



***REINSTATEMENT OF CARETAKER GOVERNMENT: A POLICY
FOR SUSTAINABLE DEMOCRACY IN BANGLADESH***

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LETTER OF APPROVAL

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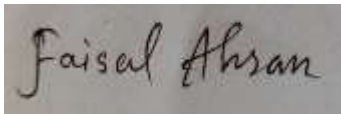
In re: Reinstatement of the Caretaker Government: A Policy for Sustainable Democracy in Bangladesh.

Dear Sir,

It's an absolute honor for me to submit the paper titled "**Reinstatement of the Caretaker Government: A Policy for Sustainable Democracy in Bangladesh**". At the time of preparing this Research Monograph I have taken into consideration every possible measure to uphold the required Standard as stated earlier. I firmly believe that this Research Monograph will reach the mark that you desire.

I, hereby, do solemnly declare that the paper presented in dissertation has been carried out by me and has not been subject to any previous publication by any institution or organization. The work that I have presented is an authentic work and does not infringe any copyright.

I, along with these lines, supplicate and hope that you would be sufficiently benevolent to this exploration paper for advancement.



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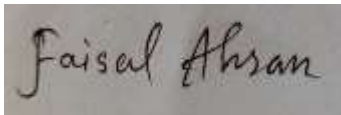
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Initially, before I start writing up the paper, I would like to express my gratitude towards some people around me for their unbound and generous support and encouragement during this project. First of all, I would like to carry millions of tons of gratitude to my supervisor Mr. Md. Safiullah for his close observation, assistance and cooperation throughout the project and also for cheering me up to be focused and issue centric. Again, I feel thankful to him for his valuable suggestions and corrections for which he spared his valuable time.

I am grateful to my family, especially to my younger brother who has always been a great support throughout my life.

I am also grateful to my mates who were and are with me during my legal studies.



.....

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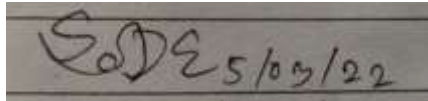
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DEDICATION

I would like to dedicate this paper to my beloved late father who dreamt to see me as a fighter in the legal arena.

DICLARATION

This is hereby certifying that the Research Monograph titled “**Reinstatement of the Caretaker Government: A Policy for Sustainable Democracy in Bangladesh.**” has been accomplished by Md. Faisal Ahsan bearing ID No. 212-38-425 in partial fulfillment of the requirement for the degree of LL.M. Program at Daffodil International University. This Research Monograph has been carried out successfully under my supervision.



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Abstract

This paper is going to investigate the restoration and sustainability of the Caretaker Government under guaranteed Constitutional mandate as the Caretaker Government is said to play a vital role for holding elections in a free and fair manner since earlier political governments had been alleged to highly rigging in the elections. The masses had lost their trust and confidence in elections under a partisan government. Thus, Caretaker Government had been emerged as a unique form of government with a view to ensuring the creditability of elections. Three elections had been accomplished successfully since its inception. Many local and international observers found Caretaker Government as a neutral form of mechanism for transferring the power peacefully. However, the legal accreditation has been over when the 15th amendment to the Constitution abolished the system taking into consideration the verdict of the Supreme Court. The main two political alliances are arguing on the issue of Caretaker Government on contrast. The ruling alliance argues that the system could not be restored in the Constitution whereas opposition alliances strongly demand for the reinstatement of the Caretaker Government. Although ruling party rejected the plea of oppositions, the demand for restoring the system has been increasing day by day. This paper establishes the plea how the Caretaker Government can be reinstated in the Constitution of Bangladesh both by dint of judicial process, interpretation of the Constitution as well as in the context of politics. This paper by doing a critical analysis on different issues has found the probability of restoration of the Caretaker Government in the Constitution. Besides, it emphasizes the demand of mainstream political parties, prominent citizens, civil societies and other civil organizations who expect that the Caretaker Government system should be restored considering the sustainability of democracy in country.

Keywords

Caretaker Government, Judicial Decision, Political Parties, Democracy, Constitution, Reinstatement.

LIST OF ABBREVIATIONS

Caretaker Government.....	Ctg
HCD	The High Court Division
AD.....	The Appellate Division
BAL.....	Bangladesh Awami League
BNP.....	Bangladesh Generalist Party
JP	Jatiya Party
FPSP.....	Fundamental Principle of State Policy
VS.....	Versus
DLR.....	Dhaka Law Review
BLD.....	Bangladesh Legal Decision

TABLE OF CONTENT

LETTER OF APPROVAL.....	ii
ACKNOWLEDGEMENT	iii
DEDICATION.....	iv
DECLARATION.....	v
ABSTRACT	vi
LIST OF ABBREVIATIONS.....	vii

CHAPTER 1

Introduction

1.1. Introduction.....	1
1.2. Background Study.....	2
1.3. Problem Statement.....	3
1.4. Research Questions.....	3
1.5.Objective of the Study.....	4
1.6.Significance of the Study.....	4
1.7.Research Methodology.....	5
1.8. Literature Review.....	5

CHAPTER 2

Interpretation of the Constitution

2.1. Interpretation of FPSP.....	7
2.2. Interpretation of Article-56.....	8
2.3. Biased Presidency.....	9
2.4. Weaknesses of the Election Commission.....	10

CHAPTER 3

Judicial Interpretation and Precedents

3.1. Syed Mashiur Rahman vs. Bangladesh.....	12
3.2. M Saleem Ullah vs. Bangladesh.....	12
3.3. Masood R Sobhan VS. Election Commission.....	15
3.4. Sultana Kamal & Others vs. Bangladesh.....	15

CHAPTER 4

Political Perils and Conflict Between Political Rivals

4.1. Elections of 1996, 2001 & 2008.....	17
4.2. Elections of 2014 and 2018.....	20
4.3. Comparison Between Elections.....	22

CHAPTER 5

Reinstatement of the Caretaker Government

5.1. Revival of Referendum.....	24
5.2. Referendum as a means of Constitutional Amendment.....	24
5.3. Doctrine of Necessity.....	26
5.4. Reinstatement on the Basis of Findings.....	27

CHAPTER 6

Reformation of the Structure

6.1. Proposed Structure.....	29
6.2. Remarks.....	32

CHAPTER 1

INTRODUCTION

1.1. Introduction

The Caretaker Government system came into existence in Bangladesh as a paradoxical concept. It was brought into effect through the Thirteenth Amendment to Constitution in 1996 by BNP led government in a political dilemma. Three elections (1996, 2001 & 2008) have been held under that system successfully and the power to govern the country's people has been transferred to the winning party peacefully. In earlier times, ruling parties tried to dictate the outcomes of elections by terrorizing their oppositions, especially when the elections were held under the partisan Governments. Thus, political parties as well as mass people had lost their faith and confidence in elections. Over the period of 1971-2001, six general elections were held under political Governments, where almost all ruling parties were alleged to have used force to manipulate the elections. It was thought that the citizens could be protected, by the Caretaker Government from Parties seeking any undue advantages in elections. Thus, Bangladesh was successful in creating a new mechanism in its political arena to hold a free and fair election, called Caretaker Government. The hope for democracy would sustain as the neutral government took the responsibility to oversee the elections. The true purpose of the mechanism was to broaden democracy as well as to benefit the political parties. Caretaker Government worked very well as two elections (1996 & 2001). These elections were free and fair. The general election in 2008 was also successful. Its abolishment not only affects political arena rather a black shadow in the democratic character of state. Hence, its revival in the Constitution is a time worthy and democratic demand.

1.2. Background Study

The spirit of freedom fight has never been reflected in the politics of Bangladesh rather the political history and culture since the Independence is dusty and always go against the public interest as rulers often tend to be highly corrupt and distorted. Formulation of BAKSHAL, killing of Sheikh Mujibur Rahman, frequent usurpation by military Junta and their illegal ruling, those all are carrying the burden of distorted political history. In 1991, the mainstream politics got back in track after a mass upsurge against military ruler but it was not stable and strong enough. Frequent walk-out by opposition, road strike and other political crisis made the situation beyond control. To overcome this deadlock situation a new form of interim government was introduced in the Constitution. This provision was added in the Constitution on 26 March 1996 by passing 13th amendment to the Constitution.¹ The Caretaker Government which was a new form of government by which state was supposed to be ruled in which the government is selected, non-political and non-partisan. Though this form of government was not new in global political history where Bangladesh accepted it as de novo since there was no earlier experience of forming such non-partisan government. This significant event in Bangladesh politics came into existence when opposition parties like Awami League, Jatiya Party and Jamaat e Islami alleged that no free fair and transparent election could be held under incumbent government. When opposition parties speeded up the movement for Caretaker Government, the incumbent government passed a Constitutional amendment in order to Constitutionalize the concept of Caretaker Government provision. Therefore, the new form of government was adopted with a view to ensuring the smooth transition of power from one elected government to another when former is done. General elections of 1996, 2001 and 2008 were comparatively free, fair and transparent held under the authority of the Caretaker Government. But the legality was challenged when the Caretaker Government took over power out of its designated form and stayed in power for almost 2 years as the government was supposed to hold the power for 90 days for holding general election. This type of dispute was common since its inception in 1996. Consequently, Caretaker

¹ The Thirteenth Amendment Act, 1996

Government was declared void and unconstitutional by a supreme Court Judgement in 2011 and consequently the 15th Amendment to the Constitution.²

1.3. Problem Statement

A total of 11 elections have been held in Bangladesh since its independence of which six elections were before adopting the Caretaker Government, three elections under the Caretaker Government and last two elections under the incumbent government. A comparison between elections held under the Caretakers government with elections held under the incumbent government shows contrasting scenario. Elections held under the incumbent government usually tend to have been rigged, gratified and ballot box stuffing. BNP, a mainstream political party having alliance with other political parties boycotted 10th general election and partially participated in 11th general elections.³ Transparency International Bangladesh, an anti-graft watchdog has presented a report on the 11th general election where massive irregularities have been unveiled. They have conducted survey on 50 constituencies out of 300 constituencies where 47 constituencies were gratified, 82% was fake vote cast at night before the election day.⁴ Thus, people lost their right to vote that directly hits the democratic character of the state.

1.4. Research questions

1. Whether Caretaker Government is undemocratic?
2. Whether judgment declaring Caretaker Government unconstitutional and void is lawful?
3. Whether the Caretaker Government can be reinstated?
4. Whether abolishment of Caretaker Government provision is politically motivated?

² Sanjida Yeasmin, Falguni Sutradhar, *The 15th Amendment of the Constitution and Confrontational Politics*, Academia, pp 38, October 2015

³ DW, *Bangladesh's 10th general election ends in chaos*, <<https://www.dw.com/en/bangladeshs-10th-general-election-ends-in-chaos/g-17342525>> 10 December 2021

⁴ Transparency International Bangladesh, *Election Process Tracking: The Eleventh National Parliament Election 2018*, <<https://www.ti-bangladesh.org/beta3/index.php/en/highlights/5749-2019-01-15-07-24-53>> 10 December 2021.

1.5. Objective of the Study

The main objective of this study is to claim the restoration of the Caretaker Government system in Bangladesh under the guaranteed Constitutional mandate in order to strengthen the democratic character of the existing democratic values and to avoid ever long political clashes between political rivals. The existing political status urges the restoration of the Caretaker Government system in Bangladesh under the guaranteed Constitutional mandate with a view to ensuring the maximum credibility of general elections which is the paramount consideration to weigh the effectiveness of the democratic character and values.

1.6. Significance of the Study

The fifteenth Amendment to the Constitution of Bangladesh has abolished the provision of the Caretaker Government altogether without describing any alternative mechanism for an all political Parties interim government than would, in turn, provides the guarantee to hold free, fair, acceptable and more credible general elections. Apart from this, nor the incumbent government has taken any initiative to reform the Caretaker Government provision. In the context of existing political culture in Bangladesh, no political party can keep trust on the incumbent government to hold general elections rather precedence shows the high enmity, clash and mutual misunderstanding among political parties especially between two mainstream political parties named Bangladesh Awami League and Bangladesh Nationalist Party. Hence, next two elections namely the general elections of 2014 and 2018 created political vacuum and disastrous political trend due to frequent election boycott by mainstream political parties and alleged rigging by the incumbent government by using the state machinery. In that situation, it would be like building castle in the air to hold free and impartial general elections under the incumbent government. Therefore, the political situation urges the reinstatement of the Caretaker Government as a means of holding free and impartial elections and to stabilize the political unrest.

1.7. Research Methodology

The study will mainly focus on an analytical approach as a methodology. As it is an analytical approach, it recourses both qualitative and quantitative method as methodology. This study report will be based on comprehensive literature review on laws, Constitution, Constitutional policies, judicial decisions in Bangladesh, international judicial decisions similar to that of Bangladesh and political cultural study in a broader aspect. A detailing paperwork perspective will be adopted to highlight development, abolishment and probable restoration of the Caretaker Government provision in the Constitution and commentaries of Constitutional experts how such restoration of the Caretaker in Bangladesh affects the basic Constitutional design. This study also covers the real scenario of Bangladesh politics and political culture in last three decades and how people struggle with the situations that have been arisen out of the rampant political conflicts between political poles. However, the judicial decisions, noticeable loopholes and probable consequences would be analyzed in a qualitative manner.

1.8. Literature Review

The Caretaker Government and elections held under the Caretaker Government is probably the most discussed issue of 21st century in Bangladesh politics. Thousands of writings including journal Articles, research work and books available on this issue. Different scholars opined for and against the issue in different times. Nizam Ahmed, a Professor of Public Administration at University of Chittagong explained the issue in his book named 'Non-Party Caretaker Government in Bangladesh: Experience and Prospect' as a mistreated phenomenon urging its restoration.⁵ But he did not illustrate the way how this provision can be restored. M Rafiqul Islam, a Professor at Macquarie University, Sydney, Australia explained at his writing titled "Talks on the 13th Amendment" the issue as undemocratic and unconstitutional and void. But his reasoning was like 'A justified purpose cannot be achieved by unlawful means'.⁶ But he has ignored that the next

⁵ Nizam Ahmed, *Non-Party Caretaker Government in Bangladesh: Experience and Prospect*, Third Edition, 2013

⁶ M Rafiqul Islam, *Talks on Thirteenth Amendment*, The Daily Star, <<http://archive.thedailystar.net/law/2011/05/03/index.htm>> May 21, 2011

two elections may be held under the Caretaker Government. Mahbub Alam Pradeep and Golam Rabbani, two Associate Professors from University of Rajshahi claimed Restoration of the Caretaker Government in their research paper titled "Abolition of Non-Party Caretaker Government System in Bangladesh: Controversy and Reality."⁷ They only emphasized only on the Constitutional approach but no judicial approach has been taken into consideration. In this paper I will demonstrate how the Caretaker Government provision can be reinstated in the Constitution of Bangladesh taking into account the judicial, the Constitutional and the political approach.

⁷ Mahbub Alam Pradeep and Golam Rabbani, *Abolition of Non-Party Caretaker Government System in Bangladesh: Controversy and Reality*, ResearchGate, July 2014

CHAPTER 2

Interpretation of the Constitution

2.1. Interpretation of Fundamental Principles of State Policy

From the inception, the newly born Bangladesh always emphasizes on the democratic values and character of the state. Such spirit has truly been derived from the great freedom fight. To uphold such spirit, the drafters of the Constitution of Bangladesh declared it as one of the basic principle of the Constitution and inserted it in an expressed provision. Article 11 of the Constitution States as follows:

*“The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured”.*⁸

Here the issue expressly states that the Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. But a gross question arose previously when the Caretaker Government was introduced in the Constitution that the state has lost its democratic character as soon as the Caretaker government takes over the power. But is it so that the state loses its democratic character if power takes over by the Caretaker Government and Article 11 remains suspended? To be specific to the answer of this question, initially an apex court decision is sufficient to supplement the issue. In **M Saleem Ullah vs. Bangladesh** the HCD held as follows:

*“Democracy, the basic structure of the Constitution, is supplanted by the free and fair election of which itself is another basic structure. The amendment was passed to consolidate the democracy by ensuring free and fair election”.*⁹

It was further stated in the same decision as follows:

⁸ Article 11, The Constitution of the People’s Republic of Bangladesh

⁹ 57 DLR (2005) 171

*“If we believe in democracy and want to practice democracy, then what is the harm if certain provisions as laid down in Article 48(3) or 56 remains suspended or kept in abeyance for a limited period of time”.*¹⁰

Therefore, the apex court termed the Caretaker Government as fundamental supplement to democracy and being a temporary arrangement, it does not affect any basic function of the Constitution.

2.2. Interpretation of Article 56

In order to scrap the Caretaker Government provision from Constitutional ambit, the incumbent government always took recourse of unconstitutional character of that system. They often alleged the system as power in the hand of unelected government is unsecured and conflict of interest of mass people. But question arises when the Constitution itself has provision of having members who are not elected by the people directly rather selected by the Prime Minister according to his wish and whim. Nor the Constitution has the provision of appointing the advisors to the Prime Minister. These unelected members of the Cabinet are known as the Technocrat and supposed to have the equal rights and privileges with other Cabinet members. Article 56(2) of the Constitution states as follows:

*“The appointments of the Prime Minister and other Ministers and of the Ministers of State and Deputy Ministers, shall be made by the President. Provided that not less than nine tenths of their number shall be appointed from among members of Parliament and not more than one tenth of their number may be chosen from among persons qualified for election as members of Parliament”.*¹¹

As the Constitution itself declares the validity of the unelected members, the Caretaker Government system derives its mandate from the Constitution. Hence, demanding unconstitutionality of the Caretaker Government is nothing but a political weapon to wrap a healthy policy and to eye wash of mass people.

¹⁰ 57 DLR (2005) 171

¹¹ Article 56(2), The Constitution of the People’s Republic of Bangladesh

2.3. Biased Presidency

President is the Constitutional head of the People's Republic of Bangladesh.¹² According to Article 48(2) of the Constitution of Bangladesh, the president of Bangladesh takes precedence over all other persons of the republic and exercises the powers and performs the duties conferred on him by the Constitution and by any other law.¹³ All executive actions of the government are expressed to be taken in the name of the President. Though theoretically the President is above all, but in reality, in the parliamentary democracy, he is a titular executive performing ceremonial functions only. The real executive power of the state is exercised by the Cabinet under the leadership of the Prime Minister. Article 48(3) clearly provides that except for appointing the Prime Minister pursuant to clause 3 of Article 56 and the Chief Justice pursuant to clause 1 of Article 95, the President always act in accordance with the advice of the Prime Minister.¹⁴ It is not presumption that the President is confined within the corners of stipulated jurisdiction rather the Constitution itself expressly curtailed the power and functions of the President in which the President acts as the shadow of the Prime Minister. Since the President is Constitutionally bound to act according to the advice of the Prime Minister, he is wholly controlled by the Prime Minister.¹⁵ The president even cannot proceed in situations where he must act independently like the state emergency. Therefore, it is quite impossible for the president to make independent decision during any elections. Hence, the President would be bound to act what the Cabinet with the leadership of Prime Minister directs.¹⁶ In addition to this, the appointment of the President is always controversial in Bangladesh as because the incumbent government always appoints a person as the President from among its party man and has allegiance to the party. But the President who was supposed to take precedence over all other persons goes in vein and his impartiality is questioned immensely. Thus, in no case, the President holds the authority to act against the Cabinet specifically the Prime Minister.

¹² Article 48(2), The Constitution of the People's Republic of Bangladesh

¹³ *ibid*

¹⁴ Article 48(3), The Constitution of the People's Republic of Bangladesh

¹⁵ *ibid*

¹⁶ *ibid*

2.4. Weaknesses of the Election Commission

The functional and institutional independence of the Election Commission is ensured in the Constitution. Article 118(4) specifically mentions that the Election Commission shall be independent in the exercise of its functions. The term of office of an Election Commissioner is fixed for five years from the date on which he enters upon his office.¹⁷ An Election Commissioner cannot be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court. To make an Election Commissioner free from biasness or influence in exercise of his power Article 118(3) provides that a person who has held office as Chief Election Commissioner shall not be eligible for appointment in the service of the republic and any other Election Commissioner shall, on ceasing to hold office as such, be eligible for appointment as chief Election Commissioner but shall not be otherwise eligible for appointment in the service of Republic. The Representation of People's Order, 1972 also guarantees the independence. The Commission may require any person or authority to perform such function or render such assistance for the purpose of the order as it may direct. All executive authorities of the Government have to assist the commission in performance of its function and for this purpose the President may, after consultation with the commission issues such directions as he may consider necessary.¹⁸ But all Constitutional mandates dealing with Election Commission go in vein as soon as the President appoints Election Commissioners including Chief Election Commissioner who have allegiance to a certain political party or the incumbent government.¹⁹ Moreover, there is no hard and fast procedure of appointing the Election Commissioners and the President has a free hand to appoint Election Commissioner in pursuance with the advice of the Prime Minister. Indirectly the power is vested on the Prime Minister since the President is bound to act accordingly in pursuance with the advice of the Prime Minister. Therefore, the Election Commissioner has less probability to go beyond the decision of the Cabinet with the leadership of the Prime Minister.

Apart from this, the Constitution on the institutional and functional independence of the Election Commission, separation of the Election Commission Secretariat from the Prime Minister's office is definitely indispensable. During Ershad regime, the Election Commission Secretariat was

¹⁷ Article 118(3), The Constitution of the People's Republic of Bangladesh

¹⁸ The Representation of People's Order, 1972

¹⁹ M. Jashim Ali Chowdury, *An Introduction to the Constitutional Law of Bangladesh*, Third Edition, January 2017, Book Zone Publications, Chittagong.

brought under the office of the President by amending the Rules of Business. Thereafter, it was handed over to the Prime Minister's office. Until recently the Election Commission Secretariat was under the control of Prime Minister's office as per the Rules of Business of 1996. In **Kazi Mamunur Rashid V Government of Bangladesh**, a mandamus was filed on the Caretaker Government to separate Election Commission Secretariat was sought.²⁰ Resorting to Article 126 of the Constitution, the court held that it was an obligation upon the government to strengthen the election commission Secretariat and allow it to function freely and independently. Accordingly, the Election Commission Secretariat Ordinance, 2008 was promulgated but the elected government coming to power in 2009, however, enacted the Election Commission Secretariat Act, 2009 annulling the Election Commission Secretariat Ordinance, 2008.²¹ But a time span of 12 years has been elapsed but a separate Election Commission Secretariat is yet to be established which clearly indicates the intention of the incumbent government to upheld and continue the illegal authority over the Election Commission. Hence, in no case, the incumbent government allows the Election Commission to hold a general election freely and fairly and optimize the use of state machinery with a view to rigging the election and influenced the stakeholders.

²⁰ 28 BLD (HCD) 87

²¹ The Election Commission Secretariat Act, 2009

CHAPTER 3

Judicial Interpretation and Precedents

3.1. Syed Muhammad Mashiur Rahman vs. Bangladesh

Shortly after the passing of the Thirteenth Amendment to the Constitution of Bangladesh, it faced a judicial challenge in **Syed Muhammed Moshiur Rahman VS. Bangladesh**.²² It was argued that though the amendment did not make any change in Article 56, it indirectly amended the Article by introducing the Chief Advisor in between the Prime Minister and his successor.²³ Since it amended the Article 56 which is protected one under Article 142(1A), a referendum was a must.²⁴ Advocate Wadud Bhuyan, the Additional Attorney General claimed that Caretaker Government being a temporary arrangement, during this period Article 56 only remains suspended and not amended. There was no addition, alteration, substitution or repeal of the Article 56 and so it was not amended. In response Mr. Syed Muhammad Moshiur Rahman appearing in person claimed that at least Article 56(4) would remain suspended and never revive. Justice Muzammel Haque accepted the arguments of the Additional Attorney General to hold that the provisions of Article 56 remain temporarily suspended to be revived after 90 days and it was not amended anyhow by the Thirteenth Amendment Act. Therefore, the petition filed by Moshiur Rahman was summarily rejected and the court upheld the formation of the newly inserted Caretaker Government.

3.2. M Saleem Ullah vs. Bangladesh

The question was again argued in a wider plane in **M Saleem Ullah VS. Bangladesh**.²⁵ Originally this petition was raised before the Bench of Justice Shah Abu Nayeem Mominur Rahman and Justice Abdul Awal Hussain. Since they could not agree with the findings of the Syed Muhammad Mashiur Rahman decision and they requested the Chief Justice to form a full Bench to decide the question. Accordingly, a full Bench was formed consisted of Justice Md. Joynal Abedin, Justice

²² 1997 BLD 55

²³ Article 56(3), The Constitution of the People's Republic of Bangladesh

²⁴ Article 142(1A), The Constitution of the People's Republic of Bangladesh repealed in the Fifteenth Amendment Act, 2011

²⁵ 57 DLR (2005) 171

Md. Awlad Ali and Justice Mirza Hussain Haider. The Thirteenth Amendment Act was challenged on several grounds Appellant.²⁶

Firstly, by introducing a government not elected by the people, it destroyed the basic structure of the Constitution that is democratic governance character.

Secondly, Articles 48(3) and 56 of the Constitution were indirectly amended by the Thirteenth Amendment. This Article has become inoperative during the Caretaker Government. So it required a referendum to be made to the people of Bangladesh which was not made.

Thirdly, this Amendment affected the independence of judiciary drastically. Article 99 of the Constitution prohibits a Judge of the supreme court to hold any office of profit after the retirement. Now Article 58C(3) requiring a retired chief Justice or Appellate Division Judge to be the Chief Advisor violates Article 99 of the Constitution of Bangladesh and threatens the independence of judiciary.²⁷

The respondent in its turn argued:

Firstly, the Caretaker Government helped the democracy by ensuring a true democratic election. Moreover, the Caretaker Government was introduced in response to a widely acclaimed popular demand.

Secondly, it did not amend Article 48(3) for 56 anyhow. Barrister Amirul Islam appearing on behalf of the Bangladesh Awami League which was made a party letter on, claimed that as the Amendment did not amend the Article 48(3) and 56 directly, it needed no referendum at all.

However, Mr Amirul Islam and Barrister Rafiqul Haq (the amicus curie) opined that the provision for appointment of Chief Justice or Appellate Division Judges in the Caretaker Government impaired the independence of judiciary and politicians should find out a solution to this.

²⁶ The Thirteenth Amendment Act, 1996

²⁷ Article 99, The Constitution of the People's Republic of Bangladesh

The court held that:

Firstly, democracy, the basic structure of the Constitution, is supplanted by the free and fair election of which itself is another basic structure.²⁸ The amendment was passed to consolidate the democracy by ensuring free and fair election.

Secondly, the Thirteenth Amendment Act did not amend the Preamble or any of these Articles. The long title of the Bill nowhere indicated that it intended to amend the Preamble or any other Article. Temporary suspension of Article 56 and 48(3) did not amount to their amendment and hence, no referendum was necessary. Rather the court asked if we believe in democracy and want to practice democracy then what is the harm if certain provisions as laid down in Article 48(3) or 56 remains suspended or kept in abeyance for a limited period of time.²⁹

Thirdly, regarding the probability of politicization of the judiciary that the court decided not to question, suspect or undermine the wisdom of the legislature in choosing persons of high moral and impartial character for discharging the powers and function as Advisor and the Chief advisor.

However, “if anything better comes out, the legislature is free to adopt”, the court of opined.

Overturn of the Decision:

The decision made by the HCD was challenged in the AD and was tried by a full bench of the AD headed by the then Chief Justice ABM Khairul Haque. A panel of 08 (eight) Amicus Curie was appointed by the AD to render their opinion as to this crucial issue. The AD heard for 10 day opinions and arguments from eight amicus curiae (friends of the court) and the counsels for both sides of the appeal. Of the amicus curiae, Dr. Kamal Hossain, TH Khan, Mahmudul Islam, M Amir-Ul Islam, and Rokanuddin Mahmud rendered opinions in favor of the Caretaker Government system. However, two jurists namely Rafique-ul Huq and Dr. M Zahir suggested reformation to the system. Whereas, Amicus curiae Ajmalul Hossain QC placed arguments against the Caretaker Government system. But the arguments of majority amicus curie have been ignored during delivering final judgment and most of them marked it as a politically motivated issue in a post verdict discussion. In addition to this, the judgment referred to hold next two general elections under the existing Caretaker Government unless the Constitution gets no further amendment but

²⁸ Article 11, The Constitution of the People’s Republic of Bangladesh

²⁹ Supra note 10

the incumbent government passed the Fifteenth Amendment to the Constitution forthwith as opposition marked it as political coup.

3.3. Masood R Sobhan VS. Election Commission and Others

In case of Caretaker Government, a further question loomed large that the Constitution did not contemplate its duration beyond 90 days. This impression was permeated in popular mind. But this duration had nowhere specifically laid down except those elections had to be held within 90 days after which it would hand over power to an elected government. Article 123 provides for election to be held within 90 days of the dissolution of the Parliament. Apart from this, Article 58B(1) provided that Caretaker Government was to remain in office until a new Prime Minister enters upon the office. So it was at least theoretically correct that the tenure of the Caretaker Government was not Constitutionally fixed. **In Masood R Sobhan vs. The Election Commission and Others**, the HCD Bench comprising of Justice Abdur Rashid held that

*“Though the term is not fixed or government should not remain in office for duration more than that is necessary for Prime Ministers entering into office. Democracy being a basic structure of the Constitution, an undemocratic government should not remain in power for an unnecessarily prolonged duration”.*³⁰

3.4. Advocate Sultana Kamal and Others vs. Bangladesh

The question once again came under judicial scrutiny in **Advocate Sultana Kamal and Others vs. Bangladesh**.³¹ Barrister Amirul Islam appearing on behalf of the petitioners vigorously argued that 90 days limit was not directory rather it was mandatory. If Article 123(3) was to be considered directory, then the whole Constitution would be a directory one since the Constitution nowhere prescribed any consequence for the default.³² The argument may be put in another way. In fact, it is not the job of the Constitution to prescribe the consequence of its violation because Constitution

³⁰ 28 BLD (HCD) 317

³¹ 14 MLR (HCD) 105

³² Article 123(3), The Constitution of the People’s Republic of Bangladesh

is not a Penal code. The Constitution stands on the belief that it shall be observed not violated. The court unequivocally accepted the argument:

*“if the Constitution is violated it is better to call it violation no justification should be cunningly applied to justify it. Offence is offence and trial of imposing justification over it is not a good option. Encouragement to violation of Constitution in Pakistan has made the breaking of Pakistan eminent”.*³³

³³ 14 MLR (HCD) 105

CHAPTER 4

Political Perils and Conflict Between Political Rivals

4.1. Elections of 1996, 2001 & 2008

Election of 1996³⁴

Election held on: 12 June 1996

Registered Voter: 56716935

Turnout: 74.96

Political Parties (Mainstream)	Number of Seats Won Out of 300	Percentage of Vote	Popular Vote
Bangladesh Awami League	146	37.4%	15882792
Bangladesh Generalist Party	116	33.6%	14255986
Jatiya Party-JP (Ershad)	32	16.4%	6954981

Succeeded by: Sheikh Hasina

Term: 1996-2001

³⁴ <http://www.ecs.gov.bd/page/election-results>

Election of 2001³⁵

Election held on: 1 October 2001

Registered Voter: 74946364

Turnout: 76.87

Political Parties (Main Stream)	Number of Seats Won Out of 300	Percentage of Vote	Popular Vote
Bangladesh Awami League	63	41.40%	22382796
Bangladesh Generalist Party	193	40.02%	23055986
Jatiya Party-JP (Ershad)	18	8.34%	2654531

Succeeded by: Begum Khaleda Zia

Period: 2001-2006

³⁵ <http://www.ecs.gov.bd/page/election-results>

Election of 2008³⁶

Election held on: 30 December 2008

Registered Voter: 81093933

Turnout: 87.13

Political Parties (Main Stream)	Number of Seats Won Out of 300	Percentage of Vote	Popular Vote
Bangladesh Awami League	230	48.04%	33634629
Bangladesh Generalist Party	30	32.50%	22757101
Jatiya Party-JP (Ershad)	27	7.04%	4926360

Succeeded by: Sheikh Hasina

Term: 2009-2014

³⁶ <http://www.ecs.gov.bd/page/election-results>

4.2. Elections of 2014 and 2018

Election of 2014³⁷

Election held on: 5 January 2014

Registered Voter: 93093933

Turnout: 18.91

Political Parties (Main Stream)	Number of Seats Won Out of 300	Percentage of Vote	Popular Vote
Bangladesh Awami League	234 ³⁸	79.14%	36134883
Bangladesh Generalist Party	Boycotted	00	00
Jatiya Party-JP (Ershad)	34	11.31%	5167698

Succeeded by: Sheikh Hasina

Term: 2014-2018

³⁷ <http://www.ecs.gov.bd/page/election-results>

³⁸ Adiba Aziz Khan, *The politics of constitutional amendments in Bangladesh: The case of the non-political caretaker government*, QSCIENCE, <<https://www.qscience.com/content/journals/10.5339/irl.2015.9?fbclid=IwAR3U9N9LSrD3cnq9OBmCaNyGbjrh2J0td2hejIEo1nV-A2ViAQpF-bHtVf0>> Volume 2015, Issue 3

Election of 2018³⁹

Election held on: 30 December 2018

Registered Voter: 104156269

Turnout: 80.20

Political Parties (Main Stream)	Number of Seats Won Out of 300	Percentage of Vote	Popular Vote
Bangladesh Awami League	257 ⁴⁰	74.63%	63523066
Jatiya Oikko Front	6	13.06%	11113253
Jatiya Party-JP (Ershad)	22	5.22%	4443351

Succeeded by: Sheikh Hasina

Term: 2018-2023

³⁹ <http://www.ecs.gov.bd/page/election-results>

⁴⁰ Adiba Aziz Khan, *The politics of constitutional amendments in Bangladesh: The case of the non-political caretaker government*, QSCIENCE, <<https://www.qscience.com/content/journals/10.5339/irl.2015.9?fbclid=IwAR3U9N9LSrD3cnq9OBmCaNyGbjrh2J0td2hejIEo1nV-A2ViAQpF-bHtVf0>> Volume 2015, Issue 3

4.3. Comparison Between Elections

The Caretaker Government came into existence in a situation to overcome political vacuum and instability in 1996 with the immense pressure from the then opposition political parties along with the demand of civil society and the foreign diplomats.⁴¹ Since its inception, the Caretaker Government system paved the way for holding general elections smoothly and without massive gratification until it came to an end by the Fifteenth Amendment to the Bangladesh Constitution in 2011.⁴² A total of three general elections had been held under the said Caretaker Government specifically in 1996, 2001 and 2008 and all of them were appreciated both by the political parties and by the mass people of the country. As compared to the previous elections held in Bangladesh before the existence of the Caretaker Government were questioned due to massive rigging, gratification, frequent boycott, using of state machinery, ballot box snatching and forcible declaration of the poll result countrywide. Comparing numerous criteria like turnout, participation of higher number of political parties, casting of higher percentage of vote, number of popular vote, seat achievement ratio it would not be difficult enough to mark those general elections as fair, transparent and acceptable under the Caretaker Government. In those three general elections the turnout rates were 74.96%, 76.87% and 87.13% which show the mass participation of people in casting their ballot.⁴³ Apart from this, the difference between winning seat ratio always fluctuated closely and the parliament got the true opposition which characterize the democracy in a gross scale. In 2011, the incumbent Awami League government started discussion to repeal the provision of Caretaker Government focusing two issues i.e. extra-Constitutional exercise of power by the Caretaker Government for a period of two years (2006-2008) and an apex court verdict. But all opposition parties along with civil society opposed the decision alleging such decision as politically motivated and to prolong the power by the BAL. Consequences of the decision were anticipated and portrayed in 2014 general election in which 37 registered political parties out of 40 boycotted the election and Bangladesh Awami League accomplished the term having a turnout of 18.91% without any strong opposition which degraded the democratic values of the state. The scenario was more acute in 2018 general election that shows massive gratification by the incumbent government. Transparency International Bangladesh, an anti-graft watchdog has

⁴¹ The Thirteenth Amendment Act, 1996

⁴² Mizanur Rahman Khan, *Sangbidhan O Tatabadhayak Sarkar Bitarka, First Edition*, March 1995, City Publication

⁴³ <http://www.ecs.gov.bd/page/election-results>

presented a report on the 11th general election where massive irregularities have been unveiled. They have conducted survey on 50 constituencies out of 300 constituencies where 47 constituencies were gratified, 82% was fake vote cast at night before the election day.⁴⁴ Thus, people lost their right to vote that directly hits the democratic character of the state

⁴⁴ Transparency International Bangladesh, *Election Process Tracking: The Eleventh National Parliament Election 2018*, <<https://www.ti-bangladesh.org/beta3/index.php/en/highlights/5749-2019-01-15-07-24-53>> 10 December 2021.

CHAPTER 5

Reinstatement of the Caretaker Government

5.1. Revival of Referendum

After the addition of Referendum in the Constitution by the 2nd Proclamation Order of 1978, is considered as the basic fabric of the Constitution.⁴⁵ The basic structure doctrine has been, for the first time, appeared in Bangladesh in the case of **Anwar Hossain Chowdhury vs. State** where a number of provisions were declared as Basic Structure and on such declaration the doctrine of Basic Structure has come on focus.⁴⁶ But the number of provisions which were declared as basic structure are not fixed. For that, Justice Habibur Rahman has declared 21 Provision as Basic Structure whereas Justice A.T.M Afzal Hossain has declared 18 provisions as Basic Structure. After the addition of Referendum in the Constitution by inserting clause 5 in Article 142 by the 2nd Proclamation Order of 1978, Provision of Referendum got the same treatment as like as provisions related to the President and the Prime Minister. Furthermore, a provision of Referendum was mandatory in order to amend any provision related to Referendum. The provision of Referendum was declared ‘unconstitutional’ in the case of **Bangladesh Italian Marble Works Ltd VS. Government of Bangladesh** due to its inclusion by the 2nd Proclamation Order of 1978.⁴⁷ The court did not adjudicate the matter on merit of Referendum and the procedure of Referendum, in no way, is contradictory with the Constitutional ideals. In fact, introducing Referendum instead of Judicial Review shall be healthy for Judiciary. Thus there is no Constitutional impediments to revive the Provision of Referendum in the Constitution of Bangladesh.

5.2 Referendum as a means of Constitutional Amendment

In this matter, here are some countries that have already put faith in referendum in bringing changes in their Constitution. The Constitution of Australia prescribes for alteration of the

⁴⁵ the 2nd Proclamation Order of 1978

⁴⁶ 1989 BLD 5

⁴⁷ 2010 BLD 6

Constitution by firstly passing of the proposal by both Houses of the parliament and then referring it to the people for approval. Referring question of Constitutional amendments to the voters will also serve the purpose of maintaining the rigidity of the Constitution which is evident from the example of Australia where until now only 8 out of 44 proposed Constitutional amendments has been approved and the Constitutional edifice in unchanged. The Constitution of the Philippines can only be amended or revised via a general Referendum. Alteration of boundaries of autonomous regions, provinces, towns, cities and barangays (villages) including creation, merger and upgrading of new local government units from existing ones, are to be decided on local referendum amongst the affected places. A referendum is the final step in the approval of a people initiative. All referendums are binding. The present Constitution was approved through a Referendum in 1987. Country like Switzerland or South Korea or the U.K depends on Referendum for Constitutional Amendments and for other crucial decision of the state. So there is no lack of maintaining global standard to revive the provision of Referendum in the Constitution of Bangladesh.

Article 7 of the Constitution of Bangladesh declares the Constitution to be the solemn expression of the will of the people and it is reasonable that people themselves should possess the absolute right to amend any provision of the Constitution and this will of people can be determined through a referendum.⁴⁸ As the Constitution is the Supreme instrument of the Country, people can reflect their will and desire in the Constitution by their direct participation through referendum. To cite an example of direct participation of people, I can set here the Referendum of 1991.⁴⁹ A referendum was held in 1991 for the decision of the question whether or not a Bill providing for the amendment of the Preamble or any provision of Article 8, 48, 56, 58, 80, 92 or 142 of the Constitution of the People Republic of Bangladesh should, after having been passed in Parliament in accordance with Article 142 (1) of the said Constitution, be assented to by the President in this referendum, people cast their decision in the ballot box and is considered as the fairest Referendum in the history.⁵⁰ So the provision of referendum is declaring both the Supremacy of the Constitution and its revival shall ensure the true will and desire of people in the Constitution.

⁴⁸ Article 7, The Constitution of the People's Republic of Bangladesh

⁴⁹ The Referendum Act, 1991.

⁵⁰ https://en.wikipedia.org/wiki/1991_Bangladeshi_constitutional_referendum

5.3. Doctrine of Necessity

The doctrine of necessity had been frequently used by the US. courts during the American civil war in a series of cases. The supreme court of Pakistan stated using the doctrine to uphold unconstitutional use and usurpation of power. The doctrine which originated in the middle ages in order to meet the threat against the state and the Constitution was used by Justice Munir in subversion of the Constitutional process and in giving legitimacy to a usurper in the modern times.⁵¹ The doctrine of necessity is a legal expression which is used to justify the extra-Constitutional actions by the administrative authority which is designed to restore the order in order to ensure the stability of the state or for the sole purpose of the welfare of the mass people. This is the only situation where any private body is exempted from sanction in spite of violating laws.

Only three years before the famous **State vs. Dosso**, Pakistan's Supreme Court used the doctrine of Necessity to resolve a Constitutional crisis in Special Reference by His Excellency the Governor General.⁵² In April 1953 the Governor General Gulam Mohammed arbitrarily dismissed the Prime Minister Khaza Nazim Uddin from his office. The third report of the Basic Principle committee of the Constituent Assembly of Pakistan was adopted on September 21, 1955. It recommended that Governor General shall not have power to dissolve the Cabinet and the Prime Minister and Cabinet shall be responsible to the Constituent Assembly. The Governor General retaliated immediately. By issuing a proclamation on October 24, 1954 he dissolved the Constituent Assembly itself. Moulavi Tamiz Uddin Khan, the president of the Constituent Assembly moved the Chief Court of Sindh where he argued that the Governor General was not competent to dissolve the Constituent Assembly. The Chief Court of Sindh held that the action of the Governor General was illegal.⁵³ But the Judgement of the Chief Court of Sindh was set aside by the Pakistani Supreme Court. Chief Justice Munir there held that the power under which Sindh Court decided the case (Section 223A of the Governance of India Act) did not received the assent of the Governor General and was not valid.⁵⁴ In his minority Judgement Justice Cornelius declined the presence of requirement of such assent. To support the Judgement Justice Munir invoked the doctrine of Necessity and took

⁵¹ M Amirul Islam, *Status of a usurper: a challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh*, The Chittagong University Journal of Law, Vol 2 1997 pp. 1-30 at p.11

⁵² 11 DLR (SC) 1

⁵³ Moulavi Tamizuddin Khan vs. Federation of Pakistan 7 DLR (WP) 121

⁵⁴ Section 223A, the Governance of India Act

recourse of Salus Populi Suprema Lex (safety of the people is the supreme law). According to him necessity makes a thing lawful which is otherwise not. The court ordered the formation of a new Constituent Assembly.

In the case of **Begum Nusrat Bhutto VS. Chief of Army Staff**, the court examined the total Milieu of the circumstances in which the extra Constitutional assumption of power occurred to determine the new regime's validity. The supreme court declared Martial law and military coup by Ziaul Haque valid. In this case, the court overruled the decision of Asma Jilani case and successfully relied on the doctrine of Necessity. The court held that

"it was in these circumstances that the armed forces of Pakistan.... Intervened to save the country from further chaos and bloodshed to disaster. It was undoubtedly and extra Constitutional step but obviously dictated by the highest consideration of state necessity and welfare of the people".⁵⁵

5.4. Reinstatement on the Basis of Findings

1. This government structure is not ultra vires to the Constitution and can be reinstated in the Constitution.
2. This government structure is supported by Article 56(2) of the Constitution and can be reinstated in the Constitution.
3. This government discharges function subject to pleasure of the President and can be reinstated in the Constitution.
4. This government is supplementary to the Election Commission to hold election and can be reinstated in the Constitution.
5. This government can be reinstated subject to the decision of AD in **M Saleem Ullah vs. Bangladesh.**

⁵⁵ 1977 PLD (SC) 657

6. This government can be reinstated subject to the decision made in **Masood R Sobhan vs. Election Commission.**

7. This government can be reinstated subject to decision made in **Sultana Kamal & Others vs. Bangladesh.**

CHAPTER 6

Reformation of the Structure

6.1. Proposed Structure

The incumbent government did not think what would be the fairest possible government structure that would take the charge of holding general election as an interim government rather Awami League backed government only scrapped the existing Caretaker Government and declared the general elections forward would be held under the incumbent government denying the formula of interim government. Even the they did not define what would be the formation of the incumbent government during election and how would be the relationship with the Election Commission and other organs of the state. In early stage, different interim government models were proposed by different organization and civil society. But government denied all showing unconstitutionality in many regards. But it is impossible to reinstate the stability in politics and evaluate true democracy without formulating an alternative interim government during general elections. Formulation of this type government is possible within the ambit of the Constitution.

Here I would like to propose an interim government having Constitutional validity which would be known as the Caretaker Government with the reformation of the preceding Caretaker Government. Some Constitutional Provisions must be amended in order to form this type of government. Article 56(2) and 57(3) shall be slightly amended with a view to constitutionalizing the Caretaker Government. The proposed government shall be consisted of 15 members in which both elected and selected members shall hold office in a prescribed manner and it would be a blended form of government.

1. The Caretaker Government would be headed by the State Councilor and selected by councilors from amongst councilors.
2. Nine Elected members from the preceding parliament with proportional representation
3. Two Appellate Division Judges ex officio.
4. Two University teacher not below the rank of Professor.
5. Two Journalists.

6. A core committee of 4 members would be formed amongst the senior lawyers of Appellate division based on seniority and expertise.
7. Formulation of a Rules of Business for the government.
8. No state policy shall be made during such transitional government and if necessary, shall be made subject to the scrutiny of the AD.
9. If the Caretaker Government fails to hand over the power in/on time, the President shall have power to dissolve the Parliament and recall the preceding parliament to form another interim government.
10. No member of the Caretaker Government shall be competent to be elected as member of the parliament to the next parliament or hold the competency of being part of the Cabinet.

Term of the Caretaker Government: The Caretaker Government shall discharge its functions as an interim government for a period of 90 days and shall carry on the routine functions of such government with the aid and assistance of persons in the services of the Republic.

6.2. Remarks

Under the critical political diversion in the third decade of the 21st century, it is much more difficult to imagine a fair, free, transparent and uninfluenced election under the incumbent government where the political parties lack mutual respect and confidence and think each other as political rivals and enemy. The Caretaker Government can only play vital role for holding elections in a free and fair manner as compared to political governments had been alleged to rigging in the elections. This is the sole to restore the democratic character of the state and the confidence of masses as the masses had lost their trust and confidence in elections under a partisan government. Thus, the judicial precedents and Constitutional mandates pave the way of restoring the Caretaker Government and can be reinstated had as a unique form of government with a view to ensuring the creditability of elections. Many local and international observers found Caretaker Government as a neutral form of mechanism for transferring the power peacefully. Apart from this, the legal accreditation which has been over when the Fifteenth Amendment to the Constitution is passed but can be reinstated by doing another amendment to the Constitution. All the registered political parties including the mainstream two political alliances need to be soften on this issue and find out

the fairest possible way to reinstate the provision in the Constitution in order to bring back the political harmony. Plea against one another not only increases the distances between political parties rather it may worsen the situation which may result internal conflict. A research conducted by Centre for Strategic Research (CSR) found that around 67% people did not support the cancellation of the system and believe that election under partisan government would not be free, fair, transparent and acceptable to all.⁵⁶ Besides main mainstream political parties, prominent citizens and civil society expect that the Caretaker Government system should be restored considering the stronger democracy in country.

⁵⁶ [https://en.wikipedia.org/wiki/Center_for_Strategic_Research_\(Russia\)](https://en.wikipedia.org/wiki/Center_for_Strategic_Research_(Russia))

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