the West Pakistani leaders of the opposition would be any more willing to share power than was Ayub; or indeed they themselves were in their earlier days in central power.'*

While divisions amongst politicians continued, their demands were not dissimilar: re-introduction of adult franchise, restoration of fundamental rights, and a revision of the constitution to reflect popular aspirations and to restore popular sovereignty. Ayub tried to stem the tide by ruthlessly suppressing the opposition. These attempts were futile; and the opposition groups raised their demands. Not only must Ayub go, but also the constitution and the institutions imposed by him must be scrapped. Faced with a massive popular uprising in both the wings of the country, his

authority began to crack. He conceded the main demands, including a general election, the restoration of parliamentary democracy based on one person one vote (which would give the Bengalis their majority) and the dismantling of the one unit in West Pakistan. But when the popular movement showed no sign of abating, he was compelled to resign. Ironically, he went the way he had come: by violating the constitution. Rather than transferring power to the Speaker as provided by the constitution that he himself had authored, he handed over power to the Army Chief, General Agha Muhammad Yahya Khan. Yahya declared martial law but quickly realized that popular upheaval could not be contained by military force; and nor was it possible for him to retract the political concessions that Ayub had been forced to make. The only way to defuse the political tension was to call for a general election and to let the constituent assembly frame a new constitution for the country. For the first time since 1947, Pakistan would have a general election on the basis of adult franchise.

Did this mean that the experience of the Ayub era had convinced the civil-military bureaucracy that they must withdraw from decision-making and return the powers of policy making to the elected representatives of the people? In fact far from it. The anti-democratic and anti-constitutional ethos was too deeply ingrained in the civil-military bureaucracy to be wiped clean just because a popular movement had overthrown a dictator. The old fears of the Punjabi elite resurfaced with even greater trepidation. Under the Ayub regime the Punjabis were the largest beneficiary of government policies. They had consolidated their political hold; they had acquired a larger share of the national economy; and were not only predominant in the armed forces but virtually occupied all the key decision-making position in the military and civil administration. The threat to a loss of their dominant position was even more pronounced than those of the civil-military bureaucracy. Indeed they had viewed Ayub's removal as a way to deflect popular discontent; and there was

widespread expectation amongst them that the popular movement would splinter and there would be a return to the status quo.

The expectations were also grounded on an assessment provided by the Director General of Forces Intelligence (DGFI). According to their assessment no single party was expected to emerge with a clear majority in the National Assembly; and it was their confident calculation that the civil-military bureaucracy would be able to return to the center of the stage as king makers by playing one faction against the other. To them the return to the status quo was assured. However, nothing was left to chance. Guided by the civil-military bureaucracy, the new military ruler made sure that the political initiative was firmly in his hands. The center piece of this contingency plan to thwart democratic expression of popular will was the so-called Legal Framework Order (LFO). The LFO, promulgated by Yahya Khan, laid down that if the constituent assembly could not complete the task of writing the constitution within 120 days, it would be automatically dissolved. A country that had taken nearly a decade to frame its first constitution was now allowed four months to complete the task on pain of dissolution. In retrospect the reasoning behind the LFO is quite obvious. The bureaucracy was well versed in the art of procrastination; and they were not unmindful of the fact that it had taken Pakistan nine years to frame its first constitution. If the election failed to give a clear majority to any party (as the military intelligence assumed it would), the possibility of meeting the deadline seemed remote. And if that was not enough – since nothing could be left to chance - the President was further armed with a veto over the wishes of the popularly elected constituent assembly. The constitution passed by the assembly would have to be *approved* by the President. The army could yet show that clubs were still trumps.

Controlling the popular demands proved more difficult and the carefully laid out plans of the civil-military bureaucracy unraveled quickly. The outcome of the elections took every one – except perhaps for Sheikh Mujib who confidently predicted the victory of the Awami League – by surprise. Mujib's Awami League, campaigning on a platform on his six-point program for autonomous provinces, won 167 out of 169 seats in East Pakistan. This gave him an overall majority in the Constitutional Assembly; and under the rules of parliamentary democracy he acquired the power to frame a constitution and form the government. The election results were the worst possible outcome from the point of view of the civil military bureaucracy – just the situation that they had been working to avert since the early 1950s. But the civil-military bureaucracy was not the only group disappointed by the election outcome. The election defeat of many of the old timers and unrepresentative politicians had not only discredited their claims to political leadership; but it had also reinforced their belief that the route to political power for them lay through the cantonment. The old alliance was reborn with a vengeance.

Sheikh Mujib was aware that his Awami League had not won a single seat in West Pakistan even though his party had won an absolute majority in the National Assembly and had enough votes to frame a constitution. However, anticipating the need to carry some of the members from West Pakistan with him, he had already entered into private dialogues with a number of smaller progressive parties, especially in Baluchistan and the NEFP. Both National Awami Party and Jamiat-i-ulema-i-Islam, who shared Awami League's quest for autonomous provinces, had signaled their willingness to work with Sheikh Mujib. But the problem arose from an unexpected quarter.

Zulfiqar Ali Bhutto's Pakistan Peoples Party (PPP) had won 88 seats in West Pakistan but mostly in the Punjab and Sindh. Bhutto was an able politician and an exceptionally ambitious. He had been a foreign minister in Ayub Khan's government but had ditched his political mentor just as Ayub's authority had begun to wane following the disastrous Indo-Pakistan war in 1965. Bhutto was not a man to let history bypass him; he would not content being the leader of the opposition; and therefore he turned to ally himself with all those who feared the control of the federal government by the Bangalis. He played upon the widespread perception amongst the Punjabi and 'muhajir' (migrant) elite that Mujib's accession to power would prove detrimental to the interests of Punjab especially, and generally to the dominance of West Pakistan businesses. The industrialists were fearful that licenses and investments would go to the Bangalis; the generals and admirals were apprehensive that not only would Mujib insist on regional parity in recruitment of the defense services but also that he would give accelerated promotion to Bengali officers to make up for their absence in the higher ranks; and civil bureaucracy likewise feared Mujib's wrath against them for their central role in thwarting democracy and denying the Bangali civil servant senior positions. It was also rumored that Mujib would shift the capital to Dhaka and the Naval headquarters to Chittagong – a large source of employment, services and procurement business. By opposing Awami League's claim to governmental power, Bhutto had positioned himself as the leader of the diverse interest groups of West Pakistan; and he was also the Trojan horse that the civil-military bureaucracy needed to thwart the emergence of a popularly elected government.

General Yahya, Bhutto and the top echelon of the civil-military bureaucracy were agreed that under no circumstances Mujib would be allowed to form a government that would give him the legitimate governmental authority to end West Pakistani domination. The strategy required that the election results would have to be annulled; the elected Bangalis leaders would be either forced to

accept an army-brokered compromise or incarcerated on charges of attempting to break-up the country; and if the population of East Pakistan showed any signs of popular resistance through civil disobedience, they would be militarily subdued. Past experience had also reinforced their views that many of the Bangali leaders who were routed in the election were waiting in the wings to be called back to the political center-stage and would be more than willing collaborators.

It was an audacious scheme but Bhutto and the civil-military bureaucracy reckoned that they would win, either heads or tails. If the Bangalis could be subdued forcefully or otherwise, then there would be a return to the status quo. However in the unlikely event the people of East Pakistan managed to take over the political control of their province, they reckoned that the loss would be sustainable. The loss of the backward province albeit with the majority of the population was viewed by many as preferable to having a government in which the Bangali leadership would have control over the entire national resources, its policy making and over the armed forces. It was argued that the secession of East Pakistan was more preferable if it spared West Pakistan the subordination to a Bangali government. For Bhutto personally such an outcome would be particularly beneficial. With the removal of the Awami League from the scene, his PPP would become the majority party in Pakistan with untrammelled power to frame a constitution for the truncated Pakistan; and as the leader of the majority party he could legitimately become the head of the government in Pakistan. Bhutto made sure over the next nine months as a civil war raged that all political solutions would be ruled out. And when the Pakistani cannons opened up on the night of March 25 1971 on unarmed Bangali civilians, it was the beginning of the end. In the war of liberation that followed, the Bengalis, with the help of Indian forces, were able to defeat the Pakistani army and to emerge as an independent country. For the first time in history the majority

of the population seceded from the minority. The events and circumstances that led to the independence of Bangladesh are complex, but it would be no exaggeration to say that things might have turned out differently if democratic institutions and constitutionalism had been given a chance.

III

Bangladesh and the Experiment in Liberal Democratic Constitutionalism 1972-75:

Bangladesh had come into being under difficult circumstances. Nine months of war of liberation took a heavy toll. The problems facing the new government were phenomenal. It had to establish an administration, restore order and get the wheels of industry and agriculture moving. More urgently, it had to rehabilitate the millions of refugees returning from India and the many more who had fled from urban areas to the safety of rural areas in order to escape from a genocidal army. They needed to be provided with materials to rebuild their homes, and with cash to buy seeds, bullocks and ploughs; and they had to be fed until the harvesting of the new crops. There was the added problem of protecting the beleaguered non-Bengali population who were thought to have collaborated with the Pakistan army -- and therefore had become the targets of ferocious vengeance.

Despite the obvious difficulties Sheikh Mujibur Rahman, the Bangabandhu and the founder of the new country, remained unflinching in his commitment to restoring constitutional government. He was also convinced of the desirability of bringing about social and economic reforms through parliamentary democracy. The speed with which the new country moved towards the establishment of a constitutional government was simply breathtaking. In marked contrast to the experience of Pakistan earlier, the new constitution of Bangladesh was drafted and unanimously approved by the constituent assembly within a year. It was a most remarkable essay on liberal democratic constitutionalism, allowing for popular participation and with careful safeguards to prevent the head

of state from interfering in politics as had happened in Pakistan. The principles of nationalism, socialism, democracy and secularism were enjoined as fundamental principles of state policy. The constitution not only guaranteed political rights and freedoms, but also included the provision of basic necessities as a fundamental responsibility of the state. The constitution laid down directives aimed at ameliorating the economic and material condition of the people and was intended to safeguard political rights as well as serve as an instrument for the transformation of social and economic life of the people through democratic institutions. It provided for popular sovereignty expressed through an elected parliament; the powers of the government were carefully limited by law; the executive was responsible to the parliament; democracy was constitutionally enshrined and a government could only hold office so long as it enjoyed the confidence of the parliament; fundamental rights were guaranteed and enforceable through an independent judiciary separated from the executive; laws inconsistent with fundamental rights were considered void; not only was equality before law guaranteed, but also right to life, personal liberty, safeguards against arbitrary detention were protected; and the freedom of movement, assembly, association, thought, speech, religion and occupation was also ensured.

As soon as the constitution was approved, the government dissolved the parliament, the Jatiya Parishad, and called for a fresh election. The new elections were held in March 1973 and the Awami League captured 292 out of 300 seats. The landslide victory, instead of strengthening the government, may actually have contributed to its weakness. The overall result of the elections probably reflected the opinion of the electorate accurately, but it certainly opened the government to the charges of vote rigging. There was, however, another unanticipated but much more serious consequence of the Awami League's electoral triumph. Many of the Awami Leaguers now secure in their seats for the next five years, felt less constrained by public opinion or concern for Party

discipline; and stories and rumors of their irresponsible behavior, misuse of power and alleged corruption were widespread, although never proven. Moreover, the absence of any meaningful opposition in parliament not only removed an effective check on the government, but also brought out the fissiparous tendencies in the League. The Awami League was a broad umbrella party which had brought together diverse strands of political ideology united by their desire to end Punjabi domination, to end attack on Bangla culture and way of life; to create a secular and tolerant society; and secure greater social justice through poverty alleviation. In the changed circumstances of an independent nationhood, many of the programs and policies earlier developed by the Party were overtaken by events; and there was no clear agreement as to how best the goals of the government might be achieved. In the years leading to the war of liberation leaders and activists differing political and ideological persuasions had jumped on to the bandwagon of the Awami League. Naturally enough their objectives and priorities were at variance from those of the Awami League; and their willingness to obey Party whip was questionable. Ironically, the sheer invulnerability of the Party following the massive electoral victory in 1973 weakened the party discipline and cohesion.

The electoral sweep by the Awami League had a further consequence which is perhaps not sufficiently recognized. More than twenty political parties had contested in the election and the voters confirmed that many of 'leader' who had occupied prominent position in national politics under successive military rulers had no popular base or constituency. The elections confirmed what had always been suspected but never fully tested, and laid bare the unrepresentative characters of these so-called party leaders. The restoration of democratic governance in Bangladesh had signaled the end of their career, influence and status in national politics. The effect on the psyche of these politicians was quite traumatic; and despairing in the prospect of not finding a role in the new

democratic set-up of Bangladesh drove them into considering other alternatives. And as in the days of Pakistan, if they were denied access to power through popular ballot, they would not be unwilling to secure their ambitions by aborting democracy. Once again this led to the banding together of diverse groups – a ragbag coalition of politicians without popular following, those who had opposed the liberation of Bangladesh, the remnants of the Pakistani trained armed forces, and those uncomfortable with Bangla culture and secularism and united by their opposition and abhorrence for the Awami League. They did what they had repeatedly done under Pakistan rule. They sought to regain their political influence by allying themselves with the military. They knew that they could rely on the military; it was a time tested and proven ally; and as was demonstrated in the past, the route to political power passed through the cantonments. Besides, the one needed the help of the other. Their overture fell on willing ears, and there was already a simmering discontent in the armed forces. The unholy anti-democratic alliance of unrepresentative politicians and the armed forces was back in place.

The government's record in establishing a constitutional government and holding a fresh election was impressive by any standards. But elsewhere it was less successful. The local government institutions were hamstrung by bureaucratic dependence and the predatory elite (disproportionately represented in Parliament) prevented the rapid empowerment of the masses; and even those schemes devised for the poor and the destitute were maneuvered to the advantage of the politically and socially dominant elite. As the economic crisis mounted, the various tensions in the society and within the Awami League itself -- which had been papered over during the war of liberation -- now began to surface. The freedom fighters, drawn from all political parties and social strata, had remained under the nominal control of the Awami League. But the unity forged during the war began to crack after independence, as their vision of a socialist Bangladesh and the road to

achieving it did not always tally with that of the Awami League. Even amongst the Awami Leaguers a large faction opposed the parliamentary approach and advocated a rapid transition to socialism through 'revolutionary' means.

Economic hardship gave teeth to political agitators and eroded the Awami League's grassroots support. Few paused to consider the magnitude of the economic problems that the new government had inherited. With the best of intentions, the government could do precious little since its ability was circumscribed by a lack of resources and expertise. Most of all, the government needed time. Yet time was one thing the government did not have. Impatience and demand for quick results was understandable. While much was wrong, these latter problems were those of governance -- not the result of constitutional shortcomings. The answer to bureaucratic inefficiencies or police ineffectiveness was not to endow them with greater powers, but with better leadership, training and accountability. Armed with extra-ordinary powers of arrest and detention, the police used their powers arbitrarily and indiscriminately. There was no real impact in curbing crime, violence or other anti-social activities like smuggling, car hijacking, extortion and attacks on pedestrians. On the contrary the police used their enhanced power to extort bribes and harass selectively those who were perceived to be opponents of the government. The police crack down backfired as many citizens were outraged by police high handedness and began to voice their criticism of the government.

Be that as it may, the support for the regime began to wither in 1974 as the country was gripped by a famine in which thousands died. Sheikh Mujib, who kept his fingers on the pulse of the nation, was aware of the problems and frustrated by the ineffectiveness of his piecemeal efforts. However it was the shock of the famine that stalked Bangladesh in 1974 and the extreme hardship and starvation in the countryside that brought home to him the need for a radical reorientation of his

policies. He shifted his attention from the urban to the rural areas and sought greater participation of the disempowered rural population in the implementation of his policies. Mujib also came to the conclusion that his radical reforms would require significant constitutional changes. He also became aware that Awami League's majority and dominance in the Parliament did not translate into its actual support in the country. The Awami League had received just over 40 percent of the popular votes (in an election in which just over 50 percent of the electorate had actually voted) but had managed to win all but 8 seats in a legislature of 300 largely because of the first past the post ballot system. A plurality of the population had either not voted for the Awami League; or was even opposed to it. The problems of Bangladesh could be best addressed by a genuinely national effort; and for that the government would have to shore up support beyond the Parliament.

The constitutional changes proposed by Sheikh Mujib directly contradicted many of the beliefs and principles he had espoused all his political life but he pressed ahead for constitutional changes in January 1975. The amended constitution provided for an executive president with considerable powers who was directly elected by the people. The government was armed with many 'special' and 'emergency' powers to deal with 'acts of terrorism;' and while the powers of parliament were not significantly altered, the president was no longer accountable to it since he was directly elected.

Mujib banned all political parties including his own Awami League and replaced them with a broad-based one party system under his own leadership. The 'second revolution,' as Mujib described his reform program, inaugurated a spate of changes. In keeping with his plan for involving popular participation in the administration and for making it more accountable to the public, Mujib attempted a major reorganization of the administration and the bureaucracy. Mujib devised a scheme that would use the experience and expertise of the civil servants and at the same

time would introduce popular participation and public accountability. For administrative purposes, the country was to be divided into 61 districts (instead of the former 19 districts) and the Deputy Commissioners or the District Magistrates (members of the civil service) would be replaced by governors drawn from Members of Parliament and local politicians. To make the district administration more sensitive to the local needs, a district administrative council would be created and would include the governor as the chairman, the deputy commissioner as secretary and others including all Members of Parliament from the district, the district secretary of BKSAL, a party representative from each of the *thanas* (police stations) and the district officers of the various ministries, and a representative of the armed forces and the police. To give teeth to the administrative council, it would be given extensive power and funds. The governor and the council would control, supervise and coordinate all administrative and developmental work of the various ministries at the district level. The council would also be in charge of maintaining law and order, collecting revenue and allocating funds.

One part of the administrative reorganization also concerned the future of the army. For some time, Mujib was aware of conspiracies in the armed forces and he feared a repetition of what happened in Pakistan. In addition to Mujib's suspicion of the armed forces, he was keenly aware of the wasteful extravagance of the military in developing third-world countries. His own experience of military rule and the recurring phenomenon of army intervention in many Afro-Asian states convinced him of the necessity of reducing the army to a position where intervention in politics would be difficult. Mujib's own position vis-à-vis the army was quite straightforward: as a force against external threat it was useless, and poor countries like Bangladesh could ill-afford to maintain large-standing armies. He also believed that foreign aggression could only be checked by popular resistance. Mujib saw the army as a white elephant; and since he was powerless to disband the

army, it must therefore be incorporated into the more productive sector of the economy. The 55,000-strong Bangladesh army was too divided and faction-ridden to strike as yet. However when Sheikh Mujib announced that the armed forces would be decentralized, and units of soldiers would be placed at the disposal of the district governors for deployment in the rural development programs, their resentment reached a bursting point. The Bangladesh army, though small, ill equipped and led mostly by relatively junior officers, had been trained and mentored in Pakistan (except for those who were drawn from the freedom fighters) and had brought with them the same contempt for democracy and civil rule as their erstwhile fellow soldiers in Pakistan. The new arrangements for the Bangladesh armed forces were scheduled to come into effect from 1 September 1975. They must either act or it would perish.

The gusto of attempted reforms had eroded Sheikh Mujib's support in several areas, including that from some of his own party members and beneficiaries. And although many of these reforms would have effected far-reaching changes in due time, in the short-run they failed to win any support from his opponents. Whatever might have been his motives, there is no doubt that Mujib had been hasty in abrogating the parliamentary system of government with an executive presidency and one-party rule. In creating a parliamentary government and a multi-party system, the 1972 constitution reflected a broad national consensus. To have used his parliamentary majority to amend the constitution without seeking a popular mandate was politically naive and myopic. More importantly, those who followed him violated the sanctity of the constitution, which opened the door for its manipulation and mutilation. To say that Mujib had acted injudiciously is not to suggest that either constitutional government or the constitutional checks and balances were destroyed. Strictly speaking, the constitutional changes merely shifted the locus of executive power from the cabinet to the president, but it did not seek to alter the constitutional limitations of the

power of the government. Parliament's control over the purse, its power of legislation and the task of oversight of the government remained intact. And most importantly, the power and independence of the judiciary was unimpaired. The essence of constitutionalism was not disturbed. However, in different circumstances and in less scrupulous hands, the powers accorded to the executive president could be open to abuse, especially in the absence of a representative parliament and an independent judiciary. This is precisely what happened after the military take-over.

The reforms were never given a try. On 15 August 1975 -- a fortnight before the new administrative scheme was due to come into operation -- Mujib, along with almost his entire family and close relations, was assassinated. The era of constitutional government was over and for the next fifteen years power would be lodged in the cantonment. The explanation for military intervention or for that matter their ability to hang on to power for more than fifteen years, is not central to the discussion here. Our concern here is to examine the delirious impact of military rule on constitutional governance.

IV

Authoritarian rule and the erosion of constitutionalism: 1975-1991

Coming to power as the striking force of an unrepresentative military-bureaucratic alliance, the Bangali military was obliged to seek some popular backing for both domestic and international purposes. Its leaders had two ways of going about it: either by gathering a coalition of small parties and unrepresentative politicians whose need for the military was every bit as great as its need for them or by setting up their own clientele of local notables who could be kept tied to the government by bureaucratic pressures and patronage. In either case, the strategy was essentially clientelistic. Both were faced by the same dilemma in the end: the clientelist option was incapable of providing any long term solution to demands for popular participation; and the support base so painstakingly

created by Major General Ziaur Rahman and Lieutenant General Hossain Mohammed Ershad collapsed overnight in the face of either intra-military factionalism or of a decline in patronage funds -- itself an inevitable result of the rapacious demands of the military.

Once the military had usurped power, its main concern was to institutionalize its control of the government. The challenge was to devise a political mechanism that, while having the trappings of a democracy, would in fact limit popular participation to the extent that pliant officials could regulate it. Both Generals Ziaur Rahman and Hossain Mohammed Ershad followed similar policies and drew their inspiration from Ayub Khan. Zia and Ershad sought to exclude those political parties and leaders with a broad political base, who were capable of mobilizing popular support, since that would threaten the dominance of the military. And in turn, both of them sought to legitimize their positions through contrived popular endorsement, launched their own political parties and manipulated and rigged the electoral process to get their representatives elected to the assembly. The fact that the elections and referendum were rigged, or that the majority of the people and political parties had either boycotted or were barred by the military from participating in the legitimating exercises was glossed over. People were not hoodwinked; and despite their claims to be constitutionally elected, both Zia and Ershad knew that their only constituency remained in the cantonments. In both cases their demise, physical or political, was determined in the cantonments.

Zia had one distinct advantage when he seized power. He did not have to tamper with the constitution and left it largely untouched. He used the extraordinary powers conferred on the president and the powers under 'special' and 'emergency' provisions untrammelled by parliamentary or judicial scrutiny. And, until such a time when he could secure the election of a pliant legislature, he kept parliament dissolved by refusing to convene it. Likewise, he shielded himself against the courts through martial law regulations until he was confident of his ability to pack the judiciary with

his own nominees. Once a pliant assembly was installed, both Zia and Ershad got the legislature to pass indemnity bills exonerating them for their unconstitutional activities. In the hands of Zia and Ershad the constitutional powers were cynically exploited. The spirit of the constitution was destroyed and in military hands the constitution became the fig leaf to shield their tyrannical rule.

The most damaging consequence of the Zia-Ershad intervention was their single-minded emaciation of all democratic and constitutional institutions. The armed services and military intelligence agencies acquired many extra-constitutional roles which they have continued to exercise even after the restoration of democracy; the independence of the judiciary, having been undermined, cannot be easily fixed; the election commission was reduced to a subordinate agency of the executive; civil servants who are not susceptible to popular accountability in the best of times, have become highly politicized, frequently undermining the popular will; the print media, the watchdog against arbitrary government, was gagged, corrupted and co-opted; radio and television developed a culture of subservience which, even after the overthrow of authoritarian rule, refuses to change; and in the absence of any form of public accountability, corruption permeated every walk of life. Most damaging of all, the ethos, values, standards and a vision of society that sustains constitutionalism were seriously eroded: social justice, public service and rule of law was a government run replaced by rapacious elite, where greed and avarice pervaded and law became a hostage to influence, power and wealth. In conclusion, it may be said that while the authoritarian rulers cynically preserved the letter of the constitution, the institutions and processes that uphold constitutionalism and constitutional governance were destroyed. The task of rebuilding constitutional democracy, institutions and processes was the most difficult legacy that the military bequeathed to its civilian successors.

The restoration of constitutional governance 1991-:

The military rulers, despite their inability to secure political legitimacy were able to hang on to power largely because the political parties were hopelessly divided amongst themselves. Not surprisingly, at the first whiff of a unity between the Awami League and the Bangladesh Nationalist Party in 1990, the military rule collapsed. The house that Ershad had built proved just as fragile as those of his military predecessors; and with his overthrow the military-sponsored Jatiya Dal all but ceased to be relevant. The overthrow of the military ruler (albeit disguised in civilian garb) was followed by the appointment of neutral caretaker government to conduct the elections. For the first time since 1975, a largely free and fair general election was held and a popularly elected government was returned to office. The new government led by the BNP was forced to restore parliamentary democracy as the price for the Awami League's participation in parliament. The Awami League had finally made amends for its historic mistake in 1975. The story of the constitution had turned a full circle: authoritarian rule was buried and parliamentary sovereignty was restored.

In the decade since the restoration of democracy in 1991 things are still unfolding. The restoration of democracy and the successful execution of three general elections are significant achievements but not a sufficient condition for the restoration of constitutional democracy. The system has not yet gotten rid of the ethos and values instilled by authoritarian rule; and still more rebuilding the institutions of constitutionalism undermined by the military is proving more difficult than was first envisaged. The elected governments have either failed or chosen not bring the military fully under parliamentary control. The military still enjoys significant influence in policy making, but more importantly, the budget of the armed forces is not debated in parliament; and nor are the defense issues subject to parliamentary oversight. And finally, the defense spending

continues to be disproportionate both in relation to the country's security concerns and to the development needs.

The extent to which democracy and constitutionalism have been restored in Bangladesh over the last decade since the ostensible restoration of democracy is still a moot question and best described as a work in progress. Stanley de Smith, the eminent liberal constitutionalist, has laid down a number of tests as to whether a country can be said to practice constitutionalism. *First*, there must be competition -- free, fair and at periodic intervals -- for governmental power and positions; *second*, the government must be accountable and amenable to popular opinion and a constitutionally created institution distinct from itself; and *finally*, there must be effective guarantees of fundamental civil and political liberties enforced by an independent judiciary. These include the freedom of expression and of the press and the right to form organizations. And where these are lacking, Stanley Smith argues, there is no constitutionalism. We shall now apply these tests of constitutionalism to Bangladesh.

1. Political competition: 'free, fair and periodic'.

Since 1991 Bangladesh has held three general elections that by most standards would be considered 'free and fair'; and indeed they have been so endorsed by independent election monitors. However to say that elections were 'free and fair' is not to argue that Bangladesh possesses institutionalized mechanisms for free competition; nor is that to suggest that the outcome of the elections has accurately reflected the popular will. In fact, far from it. The incumbent governments appoint the 'Election Commissioners' and their impartiality in conducting the elections is usually conditioned upon the extent to which the government of the day allows the Election Commission to function impartially. Even though the Election Commission enjoys statutory powers granted to it by the

constitution, in reality the autonomy of the election commissions is yet to be established. The country responded to this criticism by amending the constitution that requires the incumbent government, including the prime minister, to vacate office three months prior to the election in order for the election to be conducted under the auspices of a neutral caretaker government. This has greatly enhanced the legitimacy of the electoral process and reduced official interference. The constitution also provides that the most recently retired chief justice of the Supreme Court would be the head of the caretaker government and have the authority to appoint the Election Commissioner. But despite these innovations and constitutional provisions there is still a long way to go. The governments have manipulated the appointments of chief justices in such a way as to put in place a more favorable retired justice in time to head the caretaker government! The impartiality of the Caretaker government and the Election Commission have both been questioned and not without some bases. More over in all the three elections the army intelligence, backed by its own funds (for which there is no transparent or parliamentary accountability) and with funds coming from abroad, has covertly manipulated the electoral outcome; nor has the pervasive influence of the armed forces in the government diminished with time.

Similarly, it can be argued that when Election Commission and the election monitors, both domestic and international, declare that the elections were conducted ‘freely and fairly’ on the day of the polls, this does not actually imply that the electoral process itself was ‘free and fair’. Nor does it guarantee that the outcome of the elections accurately reflects the preference of the voters. The experience has suggested that it merely means that the voting was not rigged on the day of the ballot. It does not take into account the manner in which the voters list is manipulated to the advantage of one party or another; it does not deal with government officials using their influence on local leaders who traditionally control ‘vote banks’; and it also does not take into account the

‘intimidation’ caused by the presence of the military in the vicinity of the polling booths. In short, government officials and military intelligence still play an effective role in manipulating the electoral contests. The elections of 1991 and 2001, in which the BNP was victorious, were by all accounts ‘free and fair’ on the day of the polling. However, the electoral outcome did not fully reflect the state of its popular support. It is not possible to attribute the huge majority of the BNP in parliament to the vagaries and the distortions of the ‘first past the post’ system. A more sophisticated analysis of the election data shows careful transferring of votes in certain constituencies to tilt the electoral outcome. That the statistical aberration is much too large and persistently working to the disadvantage of one party suggests that other forces were at work. However such manipulations are difficult to document or prove through a legal challenge.

Similarly when an election is certified as ‘free and fair’, it does not take into account the debilitating impact of money on electoral outcomes and the subsequent behavior of the governments. In fact the role of campaign finance has not yet been sufficiently understood or addressed in Bangladesh as in most other countries. In Bangladesh very few candidates or parties actually adhere to the campaign spending limits set by the Election Commission. This has led not only to straightforward corruption in the form of ‘buying votes,’ but has also enhanced the influence of smugglers, drug traffickers and black-marketers who use their money either to sponsor their candidates or to sometimes seek party tickets to get themselves elected. It is therefore a small surprise that the number of people with ‘criminal’ associations either in parliaments or those holding public offices has increased dramatically. Another inevitable consequence of ‘money politics’ is that once elected, not infrequently the first concern of these elected representatives is to recoup their expenses, often through dubious methods. Public service has become a means to private opulence.

Perhaps a far more odious and distorting consequence of ‘money politics’ is the infiltration of the political parties by the rich industrialists, businessmen and landlords. Both the Awami League and the BNP offer a large number of their party tickets to those who make monetary contributions to the party. This has not only weakened the discipline of the parliamentary parties but also because many of those elected on ‘party tickets’ do not have any commitment to the program manifesto of the party. One consequence is that increasingly the parties are finding it difficult to ensure that their members adhere to the electoral commitments. The hands of the elected governments are tied; they become paralyzed, ineffective, and not surprisingly show a poor record of fulfilling their electoral commitments especially in their commitments to social justice or in their ability enact legislation that seeks to empower the poor and historically disadvantaged groups. Popular cynicism about governments is at all time high; people do not trust the governments; and even though the governments are elected, they enjoy scant legitimacy. The gap between the rulers and ruled has widened; and even though the two may live in the same country, they traverse in different universe. A striking evidence of this is that in Bangladesh, as elsewhere in South Asia, the electorate constantly votes the incumbent governments out of power.

2. Government Accountability & Popular Participation

Essential to the functioning of democracy is the regular participation of the people in the formulation of policy. In this respect the record of Bangladesh, like most other developing countries including India, is particularly poor. The contacts between the rulers and the ruled in the period between elections are few and far between; the two not only inhabit worlds that are apart, but their view of the world, their hopes and aspirations, their needs and dreams are very different. In the ‘abridged’ democratic order the governments ‘do’ things for the voters; the voters are considered

too ignorant to have a say in their own affairs. There are few, if any, avenues for the voters to be consulted – except, of course, when they vent their anger by taking to the streets.

Policies emanate from the ministries and are enacted by parliament after perfunctory debate. There is no attempt to educate, much less to involve the public in the debates; nor are there any structured discussions between the government and the groups most likely to be affected by the legislation. ‘White Papers’ setting out the government proposals on a particular issue is rarely published, nor is popular input sought on any important policy issues. By contrast, the governments have developed a wide range of tactics for diverting or stonewalling public demands. The governments frequently appoint committees and commissions -- parliamentary, judicial, public or departmental -- to inquire about and report on specific issues, but seldom are these reports made public, and still rarely are their recommendations implemented. They merely serve the purpose of stifling protests and placating public wrath. Nor are the governments mindful of popular sentiment in the making public office appointments. Public appointments are regarded as gifts and patronage of the government and appear to be made without any recognized procedure or public scrutiny. Ministers, ambassadors, heads of public enterprise corporations and even vice chancellors of the universities, owe their appointments to the president or the prime minister without so much as even a reference to parliament or any concern for their qualifications or appropriateness for the position. The purpose of popular endorsement and the scrutiny of public office holders are to endow and renew the legitimacy of the regime; however, when governments use their assured majority in parliament to rubber stamp the appointment of their nominees without consideration of public opinion the purpose of the exercise is defeated.

There is another more subtle and perhaps much more important question of participation that has not yet been adequately addressed. The prevailing norm appears to be the ‘winner takes

all'. The party that wins the election not only forms the government but also assumes all the rights and powers of governing. The parties in the opposition are excluded from participation in the government and legislation in any meaningful way. This has not only led to the polarization of the political arena but has also raised the important question of how to represent the interests and views of those who did not vote for the winning party. In a country where the ruling party has never garnered more than 40 percent of the votes, a vast majority of the population feels excluded from the governance of the country. They have little or no stake in the government; the legitimacy of the government becomes questionable in their mind; and not surprisingly, they join in the protest movements to dislodge the government. The constitution itself is silent on this question; and the various parliamentary conventions whereby the opposition groups get a say in the governance through select parliamentary committees are seldom operational. The big question is how to provide constitutional safeguards which allow the majority to rule but at the same time find a mechanism for those in the opposition to have their say in a meaningful manner.

3. Effective Guarantees of Civil and Political Liberties

Competition and participation are essential ingredients of democracy; and while both of these elements are present in Bangladesh at a formal level, we have seen that in practice they remain distant goals rather than the prevailing reality. Without the guarantee of civil and political liberties, competition and participation cannot be made a reality. As elements, their effectiveness is predicated upon institutional guarantees about the freedom of expression; the freedom of press and the right to form organizations; the right to seek public office; the ability to freely canvas and mobilize support for one's platform and program; and the assurance that those institutions responsible for making government policies are responsible to the people by whom they are elected. Once again, at the formal level, the civil and political liberties are enshrined in the constitution and

the citizens can seek redress in case of infringement of their fundamental rights through the courts. Many of the restrictions that curbed individual freedom under authoritarian rule have been removed from the statutes. Detention of political prisoners without trial, for example, is virtually impossible as courts frequently throw out government detention orders.

While one can make a sound argument that the record of civil and political liberties has improved over the years, it would be quite difficult to say that there are no areas of concern. In all the countries of South Asia there is evidence of violations by the governments of individual and group rights. In most cases, the victims of state violence cannot seek legal redress. The states have sought to legalize their use of coercion and denial of political and civil liberties under the garb of a plethora of anti-terrorist, emergency and defense of the realm laws. The treatment meted out to the minority groups like the Hindus and the tribal population is particularly galling. While one can argue that there is no official policy of discrimination, one cannot ignore that the human rights of these communities are often violated with impunity; and it is also not surprising that these two communities remain at the bottom of the socio-economic ladder.

Concluding remarks:

On the positive side Bangladesh has much to celebrate. It has restored democratic institutions; the parliamentary supremacy so badly eroded in 1975 has been restored; the constitutional mechanism of caretaker governments to conduct the election has ensured smooth transfer of power from the incumbent government to the party that wins the election; the general elections have been largely free and fair; the army has not attempted to capture power despite its pervasive political influence; there is a thriving and free press; and few political prisoners. But despite these significant achievements, the scale remains heavily tilted on the debit side.

The absence, or more accurately the erosion of the culture of constitutionalism, along with the concomitant lack of respect for rule of law, of due processes and of human rights, has meant that often democratic leaders have behaved no better than their military predecessors. The result is that the constitution and democratic institutions work in fits and starts. In each of the three elections the party that lost the election has refused to accept gracefully the popular verdict and has attempted to challenge the legitimacy of the winner to rule the country. The inability to play by the rules of the constitution has not only undermined popular confidence in democratic institutions and processes, but it has also made the normal functioning of the government very nearly impossible. Each party in turn has used a variety of means – often of questionable constitutionality – to harass and oust the elected government. While mobilizing the public against the government is a perfectly legitimate constitutional right, the opposition groups have often resorted to tactics of dubious legality. The tactic most frequently used is the ‘hartal’ – a general strike that forces offices, educational institutions, and factories to shut down. Not infrequently even trains, planes and ships also come to a grinding halt. These tactics, decried by every party when in power, are used indiscriminately and cynically for capturing power that is seriously questionable whether or not ‘hartals’ are reflective of popular feelings. More often than not hartals are products of duress and intimidation; and the cumulative effects of such strikes are disastrous. The government is deflected from carrying out its mandate; the government officials and police become brazenly politicized and partisan; and government institutions are undermined. The economic consequences are also excruciatingly painful: the livelihood is disrupted; industrial production comes to a grinding halt; exports slip; and education suffers. While the use of ‘hartal’ to express public outrage is a perfectly legitimate and constitutional tool, its cynical use is having a debilitating impact on the constitutional process.

A much more questionable tactic, one that has hurt the constitutional process most, is the boycott of the parliament by opposition groups. Both the main parties have resorted to this with predictable regularity. Even though the boycott of parliament has often resulted from grave provocations by the ruling party, it is nonetheless constitutionally questionable. A member of parliament is elected by the voters to represent her or his constituency; and by choosing to boycott the parliament the members are reneging their commitment to the electors to represent them. In other words the voter goes unrepresented in parliament. While a symbolic walkout or token absence to register discontent is permissible, prolonged boycott undermines the very heart of the democratic process and institutions. Not surprisingly parliament has lost much of its stature and public esteem; and it has been difficult for the parties to serve out the full term of their office.

The story of constitutionalism in Bangladesh ends without an ending. The constitutional development has turned a full circle; and more than half a century later we are still struggling at the starting line. A constitutional government is in harness but, the legacies of authoritarian rule have not been easy to bury. These legacies have permeated our values, our ethos and our outlook; they have lowered the tone of public debate, sapped national vitality, and have corrupted the social and moral fabric of the body politics.