IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice A.B.M. Khairul Haque.
-Chief Justice.
Mr. Justice Md. Muzammel Hossain.
Mr. Justice S. K. Sinha.
Mr. Justice Md. Abdul Wahhab Miah.
Ms. Justice Nazmun Ara Sultana.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Muhammad Imman Ali.

CIVIL APPEAL No. 139 of 2005 with CIVIL PETITION FOR LEAVE TO APPEAL NO.596 OF 2005.

(From the certificate granted under Article 103(2)(a) of the Constitution of the People's Republic of Bangladesh and from judgment and order dated 4.8.2004 passed by the High Court Division in Writ Petition No. 4112 of 1999)

Abdul Mannan Khan ..... **Appellant.**
(In C.A. No.139/20005)

Abdul Mannan Khan ..... **Petitioner**
(In C. P. No.596/2005)

-VERSUS-

Government of Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others. : .....**Respondents.**
(In both the cases)

For the Appellant. (In C.A. No.139/05) : Mr.M.I. Farooqui, Senior Advocate (with Mr. Mohsin Rashid, Advocate) instructed by Mr. M.G. Bhuiyan, Advocate-on-Record.

For the Petitioner. (In C.P.No.596/05) : Mr.M.I. Farooqui, Senior Advocate (with Mr. Mohsin Rashid, Advocate) instructed by Mr. M. G. Bhuiyan, Advocate-on-Record

For Respondent Nos.1-2. (In C.A. No.139/05) : Mr. Mahbubey Alam, Attorney General, with Mr. M. K. Rahman, Additional Attorney General, Mr. Murad Reza, Additional Attorney General, Md. Mothahar Hossain Saju, Deputy Attorney General, A.B.M. Altaf Hossain, Deputy Attorney General, Md. Ekramul Haque,

		Assistant Attorney General, Khandaker Diliruzzaman, Assistant Attorney General, Amit Talukder, Assistant Attorney General, instructed by Mr. B. Hossain, Advocate-on-Record.
Respondent Nos.3-7. (In C. A. No.139/05)	:	Not represneted.
Respondents. (In C.P.No.596/05)	:	Not represented.
As amici curiae	:	Mr. T.H. Khan, Senior Advocate Dr. Kamal Hossain, Senior Advocate Mr. Rafique-ul-Huq, Senior Advocate Dr. M. Zahir, Senior Advocate Mr. M. Amirul Islam, Senior Advocate Mr. Mahmudul Islam, Senior Advocate Mr. Rokanuddin Mahmud, Senior Advocate Mr. Ajmalul Hossain, Senior Advocate
Dates of hearing.	:	01.03.2011, 10.03.2011, 21.03.2011, 22.03.2011,24.03.2011, 30.03.2011, 31.03.2011, 03.04.2011, 04.04.2011, 06.04.2011 & 10.05.2011.

J U D G M E N T

A.B.M. KHAIRUL HAQUE, C.J. :-

c_g fvM

Avcxj `v‡qi I cv_wgK Av‡jvPbv

1| cvi¤ t nvB‡KvU wefvM KZK mswe avb (Î‡qv`k ms‡kvab) AvBb, 1996 (1996 Gi 1bs AvBb) Gi ˆeaZv c`vb mwVK nBqv‡Q wKbv AÎ Avcx‡j †mB ck DÌvcb Kiv nBqv‡Q|

cKZc‡¶ mswe avb (Î‡qv`k ms‡kvab) AvBb,1996 (1996 Gi 1bs AvBb) Gi AvBbMZ Ae¯vb wbi“cY AÎ Avcx†ji wePvh welq|

2| msw¶ß Av‡`k t 10/05/2011 Zvwi‡L ivq c`vbKv‡j wb‡æv³ Av‡`k c`vb Kiv nq t

"It is hereby declared:

(1) The appeal is allowed by majority without any order as to costs.

(2) The Constitution (Thirteenth amendement) Act, 1996 (Act 1 of 1996) is prospectively declared void and ultra vires the Constitution.

(3) The election of the Tenth and the Eleventh Parliament may be held under the provisions of the above mentioned Thirteenth Amendment on the age old prinicples, namely, quod alias non est licitum, necessitas licitum facit (That which otherwise is not lawful, necessity makes lawful), salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the Suprme law).

The parliament, however, in the meantime, is at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Care-taker Government.

The Judgment in detail would follow.

The connected Civil Petition for leave to appeal No.596 of 2005 is accordingly, disposed of."

3| nvB‡KvU KZK i"j Rvix t AÎ Av`vj‡Zi GKRb weÁ G¨vW‡fv‡KU giûg M. Saleem Ullah Î‡qv`k ms‡kvab AvB‡bi ^eaZv DÌvcb KiZt nvB‡KvU wefv‡M GKwU ixU ‡gvKvÏgv, ixU wcwUkb bs 4112/1999 `v‡qi K‡ib| `iLv¯Kvix c‡¶i weÁ G¨vW†fv‡KU g‡nv`q‡K keY KiZt nvB‡KvU wefv‡Mi GKwU ‡eÂ evsjv‡`k miKvi c‡¶ mwPe, AvBb I msm` welqK gš¿Yvjq I Ab¨vb¨ cwZev`xM‡Yi eivei GKwU Rule Nisi wbæwjwLZ fv‡e 25-1-2000 Zvwi‡L Rvix K‡it

Upon hearing Mr. M.I. Farooqui the learned Counsel for the petitioner in support of the petition and the learned Attorney General appearing for the Bangladesh who opposed the petition and as serious points of constitutional importance emerged out of the arguments of the learned counsel and the learned Attorney General, let a rule nisi be issued upon the respondents calling upon them to show cause as to why the impugned Constitution (Thirteen Amendment) Act, 1996 (Act No. 1 of 1996) (Annexure "A" & "A-1 to the petition) should not be declared to be ultra vires of the constitution of the People's Republic of

Bangladesh and of no legal effect and/or pass such other or further order or orders as to this court may fit and proper.

.....”

4| cwZev`x c¶f³ KiYt evsjv‡`k †dWv‡ij BDwbqb Ae Rvbvwjóm Gi mfvcwZ Rbve Avgvbjvn Kwei Gi Av‡e`‡bi wfwË‡Z nvB‡KvU wefvM Bnvi 19-4-2000 Zvwi‡Li Av‡`ke‡j Zvnv‡K 5bs cwZev`x wnmv‡e c¶f³ K‡i| ZvnvQvov, AvIqvgx jxM I evsjv‡`k RvZxqZvev`x `j Gi gnvmPxeØ‡qi Av‡e`b µ‡g Av`vjZ Bnvi 25-4-2000 Zvwi‡Li Av‡`k e‡j Zvnvw`M‡K h_vµ‡g 6 I 7 bs cwZev`x wnmv‡e c¶f³ KiZt Zvnv‡`i eivei Rule Rvix nq|

5| Reve, cZ¨Ëi BZ¨vw`t 1,5 I 6 bs cwZev`xc¶ c_K c_K affidavit in opposition `vwLj Kwiqv RulewU Discharge cv_bv K‡i| `iLv¯Kvixc‡¶ GKwU Supplementary affidavit I GKwU affidavit in reply `vwLj Kiv nq|

6| wWwfkb ‡e‡Â ïbvbxt nvB‡KvU wefv‡Mi wePvicwZ Shah Abu Nayem Mominur Rahman I wePvicwZ Md. Abdul Awal mgb‡q MwVZ GKwU Division Bench G 21-7-2003 Zvwi‡L †gvKvÏgvwU ïbvbx Avi¤ nq| wKš ïbvbx Kv‡j cZxqgvb nq †h Î‡qv`k ms‡kvab AvBbwUi ˆeaZv cm½ BwZc‡e ixU wcwUkb bs 1729/1996 (ˆmq` †gvnv¤§` gwkDi ingvb ebvg evsjv‡`‡ki ivócwZ I Ab¨vb¨) ‡gvKvÏgvq DÌvcb Kiv nBqvwQj, wKš wePvicwZ Md. Mozammal Haque I wePvicwZ M.A. Matin mgb‡q MwVZ Division Bench †Kvb Rule Rvix bv Kwiqv 25-7-1996 Zvwi‡L wbæwjwLZ msw¶ß Av‡`k c`vb Kwiqv wcwUkbwU LvwiR K‡ib t

“Since the provisions of the 13th Amendment Act, as it appears to us, do not come within definitions of alternation, substitution or repeal of any provision of the Constitution and since for temporary measures some provisions of the Constitution will remain ineffective, we do not find any substance in the submission of the petitioner that Article 56 of the Constitution had been in fact

amended by 13th Amendment Act. On the face of the 13th Amendment Act it appears that those provisions were made only for a limited period for ninety days before holding general election after dissolution of the Parliament or before expiry of the Parliament. We find that no unconstitutional action was taken by the legislature and as such we do not find any reason to interfere with 13th Amendment Act, we do not find any merit in the application and accordingly it is summarily rejected."

7| enËi †eÂ MV‡bi mcvwik t eZgv‡b ixU †gvKvÏgvq (ixU wcwUkb bs 4112/ 1999) weÁ wePviKe›` nvB‡KvU wefv‡Mi Dc‡iv³ Av‡`‡ki mwnZ wØgZ †cvlY Kwiqv welqwU ïbvbx Kwievi Rb¨ GKwU Full Bench MVb Kwievi Rb¨ 21-7-2003 Zvwi‡L wbæwjwLZ gZcKvk Kwiqv gvbbxq cavb wePvicwZ eivei †ck K‡ibt

Since we could not agree with the earlier decision in the case of Syed Md. Mashiur Rahman on the issue of validity of Act 1/96, we refrain from entering into other issues raised in the writ petition and did not take into our consider any submission on the issue of violation as to or destruction of basic structure of the Constitution, though we have mentioned hereinabove in the context of understanding the issue of "amendment" of Articles-48 and 56 of the Constitution, and the same should not be treated as our opinion or observation on the issue of "violation or destruction of the basic structure of the Constitution", more so when we have not given any hearing on that issue.

Accordingly as submitted by the learned Advocates on behalf of the petitioner and respondent No. 6 as well as by the learned Additional Attorney-General we are of the opinion that it is proper case for referring for a decision by Full Bench as per provision of chapter-VII of the High Court Division Rules. Having regard to the gravity and importance of the issues raised in the writ petition, including that of destruction of basic structure of the Constitution, we are of the opinion that the Full Bench, if constituted, should decide all issues raised in the writ petition and particularly the issue whether the Act 1/96 has caused amendment in the provisions of Articles-48(3) and 56 of the Constitution requiring assent thereto through referendum as contemplated by Article-142(1A), (1B) and (1C) of the Constitution.

Accordingly let this matter be placed before the learned Chief Justice for necessary order for a decision by a Full Bench as required under Rule-1 of Chapter-VII of the High Court Division Rules.

AZtci, gvbbxq cavb wePvicwZ wZbRb wePvicwZ mgb‡q GKwU Full Bench MVb KiZt AÎ ixU ‡gvKvÏgvwU ïbvbxi wb‡`k c`vb K‡ib|

8| **Full Bench** G ïbvbx t ïbvbx A‡š nvB‡KvU wefv‡Mi GKwU Full Bench Î‡qv`k ms‡kvab AvBbwU ˆea †NvlYv Kwiqv Rule wU LvwiR K‡i|

`BwU cv_wgK welqmn †gvU cvPwU welq Full Bench we‡ePbv K‡i| cv_wgK wePvh welqØq wbæi¡ct

K) whether the petitioner had the necessary locus standi to challenge the impugned amendment,

L) whether the writ petition is hit by the principle of res judicata.

Full Bench Dc‡ii `BwU wePvh welqB ixU `iLv¯Kvixi c‡¶ wb¯úwË K‡i|

Full Bench Dc‡iv³ wePvh welq we‡ePbv Kwi‡Z hvBqv K.M. Rahman V. Bangladesh 26 DLR (AD) 44, Dr. Mohiuddin Faruque V. Bangladesh 49 DLR (AD) 1 Ges ETV Ltd. V. BTRC 54 DLR(AD) 130 †gvKvÏgv¸wji iv‡qi Dci wbfi KiZt AÎ ixU †gvKvÏgvwU `v‡qi Kwi‡Z `iLv¯Kvixi locus standi iwnqv‡Q ewjqv †NvlYv K‡i|

Res judicata ZË m¤‡Ü Full Bench Gi wbKU cwijw¶Z nq †h eZgvb ixU †gvKvÏgvi `iLv¯Kvix c‡ei ixU wcwUkb bs 1729/1996 †gvKvÏgvq `iLv¯Kvix wQ‡jb bv ev Zvnv‡`i g‡a¨ Ab¨ †Kvb cvi¯úwiK cwZwbwaZgjK m¤úK (mutual representative character) wQj bv| GB Kvi‡Y eZgvb ixU ‡gvKvÏgv Res judicata ZËØviv `ó bq ewjqv Full Bench gZ cKvk K‡i|

Ab¨vb¨ cavb wePvh welq¸wj wbæi“ct

M) whether the impugned amendments require referendum under sub-article (1A) of Article 142 of the Constitution.

N) whether the impugned Act, bringing the amendments in the Constitution, is destructive of the principle of democracy,

O) whether the amendment of Article 142 by adding clauses (1A), (1B) and (1C) thereto by the Second Proclamation (Fifteenth Amendment) Order, 1978, can be said to be a valid constitutional amendment.

ZvnvQvov, wePvi wefv‡Mi ¯vaxbZv msµvš welqwU Full Bench we‡ePbv K‡i|

Full Bench Gi wZbRb weÁ wePviKe›` GKgZ nBqv Rule wU Discharge K‡ib, Z‡e Zvnviv c‡Z¨‡KB c_K c_K ivq c`vb K‡ib|

9| 103 Ab‡”Q‡`i Aax‡b mvwUwd‡KU c`vb t ivq c`vb †k‡l `iLv¯Kvixi Av‡e`b we‡ePbv KiZt Full Bench mswe av‡bi 103 Ab‡”Q` Gi AvIZvq GB g‡g mvwU‡d‡KU c`vb K‡i †h gvgjvwUi mwnZ mswe avb-e¨vL¨vi welq AvB‡bi ¸i“ZcY ck RwoZ iwnqv‡Q|

nvB‡KvU wefvM mwbw`ófv‡e D‡jL bv Kwi‡jI cKZ c‡¶ mswe avb (Î‡qv`k ms‡kvab) AvBb,1996 (1996 Gi 1bs AvBb) Gi AvBbMZ Ae¯vb wbi“cYB mvswe avwbK ¸i“Icb ck I AÎ Avcxj wefv‡Mi gj wePvh welq|

AZtci, Avcxj wefv‡M welqwU Avcxj wnmv‡e bw_f³ Kiv nq| ZvnvQvov, ixU `iLv¯Kvix Avi GKwU c_K Civil Petition for Leave to Appeal No. 596 of 2005 `v‡qi K‡i| BnvI Avcxjvwui mwnZ GK‡Î ivLv nq|

Avcxj Kvix Av‡e`‡bi †cw¶‡Z weÁ Chamber wePvicwZ Zvnvi 14-12-2010 Zvwi‡Li Av‡`k e‡j Avcxjv wU 10-1-2011 Zvwi‡L ïbvbxi Rb¨ wbaviY K‡ib|

AZci, 1-3-2011 Zvwi‡L Avcxjvwui ïbvbx Avi¤ nq|

10| nvB‡KvU wefv‡Mi ivq chv‡jvPbv t c_‡gB Avgiv nvB‡KvU wefv‡Mi Full Bench Gi ivq Av‡jvPbv Kwie|

c‡eB ejv nBqv‡Q †h gj wePvh welq we‡ePbvi c‡e Full Bench c_‡g `BwU cv_wgK welq, h_v, ixU `iLv¯wUi i¶YxqZv I res judicata ZËØviv ewiZ wKbv Zvnv we‡ePbv K‡i|

Full Bench Gi wZb Rb weÁ wePviKe›` GKgZ nB‡j I c‡Z¨‡KB c_K c_K ivq c`vb K‡ib|

c_‡gB wePvicwZ Md. Joynul Abedin Gi Av‡jvPbvwU we‡ePbvq jlqv nBj| wZwb Zvnvi iv‡qi c_‡g `iLv¯Kvixi wb‡Ri Locus standi I `iLv¯wU res judicata ZËØviv ewiZ wKbv Zvnv cv_wgK wePvh welq wnmv‡e we‡ePbv Kwiqv‡Qb|

†h †Kvb ixU †gvKvÏgvq, we‡kl Kwiqv Zvnv hw` Rb¯v_gjK ixU †gvKvÏgv nBqv _v‡K †m‡¶‡Î `iLv¯Kvixi locus standi welqwU AZ¨š¿i“ZcY| KviY, †h †Kvb e¨w³ msweav‡bi 102 Ab‡”Q‡`i AvIZvq mcxg †Kv‡Ui nvB‡KvU wefv‡Mi GB we‡kl Aww` ¶gZv hvPTv Kwi‡Z cv‡i bv| wZwb †h 102 Ab‡”Q‡`i AvIZvq GKRb ms¶ã e¨w³ c_‡gB Zvnv cwZwôZ Kwi‡Z nB‡e|

ixU `iLv¯Kvix Zvnvi ixU `iLv‡¯i 2q `dvq Zvnvi locus standi cm‡½ wbæwjwLZ e³e¨ c`vb Kwiqv‡Qbt

> “Your petitioner is a citizen of Bangladesh. He is a practising Advocate of the Supreme Court of Bangladesh and holds the Constitution of the Republic in high esteem. It is the sacred duty of every citizen to safeguard and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. Your petitioner is also the Secretary General of the Association for Democratic and Constitutional Advancement of Bangladesh (ADCAB), which has been working for the people’s awareness to guard against the violation of the Constitution and the rule of law”.

msweavb gvb¨ Kiv evsjv‡`‡ki mKj bvMwi‡Ki GKwU we‡kl mvsweavwbK `wqZ¡ eZgvb ixU †gvKvÏgvq `iLv¯Kvix msweav‡bi ZwKZ ms‡kvabwU†K msweav‡bi Ab¨Zg cavb basic feature MYZ‡ši mwnZ mvsNwlK `vex Kwiqv‡Qb| ZwKZ ms‡kva‡b evsjv‡`‡ki GKRb mv‡eK cavb wePvicwZ‡K ZËveavqK miKv‡ii Dc‡`óv

wb‡qv‡Mi weavb _vKvq wePvi wefv‡Mi ¯vaxbZv ¶b nB‡Z cv‡i ewjqv Zvnvi `iLv‡¯ Avk¼v cKvk Kiv nBqv‡Q| wePvi wefv‡Mi ¯vaxbZvI mswe av‡bi GKwU basic structure ewjqv wZwb `vex Kwiqv‡Qb| ZvnvQvov, `iLv¯Kvix mcxg †Kv‡Ui GKRb weÁ G¨vW†fv‡KU| AZGe, evsjv‡`‡ki GKRb bvMwiK wnmv‡e I mcxg †Kv‡Ui GKRb weÁ G¨vW†fv‡KU wnmv‡e ‡`‡ki mswe avb I wePvi wefv‡Mi ¯vaxbZvi wel‡q `iLv¯Kvixi ms¶ã nBevi KviY _vwK‡Z cv‡i weavq GB ixU †gvKvÏgv `v‡q‡i Zvnvi locus standi iwnqv‡Q ewjqv Avgiv nvB‡KvU wefv‡Mi wm×v‡ši mwnZ GKgZ|

AÎ Av`vj‡Zi ce wb®úwËKZ Kazi Mukhlesur Rahman V. Bangladesh 26 DLR (SC) (1974) 44 I Dr. Mohiuddin Faruque V. Bangladesh 49 DLR (AD) (1997) 1 †gvKÏgvq DÌvwcZ Locus standi Bm¨i Dci c`Ë wm×vš Ab‡gv`b Kiv nBj|

D‡jL¨ †h AÎ Avcxj †gvKvÏgvwU Avcxj wefv‡M wePvivaxb _vKvKvjxb mg‡q gj ixU `iLv¯Kvix A¨vwc‡j›U gZ¨g‡L cwZZ nb| AZci, Rbve †gvt iûj KÏm, G¨vW†fv‡KU, Zvnvi ¯‹vwfwl³ nb| Rbve †gvt iûj KÏm Zvnvi ¯‹vwfwl³ nBevi 4-11-2008 Zvwi‡Li Av‡e`bc‡Î wbæwjwLZ wb‡e`b iv‡Lbt

2. That during pendency of the present appeal, the appellant M. Saleem Ullah died on 3.8.2008 at BIRDEM hospital in Dhaka. A true copy of his death certificate is annexed hereto as Annexure-A.
3. That Mr. M. Saleem Ullah was a pioneer of Public Interest Litigation and was the Secretary General of the Association for Democratic and Constitutional Advancement of Bangladesh (in short ADCAB) and he brought the case before the Hon'ble Court in capacity of the Secretary General of ADCAB in the interest of public.
4. That the applicant Md. Ruhul Quddus is the successor Secretary General of ADCAB after the sad demise of Mr. M. Saleem Ullah. He is a learned Advocate of the Supreme Court of Bangladesh, a public interest litigant and public spirited person believes in supremacy of the Constitution and is having same grievance of Mr. M. Saleem Ullah.

5. That the present Civil Appeal is having great public importance, by which the Constitution (Thirteen) Amendment) Act 1996 (Act No. 1 of 1996) has been challenged as being ultra vires of the Constitution. The said amendment has introduced the concept of Non-party Care Taker Government, a non-representative and undemocratic Government in violation of the basic and fundamental concept of democracy and also in violation of the mandatory provision of Article 142 (1A) of the Constitution; that independence of the judiciary, a basic structure of the Constitution is also affected and impaired by the impugned Act.

BwZg‡a¨ Rbve †gvt iûj KÏm nvB‡KvU wefv‡M wePvicwZ wbh³ nB‡j Rbve Avãj gvbvb Lvb Avcxj Kvix wnmv‡e Zvnvi ¯jwfwl³ nb| Zvnvi 9-12-2010 Zvwi‡Li Av‡e`bc‡Î wZwb e‡jbt

4. That after the sad demise of M. Saleem Ullah, his successor-in-office Md. Ruhul Quddus was substituted in the present appeal, who has now been elevated on the bench on 4.11.2010.

5. That after elevation of Mr. Ruhul Quddus, the central committee of ADCAB through a decision of its general meeting entrusted the present applicant, Md. Abdul Mannan Khan as the next Secretary General of ADCAB and also instructed him to proceed with and conduct the public interest litigations (PIL) initiated by ADCAB. The applicant is an Advocate of the Supreme Court of Bangladesh, a public spirited person who believes in supremacy of the Constitution of the Republic and independence of the judiciary. He is having the same grievance as Mr. M. Saleem Ullah had as Secretary General of ADCAB.

D‡jL¨, hLb Avcxjw`U `v‡qi Kiv nq ZLb gj Avcxj Kvix RxweZ wQ‡jb| Zrci, Zvnvi ¯jwfwl³ e¨w³ I mcxg †Kv‡Ui GKRb weÁ G¨vW†fv‡KU| †`‡ki bvMwiK I AÎ Av`vj‡Zi weÁ G¨vW†fv‡KU wnmv‡e AÎ Avcxj †gvKvÏgvU cwiPvjbv Kwi‡Z Zvnvi c‡qvRbxq locus standi iwnqv‡Q e‡U|

ZvnvQvov, eZgvb Avcxj †gvKvÏgvq GKwU AZ¨š¿i“ZcY mvsweavwbK ck DÌvwcZ nBqv‡Q| Bnv mivnv Kiv RvZxq ¯v‡_ AwZ c‡qvRb| GB cm‡½ Ardeshir H Mama V. Flora Sassoon 55 Ind. App. 360=AIR

1928 PC 208 †gvKvÏgvwU cwYavb‡hvM¨| Bnv GKwU Pw³ ce‡ji ‡gvKvÏgv wQj| wKš †gvKvÏgvwU wbæ Av`vj‡Z wb¯úwË nBevi c‡eB ev`x Pw³ Avi cvjb Kwi‡Z iwR bb ewjqv weev`x‡K Rvbvq weavq Privy Council G c¶M‡Yi AvBbMZ Ae¯vb wbavi‡Yi c‡qvRb wQj bv, ZeI we¯wiZ ïbvbx nq Ges G cm‡½ Lord Blanesburgh e‡jbt

> "In these circumstances their Lordships think, that whether or not this appeal can be disposed of without further reference to it, they ought to express their views upon so important a question of practice now that it has been raised and fully argued. In such a matter certainty is more important than anything else. A rule of practice, even if it be statutory, can when found to be inconvenient be altered by competent authority. Uncertainty in such a matter is at best an embarrassment and may at its wrost be a source of injustice which, in some cases, may be beyond judicial remedy. Accordingly in this judgment, their Lordships will deal with all the matters in controversy to which they have referred, irrespective of the question whether last of them of necessity now calls for determination at their hand." (page 366 IA)

Union of India V. Sankalchand Himatlal Sheth, AIR 1977 SC 2328 ‡gvKvÏgvq wePvicwZ Sheth ‡K Ab¨ GKwU nvB‡Kv‡U e`wj Kwi‡j ¸RivU nvB‡KvU Zvnv A‰ea †NvlYv K‡i| mcxg †Kv‡U Avcxj wePvivaxb _vKvKvjxb mg‡q miKvi Zvnvi e`wji Av‡`k cZ¨vnvi Kwi‡j wZwbI ixU †gvKvÏgvwU cZ¨vnvi K‡ib| wKš Zvnv m‡ZI mcxg †Kv‡Ui wePvicwZMY ZwKZ welqwU m¤ú‡K we¯wiZ ivq c`vb K‡ib| G cm‡½ Justice VR Krishna Iyr Gi Awf gZ cwYavb‡hvM¨t

> "118. We have earlier stated that the appeal has happily ended by consensus. The deeper constitutional issues have been considered and answered by us, responding to our duty under Article 141 and to avoid future shock to the cardinal idea of justice to the justices. ..... The highest court with constitutional authority to declare the law cannot shrink from its obligation because the lis which has activised its jurisdiction has justly been adjusted."(A‡av‡iLv c`Ë)

GgZ Ae¯vq †h‡nZ gj A¨vwc‡j‡›Ui ¯‡j GKB ai‡bi Locus Standi m¤úb A¨vwc‡j›U ¯jvwfwl³ nBqv‡Qb Ges ZwKZ welqwU mvswevwbK fv‡e AwZkq ¸i"ZcY weavq wb¯úwË Kiv c‡qvRb|

c‡eB D‡jL Kiv nBqv‡Q †h ixU wcwUkb bs 1729/1996 (Syed Muhammed Mashiur Rahman V. Bangladesh 17 BLD 55) †gvKvÏgvq mswewavb (Î‡qv`k ms‡kvab) AvBb Gi ^eaZv P¨v‡jÄ Kiv nBqwQj wKš nvB‡KvU wefvM i“j Rvix bv Kwiqv GKwU msw¶ß Av‡`‡k Zvnv LwiR K‡i|

Bnv mZ¨ †h †`Iqvbx Kvhwewa AvB‡bi 11 aviv Abmv‡i GKB c¶M‡Yi g‡a¨ GKB welq jBqv GKB KviYvax‡b Avi GKwU bZb †gvKvÏgv res judicata ZË Abmv‡i ewiZ| BnvI mZ¨ †h †`Iqvbx Kvhwewa AvB‡bi 141 aviv Abmv‡i mvaviYZ †`Iqvbx Kvhwewa AvBb ixU †gvKvÏgvi †¶‡Î I c‡hvR¨, Z‡e ‡mB c‡qvM †`Iqvbx †gvKvÏgvi b¨vq memgq GKB iKg fv‡e bvI nB‡Z cv‡i|

ixU †gvKvÏgv GKwU we‡klAvw` ev gj †gvKvÏgv| GBi“c †gvKvÏgv gjZ AvB‡bi ck‡ZB mxgve×| nvB‡KvU wefv‡Mi GKwU ‡eÂ hw` AvB‡bi ckwU GKfv‡e wm×vš c`vb K‡i Z‡e mvaviY fv‡e Bnv mgM nvB‡KvU wefv‡MiB wm×vš ewjqv MnY Kwi‡Z nq|

Z‡e GKwU ågvZK AvBbx wm×vš KLbB nvB‡Kv‡Ui Avi GKwU †eÂ AbmiY Kwi‡Z eva¨ bq| “The blunders of one age cannot warrant the blunders of another” (Watkins : Principles of Conveyancing) (Professor J.H.Baker : An Introduction to English Legal History, page-105) |

‡Kvb GKwU wel‡q cev‡ý wm×vš nB‡j nvB‡KvU wefvM GKB AvB‡bi c‡k n¯‡¶c Kwi‡Z mshZ nB‡e wVKB wKš GLwZqviwenxb nB‡e bv| GB †c¶vc‡U fviZxq mcxg †Kv‡Ui B. Prabhakar Rao V. State of A.P, AIR1986 SC 210, ‡gvKvÏgvq c`Ë ivq cwYavb †hvM¨ (côv-227)t

> “23..... a writ petition similar to Writ Petitions Nos. 3420-346/83 etc. had been filed earlier and had been dismissed in limine by a Bench of this Court. We do not see how the dismissal in limine of such a writ petition can possibly bar the present writ petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction. So the objection such as it was, was not pursued further.”

Z‡e hw` nvB‡KvU wefv‡Mi Avi GKwU †eÂ c‡ev³ †e‡Âi wm×v‡ši mwnZ wØgZ †cvlY K‡i Z‡e High Court Rules Abmv‡i D³ †eÂ GKwU enËi †eÂ MVb Kwievi j‡¶ c`‡¶c MnY Kwi‡Z cv‡i| G‡nb ‡¶‡Î res judicata-i †Kvb ck D‡V bv|

gj K_v nB‡Z‡Q †h ZwKZ welqwU Povš wm×vš nBqv‡Q wKbv| hw` Avcxj wefv‡M †Kvb AvBbx c‡ki Povš wm×vš nq, Zvnv nvB‡KvU wefvM Ges Aa¯b mKj Av`vj‡Zi Dci evaïKi| ‡mB GKB ck ev GKB NUbv cbivq nvB‡Kv‡U DÌvcb evwiZ nB‡e|

Avcxj wefvM hw` I stare decisis ZË Abmv‡i D³ wefv‡M gxgvsmxZ ck bwRi (precedence) wnmv‡e cvq mKj mg‡qB AbmiY Kwi‡e Z‡e Avcxj wefv‡Mi wbKU hw` wb‡Ri †Kvb AvBbx wm×vš ågvZ¥K ewjqv cZxqgvb nq Z‡e D³ AvBbx wm×vš cwieZb Kwi‡Z cv‡i KviY " For that were to wrong every man having a like cause, becuase another was wronged before": Vaughan, C.J. (in Bole V. Horton,1673) (Professor J.H.Baker: An Introduction to English Legal History, page-105) |

G‡nb AvBbx Ae¯v‡b Avgiv res judicata c‡k nvB‡KvU wefv‡Mi mwnZ GKgZ ‡cvlY Kwi|

Zrci gj wePvh welq (M) m¤‡Ü wePvicwZ Abedin e‡jb †h mswkøv‡bi c¯vebv ev mswkó ‡h mKj weavb †h¸wj ms‡kvab Kwi‡j MY‡fvU c‡qvRb nq Zvnvi GKwUI ms‡kvab Kiv nq bvB weavq MY‡fv‡UiI ck I‡V bv|

`iLv¯Kvix c‡¶ wb‡e`b †h mswkøv‡bi 58L, 58M I 58N Ab‡"Q`¸wj c¯vebv, 8, 48 I 56 Ab‡"Q`¸wj‡K mivmwi bv nB‡jI c‡iv¶fv‡e ms‡kvab Kwiqv‡Q GB e³‡eïi †cw¶‡Z weÁ wePviK wm×vš c`vb K‡ib †h D³ Ab‡"Q`¸wji †Kvb ms‡kvabx nq bvB, ZwKZ AvBbwU 48(3), 141K(1)I 141M(1) Ab‡"Q` ¸wj‡K mxwgZ mg‡qi Rb¨ ¯wMZ Kwiqv‡Q gvÎ|

Zrci, mswkøv‡bi basic structure h_vt MYZš I wePvi wefv‡Mi ¯vaxbZv‡K 58L nB‡Z 58O Ges 99(1) Ab‡"Q‡`i ms‡kvabx †Kvb

fv‡e Le Kwiqv‡Q wKbv Zvnv weÁ wePviK we‡ePbv Kwiqv‡Qb| GB cm‡½ Zvnvi gše¨ GB †h MYZš¿ wePvi wefv‡Mi ¯vaxbZv DfqB mswea v‡bi basic feature | ZvnvQvov, Aeva I mô wbevPbI MYZ‡ši Ask Ges mswea v‡bi 'basic feature'|

cwK¯vb I fviZ GgbwK evsjv‡`‡ki gj mswea v‡bI 'caretaker' miKvi e¨e¯v iwnqv‡Q, Rbve iwdK-Dj nK I Rbve iv¾vK weÁ G¨vW†fv‡KU g‡nv`qM‡Yi GB wb‡e`b, Ges Since such scheme was not found to suit the genius of the people of our country there was an out cry for a non-party care-taker government to hold the general election of the Parliament to ensure free, fair and independent election Zvnv‡`i GB e³e¨ wePvicwZ Abedin h‡_ó A_en ewjqv gZ cKvk K‡ib|

mswea v‡bi 99(1) Ab‡"Q` m¤‡Ü `iLv¯Kvix c‡¶ DÌvwcZ e³e¨ †h Aemicvß cavb wePvicwZ I wePvicwZMY‡K h_vµ‡g cavb Dc‡`óv c‡` wb‡qv‡Mi mvswea wbK evav `ixfZ Kwiqv wePvi wefv‡Mi ¯vaxbZv Le Kiv nBqv‡Q| GB e³‡e¨i ‡cw¶‡Z wePvicwZ Abedin g‡b K‡ib †h Aeva, mô I wbi‡c¶ wbevP‡bi mv‡_ Aemicvß cavb wePvicwZ I wePvicwZMY‡K h_vµ‡g hw` cavb Dc‡`óv wb‡qvM Kiv nq Zvnv weZwKZ Kwievi †Kvb KviY bvB|

wePvicwZ Md. Joynul Abedin MYZš¿ I wePvi wefv‡Mi ¯vaxbZv‡K mswea v‡bi basic structure ewjqv‡Qb e‡U Z‡e ZwKZ ms‡kvab¸wj D³ basic structureØq‡K Le Kwiqv‡Q wKbv ‡m m¤‡Ü †Kvb gše¨ K‡ib bvB| wePvicwZ Md. Awlad Ali Zvnvi c_K iv‡q e‡jb †h ZwKZ mswea vb (Î‡qv`k ms‡kvab) AvBb mswea v‡bi 8,48 I 56 Ab‡"Q`‡K ms‡kvab K‡i bv weavq 142(1K) Ab‡"Q‡`i AvIZvq MY‡fv‡Ui †Kvb c‡qvRb bvB|

wePvicwZ Ali g‡b K‡ib †h cKZ MYZ‡ši ¯v‡_B wbi‡c¶ ZËveavqK miKvi e¨e¯v cewZZ nBqv‡Q| wZwb g‡b K‡ib †h MYZ‡ši ¯v‡_ mxwgZ mg‡qi Rb¨ mswea v‡bi 48(3), 56 I 57(3)

Ab‡”Q` ¯wMZ ivwL‡j †Kvb ¶wZ bvB| wKš msweavb I ivóxq Rxe‡b D³ weavb¸wji ¸i“Z m¤‡Ü wZwb †Kvb e³e¨ c`vb K‡ib bvB|

AZtcit, wePvicwZ Ali msweavb (Î‡qv`k ms‡kvab) AvBb, msweav‡bi 8, 48(3), 56 I 57(3) Ab‡”Q`¸wj †Kvb fv‡e ms‡kvab K‡i wKbv Zvnv Av‡jvPbv K‡ib| wZwb e‡jb †h 58(L) nB‡Z 58(O) chš Ab‡”Q`¸wj msweav‡bi, we‡kl Kwiqv 48(3), 56 I 58(O) Ab‡”Q‡`i †Kvb cwieZb ev ms‡kvab Avbqb K‡i bvB| ZwKZ ms‡kvab `viv Dc‡iv³ Ab‡”Q`¸wj cwiewZZ nB‡j †m¸wj‡K KvhKi Kwi‡Z msm`‡K cbivq AvBb wewae× Kwi‡Z nBZ, wKš G‡¶‡Î wZb gvm c‡i bZb miKvi ¶gZv Mn‡Yi ci gj 48(3), 56 I 57(3) Ab‡”Q`¸wj cbivq ¯qswµqfv‡e KvhKi nB‡e| GB wZb gvm mgq D³ Ab‡”Q`¸wj ¯wMZ I AKvhKi _vwK‡e gvÎ, Kv‡RB GB Kvhµg‡K msweavb ms‡kvab ejv hvq bv ewjqv wZwb gZ cKvk K‡ib|

Aek¨ Î‡qv`k ms‡kvab m¤ú‡K wePvicwZ Ali i wb‡Ri gše¨t

> “is a peculiar and novel political contrivance, and it is an unprecedented legislation in our legislative history....”

G m¤‡Ü Avi †Kvb gše¨ wb‡¯úv‡qvRb|

AZcit, wePvicwZ Ali Î‡qv`k ms‡kvab AvBb, wePvi wefv‡Mi ¯vaxbZv ¶b Kwiqv‡Q wKbv †m m¤ú‡K Av‡jvPbv K‡ib| wePvi wefv‡Mi ¯vaxbZv msweav‡bi GKwU basic structure ewjqv wePvicwZ Ali gše¨ K‡ib| wZwb e‡jb †h GKRb Aemi cvß cavb wePvicwZ Aemi Mn‡Yi ci wePvi wefvM‡K Avi †Kvb fv‡e cfvewbZ Kwi‡Z cv‡ib bv| wZwb Avkv cKvk K‡ib †h Aemicvß cavb wePvicwZ ev Ab¨‡Kvb wePvicwZ hvnvi cavb Dc‡`óv nBevi K_v Zvnvi hw` †Kvb we‡kl ivR‰bwZK `‡ji cwZ c¶cvZ ev `ejZv _v‡K Z‡e Zvnvi D³ c` MnY bv KivB DwPr|

wKš cKZ c¶cvZ ev `ejZv _vKv ev bv _vKv ck bq, mwVK ck nB‡Z‡Q †h Hi“c †Kvb m¤vebv Av‡Q wKbv| Ggb wK hw`

m¤ebvI _v‡K Zvnv nB‡jB mswkó wePvicwZ I Zvnvi m‡½ wePvi we fv‡Mi fvegwZ I ¶b nB‡e|

msweav‡bi basic structure aŸsm n I qv cm‡½ wePvicwZ Ali mvgwiK AvBb Øviv msweavb cwieZb Ges Zrci msweavb (cÂg ms‡kvab) AvBb, 1979, gvidr Ab‡gv`b I wbwðZKiY cm½ Av‡jvPbv K‡ib hvnv eZgvb †gvKvÏgvi welqe¯ bq| wZwb Aek¨ mwVK fv‡eB e‡jb †h RvZxq msm‡`i I basic structure cwieZb Kwievi †Kvb ¶gZv bvB|

weÁ wePvicwZ basic structure cwieZb cm½ Av‡jvPbv Kwi‡Z hvBqv mvgwiK AvBb Øviv msweav‡bi basic structure cwieZb m¤‡Ü Av‡jvPbv K‡ib wKš GB cm½ AÎ †gvKvÏgvi wePvh welq b‡n| wePvh welq nBj ZwKZ msweavb ms‡kvab AvBbwUi Øviv MYZš I wePvi we fvM Gi b¨vq basic structure †K †Kvb fv‡e Le Kwiqv‡Q wKbv, wKš G m¤‡Ü weÁ wePviK †Kvb wbwðZ gše¨ K‡ib bvB|

wePvicwZ Mirza Hussain Haider Zvnvi iv‡qi cvi‡¤ MYZš jBqv Av‡jvPbv K‡ib| wZwb MYZš cm‡½ President Abraham Lincoln nB‡Z D×wZ c`vb K‡ib, Justice Mathew nB‡Z ‘rule of majority’ Ges Sir Ivor Jennings nB‡Z ‘the vesting of the political power in free and fair election’ gše¨ D×Z KiZt wbevPb gva¨‡gB †h msL¨vMwiôZv wbYq m¤e Zvnv e‡jb| MYZš‡K cwZôvwbK i“c c`vb Kwievi Rb¨ mgqgZ Aeva I mô wbevP‡bi c‡qvRbxqZv Ges Hiƒc Aeva I mô wbevP‡bi Abcw¯wZ‡Z MYZš †h A_nxb nBqv c‡o ZvnvI mwbcb fv‡e eYbv K‡ib|

Rao V. State (1998) 4 SCC 626 bwRiwUi cwZ `wó AvKlY ceK wePvicwZ Haider e‡jb †h MYZš hw` I msweav‡bi GKwU basic structure wKš msweavb (Î‡qv`k ms‡kvab) AvBb, A‰ea nB‡e bv KviY Bnv MYZ‡ši DrKl mvab Kwiqv‡Q|

D×Z bwRiwU‡Z c×wZi DrK‡li K_v ejv nBqv‡Q MYZšnxbZvi K_v ejv nq bvB| ZwKZ ms‡kvabxi Kvi‡Y nq‡Zv wbevPb Aeva I mô nB‡e wKš wZb gvm †h MYZš Abcw¯Z _wK‡e

Bnvi AvBbMZ I mvswe avwbK Ae¯vb m¤‡Ü weÁ wePviKe›` †KnB we‡ePbv K‡ib bvB|

Aci `BRb weÁ wePviKM‡Yi b¨vq wePvicwZ Haider I e‡jb †h †h‡nZ ZwKZ ms‡kvabx c¯vebv, 8, 48,56 I 142 Ab‡”Q‡` †Kvb ms‡kvab Avbqb Kiv nq bvB †m‡nZ MY‡fv‡Ui c‡qvRb bvB|

AvBbMZ mwVK Ae¯vb GB †h BwZg‡a¨ mcxg †Kv‡Ui Dfq wefvM mswe avb (cÂg ms‡kvab) AvBb, 1979, ewZj Kivq Ges 142 Ab‡”Q` Bnvi gj Ae¯v‡b wdwiqv hvIqvq mswkó ms‡kva‡b MY‡fv‡Ui we avb jß nBqv‡Q|

wePvicwZ Abedin I wePvicwZ Haider DfqB GB Dc-gnv‡`‡ki wZbwU †`‡ki mswe av‡b wbewPZ miKv‡ii kvmbKvj A‡š GK ai‡bi care-taker miKvi eiveiB we`¨gvb _v‡K Ges we`vqx cavbgšx I Ab¨vb¨ gšxMY Zvnv‡`i cwZwbwaZkxj Pwi Î nvivq Zvnv gše¨ Kwi‡j I wK fv‡e ev wK cwµqvq Zvnviv Zvnv‡`i cwZwbwaZkxj Pwi Î nvivq Zvnv e¨vL¨v K‡ib bvB| D‡jL¨ †h ZwKZ mswe avb ms‡kvab Gi c‡ei 123 Ab‡”Q` we`vqx miKv‡ii †gqv` g‡a¨ mvaviY wbevPb Abôv‡bi we avb iwLqv‡Q|

Zvnviv 99 Ab‡”Q‡`i ms‡kvab m¤ú‡K e³e¨ iwLqv‡Qb e‡U wKš ZwKZ ms‡kvab wePvi wefv‡Mi mvaxbZv ¶b K‡i wKbv Zvnv c_‡gB ¯vaxb fv‡e we‡ePbv K‡ib bvB| hw` ¶b bv K‡i Z‡eB ïa 99 Ab‡”Q‡`i ms‡kvab we‡ePbvi ck I‡V|

Full Bench Gi weÁ wePviKe›` Î‡qv`k ms‡kva‡bi AvBbMZ Ae¯vb wbYqv‡_ RbM‡Yi †fvU c`v‡b mwe av I D³ ms‡kvabx mKj ivR‰bwZK `‡ji g‡Zi wfwË‡Z Kiv nBqv‡Q Zvnvi Dc‡iB AwaKZi ¸i“Z Av‡ivc Kwiqv‡Qb wKš D³ ms‡kvabx iv‡ói MYZwšK I cRvZwšK Pwi Î, wePvi wefv‡Mi ¯vaxbZv cfwZ basic structure Gi mwnZ mvsNwIK wKbv Zvnv Ab¨ mKj Avbmw½K we‡ePbv eRb KiZt m¤úY ¯vaxb fv‡e wbi“cY Kwievi Dci Zvnv‡`i AwaKZi ¸i“Z

Av‡ivc Kiv DwPr wQj, wKš Zvnviv Zvnv h‡_ó fv‡e Kwiqv‡Qb ewjqv cZxqgvb nq bv|

mKj weÁ wePviKMY mwVK I †hŠw³K fv‡eB wbevPb Kwgkb Gi mvsweavwbK I AvBbMZ `vq I `vwq‡Zi Dci ¸i“Z Av‡ivc Kwiqv‡Qb|

11| **Amicus Curiae** wb‡qvM t AÎ gvgjwU ïbvbxi cvi‡¤ wbæwjwLZ wmwbqi G¨vW†fv‡KUMY‡K amicus curiae wnmv‡e Av`vjZ‡K mn‡hvwMZv Kwievi Rb¨ AvnŸvb Kiv nq t

1) Rbve wU GBP Lvb
2) W.Kvgvj †nv‡mb
3) Rbve iwdK-Dj nK
4) W. Gg. Rnxi
5) Rbve gvng`j Bmjvg
6) Rbve Gg. Avgxi Dj Bmjvg
7) Rbve †ivKb DwÏb gvng`
8) Rbve AvRgvjj †nv‡mb

12| AvcxjKvix c‡¶ e³e¨ †ck t Rbve Gg AvB dvi“Kx, wmwbqi G¨vW†fv‡KU, AvcxjKvix c‡¶ Zvnvi e³e¨ ‡ck Avi¤ K‡ib|

e³‡e¨i c_‡gB wZwb 1994 mv‡j AbwôZ gv¸iv Dc-wbevPb I ZrcieZx‡Z mKj `‡ji †hŠ_ Av‡›`vj‡b †`k APj nBqv cwoevi NUbvejx eYbv K‡ib|

Zrci, weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h evsjv‡`k iv‡ói MYZvwšK I cRvZvwšK cwiPq ev PwiÎ, wePvi wefv‡Mi ¯vaxbZv, GB ˆewkó¨¸wj MYcRvZvwšK evsjv‡`k iv‡ói msweav‡bi gj ˆewkó¨ ev KvVv‡gv (basic structure) | wKš ZwKZ Î‡qv`k ms‡kvab msweav‡bi Dc‡iv³ gj ˆewkó¨¸wji aŸsm mvab Kwiqv‡Q|

weÁ G¨vW†fv‡KU g‡nv`q msweav‡bi c¯vebvi cwZ `wó AvKlYceK wb‡e`b K‡ib †h RvZxqZvev`, mgvRZš, MYZš I agwbi‡c¶Zvi b¨vq D”P Av`kev` msweav‡bi †gŠwjK bxwZ| GKwU

MYZvwšK cwµqvi ga¨ w`qv evsjv‡`‡ki mgvRZvwšK mgv‡R mKj bvMwiK‡`i Rb¨ †gŠwjK gvbevwaKvi, mgZv Ges b¨vqwePvi wbðZKiYB wQj msweav‡bi D‡Ïk¨|

7 Ab‡”Q‡`i cwZ `wó AvKlY ceK wZwb wb‡e`b K‡ib †h RbM‡Yi Awfcv‡qi cig Awfe¨w³ i‡c msweavb cRvZ‡ši m‡ev”P AvBb Ges cRvZ‡ši mKj ¶gZvi gvwjK evsjv‡`‡ki RbMY| GB msweavb evsjv‡`‡ki RbM‡Yi GKwU mvgvwRK Pw³ ev eÜ‡bi Awfe¨w³| Jean Jacques Rousseu Zvnvi mweL¨vZ Social Contract M‡š GBi“cB Kíbv I aviYv Kwiqv‡Qb|

weÁ G¨vW†fv‡KU g‡nv`q wb‡e`b K‡ib †h msweav‡bi Î‡qv`k ms‡kva‡bi ci msweav‡bi PwiÎB cwieZb nBqv wMqv‡Q KviY Bnvi basic structure cwieZb nBqv‡Q| GB ms‡kva‡bi d‡j wePviK‡`i wbi‡c¶Zv ckwe× nBqv‡Q Ges mvweKfv‡e wePvi wefvM ¶wZM¯ nBqv‡Q|

wZwb wb‡e`b K‡ib †h msweav‡bi PZ_ fv‡Mi 2q cwi‡”Q` 90w`‡bi Rb¨ AKvhKi ev ineffective _vwKevi weavb KvhZ bZb GKwU Legal Order mwó K‡i hvnvi †Kvb AvBbMZ ˆeaZv bvB| Bnv mZ¨ †h RvZxq msm` †h ‡Kvb AvBb cYqb Kwi‡Z cv‡i, GgbwK 142 Ab‡”Q‡`i kZ mv‡c‡¶ msweavbI ms‡kvab Kwi‡Z cv‡i wKš KLbB basic structure ¶b Kwi‡Z cv‡i bv| 55 Ab‡”Q` m¤‡Ü wZwb e‡jb †h Bnv iv‡ói wZbwU cavb ¯‡¤i GKwU ¯¤ wbevnx miKvi mwó Kwiqv‡Q Ges wbevnx miKv‡ii Pvwj Kv kw³ gwšmfv‡K †hŠ_fv‡e msm‡`i wbKU `vqx ivwLqv‡Q| GBfv‡e iv‡ói Avi GKwU ¯¤ RvZxq msm‡`i gLv†c¶x Kwiqv ivó cwiPvjbvq GKwU checks and balances ev fvimvg¨ mwó Kwiqv‡Q| wKš 2K cwi‡”Q` Avbqb Kivq ‡mB fvimvg¨ AšZ 90 w`‡bi Rb¨, †¶Î we‡k‡l 2 ermi ev ZrDaŸ mg‡qi Rb¨ bó nBqv‡Q Ges msweavb AKvhKi nBqv‡Q Z_v MYZš, AšZ H mg‡qi Rb¨ wejß nBqv‡Q Ges iv‡ói cRvZvwšK PwiÎ Le nBqv‡Q|

wZwb Avi I e‡j b †h 58K Ab‡”Q‡`i kZ †gvZv‡eK 72(4) Ab‡”Q‡`i Aax‡b msm` cbvivnŸvb Kiv nB‡j cavbgšxi mvsweavwbK Ae¯vb wK nB‡e Zvnvi I †Kvb e¨vL¨v bvB|

weÁ G¨vW†fv‡KU g‡nv`q nvB‡Kv‡Ui Full Bench Gi iv‡qi mgv‡jvPbv Kwiqv e‡j b ‡h nvB‡Kv‡Ui weÁ wePviKMY ZwKZ ms‡kvab †K ms‡kvab ev amendment Awfwn Z bv Kwiqv PZ_ fv†Mi 2q cwi‡”Q` 90 w`‡bi Rb¨ ‘ineffective’ ev AKvhKi _vwK‡e ewjqv‡Qb wKš msweav‡b msweav‡bi †Kvb Ask GBi“c ineffective _vwKevi †Kvb weavb bvB ewjqv wZwb wb‡e`b K‡ib|

weÁ G¨vW†fv‡KU g‡nv`q msweav‡bi 61 I 58L(3) Ab‡”Q‡`i Zjbvgj K we‡klY KiZt e‡j b †h ivócwZ I cavb Dc‡`óvi g‡a¨ GKwU dichotomy of power struggle ev `B mvsweavwbK c`vwaKvix e¨w³Ø‡qi g‡a¨ ci¯úi we‡ivax GKwU ¶gZvi Ø›` mwó Kwiqv‡Q KviY GKw`‡K cavb Dc‡`óv 58L(3) Ab‡”Q‡`i Aax‡b iv‡ói wbevnx cavb, Ab¨w`‡K, ivócwZ msm` I gwšmfvi Abcw¯wZ‡Z 61 Ab‡”Q‡`i Aax‡b wb‡RB mvgwiK evwnbxi cavb nB‡eb|

ZvnvQvov, 48 (3), 141K(1) Ges 141M(1) Ab‡”Q` Gi Aax‡b †Kvb c`‡¶c jB‡Z nB‡j cavbgšxi civgk I Zvnvi cwZ¯v¶i MnY Kwievi weavb iwnqv‡Q wKš 58O Ab‡”Q` Abmv‡i ivócwZ wb‡Ri we‡ePbv Abmv‡i Dc‡iv³ Ab‡”Q‡` e¨³ ¶gZv c‡qvM Kwi‡Z cvwi‡eb, djk“wZ‡Z wZwb gj msweav‡bi †LZvex ivócwZ nB‡Z cKZ c‡¶ iv‡ói wbevnx cavb ivócwZ‡Z cwiYZ nB‡eb| Bnvi d‡j ivócwZ GK”QÎ ¶gZvavix nB‡eb Ges ¶gZvi c_KKiY ZË Le nB‡e|

weÁ G¨vW†fv‡KU g‡nv`q Avk¼v cKvk K‡ib †h ivócwZ 58M (6) Ab‡”Q` Abmv‡i hw` cavb Dc‡`óvi `vwqZfvi MnY K‡ib Z‡e wZwb ^¯ikvm‡K cwiYZ nB‡Z cv‡ib hvnv 2006 mv‡ji †kl fv‡M

‡`Lv w`qv‡Q| GB cm‡½ wZwb 1996, 2001 I 2006 mv‡ji ZËveavqK miKvi Avg‡ji wewfb NUbvejx eYbv K‡ib|

weÁ G¨vW†fv‡KU g‡nv`q AviI e‡jb †h gv¸iv Dc-wbevP‡b Abwô Z KviPwc I †eAvBbx NUbvejx‡K AwZgvÎvq ¸i“Z c`vb Kiv nBqv‡Q| e¯Z H mKj A‰ea KvhKjv‡ci Rb¨ cKZc‡¶ wbevPb Kwgk‡bi e¨_ZvB `vqx| ZvnvivB mgq gZ h_vh_ c`‡¶c jB‡Z e¨_ nIqvq gv¸ivi wbevP‡bi b¨vq Abwf‡cZ NUbv NwUqv‡Q| †mRb¨ wbevPb Kwgkb mwVK fv‡e kw³kvjx Kwievi c‡qvRb _vwK‡jI msweav‡bi Î‡qv`k ms‡kva†bi †KvbB c‡qvRb wQj bv|

wZwb U.N. R. Rao V. Smt. Indira Gandhi, AIR 1971 SC 1002, †gvKvÏgv D‡jLceK wb‡e`b K‡ib ‡h RvZxq msm` fwOqv hvIqvi ciI gšxmfv KvhKi _vwK‡Z cv‡i, ZËveavqK miKv‡ii †Kvb c‡qvRb _v‡K bv| eiÂ, wZwb wb‡e`b K‡ib †h, MZ ZËveavqK miKv‡ii mgq wePvi wefvM‡K wbqšY Kwievi GKUv c‡Póv wQj|

ZvnvQvov, Anwar Hassain V. Bangladesh 1989 BLD (Special Issue) †gvKvÏgvi D‡jLceK wZwb wb‡e`b K‡ib †h wePvicwZ Badrul Haider Chowdhury msweav‡bi 7 Ab‡”Q`‡K Ges wePvicwZ M.H. Rahman msweav‡bi c¯vebv‡K ‘Pole Star’ wnmv‡e eYbv K‡ib| wZwb D³ †gvKvÏgvq c`Ë iv‡qi wewfb Ask D×Z Kwiqv GKwU mvivsk `vwLj K‡ib|

Rbve dvi“Kx, G¨vW†fv‡KU, wb‡e`b K‡ib ‡h GB fv‡e Î‡qv`k ms‡kvab AvBb msweav‡bi cRvZvwšK PwiÎ Le K‡i| ZvnvQvov, wePvi wefv‡Mi ¯vaxbZvI ¶b K‡i|

Rbve †gvnvg¥` †gvn‡mb iwk`, G¨vW†fv‡KU t

Avcxj Kvix c‡¶ Rbve Gg AvB dvi“Kx e¨wZ‡i‡K Rbve †gvnvg¥` †gvn‡mb iwk` Av`vj‡Zi AbgwZ MnY ceK Zvnvi e³e¨ †ck K‡ib|

wZwb msweav‡bi ¸i“ZcY w`K¸wj Zwjqv a‡ib| wZwb MYZš †h msweav‡bi GKwU Basic Structure Zvnv wewfb bwRi Gi cwZ `wó

AvKlb ceK e¨vL¨v K‡ib| ZvnvQvov, wZwb e‡j b †h ZwKZ mswe avb ms‡kvab AvBb wePvi we fv‡Mi ¯vaxbZv Le Kwi‡e, Aemi cvß cavb wePvicwZ ivR‰bwZK D‡Ï‡k¨i wkKvi (Political victim) nB‡Z cv‡ib|

weÁ G¨vW‡fv‡KU g‡nv`q e‡j b †h, wb`jxq ZËveavqK miKvi Ggb e¨w³eM mgb‡q MwVZ hvnviv RbM‡Yi †fv‡U wbevwPZ b‡nb| GgZve¯nvq wbevwPZ RbcwZwbwa‡`i Z_v RvZxq msm‡`i m`m¨‡`i mgb‡q ZËveavqK miKvi MVb Kiv hvB‡Z cv‡i| †hB miKviwU AšeZxKvjxb miKvi wnmv‡e 90 w`b ¶gZvq _vwKqv wbevPb cwiPvjbv Kwi‡e| GB miKv‡ii m`m¨MY Kgc‡¶ GK †gqv`Kvj wbevP‡b Ask MnY Kwi‡Z cwi‡e bv| GB miKviwU MwVZ nB‡e RvZxq msm‡` ¸i“ZcY Ae`vb iwLqv‡Qb A_vr wbqwgZ nvwRi _vwKqv weZKmn msm‡`i mKj KgKv‡Û Ask MnY Kwiqv‡Qb Ggb mKj m`m¨ evQvB Kwiqv MwVZ nB‡e| Zvnv‡`i g‡a¨ nB‡ZB GKRb‡K miKvi cavb Kiv hvB‡e| Zvnviv GKwU Aeva l MnY‡hvM¨ wbevPb Abôv‡bi e¨e¯nv Kwi‡eb|

wZwb AvIl e‡j b †h GKB mv‡_ wbevPb Kwgkb‡K kw³kvjx Kwi‡Z nB‡e| KviY wbevPb KwgkbB mvaviY wbevPb Abôv‡bi ¸i“ZcY KvR m¤úb Kwi‡e| c‡qvRbxq AvBb cYqb Kwiqv Kwgk‡bi kwl“ ew× Kwi‡Z nB‡e|

13| A¨vUbx-†Rbv‡ij c‡¶ e³e¨t

A¨vUbx-†Rbv‡ij g‡nv`q Avgv‡`i gw³h× l Zrci 1991 mv‡j MYZ‡š cZ¨veZ‡bi BwZnvm eYbv KiZt wZwb AvB‡bi kvmb l wePvi we fv‡Mi ¯vaxbZv m¤‡Ü e³e¨iv‡Lb|

cRvZš m¤‡Ü e³e¨ iwL‡Z hvBqv wZwb e‡j b †h 1990 mv‡j i †kl fv‡M wePvicwZ mvnvewÏb Avn†g` `j gZ wbwe‡k‡l mK‡j i Ab‡iv†a A¯vqx ivócwZi c` MnY K‡ib Ges †`‡k GKwU Aeva l wbi‡c¶ wbevPb Abwôz nq l †`‡k MYZš cbenvj nq| ivócwZ RvZxq msm` KZK wbevwPZ nb Kv‡RB wZwb †h AwbevwPZ

Zvnv ejv hvq bv| ZvnvQvov, mswevbB Zvnv‡K KZK¸wj ¶gZv c`vb Kwiqv‡Q, †hgb, cavbgšx I cavb wePvicwZ wb‡qvM c`vb| ZvnvQvov, 49 Ab‡"Q` Abmv‡i †h †Kvb `‡Ûi gvRbv, wej¤b I weivg gÄi Kwievi Ges †h †Kvb `Û gIKd, ¯wMZ ev nvm Kwievi ¶gZv ivócwZi iwnqv‡Q| Kv‡RB ivócwZi †Kvb ¶gZv bvB G K_v ejv hvq bv|

MYZš c‡k wZwb e‡jb †h evsjv‡`k iv‡ói Ab¨Zg gjbxwZ nBj MYZš Ges iv‡ói c‡Z¨KwU ¯‡i MYZš ivó e¨e¯v wbwðZ Kiv nBqv‡Q| Z‡e mswev‡bi 56(2) Ab‡"Q` e‡j AwbevwPZ e¨w³ I gšx c‡` wb‡qvM cvB‡Z cv‡ib Zvnvi weavb iwnqv‡Q| G cm‡½ wZwb msm`-m`m¨MY KZK wbevwPZ gwnjv m`m¨M‡YiI K_v D‡jL K‡ib|

GB †c¶vc‡U wZwb Aeva I wbi‡c¶ wbevPb Abôv‡bi Rb¨ AwbevwPZ Dc‡`óv wb‡qv‡Mi c‡qvRbxqZvi K_v D‡jL K‡ib|

wZwb e‡jb †h fvi‡Zi wbevPb Kwgkb Gi b¨vq evsjv‡`‡ki wbevPb Kwgk‡biI GKB ¶gZv I `vwqZ iwnqv‡Q wKš NUbv cev‡n †`Lv hvq †h evsjv‡`‡ki wbevPb Kwgkb wbevPb e¨e¯vcbvq fvi‡Zi wbevPb Kwgk‡bi b¨vq k³ fwgKv jB‡Z e¨_ nb| GB Kvi‡YB wb`jxq ZËveavqK miKvi c‡qvRb nBqv‡Q ewjqv wZwb Rvbvb|

mswevb ms‡kva‡bi Rb¨ Mb‡fv‡Ui c‡k wZwb e‡jb †h mswevb cÂg ms‡kvab †gvKvÏgv c`Ë iv‡qi c‡i D³ ms‡kvabx KZK AbxZ mswev‡bi 142 Ab‡"Q†`i ms‡kvabwU jß nBqv‡Q weavq MY‡fv‡Ui †Kvb ck Avi I‡V bv|

weÁ A¨vUbx †Rbv‡ij e‡jb †h †h‡nZ ZwKZ ms‡kvabwU Øviv wKQ bZb Ab‡"Q` ms‡hvRb Kiv nBqv‡Q gvÎ wKš we`¨gvb †Kvb Ab‡"Q` ev miKv‡ii aiY cwieZb Kiv nq bvB weavq Bnv ejv hvq bv †h ZwKZ Î‡qv`k ms‡kvab mswev‡bi Basic structure Gi †Kvb cwieZb NUvBqv‡Q|

wZwb Avi I e‡jb †h †h‡nZ msm`-m`m¨MY GKwU wbw`ó †gqv‡`i Rb¨ wbevwPZ nb Ges cavbgšx I gjZt GKRb msm`-m`m¨ wKš wZwb ivócwZi Ab‡iv‡a cieZx cavbgšx `vwqZ MnY bv Kiv chš D³ c‡` envj _vwK‡Z cv‡ib|

GKB hw³‡Z wZwb e‡jb †h †h‡nZ cavbgšx Zvnvi †gqv` cieZx wKQKvj mgq Zvnvi c‡` _vwKqv miKvi cwiPvjbv Kwi‡Z cv‡ib †h mg‡qi Rb¨ wZwb wbevwPZ b‡nb Kv‡RB Aeva I wbi‡c¶ wbevP‡bi ¯v‡_ AwbevwPZ Dc‡`óvMYI miKvi cwiPvjbv Kwi‡Z cv‡ib|

AvcxjKvix weÁ G¨vW†fv‡KU g‡nv`‡qi e³e¨ †h wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óv c‡` cavb wePvicwZ ev Aci †Kvb wePvicwZ wb‡qvM cvß nB‡j wePvi wefv‡Mi fvegwZ ¶b nB‡e GB e³‡e¨i mwnZ weÁ A¨vUbx-†Rbv‡ij wØgZ †cvlY K‡ib, Z‡e wZwb ¯xKvi K‡ib †h cavb Dc‡`óv c` Mn‡Yi m‡hvM _vwKevi Kvi‡YB cavb wePvicwZ Av‡jvwPZ/mgv‡jvwPZ nb|

14| **Amicus Curiae** c‡¶ e³e¨ t

(1) Rbve wU GBP Lvb, wmwbqi G¨vW†fv‡KU, Zvnvi hw³ Z‡Ki cvi‡¤ e‡jb †h nvB‡Kv‡U 4-8-2004 Zvwi‡L hLb eZgvb ZwKZ ms‡kvab m¤‡Ü ivq nq ZLbI cÂg ms‡kvab wel‡q ivq nq bvB, nvB‡Kv‡U D³ ivq nq 29-8-2005 Zvwi‡L I Avcxj wefv‡M ivq nq 1-2-2010 Zvwi‡L|

Rbve Lvb 1990 mv‡ji wW‡m¤‡ii c_‡g evsjv‡`‡ki ¶gZvi cU cwieZb I wePvicwZ kvnvewÏb Avn¤§` Gi A¯vqx ivócwZi `vwqZ Mn‡Yi NUbv cbtm¥iY Kwiqv e‡jb †h wZwbB Gwel‡q wePvicwZ kvnvewÏb Avn¤§‡`i mwnZ mv¶vr Kwiqv ivócwZi `vwqZ Mn‡Yi Rb¨ Ab‡iva Kwiqv wQ‡jb|

1996 mv‡j 15B †de“qvix Zvwi‡L AbwôZ GKZidv wbevP‡bi ci †`‡k cPÛ Aw¯iZv Avi¤ nB‡j Aa¨vcK W. e`i“‡ÏvRv †PŠaix

me Rbve wU.GBP Lvb, Rwgi DwÏb miKvi, L›`Kvi gvnee DwÏb, mvjvg ZvjK`vi mK‡j wgwjZ nBqv ZËveavqK miKv‡ii aviYv mwó K‡ib| wePvicwZ Rbve KÏm ‡PŠaix AvBbwUi Lmov c¯Z K‡ib| †`‡k ZLbKvi cPÛ Aw¯iZvi ‡c¶vc‡U Î‡qv`k ms‡kvab AvBbwU cYqb Kiv RbM‡Yi ¯v‡_ Aek¨ c‡qvRbxq nBqv cwoqvwQj| mvb‡›` mK†j Zvnv ZLb MnYI KwiqvwQj| †mB AvBbwUB GLb mswkøvab cwicwš ARnv‡Z A‰ea †NvlYvi †eAvBbx cv_Yv Kiv nBqv‡Q ewjqv Rbve Lvb `tL cKvk K‡ib|

wZwb e‡jb †h mswkøv‡bi †Kvb ms‡kvab nB‡Z cv‡i bv Ggb e³e¨ KLbB MnY‡hvM¨ nB‡Z cv‡i bv| MYZš GKwU we‡kl aviYv| Bnv‡K cKZ cùwUZ Kwi‡Z Aš`wó D`vi I cmvwiZ Kwi‡Z nq| wbi‡c¶ I ¯vaxb wbevPb e¨wZ‡i‡K MYZš Kíbv I Kiv hvq bv| MYZ‡ši mwnZ wbevPb A½v½x fv‡e RwoZ| MYZš‡K cKZ i“c`v‡bi Rb¨ wbevPb engine Gi b¨vq KvR K‡i|

AZtci, weÁ G¨vW†fv‡KU g‡nv`q Harold Lasky, Sir Ivor Jennings I Sir Winston Churchill nB‡Z MYZ‡ši msÁv D×Z Kwiqv e‡jb †h †`‡ki RbM‡Yi ¯v‡_ I MYZ‡ši ¯v‡_ Î‡qv`k ms‡kvab mswkøv‡bi mwnZ msh³ Kiv nBqvwQj|

MYZš I wbevP‡bi K_v ewj‡Z wMqv Rbve Lvb Sir Winston Churchill ‡K D×Z Kwiqv e‡jbt

> “At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper, no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.”

wZwb e‡jb ‡h MYZ‡ši Rb¨B mô I wbi‡c¶ wbevPb c‡qvRb Ges ‡mB D‡Ï‡k¨B GB ms‡kvabxwU Avbv nBqvwQj|

Rbve Lvb AviI e‡jb †h wePvicwZ Gg GBP ingvb I wePvicwZ jwZdi ingvb KZK cwiPvwjZ wbevPb¸wj meRbMvn¨ nBqvwQj|

AZtci, Rbve wU GBP Lvb, weÁ G¨vW†fv‡KU g‡nv`q Full Bench Gi wePvicwZ Rbve Rqbj Av‡ew`‡bi iv‡qi Dcmsnv‡ii w`‡K Avgv‡`i `wó AvKlYceK c_g PviwU wm×vš‡K (‡ccvi eK cô-96-97) mg_b KiZt e³e¨ iv‡Lb| cÂg wm×vš m¤ú‡K wZwb e‡jb †h msweavb (cÂg ms‡kvab) AvBb †gvKvÏgvq Avcxj wefv‡Mi ivq nBevi ci D³ ivq KvhKi nBqv‡Q Ges D³ ivq mv‡c‡¶ cÂg ms‡kvabx evwZj KvhKi nBqv‡Q awiqv jBqv ejv hvq ‡h 142 Ab‡”Q‡`i 1(K), 1(L) I 1(M) `dvq ewYZ MY‡fv‡Ui (referendum) `vex msµvš `iLv¯Kvixi e³e¨ evwZj nB‡e Ges Av`vj‡Zi cÂg wm×vš Abvek¨K nB‡e|

wZwb e‡jb †h gvbbxq cavbgšx ewjqv‡Qb †h kxNB msweavb ms‡kvab Kiv nB‡e|

wePvi wefv‡Mi ¯vaxbZv weN nIqv m¤‡Ü `iLv¯Kvixi wb‡e`‡bi ‡cw¶‡Z wZwb e‡jb †h 1991 mv‡ji mvaviY wbevPbmn wZbwU wbevPb evsjv‡`‡ki mv‡eK cavb wePvicwZMY mdjfv‡e cwiPvjbv KwiqvwQ‡jb|

wZwb e‡jb †h msweav‡bi PZ_ fv‡M 2K cwi‡”Q` ms‡hvRb, msweav‡bi basic structure cwieZb ev aŸsm ev msweav‡bi †Kvb weKwZ mvab K‡i bv| GB m‡½ wZwb e‡jb †h hw` beg-K fvM MYZš‡K ¶b bv Kwiqv _v‡K Z‡e 2K cwi‡”Q` I MYZš‡K ¶b K‡i bvB|

2004 mv‡j msweavb (PZ`k ms‡kvab) AvBb, 2004, gvidr 96(1) Ab‡”Q` ms‡kvab KiZt mcxg †Kv‡Ui wePviKM‡Yi PvKixi eqm 67 ermi chš ew× Kwievi mgv‡jvPbvi Rev‡e wZwb msweavb (PZ_ ms‡kvab) AvBb, 1975, gvidr 116 Ab‡”Q` ms‡kvab Kwievi mgv‡jvPbv K‡ib|

msweav‡bi c¯vebvi cwZ `wó AvKlY ceK wZwb e‡jb ‡h evsjv‡`k GKwU MYcRvZvwšK †`k| GLv‡b RbMY Zvnv‡`i wbevwPZ cwZwbwa gvidr Zvnv‡`i ¶gZv c‡qvM K‡i| GB Kvi‡Y wbevPbI

mswe av‡bi GKwU basic structure | wbevPb e¨wZ‡i‡K MYZš Kíbv I Kiv hvq bv| wbevP‡bi gva¨‡gB MYZš ARb Kiv m¤e|

wePviwZ mvnvewÏb Avn‡¤§`B cKZ c‡¶ ZËvavqK miKvi aviYvi c_ c`kK Ges †KnB Zvnvi cwiPvwjZ ckvmb P¨v‡jÄ K‡i bvB|

‡fvU wQbZvB †iva Kwievi Rb¨B ZËveavqK miKvi e¨e¯v MnY Kiv nBqwQj|

ZËveavqK miKvi e¨e¯v KZ ermi ejer _vKv DwPr ck Kwi‡j wZwb Zvr¶wYK Reve †`b †h cÂvk ermi|

RvZxq msm` fwOqv hvBevi ci ciB ZËveavqK miKvi `wqZ MnY K‡i|

RvgvZ-B-Bmjvg `j me mgqB ewjqv Avwmqv‡Q †h wbevPb Abôvb Kwievi Rb¨ GKwU cwZôvb c‡qvRb GB e³‡e¨i judicial notice jBevi Rb¨ Rbve Lvb AÎ Av`vj‡Zi wbKU Av‡e`b Rvbvb| ZvnvQvov, wZwb RvZxq msm` mswevb ms‡kvab Kiv chš AÎ †gvKvÏgvi ïbvbx ¯wMZ Kwi‡Z ev AšZ ivq ¯wMZ Kwi‡Z Av‡e`b Rvbvb|

gj mswev‡bi 95 Ab‡”Q‡` ivócwZ cavb wePviwZi mwnZ civgk Kwiqv Ab¨vb¨ wePviK‡K mcxg †Kv‡U wb‡qvM c`vb Kwi‡eb ewjqv wevb wQj wKš mswevb (PZ_ ms‡kvab) AvB‡b wePviK wb‡qv‡Mi †¶‡Î cavb wePviwZi mwnZ civg‡ki weavb eRb Kiv nBqv‡Q ewjqv Rbve Lvb wb‡e`b K‡ib|

Dcmsnv‡i Rbve wU GBP Lvb nvB‡KvU we fv‡Mi Full Bench Gi ivq envj Ges Avcxj LwiR Kwievi Rb¨ gZ cKvk K‡ib|

(2) W.Kvgvj †nv‡mb, wmwbqi G¨vW†fv‡KU, Zvnvi e³‡e¨i cvi‡¤ e‡jb †h GLv‡b mswevb we‡ePbvi Rb¨ Dc¯vcb Kiv nBqv‡Q (propounding the Constitution)| Avgv‡`i mswev‡bi Ab¨Zg †gŠwjK bxwZ evOvjx RvZxqZvev` Bnvi wfwË|

wZwb e‡j b †h mcxg †Kv‡Ui wePviK‡`i fxwZ ev AbM‡ni D‡a DwVqv ivq c`vb Kwi‡Z nB‡e| Avgv‡`i ivóxq Rxe‡b Avgiv A‡bK `tmgq (moments of darkness) AwZevwnZ KwiqvwQ wKš Avgiv KLbB AwePvi MnY Kwie bv| cwiev‡ii cwZ, mgv‡Ri cwZ Avgv‡`i `vwqZ iwnqv‡Q, iv‡ói cwZ Avgv‡`i mvsweavwbK `vwqZ iwnqv‡Q| msweavb mK‡ji Rb¨B Acwinvh| Avgv‡`i mvsweavwbK gj¨‡eva iwnqv‡Q| evOvjx RvwZqZvev` A_ AÜ ¯v‡`wkKZv (Chauvinism) b‡n| Bnv mv¤ú`vwqK RvwZqZvev` bq| msweavb AZxZ nB‡Z Ab‡ciYv cvBqv _v‡K| msweavb c‡YZvMY gj¨‡eva‡K m¤§vb Kwi‡Zb| msweavb gj¨‡ev‡ai Dci wfwË Kwiqv iwPZ nBqvwQj, A‡_i Dci wfwË Kwiqv b‡n| Bnvi GKwU HwZnvwmK gvÎv iwnqv‡Q|

GKB fv‡e MYZ‡šil gj¨‡eva iwnqv‡Q| msweav‡bi 7 Ab‡”Q` mgM msweav‡bi kw³ mÂviY Kwiqv‡Q| ÔRbMYÕ (people) k‡ãi A_ Avgv‡`i Abaveb Kwi‡Z nB‡e| iv‡ói ¯v‡_i mwnZ e¨w³MZ ¯v_ mgwbZ Kwi‡Z nB‡e|

msweav‡bi GKwU cweÎZv iwnqv‡Q| wbevP‡bi bv‡g Ab¨ wKQ NUvb nB‡Z‡Q| c‡Z¨KwU gvb‡liB A_, kw³, Pvc, wbcxob I A½xKv‡ii cfve g³ Ae¯vq wb‡Ri cQ›` gZ †fvU c`v‡bi AwaKvi iwnqv‡Q|

weÁ G¨vW†fv‡KU g‡nv`q 1990 mv‡ji 3iv wW‡m¤‡ii AmvaviY I NUbveûj Ae¯vi K_v m¥iY Kwiqv e‡jb †h ZLb GKw`‡K mvgwiK kvm‡bi m¤vebv Ab¨w`‡K mK‡ji wbKU MnY‡hvM¨ GKRb wbi‡c¶ ivócwZ c‡qvRb wQj| GBi“c ¸i“Zi mg‡q wePvicwZ mvnvewÏb Avn‡g` A¯vqx ivócwZi `vwqZ fvi MnY K‡ib| AZtci, msweavb I ivó i¶v Kwievi ¯v‡_ msweav‡bi GKv`k I Øv`k ms‡kvab Kiv nq|

wKš gv¸iv Dc-wbevPb GKwU DcvL¨vb, Bnv mKj wekvm‡hvM¨Zv nvivq| hvwšK fv‡e msweavb AbmiY Kwi‡j ewj‡Z nq †h GKwU ivR‰bwZK `j msL¨v Mwiô †fvU cvBqv Dc-wbevPbwU‡Z

Rq jvf Kwiqv‡Q| wKš cKZ c‡¶ Bnv GKwU bvggvÎ wbevPb wQj †hLv‡b 10% †fvUviMYI Ask MnY K‡i bvB| Bnv wQj GKwU AwZkq ¸i“Zi Ae¯v †hLv‡b msweav‡bi cweÎZv Ges MYZvwšK gj¨‡eva †jvc cvBqvwQj|

GBi“c cwiw¯wZ‡Z GKwU ZËveavqK miKvi gvidr wbevPb Abôvb Kwievi aviYv Rb¥jvf K‡i KviY wbevPb Kwgkb mô wbevPb Abôvb Kwi‡Z evi evi e¨_ nBqv‡Q|

msweavb GKwU Rxeš `wjj| Bnv †Kvb Acwikxwj Z ev hvwšK MbYv b‡n|

msweav‡bi 7 Ab‡”Q` cwZwbwaZkxj MYZ‡ši aviYv ev¯evqb Kwiqv‡Q| 1996 mv‡j lô RvZxq msm` msweavb (Î‡qv`k ms‡kvab) AvBb wewae× K‡i|

Î‡qv`k ms‡kva‡bi wfwË‡Z mv‡eK cavb wePvicwZ Gg GBP ingvb cavb Dc‡`óv nb Ges Zvnvi †bZ‡Z 23-6-1996 Zvwi‡L mßg RvZxq msm` wbevwPZ nq|

‡Kvb ivR‰bwZK `j‡K evPv‡bvi Rb¨ bq, msweavb‡K i¶v Kwievi Rb¨ Î‡qv`k ms‡kvab c‡qvRb nBqvwQj| Bnv Qvov ZLb Avi †Kvb Dcvql wQj bv Ges Zvnv Kiv nBqvwQj mKj `‡ji gZvbmv‡i|

GB chv‡q weÁ G¨vW†fv‡KU g‡nv`q Professor Amartya Sen wjwLZ ‘The Argumentative Indian’ M‡ši 12-13 côvi KZKvsk cwoqv †kvbvb Ges e‡jb †h mK‡ji m‡½ Av‡jvPbvB ZËveavqK miKvi aviYvi †hŠw³K wfwË| ZvnvQvov, msweav‡bi 7 Ab‡”Q` †emvgwiK kvm‡bi aviYvB †`q|

MYZš m¤‡Ü ewj‡Z wMqv W. Kvgvj †nv‡mb e‡jb Bnv ïagvÎ GKwU e¨vjU ev· I GKwU †fv‡Ui e¨vcvi bq| Zvnvi †_‡K I A‡bK wKQ †ekx| Bnv ïa msL¨v Mwi‡ôi welq bq| GKwU MYZ‡š mKj RbM‡Yi e³e¨ _wK‡Z cv‡i| GgbwK kZKiv GKfvM †jv‡KiI K_v ejvi AwaKvi Av‡Q, Zvnv‡`iI e³e¨ _wK‡Z cv‡i|

1948 mv‡j Z`vbxšb igbv †im‡Kvm gq`v‡b cwK¯v‡bi c_g MfYi †Rbv‡ij Rbve Gg G wRbvni e³Zv cm½ D‡jL Kwiqv weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h hLb wZwb D`B cwK¯v‡bi ivó fvlv nB‡e ewjqv †NvlYv K‡ib ZLb XvKv wekwe`¨vj‡qi K‡qK Rb QvÎ Ôbv bvÕ ewjqv wPrKvi Kwiqv D‡V| D³ cwZev`B wQj hvnv mwVK I b¨vq, Zvnvi GKwU m›`i mPbv| MYZvwšK Av‡›`vjb memg‡qB kvwšcY nIqv DwPr| miKvi MYgva¨g wbqšY Kwi‡Z Pvwn‡j I RbM‡Yi e³e¨B keY Kiv DwPr|

h_vh_ wbevPb Kwgk‡bi Abcw¯wZ‡Z mô wbi‡c¶ wbevPb m¤e b‡n, d‡j MYZš weKwkZ nB‡e bv|

MYcRvZvwšKZv m¤‡Ü weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h mswkøvab (Î‡qv`k ms‡kvab) AvBb, wKfv‡e mswkøv‡bi MYcRvZvwšK Pwi Î¶b K‡i Zvnv ewS‡Z wZwb A¶g|

wbevPb Abôvb inm¨gwÛZ nq KviY mK‡jB ¶gZvi Ace¨envi K‡i| Z‡e wZwb e‡jb †h Avgiv mvgwiK kvmb Pvwn bv, eiÂ, mô I wbi‡c¶ wbevP‡bi gva¨‡g wZwb bvMwiK ¯vaxbZvi †kôZ `vex K‡ib|

weÁ G¨vW†fv‡KU g‡nv`q mswkøv‡bi Pvi gjbxwZ D‡jL KiZt wb‡e`b K‡ib †h Bnvi AwZmijxKiY cwiZ¨vR¨| cKZ gge¯ nB‡Z‡Q mZ¨Kvi gj¨‡eva, BnvB wPi¯vqx|

Dr. Ambedkar Gi K_v D†jL Kwiqv wZwb e‡jb †h mvgvwRK MYZš, mgvRZš, mgZv, m¤§v‡bi mwnZ mgAwaKvi GB¸wjB nB‡Z‡Q mswkøv‡bi cKZ gjbxwZ|

weÁ G¨vW†fv‡KU g‡nv`q wb‡e`b K‡ib †h mswkøvab mwnsmZv eRb Kwiqv kvwšcY fv‡e mgZv ¯vcb K‡i|

`iLv¯Kvix c‡¶ DÌvwcZ e³e¨ †h ZwKZ ms‡kvabx MYZvwšK aviYv aŸsm Kwiqv‡Q Zvnv LÛb Kwiqv wZwb e‡jb †h D³ e³e¨ GKwU ‡mvMvb eB Avi wKQB b‡n|

wZwb e‡jb †h ZËveavqK miKvi wbevPb Kwgkb‡K mvnvh¨ mn‡hvwMZv K‡i djk“wZ‡Z wbevPb A‡bK †ekx mô I wbi‡c¶ nq| ZËveavqK miKvi e¨wZ‡i‡K †fvUvi‡`i cQ›`gZ †fvU c`v‡bi ¯vaxbZv _v‡K bv| wbevP‡b A‡_i GKwU weivU fwgKv _v‡K| ivR‰bwZK `j¸wj‡Z g‡bvbqb µq-weµq nq, GgbwK g‡bvqb jBqv wbjv‡gi b¨vq Ae¯v nq| wZwb e‡jb †h GgbwK cwjk evwnbxI wbevPb Kwgkb‡K c‡qvRbxq mn‡hvwMZv c`vb K‡i bv|

wZwb 1970 mv‡ji wbevPb‡K m¥iY Kwiqv e‡jb †h ZLb wbevP‡b g‡bvbqb wbjv‡g DwVZ bv wKš GLb `bxwZ GKwU we‡kl ûgwK e‡U| wZwb e‡jb †h g‡bvbqb cwµqvi ¯”QZv wbwðZ Kiv AwZkq c‡qvRbxq| ivR‰bwZK `j¸wji wbR¯ `jxq e¨e¯vcbv‡ZI ¯”QZv c‡qvRb hvnv‡Z Rbmvavi Y ivR‰bwZK `j¸wj‡Z mZZv I MYZš iwnqv‡Q †m m¤‡Ü wbwðZ nIqv hvq|

wZwb AviI e‡jb †h 2006 mv‡j mcxg †Kv‡Ui GKRb wePviK‡K cavb wbevPb Kwgkbvi wnmv‡e wb‡qvM c`vb Kiv nq| cieZx‡Z GK †KvwU wÎk j¶ fqv †fvUvi aiv c‡o|

eZgv‡b wbevPb Kwgk‡bi Avav-‰ePvwiK I Rbk•Ljv i¶vi ¶gZv iwnqv‡Q Z‡e ¶gZv AviI ew× Kwievi c‡qvRb iwnqv‡Q ewjqv weÁ G¨vW†fv‡KU g‡nv`q g‡b K‡ib| Î‡qv`k ms‡kva‡bi c‡i wb¯úwËKZ Masder Hossain †gvKvÏgvq AvB‡bi kvmb I wePvi wefv‡Mi ¯vaxbZvi c‡qvRbxqZvi K_v ejv nBqv‡Q ewjqv wZwb Rvbvb| wePvi wefv‡MI GKwU mwµq fwgKvi c‡qvRb iwnqv‡Q ewjqv wZwb g‡b K‡ib|

(3) Rbve iwdK Dj nK, wmwbqi G¨vW†fv‡KU, Zvnvi wjwLZ hw³ZK DÌvcb Kwiqv e‡jb †h 1994 mv‡j gv¸iv DcwbevPb cieZx Ri“ix Ae¯vi ‡c¶vc‡U RvZxq msm` 1996 mv‡j GKwU `j wbi‡c¶ ZËveavqK miKvi c×wZ mswea v‡bi PZ_ fv‡M 2q cwi‡”Q‡`i c‡i 2K cwi”Q` wnmv‡e ms‡hvRb K‡i|

weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h RvZxq msm` fvwOqv hvBevi ci wbevPb Abôvb Kwievi Rb¨ Avgv‡`i msweav‡bB GK ai‡bi ZËveavqK miKvi c×wZ we`¨gvb iwnqv‡Q wbevPb Abôvb bv nIqv chš Ges bZb cavbgšx Kvhfvi MnY bv Kiv chš msweav‡bi 56(4) I 57(3) Ab‡"Q‡`i Aax‡b msm` m`m¨ I cavbgšx ¯xq c‡` envj _v‡Kb| GB c×wZ‡KB GK ai‡bi ZËveavqK miKvi ejv hvq| wKš 1996 mv‡j AZ¨š m¼Ugq cwiw¯wZ‡Z wb`jxq ZËveavqK miKvi c×wZ ceZb Kiv nq| RvZxq msm‡`i wbevPb Abôv‡b RbMY Z`vbxšb miKv‡ii Dci Av¯v nvivBqv †dwjqvwQj weavq wb`jxq ZËveavqK miKvi MVb Kwievi c¯ve Kiv nBqvwQj| H mgq evsjv‡`k RvZxqZvev`x `j ¶gZvmxb wQj| RvZxq msm‡` GKwU mô I wbi‡c¶ wbevPb Abôv‡bi Rb¨ Ab¨vb¨ ivR‰bwZK `‡ji c¶ nB‡Z GKwU wb`jxq ZËveavqK miKvi ¯vc‡bi `vex wQj| mKj ivR‰bwZK `j wb`jxq ZËveavqK miKvi e¨e¯v Z‡Z GKgZ nIqvq mswkó AvBbwU wewae× Kiv nq| H mgq wb`jxq ZËveavqK miKvi e¨e¯vi c‡qvRb wQj wKš eZgv‡b Bnvi ¸i"Z ev c‡qvRb divBqv wMqv‡Q wKbv ZvnvB we‡ePbvi welq| wb`jxq ZËveavqK miKvi aviYv msweav‡bi gj ¯Z¤¸wji mwnZ mvsNwlK ewjqv mgv‡jvPbv Kiv nq| c_gZt wb`jxq ZËveavqK miKvi AwbevwPZ e¨w³‡`i Øviv MwVZ, wØZxqZt †h‡nZ, me‡kl Aemi cvß cavb wePvicwZ cavb Dc‡`óv nB‡eb, †m‡nZ Bnv wePvi wefv‡Mi fvegwZ ¶b Kwi‡Z cv‡i|

weÁ G¨vW†fv‡KU g‡nv`q wb‡e`b K‡ib †h cv_wgK chv‡q wb`jxq ZËveavqK miKvi mvd‡j¨i mwnZ Bnvi `vwqZ cvjb KwiqvwQj| wKš me‡kl 1/11 (2007 mvj) NUbvi cvi‡¤ wb`jxq ZËveavqK miKv‡ii bv‡g ivócwZ wb‡RB wb‡R‡K cavb Dc‡`óv wb‡qvM K‡ib Ges mvgwiK evwnbxi wb‡`‡k cieZx‡Z Zvnv cwieZb K‡ib| weÁ G¨vW†fv‡KU g‡nv`q m¤eZ 2007-2008 mv‡ji ZËveavqK miKv‡ii mg‡qi K_v ewjqv Avkv cKvk K‡ib †h Bnv

Avi KLbI cbivewË nB‡e bv Ges ZvnvQvov wb`jxq ZËveavqK miKvi m¤§‡Ü mveavbZvi K_v e‡jb|

AZci, weÁ G¨vW†fv‡KU g‡nv`q nvB‡KvU wefv‡Mi Full Bench Gi ivq Av‡jvPbv KiZt e‡jb †h 1996 mv‡j †h wb`jxq ZËveavqK miKvi c×wZi c‡qvRb AbfZ nBqvwQj, cwieZxZ cwiw¯wZ‡Z Zvnv Pvj _vwK‡e wKbv ZvnvB GLb ck| ZwKZ ms‡kvabwU †Kvb ms‡kvab bq Full Bench Gi †Kvb ‡Kvb weÁ wePvi‡Ki GB g‡Zi mwnZ wØgZ †cvlY Kwiqv wZwb e‡jb †h Î‡qv`k ms‡kvab Aek¨B mswewa‡bi GKwU ms‡kvabx wKš, wZwb e‡jb †h ck nB‡Z‡Q †h D³ ms‡kvabx mswewa‡bi ‡Kvb basic structure ¶b Kwiqv‡Q wKbv A_ev eZgvb †c¶vc‡U GB c×wZi c‡qvRbxqZv I ¸i“Z ¶b nBqv‡Q wKbv ZvnvB we‡eP¨|

weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h hw` I Î‡qv`k ms‡kva‡bi ci A‡bK w`b AwZewnZ nBqv‡Q wKš mô I wbi‡c¶ wbevPb, hvnv GKwU MYcRvZvwšK iv‡ói Rb¨ GKvš Acwinvh, Zvnv mswewa‡b i¶Y Kiv GLbI c‡qvRb iwnqv‡Q|

Z‡e Î‡qv`k ms‡kvab AvB‡b wb`jxq ZËveavqK miKv‡i cavb wePvicwZ I Ab¨vb¨ wePviKM‡Yi cavb Dc‡`óv wnmv‡e wb‡qv‡Mi wewa‡bi Kvi‡Y RbM‡Yi g‡b m‡ev”P Av`vjZ nB‡Z ¯vaxb, b¨vh¨ I wbi‡c¶ wm×vš c`v‡bi e¨vcv‡i RbM‡Yi g‡b Avk¼vi D‡`K nB‡Z cv‡i|

weÁ G¨vW†fv‡KU g‡nv`q Avk¼v cKvk K‡ib †h Avgiv Avgv‡`i ˆeVKLvbvq Av‡jvPbv Kwi ‡h †Kvb cavb wePvicwZ ev wePvicwZ whwb me‡kl Aemicvß cavb wePvicwZ nB‡eb wZwb wbi‡c¶ fv‡e Zvnvi `vwqZ cvjb Kwi‡Z‡Qb bv A_ev †Kvb wePvicwZ Kvnv‡K AwZ µg Kwi‡Z‡Qb (Supersede) hvnv‡Z wZwb me‡kl Aemicvß cavb wePvicwZ nBqv wb`jxq ZËveavqK miKvi cavb nB‡Z cv‡ib| GB ai‡bi Avk¼v m‡ev”P Av`vj‡Zi cwZ RbM‡Yi m¤§vb‡eva ¶b Kwi‡Z cv‡i| †h mKj wePviKM‡Yi me‡kl cavb

wePvicwZ nBevi m¤ebv iwnqv‡Q Zvnviv nq‡Zv GB c‡`i Rb¨ G‡Kev‡iB cfvweZ bb wKš RbM‡Yi g‡b GB Avk¼v memgq _vwK‡Z cv‡i †h wePvicwZ 'X' ¶gZvkxb `‡ji ¯v_ msi¶Y Kwi‡Z‡Qb KviY wZwb cavb wePvicwZ Ges mvaviY wbevP‡bi c‡e me‡kl Aemicvß cavb wePvicwZ nB‡Z Pv‡nb| cKZ c‡¶ Bnv cZxqgvb nq †h Avcxj wefv‡Mi GKRb ‡Rô¨ wePvicwZ‡K AwZµg Kiv nBqvwQj Ges GKRb Kwbô wePviK‡K cavb wePvicwZ wb‡qvM Kiv nq| Bnv nq‡Zv m¤úYfv‡e †hvM¨Zvi wfwË‡Z nB‡Z cv‡i wKš RbMY g‡b K‡i, †h miKvi ¶gZvq Av‡Q Rbve 'X' cavb Dc‡`óv wnmv‡e Zvnv‡`i cwiKíbv mdj Kwi‡e, mZivs 'X' hvnvi Dci `jxq e¨w³i"‡c Zvnv‡`i Av¯v I wekvm iwnqv‡Q, wZwb 'Y' †K AwZµg (Supersede) K‡ib| RbM‡Yi g‡b GB ai‡bi Avk¼v MnY‡hvM¨ bq, Kvg¨I bq|

weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h Z‡e wb`jxq I ZËveavqK miKv‡ii GLbI c‡qvRbxqZv iwnqv‡Q, KviY ¶gZvkxj `j ev cavb we‡ivax`j mwVK c‡_ AvPiY Kwi‡Z‡Qb bv| †Kvbiƒc m¤§vb‡eva e¨wZ‡i‡K Zvnviv ci¯úi‡K mgv‡jvPbv Kwi‡Z‡Qb| weÁ G¨vW†fv‡KU g‡nv`q Avk¼v cKvk K‡ib †h Bnv AwZkq cwi¯‹vi ‡h hw` m‡ev"P Av`vjZ Î‡qv`k ms‡kvab‡K A‰ea †NvlYv K‡i, Zvnv nB‡j evsjv‡`k RvZxqZvev`x `j wbevP‡b Ask MnY Kwi‡e bv | wZwb Aek¨ g‡b K‡ib †h wePviK‡`i cavb Dc‡`óv ev Dc‡`óv nIqv DwPr bq|

weÁ G¨vW†fv‡KU g‡nv`q G m¤ú‡K wbæwjwLZ PviwU c¯ve K‡ib t

(i) Before dissolution or expiry of Parliament, the party in power and the opposition party in the Parliament shall nominate 3 or 5 persons each whom they think are eligible to become Chief Adviser or Adviser of the Non-party Caretaker Government.

(ii) Three retiring last Chief Justices of Bangladesh shall nominate one of them from the panel of persons nominated as above to be the Chief Adviser.

(iii) The Chief Adviser should then request the party in power and the opposition party to suggest names from whom he can appoint Advisers of the Non-party Caretaker Government. Both parties may give 10 names each and from these 20 names the Chief Adviser shall appoint the advisers of the Non-party Caretaker Government. May be there are common names.

(iv) And it should be clearly stated that the Non-party Caretaker Government shall complete the election of the Parliament within 90 days from the dissolution of Parliament. This is required to be mentioned so that 1/11 is not repeated.

weÁ G¨vW‡fv‡KU g‡nv`q g‡b K‡ib †h Dc‡iv³ fv‡e hw` wb`jxq ZËvavqK miKvi MwVZ nq Zvnv nB‡j Zvnviv RbM‡Yi cwZwbwa bb ewjqv †Kn mgv‡jvPbv Kwi‡Z cwi‡e bv (Zvnviv wbewPZ cwZwbwa bv nB‡j I wbewPZ cwZwbwaMY`viv g‡bvbxZ)| hw` GB fv‡e me`jxq ZËveavqK miKvi MwVZ nq Z‡e wZwb g‡b K‡ib †h wePvi wefvM iv‡ói kvmb e¨e¯v cwiPvjbv Kwi‡Z‡Q Ges/A_ev Zvnviv RbM‡Yi cwZwbwa bb, GB ai‡bi mgv‡jvPbv Kwievi m‡hvM KgB _v‡K| AvR I mvaviY gvbl g‡b K‡i, †h miKvi ¶gZvq iwnqv‡Q Zvnv‡`i ZËveav‡bi cwie‡Z ïagvÎ wb`jxq ZËveavqK miKv‡ii ZËveav‡b mô I wbi‡c¶ wbevPb Abwô Z nB‡e|

weÁ G¨vW†fv‡KU g‡nv`q g‡b K‡ib †h Bnv `fvM¨RbK| Bnv AvZ¥Aegvbbv Ki| hw` I ¶gZvkxb`j 5(cvP) ermi miKvi cwiPvjbv Kwi‡Z cv‡i, Bnv RvZxq msm‡`i wbevPb Abôvb Kwi‡Z cv‡i bv| Avgv‡`i †`‡k Ggb Ae¯v †h Kvnv I †Kvb Av¯v Ac‡ii Dci bvB| wb‡R‡`i g‡a¨ mK‡jiB Awekvm| mZivs, Ggb GKwU c_ ewnni Kwi‡Z nB‡e †h hvnv‡Z wb`jxq ZËveavqK miKvi e¨e¯v eRvq _v‡K wKš GKB m‡½ wePvi wefv‡Mi mivmwi m¤ú³Zv Govb m¤e, Ab¨_vq RbM‡Yi g‡b wePvi wefv‡Mi ¯vaxbZv jBqv ck DwV‡Z cv‡i|

weÁ G¨vW†fv‡KU g‡nv`q Zvnvi wjwLZ e³‡e¨i †kl fv‡M ¯xKvi K‡ib †h wb`jxq ZËveavqK miKvi aviYv Avgv‡`i mswkøv‡bi gj KvVv‡gv ev ¯‡¤i mwnZ mvgÄm¨cY bq| wKš

cwiewZZ cwiw¯wZ‡Z evsjv‡`‡k AvB‡bi kvmb I MYZ‡ši Rb¨ GiKg GKwU miKvi mn¨ Kwi‡Z nq| me‡kl Aemicvß cavb wePvicwZi ‡h‡nZ evsjv‡`‡ki cavb Dc‡`óv nBevi K_v wQj ïagvÎ †mB Kvi‡Y 1/11 Gi mgq miKv‡ii †Kgb Ae¯v nBqvwQj Zvnv mK‡jB Rv‡b| fwel¨‡Z GB i∫c NUbv Avevi NUK Zvnv †KnB Pv‡nbv| mK‡jB mô I wbi‡c¶ wbevPb Pvq hvnv e¨wZZ MYZš cwZôv m¤e bq| wZwb e‡jb †h Bnv Avgv‡`i Dcjwä †h wb`jxq ZËveavqK miKvi Avgv‡`i Aek¨ c‡qvRbxq wKš Bnv Ggb fv‡e cbMVb c‡qvRb hvnv‡Z iv‡ói ckvm‡b wePvi wefv‡Mi mivmwi m¤ú³ Zv _vwK‡e bv|

(4) W. Gg.Rnxi, wmwbqi G¨vW‡fv‡KU, g‡nv`q e‡jb †h evsjv‡`k e¨wZZ cw_exi †Kv_vI AwbevwPZ ZËveavqK miKv‡ii aviYv cvIqv hvq bv| AštZ wZb gvm GKRb AwbevwPZ e¨wI“ Z_v me‡kl Aemicvß cavb wePvicwZ whwb msweav‡bi Av‡jv‡K Aem‡i wMqv‡Qb, wZwb †`k cwiPvjbv Kwi‡eb| GB aviYvwU Avgv‡`i mKj ivRbxwZwe`‡`i Ges wbevwPZ miKv‡ii mZZvi Dci Kvwjgv †jcb Kwiqv‡Q| ZIveavqK miKvi c×wZ GB aviYvB c`vb K‡i †h, mKj ivR‰bwZK `jB Amva Ges Zvnv‡`i Dci GKwU wbi‡c¶ wbevPb cwiPvjbv Kwievi wbwgË Av¯nv ivLv hvq bv| ¯xKZ g‡ZB hw` AmZZvi ARnv‡Z GKwU Aeva wbi‡c¶ wbevPb cwiPvjbvi Rb¨ Zvnv‡`i Dci Av¯nv ivLv m¤fe bv nq Zvnv nB‡j †`k cwiPvjbvi Rb¨ wKfv‡e Zvnv‡`i Dci Av¯nv ivLv hvq ? cw_exi †Kv_vI wbevPb cm‡½ ivR‰bwZK‡`i cwZ AmZZvi Ges Awek¯ZZvi Ggb mij ¯xKv‡iwI“ Avi bvB| ivR‰bwZKMY Ges `j¸wj Amr Ges wbevP‡bi mgq Zvnvw`M‡K ¶gZvi kx‡l ivLv hvq bv-Bnv awiqv jIqv A‡hŠwI“K|

msweav‡bi 7 Ab‡”Q`wU gj touchstone| Bnv‡Z ejv nBqv‡Q †h, msweavb RbM‡Yi Avkv AvKvsLvi ewntcKvk Ges ZvnvivB cRvZ‡ši mKj ¶gZvi gvwjK| GB Av`vj‡Zi wewfb ivq Øviv

AvBb I mswea v‡bi wewfb weavb‡K evwZj Kwiqv GB Ab‡”Q` mcwZwôZ Kiv nBqv‡Q|

wb`jxq ZIveavqK miKvi msµvš weavbmgn, Chapter IIA Ges 141(K), (L) I (M) Ab‡”Q` GKwU wec`¾bK mwb‡ek hvnv MYZš Ges AvB‡bi kvmb‡K ZIveavqK miKvi Øviv Awbw`óKv‡ji Rb¨ weP¨Z Kwiqv ‡dwj‡Z cv‡i| Bnvi AwfÁZv mv¤úwZK AZx‡Z 2007-08 mv‡j nBqv‡Q| MYZ‡ši GB weP¨wZ mswea v‡bi Î‡qv`k ms‡kvabxi cZ¨¶ dj| hw` †Kvb enr ivR‰bwZK `j g‡b K‡i †h †Kvb wbw`ó Aemicvß cavb wePvicwZ cwURvb Ges GB ARnv‡Z wbevPb eqKU Kwiqv e‡m, Z‡e GB mgm¨v wbim‡bi Dcvq Kx? Ggb wK cieZx cavb wePvicwZ‡K I GB AvcwËi m¤§Lxb nBevi AvksKv _v‡K|

Ab¨‡`k, we‡klZt cwZ‡ekx fvi‡Z wbevPb Kwgkb‡K kw³kvjx I ¯vaxbfv‡e Mwoqv †Zvjv nBqv‡Q Ges ‡mLv‡b wbi‡c¶ e¨w³eM‡K wbevPb Kwgkb MV‡b evwQqv jIqv nq| Avgv‡`i eZgvb wbevPb Kwgkb †Kej 2008 mv‡ji mvaviY wbevPbB m¤úb K‡i bvB ¯vbxq wbevPb mgnI cwiPvjbv Kwiqv‡Q hvnvi Øviv Kwgkb ¯”QZv I wbi‡c¶Zv cgv‡Y m¶g nBqv‡Q| hw`I wbR cv_x civwRZ nBevi ARnv‡Z Kwgkb Dfq enr `j KZK XvjvIfv‡e mgv‡jvPZ nBqv‡Q| Bnv wbi‡c¶Zvi GKwU cKZ wb`kb| Bnv wbwðZ †h Avgiv GLbI fvi‡Zi b¨vq gReZ MYZš I AvB‡bi kvmb cwZôvq m¶g nB bvB| Avgv‡`i †`‡k mKj wKQ GZUvB ivRbxwZKiY Kiv nBqv‡Q †h cavb wePvicwZ‡K ivRbxwZi I weZ‡Ki D‡× ivLvi aviYvwUI cwiZ¨vM Kiv nBqv‡Q| evsjv‡`‡ki c‡Z¨KwU bvMwi‡KiB wbR¯ ivR‰bwZK gZ iwnqv‡Q Ges ivRbxwZi RM‡Zi cvwP‡ji Dfq cv‡ki e¨w³MY wekvm K‡ib †h cavbwePvicwZmn c‡Z¨‡KB GKB gvbwmKZv †cvlY K‡ib A_vr ivR‰bwZK c¶cvZ †`v‡I `ó|

msweav‡bi 58O Ab‡”Q` c`Ë¶gZv e‡j ivócwZ Ri“ix Ae¯v †NvlYv Kwi‡Z cv‡ib- Bnvi Rb¨ cavbgšxi cwZ¯v¶‡ii

c‡qvRb nq bv| hvnvi d‡j 1/11 mwó nq| 1/11 Gi d‡j m¤ve¨ i³øvb Gi nvZ nB‡Z †`k i¶v cvBqv‡Q Ges wbevPbx fwgKvI h_vh_ wQj| Z_vwc Bnv cgvY nBqv‡Q †h, Î‡qv`k ms‡kvavbxi Ace¨envi ‡Kvb ZZxqc¶ Kwi‡Z cv‡i Ges Zvnviv Awbw`ó Kv‡ji Rb¨ ¶gZv AvKovBqv _vwK‡Z I cv‡i|

GLv‡b 1/11 ewj‡Z weÁ G¨vW†fv‡KU g‡nv`q 2007 mv‡ji 11B Rvbqvix Zvwi‡L †NvwlZ Riƒix Ae¯nv Ges ZrcieZx cvq `B ermi kvmbKvj eSvBqv‡Qb|

wb`jxq ZËveavqK miKvi c×wZ Rbg‡b wePvi wefv‡Mi fvegwË‡K ¶wZM¯ Kwi‡Z cv‡i; miKv‡ii c‡¶ Av`vjZ nB‡Z †Kvb ivq nB‡j GK ai‡bi mgv‡jvPbv nB‡Z cv‡i| Bnv Avgv‡`i‡K Rb¨ i“Z m¤úb Av‡iKwU c‡ki m¤§Lxb K‡i- GB c×wZ †PŠÏ ermi awiqv Pwjqv Avwm‡Z‡Q Ges †Kvb ivR‰bwZK `jB wbevP‡b Aci `‡ji mvaviY wbevP‡b cfvweZ bv Kivi wel‡q Av¯vkxj bq- Ggb GKwU cwiw¯wZ‡Z GB Av`vjZ hw` Î‡qv`k ms‡kvabx evwZj Kwiqv †`q Zvnv nB‡j wK nB‡e? mswea v‡b ewYZ MYZ‡ši gZ †gŠwjK KvVv‡gvi mwnZ AmvgÄm¨ weavb mgn evwZj Kwievi ¶gZv GB Av`vj‡Zi iwnqv‡Q| wKš AvBb cYqb ev mswea v‡b †Kvb wKQ ms‡hvR‡bi ¶gZv bvB| GB ixU wcwUkbwU hLb `v‡qi Kiv nq ZLbI 1/11 NUbvwU N‡U bvB| wKš GB ixU wcwUk‡b †h AvksKv e¨³ Kiv nBqv‡Q Zvnv cieZx NUbvi Øviv †hŠw³K cgvY nq| 1/11 Gi KkxjeMY `B erm‡iiI AwaK mgq awiqv ¶gZvq wQj hvnv Zvnv‡`i Kiv DwPZ nq bvB | weÁ G¨vW†fv‡KU g‡nv`q AvksKv cKvk K‡ib †h, cieZx 1/11 wfb PwiÎ jBqv Av‡iv `xN mg‡qi Rb¨ Awm‡Z cv‡i| Aek¨B MYZš msi¶‡Yi GKUvB Dcvq Avi Zvnv nBj RbM‡Yi MYZwšK †eva-†hgbwU iwnqv‡Q cwðgv †`k¨wj‡Z ev fvi‡Z|

GB Ae¯v nB‡Z DËi‡Yi GKgvÎ Dcvq nBj ¯Zš Z_v c_K ev‡RU m¤wjZ GKwU kw³kvjx wbevPb Kwgkb| ivRbxwZwe`,

miKwi Avgjv Ges wePviKe›`‡K wbR wbR †¶‡Î `jgZ Ges e¨w³ ivR‰bwZK cQ‡›`i D‡× _vwKqv KvR Kwi‡Z nB‡e| hvB‡nvK, GKRb Aemi cvß cavb wePvicwZ nq‡Zv ev wZb gv‡mi Rb¨ miKvi cwiPvjbv Kwi‡j-wZwb A_ev Zvnvi †Kvb Dc‡`óv wK mgM ‡`‡k wbevPb Kwgk‡bi KgKv‡Ûi Dci n¯‡¶c Kwi‡Z cv‡ib? cavb Dc‡`óvi †bZ‡Z MwVZ ZËveavqK miKvi `kK ev `šnxb e¨vN e¨wZZ wKQB b‡n| wbevPb Kwgkb Ges Zvi KgKZve›` wbevPb cwµqv cwiPvjbv Kwi‡eb| AwbewPZ ZËveavqK miKvi wZb gv‡mi g‡a¨ GKwU mô wbevPb m¤úb Kwi‡eb Bnv GKwU Acwic° aviYv e‡U|

GB †¶‡Î Avgiv †ejwRqv‡gi `óvš j¶¨ Kwi‡Z cvwi| †mLv‡b GKwU ZËveavqK miKvi 270 w`‡bi †ekx mgq awiqv ¶gZvq wQj| Ae‡k‡l ivRbxwZKMY‡K GKwU miKv‡ii wel‡q GKgZ Kwievi Rb¨ †m‡`‡ki RbMY iv¯vq bvwgqv AvwmqvwQj| KZK AcPwjZ c×wZ‡Z Zvnviv cwZev` I cPvibv PvjvBevi †KŠkj MnY KwiqvwQj|

A‡ówjqvi ÔÔZËveavqK miKviÕÕ ewj‡Z MfYi KZK cvjv‡g›U fvw½qv w`evi ci nB‡Z mvaviY wbevPb Abôvb chš miKvi‡K eSvBqv _v‡K| wbevP‡bi c‡il ¯í mg‡qi Rb¨, hZ¶Y chš cieZx gšxmfv wbh³ bv nB‡e GB miKvi ¶gZvq _vwK‡Z cv‡i| †mB †`‡k †Kvb c_K ÔÔZËveavqK miKviÕÕ wbhw³i c‡qvRb nq bv| we`¨gvb miKviB wbQK *“Caretaker mode”* G Pwjqv hvq| 1975 mv‡j A‡ówjqvi mvswevwbK msKUKv‡j MfYi †Rbv‡ij m¨vi Rb †Ki GKwU ZËveavqK miKvi g¨vjKg †dRv‡ii †bZ‡Z MVb Kwiqv †`b| kZ wQj †h Awej‡¤ mvaviY wbevP‡bi †NvlYv †`lqv nB‡e Ges GB miKviwU ZËveavqK wnmv‡e KvR Kwi‡e| cwiw¯wZ Abmv‡i Bnv wQj GKwU PgrKvi mgvavb|

“Guidance on Caretaker Conventions” kxlK GKwU `wjj Øviv gšx cwil‡`i `ßi nB‡Z Bnv cwiPwjZ nBqv _v‡K| GB ZIveavq‡Ki

weavbvejx mwbwÏ ófv‡e ewjqv w`‡Z‡Q †h, msm` fvw½qv hvBevi c‡i miKv‡ii KvhG“g Aek¨B PvjvBqv hvB‡Z nB‡e Ges ^`bw›`b ckvmwbK welq¸wj Aek¨B aZ‡e¨i g‡a¨ Avwb‡Z nB‡e| hvB‡nvK, ZIveavqK msµvš †iIqvR ZIveavqK miKv‡ii Dci KZK wewawb‡la Av‡ivc K‡i| D`vniY ¯i“c ejv hvq †h, Ri“ix welq e¨ZxZ miKviwU †Kvb ¸i“Zi bxwZwbaviYx wel‡q wm×vš MnY Kwi‡Z cvwi‡e bv| miKvix †Kvb D”Pc‡` wb‡qvM c`vb Kwi‡e bv| †Kvb cKvi eo iK‡gi PwI“‡Z Ave× nB‡e bv ev cwZk“wZe× nB‡e bv; mKj cKvi AvšRvwZK mg‡SvZv †gqv`v‡ši Rb¨ wcQvBqv w`‡e|

weÁ G¨vW†fv‡KU g‡nv`q wb‡e`b K†ib †h, wb`jxq ZIveavqK miKv‡ii c×wZwU msm`xq MYZvwšK miKv‡ii wei“‡× hvq| wbevwPZ miKv‡ii ØvivB †`k cwiPvjbv Kiv msG“vš RvwZi cZ¨vkv‡KB †Kej GB Î‡qv`k ms‡kvabx AKvhKix K‡i bv- wePvi wefvM‡KI weZ‡K RovBqv †d‡j| miKvi KZK wbevPb cwiPvjbvq Ace¨envi GovBevi Rb¨ Zvnvi m¯có c¯Zve nBj-GKwU AvPiYwewamn A‡÷wjqv Ges cwðgv †`kmg‡ni b¨vq ZIveavqK miKvi evsjv‡`‡kI ceZb Kiv hvB‡Z cv‡i| GB iKg wbQK ^`bw›`b Kvhvejx cwiPvjbvi weavb Aek¨ Î‡qv`k ms‡kvabx‡ZI wQj| wbevPb Kwgkb‡K mevZ¥K ¶gZv c`vb Ges B‡jKUwbK †fvUvi ZvwjKv c¯ZZ Kwievi Rb¨ weÁ G¨vW‡fv‡KU g‡nv`q gZ c`vb K‡ib|

(5) Rbve Gg Avwgi-Dj Bmjvg, wmwbqi G¨vW†fv‡KU, c_‡gB mswevab cÂg ms‡kvab †gvKvÏgv Gi cm½ DÌvcb Kwiqv e‡jb †h D³ iv‡qi †cw¶‡Z mswev‡bi †Kvb weavb cwieZ‡b MY‡fv‡Ui Avi c‡qvRb bvB|

Zrci weÁ G¨vW†fv‡KU g‡nv`q mswev‡b c¯vebvi cvi‡¤i cwZ `wó AvKlb Kwiqv e‡jb †h mswevbwU RbM‡Yi mswevab Ges GB evsjv‡`k iv‡ói gvwjK evsjv‡`‡ki RbMY|

wZwb e‡j b †h GKwU mô wbevPb Abôv‡bi Rb¨ GKwU mwVK †fvUvi Zvwj Kv c‡qvRb nq wKb 2006 mv‡j wbevPb Kwgkb †fvUvi Zvwj Kv mwVK fv‡e nvj bvMv` Kwi‡Z m¤úY e¨_ nq, ei Â †fvUvi Zvwj Kv AmsL¨ fqv †fvUv‡i cwicY wQj | BwZg‡a¨ Z`vbxš b gnvgvb¨ ivócwZ Zvnvi mvsweavwbK Ae¯nvb I `vwqZ-KZe¨ wem¥Z nBqv wb‡RB cavb Dc‡`óvi c` MnY K‡ib | Zvnvi D³ c`‡¶c nvB‡KvU we fv‡M P¨v‡j Á Kiv nq | wKš cavb wePvicwZ Zvnv ¯nwMZ K‡ib |

wZwb wePvicwZ Holmes ‡K D×Z Kwiqv e‡j b †h The life of the law has not been logic; it has been experience |

wZwb mswea vb m¤‡Ü e‡j b †h Bnv GKwU Social contract | Universal Declaration of Human Rights, 1948, Gi †NvlYvi cwZ `wó AvKlY ceK wZwb e‡j b †h c‡Z¨KwU bvMwi‡Ki wb‡Ri miKvi cQ› ` Kwievi AwaKvi iwnqv‡Q | 1971 mv‡j i 10B Gwc‡j i Proclamation of Independence GB AwaKv‡i i Dci wfwË KwiqvB †NvwlZ nBqvwQj | GB mveRbxb †fvUvwaKvi Aeva I wbi‡c ¶ wbevP‡bi Dci wbfikxj | GB Aeva I wbi‡c ¶ wbevPb I mswea v‡bi GKwU basic structure |

weÁ G¨vW†fv‡KU g‡nv`q AZtci ivR‰bwZK b¨vq wePv‡i i K_v e‡j b | wZwb e‡j b †h ivR‰bwZK b¨vq wePv‡i i Rb¨B Aeva I wbi‡c ¶ wbevPb c‡qvRb | †fvUvi Zvwj Kvq bvg DVv‡bv GKwU bvMwiK AwaKvi |

weÁ G¨vW†fv‡KU g‡nv`q Anwar Hossain V. Bangladesh †gvKv Ï gvi iv‡qi cwZ `wó AvKlbceK e‡j b ‡h evsjv‡`k ivó GKwU MYcRvZvwš K ivó | G cm‡½ wZwb mswea v‡bi c¯vebv, 8 I 11 Ab‡”Q‡`i cwZ `wó AvKlY K‡ib |

wZwb ivR‰bwZK e¨_Zvi KviY wnmv‡e AvB‡bi kvm‡bi Abcw¯wZ‡KB `vqx K‡ib |

wZwb e‡j b †h A‡bK †`‡kB wbevPb Kvjxb mg‡qi Rb¨ AšeZxKvjxb miKvi iwnqv‡Q hvnv cwZwbwaZkxj miKvi bq | H

mKj †`‡k wbevwPZ m`m¨MYB DI“ AšeZxKvjxb miKv‡i _v‡Kb e‡U wKš H mg‡qi Rb¨ wbevwPZ msm` m`m¨ wnmv‡e miKvi cwiPvjbv K‡ibbv,Zvnviv Zvnv‡`i ÔwbevwPZÕ ‡hvM¨Zv ev ˆewkó¨ cwiZ¨vM KiZt AšeZxKvjxb miKv‡ii m`m¨ wnmv‡e H wbevPbKvjxb mg‡qi Rb¨ miKvi cwiPvjbv K‡ib|

wbevP‡bi c‡e me‡kl cavb wePvicwZi cavb Dc‡`óv c‡` wb‡qvM cm‡½ wZwb wePvi wefv‡Mi fvegwZ †h ¶b nB‡Z cv‡i Zvnv A¯xKvi Kwi‡Z cv‡ib bvB|

gv¸iv Dc-wbevPb m¤ú‡K weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h wbevPb Kwgkb AvB‡bi kvmb AbmiY Kwi‡Z e¨_ nBqvwQj| cavb wbevPb Kwgkbvi GgbwK gv¸iv nB‡Z Pwjqv Avwm‡Z eva¨ nBqvwQ‡jb| 1996 mv‡ji 15B †de“qvix Zvwi‡L AbwôZ lô RvZxq msm‡`i wbevP‡b GKwU gvÎ ivR‰bwZK `j Ask MnY Kwiqvwaj| GB Kvi‡YB RbMY wb`jxq ZZveavqK miKv‡ii Rb¨ msMvg Kwiqvwaj Ges GB msMvg wQj cKZc‡¶ MYcRvZvwšK miKvi cbtcwZôvi j‡¶| wb`jxq ZËveavqK miKv‡ii gva¨‡g wbevPb KiZt MYcRvZvwšK miKvi cwZôv m¤e nBqvwQj|

weÁ G¨vW†fv‡KU g‡nv`q D‡jL K‡ib †h mô, Aeva I wbi‡c¶ wbevP‡bi gva¨‡gB gvbl †fvUvwaKvi wdwiqv cvB‡Z cv‡i I cKZ MYZš cwZwôZ nB‡e Ges msweav‡bi 7 Ab‡”Q` Gi D‡Ïk¨ md j nB‡e|

wZwb AviI e‡jb †h GKwU wbi‡c¶ miKvi e¨wZ‡i‡K †`‡ki Avgjv Z š‡K mwVK c‡_ cwiPvjbv Kiv m¤e bq|

Dcmsnv‡i wZwb e‡jb †h eZgvb wb`jxq ZËveavqK miKvi e¨e¯vq †h mg¯ dvK‡dvKi iwnqv‡Q Zvnv `wifZ Kwievi c‡qvRb iwnqv‡Q|

wZwb g‡b K‡ib †h MYZ‡ši ¯v‡_ GLbI ZËveavqK miKv‡ii c‡qvRb iwnqv‡Q Ges ZwKZ mswevab Î‡qv`k ms‡kvab AvBbwU ˆea|

wKš 2007 I 2008 mv‡ji ZËveavqK miKvi e¨wZ‡i‡KI 3 (wZb) gv‡mi Rb¨ ZËveavqK miKvi †gqv`Kvjxb mg‡q evsjv‡`‡k MYZwšK I cRvZwšK ivó e¨e¯v _v‡K wK bv GB ck wZwb GovBqv hvb|

(6) gvng`j Bmjvg, wmwbqi G¨vW†fv‡KU, g‡nv`q wb‡e`b K‡ib †h, Î‡qv`k ms‡kvabxwU mswea v‡bi PviwU †gŠwjK ˆewk‡ó¨i mwnZ Z_v cRvZwšK ‰ewkó¨, MYZš Ges wePvi wefv‡Mi ¯vaxbZvi mwnZ AmvgÄm¨cY (ultra vires) g‡g P¨v‡jÄ Kiv nBqv‡Q|

wZwb wb‡e`b K‡ib †h ck DÌvcb Kiv nBqv‡Q †h, ˆeafv‡e MwVZ bv nIqvi `i“Y KLbB we‡ivax`j KZK MnY‡hvM¨ nq bvB Ggb GKwU ¯ívq msm` (lô RvZxq msm`) Øviv cvmKZ mswea v‡bi GBifc ms‡kvabx wKfv‡e ˆea wnmv‡e we‡ewPZ nB‡Z cv‡i ? c_g w`‡K Aek¨ mswea v‡bi 142(1K) Ab‡”Q‡` ewYZ MY‡fvU Gi weavb jswNZ nIqvi welqwU P¨v‡jÄ Kiv nBqvwQj| MY‡fvU Abôv‡bi cm½wUi msw¶ß Reve nBj - GB weavbwU mvgwiK AvB‡bi digvb e‡j Avbqb Kiv nq Ges msm` KZK mswea v‡bi cÂg ms‡kvabxi gva¨‡g ˆeaZv `vb Kiv nq; wKš D³ cÂg ms‡kvabxwU mswea v‡bi mwnZ ultra vires Z_v AmvgÄm¨cY †NvwlZ nBevi c‡i 142(1K) Ab‡”Q`wUi Aemvb N‡U Ges MY‡fvU Abwôz bv Kivi ARnv‡Z mswea v‡bi †Kvb ms‡kvabx‡K GLb Avi AKvhKix ewjevi m‡hvM bvB| lô RvZxq msm‡`i KvhKwiZv m¤ú‡K ejv hvq †h, †`‡ki mKj ivR‰bwZK `j lô RvZxq msm` KZK cvmKZ Î‡qv`k ms‡kvabx MnY Kwiqv‡Q; Bnvi wea v‡bi Abmi‡Y GKwaµ‡g Abwôz wZbwU mvaviY wbevP‡b †`‡ki RbMY Ask MnY Kwiqv‡Q| mZivs lô RvZxq msm‡`i †hvM¨Zv ev KvhKwiZv cm‡½ ck DÌvcb Kiv evZjZv gvÎ|

cRvZwšK ˆewkó¨ (cKwZ) m¤‡Ü wZwb ck DÌvcb Kwiqv‡Qb †h, we‡ePbvaxb ms‡kvabxwU Øviv mswea vb ev iv‡ói cRvZwšK Pwi‡Îi †Kvbifc evZ¨q NwUqv‡Q wKbv| hLb ivócav‡bi c`wU

ivRKxq DËiwaKvim‡Î wbawiZ nq ZLb Bnv‡K ivRZš e‡j| hw` GB ivRv megq ¶gZvi AwaKvix mve‡fŠg bvI nBqv _v‡Kb - †Kej bvg gvÎ ivRv nBqv _v‡Kb Z_wc Bnv‡K ivRZšB ejv nBqv _v‡K| †MU we‡Ub, A‡ówjqv, KvbvWv, wbDwRj¨vÛ GB †kYxi g‡a¨B MY¨ nBqv _v‡K - hw` I GB mKj ivó¸wj MYZwšK| Avgv‡`i mswea v‡bi 48(1) Ab‡”Q` Abmv‡i ivócwZ nB‡jb ivócavb| wZwb RvZxq msm‡` RbMY KZK wbewPZ cwZwbwa‡`i Øviv wbewPZ nBqv _v‡Kb| Î‡qv`k ms‡kvabx Øviv 48(1) Ab‡”Q‡`i †Kvbiƒc cwieZb NUv‡bv nq bvB| ivócwZi c`wU GLbI RbcwZwbwa‡`i Øviv ciY nBqv _v‡K Ges mswea v‡bi cRvZwšK ‰ewkó¨ Î‡qv`k ms‡kva‡b hvnv wKQ _vKK bv †Kb Bnvi Øviv ¶b nq bvB|

MYZwšK ˆewkó¨ cm‡½ weÁ G¨vW‡fv‡KU g‡nv`q e‡jb †h ÔMYZšÕ GKwU A¯úó Ges Aw¯wZ¯vcK aviYv| Bnvi cKwZ ev¯eZv Abmv‡i ZviZg¨ NwUqv _v‡K| GgbwK KwgDwbó iwkqvI `vex KwiZ †h Zvnviv cKZ MYZ‡ši aviK| Avgiv Bnvi eûj cPwjZ A‡_B ewj‡Z cwi - RbM‡Yi Øviv, RbM‡Yi Rb¨ I RbM‡Yi MwVZ miKviB MYZš| hvnv m¤e nBqwQj cPxb bMi ivómg‡n - †hLv‡b mKj bvMwiKMY GKwU wbwÏó ¯v‡b GKwÎZ nBqv ivR‰bwZK wm×vš mgn MnY KwiZ| eZgvb we‡ki ¶`Zg iv‡óI GB ai‡Yi cZ¨¶ AskMn‡Yi gva¨‡g ivó cwiPvjbv m¤e b‡n| Z`¯‡j RbM‡Yi wbewPZ cwZwbwa‡`i Øviv ivó cwiPvjbvi c×wZ ¯vb Kwiqv jBqv‡Q| Avgv‡`i mswea v‡bi mßg (7) I GKv`k (11) Ab‡”Q` ÔRbcwZwbwa‡`i Øviv cwZwbwaZgjK miKviÕ Gi wb‡`kbv c`vb K‡i| Avcxj Kvixi Awf‡hvM nBj - Î‡qv`k ms‡kvabxi weavb Abmv‡i cvP ermi Aši hZ Kg mg‡qi Rb¨B nDK bv †Kb GKevi †`‡ki miKvi cwiPvjbvi fvi RbcwZwbwa b‡n Ggb e¨w³e‡Mi nv‡Z Pwjqv hvq - hvnv mswea v‡bi †gŠwjK KvVv‡gvi MYZwšKZv‡K e¨vnZ Kwiqv _v‡K| Bnv j¶Yxq †h MYZ‡ši wbR¯ mxgve×Zv iwnqv‡Q| MYZ‡ši Af¨š‡iB Bnvi wbR¯ webv‡ki exR enb

Kwi‡Z‡Q| GB wel‡q m‡evrKó D`nviYwU nBj ZZxq Rvgvb wicvewj‡Ki gva¨‡g wnUjv‡ii DÌvbce| Pareto, Mitchel Ges Moscai gZ wZbRb cL¨vZ ivR‰bwZK `vkwbK K‡Vvi fv‡e MYZ‡ši GB Î"wU¸wj Zwjqv a‡ib| hvnvi cwiYwZ‡Z BUvjx‡Z d¨vmxev‡`i DÌvb nBqv‡Q| GKwU c_K c‡_ Avgv‡`i cRvZ‡šI MYZš aŸs‡mi cwµqv Pwj‡Z‡Q| Aeva I wbi‡c¶ wbevP‡bi gva¨‡g wbevwPZ RbcwZwbwa‡`i Øviv MYZš cwZôv Kiv m¤e| wKš¶gZvmxb `‡ji wbevP‡b KviPwc e¨wZµ‡gi cwie‡Z wbq‡g cwiYZ nq| gv¸iv Dc-wbevPb KviPwci m‡evwbKó `óvš nBqv iwnqv‡Q| cwZev‡`¶gZvmxb `j e¨wZZ ivR‰bwZK `j mgn ivRc‡_ Ae¯vb jBqvwQ‡jb| AvBb-k•Ljv cwiw¯wZi gvivZ¥K AebwZ NwUqvwQj| RbRxeb ¯wei nBqv cwoqvwQj| B‡Zvg‡a¨ RvZxq msm‡`i †gqv`†kl nBqv Av‡m Ges weGbwc e¨wZZ gj ivR‰bwZK `j¸wji AskMnY QvovB GKwU wbevPb Abwôz nq| `xN `iKlvKwli ci GKwU ivR‰bwZK HK¨gZ¨ cwZwôZ nq - hvnvi dj nBj mswea v‡bi Î‡qv`k ms‡kvabx Ges †gvUvgwU MnY‡hvM¨ wbevP‡bi gva¨‡g mßg RvZxq msm` MwVZ nq| GB Kómva¨ cqvm †Kej MYZš‡K i¶v Kwievi Rb¨ MnY Kiv nBqvwQj| Bnv mZ¨ †h Î‡qv`k ms‡kvabxi weavb Øviv miKv‡i RbcwZwbwaZ ¯í mg‡qi Rb¨ ¯wMZ _v‡K; Z‡e Bnv †`‡k MYZš PPvi c_‡K mMg K‡i| mvgvwRK weÁv‡b meKv‡ji -me¯v‡bi mecKvi ivR‰bwZK mgm¨v wbim‡bi Rb¨ †Kvb ¯vqx mgvavb bvB| †MU we‡U‡b hvnv c‡qvM Kwiqv mdj cvIqv wMqv‡Q Zvnv evsjv‡`‡ki Rb¨ c‡hvR¨ b‡n|

weÁ G¨vW†fv‡KU g‡nv`‡qi g‡Z evsjv‡`‡ki RbM‡bi eZgvb ivR‰bwZK cwic°Zv Abhvqx †`‡ki I mswea v‡bi MYZvwšK ˆewkó¨ msi¶‡Yi wbwgË ZËveavqK miKv‡ii Aax‡b wbevPb Abôv‡bi †Kvb weKí bvB| MYZš‡K evPvBqv iwLevi Rb¨ bv nq ¯í mg‡qi Rb¨ MYZvwšK e¨e¯v ¯wMZB ivLv nBj|

wePvi wefv‡Mi ¯vaxbZv cm‡½ weÁ G¨vW‡fv‡KU g‡nv`q e‡jb ‡h, ÔwePvi wefvMxq ¯vaxbZvÕ Øviv Avgiv cKZc‡¶ wK eSvB‡ZwQ Zvnvi Dci wbfi Kwiqv ewj‡Z nq †h mswkøv‡b Ggb A‡bK welq iwnqv‡Q hvnvi Øviv wePvi wefvMxq ¯vaxbZv Le Kiv nBqv‡Q| Bnv ejv hvq †h wbevnx wefvM KZK wePviK wb‡qv‡Mi weavb wePvi wefvMxq ¯vaxbZv Le Kwiqv‡Q| ejv nBqv _v‡K †h msm` KZK cYxZ Av`vj‡Zi Kvhwewa cKZ b¨vqwePvi cwZôvq wePvi wefv‡Mi ¯vaxbZv‡K Le Kwiqv‡Q| wKš Jurisprudence Gi `wó‡KvY nB‡Z ÔwePvi wefvMxq ¯vaxbZviÕ mwbwÏó A_ iwnqv‡Q| Secretary of Ministry of Finance V. Masdar Hossain 2000 BLD(AD) 104 †gvKÏgvq GB Av`vjZ (hLb Î‡qv`k ms‡kvabx envj wQj) ch‡e¶Y c`vb K‡ib †h, mswkøv‡bi †Kvb weavbB D”P Av`vj‡Zi wePviKM‡Yi ¯vaxbZv‡K Le K‡i bv Ges GB ZwKZ ms‡kvabxwU†Z †Kej D”P Av`vj‡Zi wePviKMYB mswkó|

mswkøv‡b Ggb wKQB bvB hvnvi wfwË‡Z ejv hvB‡Z cv‡i †h mcxg †Kv‡Ui wePvwiK Kv‡h c‡iv¶ n¯Z‡¶c Kwievi m‡hvM Av‡Q| AwaKš, mcxg RwWwmqvj KvDwÝj Gi Øviv mcxg †Kv‡Ui wePviKM‡Yi KvhKvj wbwðZ Kwiqv‡Qb| Avcxj Kvixc¶ nB‡Z GB hw³ c`kb Kwi‡Z cv‡ib †h, cavb Dc‡`óvi c`wU mcxg‡Kv‡Ui wePviKM‡Yi Rb¨ Sjš gjv ¯i‚c wbi‡c¶ wePvi e¨vnZ Kwievi KviY nB‡Z cv‡i| wKš Bnv‡K GKRb wePvi‡Ki wePviKv‡hi n¯Z‡¶c wnmv‡e we‡ePbv Kiv hvB‡e bv ev Bnv‡Z Zvnvi PvKwii mweav KZb ev Ab¨ †Kvbfv‡e Zvnvi KgKvj e¨nZ Kiv hvB‡e bv| Bnv g‡b ivLv DwPZ †h wePviKMY fqfxwZ ev cfve ev cxwZ ev we‡Øl Gi E‡aŸ _vwKqv Rb¯v‡_ wVK KvRwU Kwievi Rb¨ kc_ MnY Kwiqv‡Qb| †Kvb wePviK hw` miKvi weivM nB‡e Ges Zvnv‡K Aem‡i hvBevi c‡i cavb Dc‡`óv wnmv‡e wb‡qvM c`vb Kwi‡e bv GB wPšvq h_vh_ ivq `vb nB‡Z weiZ _v‡Kb Zvnv nB‡j wZwb kc_ f½ Kwi‡eb; Z‡e Bnv ejv hvB‡e bv †h Zvnv‡K †Kn b¨vqwePv‡i evav

w`qv‡Q| mcxg‡Kv‡Ui GKRb wePviK‡K Avevwm K cU eivÏ Kwievi GLwZqvi wbevnx wefv‡Mi| Bnv ejv hvB‡e bv †h H GLwZqv‡ii Kvi‡Y wePviKM‡Yi wePviKv‡h cfve †dwj‡e| Avgiv GB chv‡q ‡`wLe †h, wbevnx wefvM ev miKv‡ii AvBb wefvM Øviv †Kvbiƒc cfve QvovB wePviKMY ¯vaxbfv‡e wePvwiK Kg m¤úv`b Kwi‡Z‡Qb wKbv| Î‡qv`k ms‡kvabxi Av‡jv‡K GB c‡ki DËi Aek¨B †bwZevPK|

mv¤cwZK AZx‡Z msweavb Abmv‡i ZËveavqK miKvi MVb cwµqvi Ace¨envi Kiv nBqv‡Q| wKš wKQ AvB‡bi Ace¨env‡ii Kvi‡Y KLbB AvBbwU †eAvBbx nBqv hvq bv| D³ Ace¨envi †iva Kwievi Rb¨ c‡qvRbxq e¨e¯v MnY Kwi‡jB nq|

(7)| Rbve †ivKb DwÏb gvng`, wmwbqi G¨vW†fv‡KU, GKwU mZKevYx D”Pvib KiZt Zvnvi el“e¨ Avi¤ K‡ib GB ewjqv †h ZwKZ msweavb (Î‡qv`k ms‡kvab) AvBbwU Av‡eMewRZfv‡e we‡ePbv Kwi‡Z nB‡e|

wZwb e‡jb †h ZwKZ msweavb ms‡kvab AvBbwU c‡qv‡Mi c‡e 1973 mvj nB‡Z †h ivR‰bwZK `j ¶gZvq _v‡Kb Zvnviv KLbI wbevP‡b nv‡ib bvB, Ggb wK Dc-wbevP‡bI KviPwc nq, †hgb gv¸iv Dc-wbevPb|

2004 mv‡j GKwU we‡klD‡Ï‡k¨ msweavb ms‡kvab KiZt mcxg †Kv‡Ui wePviKM‡Yi Aemi Mn‡Yi eqm ew× Kiv nq| cavb Dc‡`óv c‡` wb‡qv‡Mi Rb¨ Avcxj wefv‡Mi Aemi cvß wePviKM‡Yi m¤§‡L GKwU gjv SjvBqv ivLv nq|

¯xKZ g‡ZB wePvi wefv‡Mi ¯vaxbZv msweav‡bi GKwU basic structure | ck nB‡Z‡Q †h ZwKZ msweavb ms‡kvab AvBbwU wePvi wefv‡Mi ¯vaxbZv‡K †Kvb fv‡e ¶b K‡i wK bv|

ÔAvgiv, evsjv‡`‡ki RbMYÕ, K_v¸wj msweav‡bi 7 Ab‡”Q‡`i mwnZ cwo‡Z nB‡e| msweavb evsjv‡`‡ki m‡ev”P AvBb KviY Bnv

evsjv‡`‡ki RbM‡Yi B”Qv (will) †K cùwUZ K‡i| mcxg ‡KvUB mswe av‡bi †kôZ avi Y K‡i KviY mcxg †KvUB mswe av‡bi Awf fveK| mswe av‡bi 102 Ab‡”Q` mcxg ‡Kv‡Ui nvB‡KvU we fv‡Mi Dci KwZcq Av‡`k I wb‡`k c`v‡bi ¶gZv Acb K‡i|

mswe av‡bB MYZš wKfv‡e Abkxwj Z nB‡e Zvnv eYbv Kiv nBqv‡Q| wbevP‡bi gvav‡g RbMY Zvnv‡`i cwZwbwa wbavi Y K‡ib| gwšmfv RvZxq msm`‡K cwZwbwaZ K‡i|

RvZxq msm` A_-AvBbmn mKj cKvi AvBb cYqb K‡i| RvZxq msm` 142 Ab‡”Q‡`i Aax‡b 11 Ab‡”Q` I †gŠwjK AwaKvi e¨wZZ mswe av‡bi ‡h †Kvb ms‡kvab Kwi‡Z ¶gZv cvß|

Anwar Hossain V. Bangladesh (Aóg mswe avb ms‡kvab) †gvKvÏgvq mswe av‡bi basic structure cwieZb ev ms‡kvab Kiv hvq bv ewjqv mcxg ‡Kv†Ui Avcxj we fvM †NvlYv K‡i| mswe av‡bi Awf fveK we avq mcxg ‡KvU msm` KZK cYxZ AvB‡bi ^eaZv/A^eaZv †NvlYv Kwi‡Z cv‡i|

ivócwZ mcxg †Kv‡Ui wePviK wb‡qvM `vb Kwiqv _v‡Kb wKš mcxg ‡Kv†Ui Dci wbevnx we fv‡Mi Avi †Kvb wbqšY _v‡K bv| ïagvÎ Am`vPi‡Yi Rb¨ wePviKMY‡K Acmvi Y Kiv hvB‡Z cv‡i|

mcxg †Kv‡Ui Judicial Review Gi ¶gZv iwnqv‡Q| †Kvb msm` m`‡m¨i A‡hvM¨Zvi ck DwV‡j ¯úxKvi g‡nv`q welqwU wbevPb Kwgk‡bi wbKU †ciY K‡ib| wbevPb Kwgkb ïbvbx A‡š Zvnv‡`i gZvgZ ¯xúKvi g‡nv`‡qi wbKU ‡ciY K‡ib| GB gZvgZI mcxg †Kv‡U P¨v‡jÁ Kiv hvq|

cavb wePvicwZ mvnvewÏb Avn‡g` A¯vqx ivócwZ c‡` wb‡qvM cvß nBqv iv‡ói wbevnx cavb nBqvwQ‡jb wKš †KnB Zvnvi wbi‡c ¶Zv m¤‡Ü ck DÌvcb K‡i bvB|

cavb Dc‡`óv c‡` cavb wePvicwZi wb‡qvM cm‡½ wZwb e‡jb †h ivR‰bwZK `j¸wji wbKU cavb wePvicwZ e¨wZ‡i‡K Ab¨ †Kvb e¨w³ MnY‡hvM¨ wQj bv| Bnv m‡evËg mgvavb bv nB‡j I Avi †Kvb

c¯ve mKj ivR‰bwZK `‡ji wbKU MnY‡hvM¨ wQj bv| H mg‡q cavb wePvicwZB GKgvÎ Avkvi Av‡jv wQ‡jb|

cavb wePvicwZ mvnvewÏb Avn†g` A¯vqx ivócwZ wQ‡jb, Zrci cbivq cavb wePvicwZ c‡` cZ¨veZb K‡ib wKš Zvnv‡Z mcxg †Kv‡Ui `vwqZ cvj‡b Zvnvi †Kvb mgm¨v nq bvB|

mcxg †Kv‡Ui wePviKM‡Yi eqm †ewVK mg‡q †ewVK Dcv‡q ew× Kiv nBqwQj, Aek¨ Z`vbxšb we`vqx cavb wePvicwZ Rbve †K, Gg, nvmvb 2006 mv‡ji †kl w`‡K cavb Dc‡`óv nB‡Z Zvnvi AcivMZv cKvk K‡ib|

weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h †hLv‡b KgiZ wePviKMYI wewfb ai‡bi Z`š Kwi‡Z m¶g †mLv‡b GKRb Aemicvß cavb wePvicwZi cavb Dc‡`óv nB‡Z evav ‡Kv_vq| 1996 mv‡ji †deqvix gv‡mi wbevPb cieZx NUbvejx eYbv Kwiqv weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h hZ RwUjZvB _vKK bv †Kb GB mgq wb`jxq ZËveavqK miKvi e¨wZZ Avi †Kvb MnY‡hvM¨ mgvavb wQj bv|

h³ iv‡R¨ Parliament fwOqv †M‡j convention Abmv‡i wbevP‡bi ci bZb cavbgšx †hvM`vb bv Kiv chš ceZb cavbgšx Queen Gi Ab‡iv‡a miKvi cwiPvjbv K‡ib | wKš H AwZwi³ mgq wZwb AwbewPZB _v‡Kb|

cavbgšx c`Z¨vM Kwi‡j ev¯xq c‡` envj bv _vwK‡j gšxMY c`Z¨vM Kwiqv‡Qb ewjqv MY¨ nB‡jI 58 (4) Ab‡”Q` Abmv‡i Zvnv‡`i DËiwaKvixMY Kvhfvi MnY bv Kiv chš Zvnviv¯ ¯ c‡` envj _vwK‡eb| Bnv‡Z hw` MYZš j•Lb bv nq Zvnv nB‡j 58L Ab‡”Q` Øviv MYZš j•Lb nB‡Z cv‡i bv|

mveRbxb †fvUvwaKvi gvidr msm‡` 300 m`m¨ wbevPb MYZ‡ši wfwË| msweav‡bi 7(2) Ab‡”Q` MYZš wbwðZ Kwiqv‡Q Ges 11 Ab‡”Q` MYZ‡ši aiY eYbv Kwiqv‡Q| 59 I 60 Ab‡”Q`

¯vbxq miKvi mwó Kwiqv‡Q| RvZxq msm` fvwOqv hvBevi mv‡_ mv‡_ cavbgšx I msm` m`m¨M‡Yi Mandate Gi mgvwß nq|

mswe avb (Î‡qv`k ms‡kvab) AvBb Gi D‡Ïk¨ nBj KviPwcnxb Aeva I mô wbevPb Abôvb|

wbevPb Kwgkb gv¸iv Dc-wbevP‡bi KviPwc eÜ Kwi‡Z cv‡i bvB| 1996 mv‡ji †de“qvix gv‡m AbwôZ wbevP‡b †fvU KviPwc nBqvwQj| mswe av‡bi Aax‡b wbevPb Kwgk‡bi wbhw³ mwVK fv‡e nB‡j I ivR‰bwZK `j¸wji cfv‡e Bnv fvjfv‡e I AvBbvbMfv‡e `vwqZ cvjb Kwi‡Z cv‡i bv|

weÁ G¨vW†fv‡KU g‡nv`q e‡jb †h ZwKZ mswe avb ms‡kvab AvBb evwZj Kwi‡j I 2006 mv‡ji †kl fv‡Mi Pig m¼U Govb m¤e nBZ bv| cKZc‡¶ GB ai‡bi m¼U GovBevi Rb¨B ló RvZxq msm‡`i wbevP‡bi c‡i ZwKZ mswe avb ms‡kvab AvBb cYqb Kiv nq| Zvnvi c‡i I m¼U KvwU‡Z‡Q bv| me‡kl cavb wePvicwZ GKwU ivR‰bwZK `‡ji wbKU MnY‡hvM¨ bv I nB‡Z cv‡i, Avevi, Zvnvi ceeZx cavb wePvicwZ Ab¨ ivR‰bwZK `‡ji wbKU MnY‡hvM¨ nB‡e bv| mgm¨v Pwj‡ZB _vwK‡e|

(8) AvRgvjj †nv‡mb, wmwbqi G¨vW‡fv‡KU, g‡nv`q e‡jb †h, Î‡qv`k ms‡kvabxi †gvU wZbwU gjwelq‡K P¨v‡jÄ Kwiqv GB Avcxjw U Avbvqb Kiv nBqv‡Q| Ab¨fv‡e ejv hvq Î‡qv`k ms‡kvabx mswe av‡bi wZbwU †gŠwjK welq‡K webó Kwiqv w`qv‡Q| GB¸wj nB‡Z‡Qt MYZš, cRvZvwšK ˆewkó Ges wePvi wefvMxq ¯vaxbZv| mswe av‡bi †gŠwjK KvVv‡gvi mvwnZ ZwKZ ms‡kvabxwU GB Kvi‡b mvsNwlK|

nvB‡KvU wefv‡M Av‡iKwU hwl“ Zwjqv aiv nBqv‡Q †h, mswe av‡bi 142 Ab‡”Q` Abmv‡i GB ms‡kvabxwUi RbgZ hvPvB‡qi wbwgË MY‡fvU AvnŸvb Kiv nq bvB weavq Dnv Aï×| GB cms‡M weÁ G¨vW†fv‡KU g‡nv`‡qi gZ nBj cÂg ms‡kvabxi iv‡qi c‡i

MY‡fv‡Ui Avi Avek¨KZv bvB| KviY H ivq Øviv MY‡fv‡Ui welqwUI msweav‡bi mwnZ AmvgÄm¨cY g‡g †NvwlZ nBqv‡Q|

wZwb e‡jb †h, Î‡qv`k ms‡kvabxi gva¨‡g msweav‡bi †gŠwjK KvVv‡gv webó nBqv‡Q weavq Dnv evwZj †NvlYvi †hvM¨|

MYZš Ges cRvZvwšK ˆewkó¨ cm‡½ weÁ G¨vW‡fv‡KU g‡nv`q e‡jb †h, MYZš Ges cRvZvwšK ˆewkó¨ Avgv‡`i msweav‡bi †gŠwjK KvVv‡gv| Avgv‡`i msweavb Abmv‡i MYZ‡ši c‡qvM nBqv _v‡K msm‡` RbM‡Yi wbewPZ cwZwbwa‡`i gva¨‡g| msweav‡bi c¯Zvebv, 7 Ab‡”Q` PZ_ fv‡Mi 1g I 2q Aa¨v‡q †`k †KejB RbcwZwbwa‡`i Øviv cwiPvwjZ nBevi cZ¨vkv Kiv nBqv‡Q| me`vB 'Avgiv,evsjv‡`‡ki RbMY'B Zvnv‡`i mivmwi wbewPZ cwZwbwai gva¨‡g Zvnv‡`i welqvw` m¤ú‡K wm×vš MnY Kwi‡e| msweav‡bi gj †PZbv nBj †Kvb Ae¯v‡ZB GB ÔcwZwbwaZgjKÕ ˆewkó¨i mwnZ Av‡cvl bv Kiv| 1972 mv‡ji gj msweav‡bi web¨vm Abmv‡i RbMY KZK wbewPZ cavbgšx I gšx cwil` wbevnx Kvhvejx c‡qvM Kwi‡e| cRvZ‡ši ivócwZ msm` m`m¨‡`i Øviv wbewPZ-mivmwi RbM‡Yi Øviv wbewPZ b‡nb- cKZ c¯v‡e Zvnvi †Kvb KvhKix wbevnx KgKvÛ bvB| cKZ cwZwbwaZgjK ˆewkó¨ bv _vKvq Zvnv‡K cavbgšxi civgk Abmv‡i Kvh m¤úv`b Kwi‡Z nq| GKB Kvi‡Y ¯vaxb KZ‡Z wZwb Kvh m¤úv`b Kwievi AwaKvix b‡nb| Ggb wK GKwU gû‡Zi Rb¨I GB cwZwbwaZgjK ˆewkó¨ nB‡Z weP¨Z nIqv hvB‡e bv-BnvB msweav‡bi gj †PZbv|

GKB fv‡e ivRZ‡ši wecix‡Z evsjv‡`k GKwU cRvZš| iv‡ói wZbwU A‡½i mKj ¶gZvB ÔAvgiv, evsjv‡`‡ki RbMYÕ Gi gwjKvbvaxb| Zvnviv mve‡fŠg Ges me¶‡Yi Rb¨B GB ÔmveavbZÕ Zvnv‡`i AwaKv‡iB _v‡K| AZGe, iv‡ói mKj wm×vš Ges Kvhµg Aek¨B msweavb ewYZ cwµqvq mivmwi RbM‡Yi †fv‡U wbewPZ cwZwbwa‡`i gva¨‡gB m¤úb nB‡Z nB‡e|

fviZ I evsjv‡`‡ki b¨vq GKwU ÔMYcRvZšÕ| fviZxq mcxg †Kv‡U R.C. Poudyal v Union of India AIR 1993 SC 1804 ‡gvKÏgvq ÔMYcRvZšÕ Gi A_ c`vb Kwiqv‡Q| hvnv Avgv‡`i msweav‡b e¨I“ ÔMYcRvZšxÕ Gi Abi¥c|

Avgv‡`i msweav‡b ÔMYcRvZšxÕ ewj‡Z RbM‡Yi ¶gZv eSvq hvnv msweav‡bi †gŠwjK KvVv‡gv|

ZwKZ ms‡kvabx MYZš Ges cRvZvwšK ^ewkó¨†K msKwPZ Kwiqv †dwjqv‡Q| msweav‡b wb`jxq ZËveavqK miKv‡ii KvVv‡gv Avg`vbx Kivi ci nB‡Z msweav‡b GKwU cwZwbwaZnxb miKvi RbcwZwbwaZKvix miKv‡ii ¯jveZx nBqv‡Q hvnv msweav‡bi ÔMYZšÕ I ÔcRvZvwšKÕ ^ewkó¨ `BwUi mwnZ mvsNwlK|

GBLv‡b D‡jL¨ †h, nvB‡KvU wefvM ÔMYZšÕ‡K kw³ kvjxKi‡Yi j‡¶¨ Aeva wbevP‡bi c‡qvRbxqZvi welqwU‡Z †Rvi w`qv‡Q; wKš Ô†gŠwjK KvVv‡gvÕ Z‡Zi cm‡½ bRi †`q bvB| GB Kvi‡Y DI“ ivq evwZj nBevi †hvM¨|

wePvi wefv‡Mi ¯vaxbZv cm‡½ G¨vW‡fv‡KU g‡nv`q e‡jb †h Bnv cwZwôZ †h, wePvi wefv‡Mi ¯vaxbZv †h ‡Kvb msweav‡bi †gŠwjK KvVv‡gv| weL¨vZ Aóg ms‡kvabx †gvKÏgvwUB (1989 we.Gj.wW we‡kl msL¨v) Avgv‡`i †`‡ki msweav‡bi †gŠwjK KvVv‡gv msµvš c_g †gvKÏgv|

wb`jxq ZËveavqK miKvi e¨e¯nvq me‡kl Aemicvß cavb wePvicwZ cavb Dc‡`óv wbhw³i weavb Av‡Q| Zvnv‡K cvIqv bv †M‡j Aci cavb wePvicwZ nB‡eb cavb Dc‡`óv| GB e¨e¯nv Pvj nBevi ci mK‡jB wePvi wefv‡Mi ¯vaxbZv m¤ú‡K D‡ØM cKvk Kwiqv Avwm‡ZwQ‡jb| Avgv‡`i AwfÁZv nBj GB e¨e¯nvi mevwaK g‡›`i wkKvi nBqv‡Q ÔwePvi wefvMÕ| †h‡nZ cavb wePvicwZB ZËveavqK miKv‡ii cavb Dc‡`óv nB‡eb †m‡nZ ¶gZvmxb `j Zvnv‡`i cQ‡›`i e¨w³‡K cavb wePvicwZ wbh³ Kwievi †Póv K‡i-hvnv‡Z wZwbB c‡i cavb Dc‡`óv nB‡Z cv‡ib| mcxg †Kv‡U wePviK

wb‡qv‡Mi mgqI GKB j¶¨ wPšvq iwLqv KvR Kiv nq, hvnvi djk“wZ‡Z wePvi wefvM ¯vaxb I wbi‡c¶ wePviK cwß nB‡Z ewÂZ nB‡Z‡Q| cavb wePvicwZi c`wUI µgk weZwKZ nBqv cwo‡Z‡Q| we‡klZt 2006 mv‡ji AwfÁZv nB‡Z †`Lv wMqv‡Q †h, ZLb we‡ivax `j me‡kl Aemicvß cavb wePvicwZi Aax‡b wbevP‡b bv hvBevi Rb¨ Av‡›`vjb-msMvg I we‡¶vf Kwiqv‡Q| c‡i `B eQi †mbv mgw_Z ZËveavqK miKvi †`‡ki AvB‡bi kvmb Ges †gŠwjK AwaKvi jsNb Kwiqv †`k kvmb Kwiqv‡Q|

‡kl `B eQ‡ii AwfÁZvq †`Lv hvB‡Z‡Q †h Aemicvß cavb wePvicwZi Aax‡b wb`jxq ZËveavqK miKvi c×wZ Avi KvR Kwi‡Z‡Q bv| we‡klZ wZwb hLb RbM‡bi wbKU MnY‡hvM¨ bv nb| BnvB cgvY K‡i †h Aeva wbi‡c¶ wbevPb Abôv‡bi wbwg‡Ë Aemicvß cavb wePvicwZi Aax‡b wb`jxq ZËveavqK miKvi c×wZ m‡evËg weKí e¨e¯nv b‡n|

weÁ G¨vW‡fv‡KU g‡nv`q e‡jb †h GB hwI“ DÌvcb Kiv nBqv‡Q †h, evsjv‡`‡k Aeva wbi‡c¶ wbevPb Abôv‡bi j‡¶¨ wbÏjxq ZËveavqK miKvi e¨e¯nvwU wØZxq m‡evËg mgvavb| GB cm‡½ weÁ G¨vW†fv‡KU e‡jb †h, evsjv‡`‡ki GKwU †MŠiegq ¯vaxbZv h‡×i BwZnvm iwnqv‡Q, evsjv‡`‡ki RbMY GKwU DËg RvwZ wnmv‡e †gŠwjK AwaKvi I mswkøv‡bi cvavb¨ m¤wjZ cw_exi gv‡S GKwU DËg mswkøvb cYqb I MnY Kwiqv‡Q| Zvnv nB‡j ¯vaxbZvi Pwjk ermi c‡i †Kb Avgvw`M‡K wØZxq m‡evËg MYZvwšK e¨e¯nvq hvB‡Z nB‡e ? Aek¨B GB RvwZi Rb¨ m‡evËg MYZšB cZ¨vkZ|

nvB‡KvU wefv‡Mi dj †eÂ Ab‡gv`b Kwiqv‡Q †h, Aeva I wbi‡c¶ wbevPb Abôv‡bi Rb¨ wb`jxq ZËveavqK miKviB GKgvÎ mgvavb bq Ges we‡ki mKj DbœZ RvwZB wbevP‡bi mbvZb cwµqvB AbmiY Kwiqv _v‡K| Bnv ejv hvB‡Z cv‡i †h, gj j¶¨ nBj Aeva I wbi‡c¶ wbevPb Abôvb Kiv-wb`jxq ZËveavqK miKvi bq|

DbZ †`kmg‡n wbevPb AbwôZ nq wbevPb Kwgk‡bi Aax‡b; wb`jxq ZIveavqK miKv‡ii Aax‡b bq| †mB me †`‡k †KnB wbevP‡bi wbi‡c¶Zv wbqv ck DÌvcb K‡i bv| Avgv‡`i m¤§‡LI †UKmB GKwU weKíB iwnqv‡Q Zvnv nBj wbevPb Kwgk‡bi Aax‡bB wbevPb AbwôZ Kiv| Bnvi Rb¨ c‡qvRbxq AvBb I wewa cYqb Kiv hvnv‡Z wbevPb Kwgkb Aeva I wbi‡c¶ wbevPb AbwôZ Kwi‡Z cv‡i| mZivs mswkøv‡bi †gŠwjK KvVv‡gvi ¶wZKviK Î‡qv`k ms‡kvabwU AvBbZ i¶Yxq bq|

Avgv‡`i mswkøv‡b ewYZ cwZwbwaZgjK MYZ‡ši weavbwU weiwZnxb| wKš Î‡qv`k ms‡kvabx GB wbtwQ` avivevwnKZvq weiwZi mwó K‡i| AštZ `Bevi Amvswkøvwb K›nvq ¶gZv Mn‡Yi wZ³ AwfÁZv Avgv‡`i iwnqv‡Q Ges DfqwUB Av`vjZ KZK cÂg I mßg ms‡kvabx gvgjvi ivq Øviv †eAvBbx †NvwlZ nBqv‡Q| Bnv j¶Yxq †h, mswkøv‡b †Kvb cKvi m‡hvM bv _vKv ¯‡ZI †eAvBbxfv‡e ¶gZv Mn‡Yi gZ NUbv NwUqv‡Q Ges †mB Kvi‡Y mcxg †KvU †eAvBbx †NvlYv Kwi‡Z cvwiqv‡Q| wKš GB ai‡Yi m‡hvM Î‡qv`k ms‡kvabx‡Z we`¨gvb _vKvq †mB mo½ c_ awiqv AvBbx Avei‡Yi gva¨‡g D”Pvwfjvlx‡`i ¶gZv MnY Kwievi e¨e¯nv _vwKqv hvB‡e| †mbvevwnbx mgw_Z ZËveavqK miKv‡ii `BwU erm‡ii AwfÁZv Avgv‡`i‡K †mB AvksKvi K_vB m¥iY KivBqv †`q| AZGe, GBme ev¯ZeZvi Av‡jv‡KB Î‡qv`k ms‡kvabx evwZj nIqv Avek¨K|

15| cv_wgK we‡ePbv t

1994 mv‡j gv¸iv Dc-wbevP‡b wecj KviPwci Awf‡hvM DwV‡j Z`vbxšb we‡ivax `j GKwU wb`jxq ZËveavqK miKv‡ii gva¨‡g wbevPb Abôvb Kwievi Rb¨ cej Av‡›`vjb Avi¤ K‡i| evsjv‡`‡ki ivRbxwZ‡Z GB Bm¨ GK cPÛ Aw¯iZv mwó K‡i| †`‡ki meÎ GB e¨e¯v jBqv Avjvc-Av‡jvPbv, ZK-weZK Pwj‡Z _v‡K| we‡ivax`j KZK AvnŸvbKZ µgvMZ niZv‡j †`‡ki ¯vfweK Rb-Rxeb cvq

¯wei nBqv c‡o| Zvnviv cieZx AšZ wZbwU mvaviY wbevPb wb`jxq ZËveavqK miKv‡ii ZËveav‡b Abôvb Kwievi `vex RvbvB‡Z _v‡Kb| GBi“c GK cwiw¯wZi g‡a¨ 1996 mv‡ji 15B †de“qvix evsjv‡`‡k lô mvaviY wbevPb AbwôZ nq wKb †`‡ki cavb we‡ivax `j¸wj H wbevPb eRb K‡i| AZcit RvZxq msm` wb`jxq ZËveavqK miKvi e¨e¯v m¤wjZ mswevab (Î‡qv`k ms‡kvab) AvBb, 1996, wej MnY K‡i| Zrci, ivócwZ 28‡k gvP Zvwi‡L wejwU‡Z ¯v¶i `vb Kwi‡j Zvnv AvB‡b cwiYZ nq|

Dc‡iv³ AvB‡bi Aax‡b MwVZ wb`jxq ZËveavqK miKvi 1996 mv‡ji 12B Rb Zvwi‡L mßg RvZxq msm‡`i wbevPb Abôvb K‡i|

wKš GB AvB‡bi c‡qvRbxqZv I AvBbMZ ˆeaZv jBqv ‡`‡k Avjvc-Av‡jvPbv Pwj‡ZB _v‡K| GB †c¶vc‡U ZwKZ AvBbwUi ˆeaZv P¨v‡jÄ Kwiqv ixU wcwUkb bs 1729/1996 `v‡qi nq| Bnv GKwU msw¶ß Av‡`‡k LvwiR nq| Zrci, AÎ ixU †gvKvÏgvwU `v‡qi nq| nvB‡KvU wefv‡M GB ixU †gvKvÏgvq GKRb cexY mvsevw`K Ges †`‡ki `B enr ivR‰bwZK `‡ji gnvmwPeMY c¶f³ nb| Bnv nB‡Z cZxqgvb nq †h ZwKZ AvBbwUi ˆeaZvi c‡k †`‡k A‡b‡KiB DrKôv iwnqv‡Q| Aek¨ Avcxj wefv‡M Zvnv‡`i c¶ nB‡Z †Kvb hw³-ZK DÌvcb Kiv nq bvB| Z‡e Bnv mZ¨ †h evsjv‡`‡ki RbM‡Yi GKwU †ek eo Ask wb`jxq ZËveavqK miKv‡ii ZËveav‡b wbevPb Abôv‡bi c¶cwZ| Bnvi c‡¶ mev‡c¶v eo hw³ nBj †h MYZ‡ši ¯v‡_ GKwU mô I wbi‡c¶ wbevPb Abôvb KiY, KviY, gv¸iv Dc-wbevPb Abôv‡b Z`vbxšb wbevPb Kwgkb I miKv‡ii Pig e¨_Zvi NUbv GLbI mK‡jiB g‡b D¾j nBqv iwnqv‡Q| mK‡ji fq †h `jxq miKv‡ii Aax‡b mô I wbi‡c¶ wbevPb Abôvb Av‡`Š m¤e b‡n| BnvB mKj weZ‡Ki gj| †h ivR‰bwZK `j‡K †`‡ki RbMY †fvU c`vb Kwiqv miKvi MV‡bi Rb¨ KZZ c`vb (mandate) Kwij, A_P cieZx mvaviY wbevPb

Abôv‡b †mB miKv‡i‡KB †`‡ki RbMY,AšZ Bnvi GKwU enr Ask, cieZx mvaviY wbevPb Abôv‡bi mgq ¶gZvq †`wL‡Z Pv‡n bv, cv‡Q gv¸iv Dc-wbevP‡bi cbivewË nq| Aek¨ gv¸iv Dc-wbevP‡bi c‡i Avi †Kvb Dc-wbevP‡b †fvU KviPwci †Kvb †Rvivj Awf‡hvM Avi I‡V bvB|

wb`jxq ZËveavqK miKvi mwóKvix msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, mv‡ji ˆeaZv AÎ ixU †gvKvÏgvq P¨v‡jÄ Kwi‡j nvB‡Kv‡Ui Full Bench Bnvi 4-8-2004 Zvwi‡Li iv‡q Rule wU Discharge KiZt msweav‡bi 103 Ab‡”Q‡`i Aax‡b mvwUwd‡KU c`vb Kivq Bnv mivmwi Avcxj wnmv‡e bw_f³ nq| ZvnvQvov, ixU `iLv¯ZKvix c‡¶ GKwU c_K Civil Petition For Leave to Appeal No. 596 of 2005 `v‡qi Kiv nq|

GB Avcxj †gvKvÏgvq wbtm‡›`‡n GKwU mKwVb ivR‰bwZK fv‡e weZwKZ welq RwoZ iwnqv‡Q hvnv GB Av`vj‡Zi wb¯úwËi welq Aek¨B b‡n| wKš nvB‡KvU wefv‡Mi ixU Awa‡¶‡Îi AvIZvq (Writ Jurisdiction) Dc‡i ewYZ ZwKZ AvBbwUi ˆeaZv P¨‡jÄ KiZt `vex Kiv nBqv‡Q †h ZwKZ AvBbwUi gva¨‡g msweav‡b ‡h ms‡kvab Avbqb Kiv nBqv‡Q Zvnv Amvsweavwb K Z_v A‰ea|

G‡¶‡Î ZwKZ AvBbwU msweav‡bi Av‡jv‡K we‡ePbv Kiv nvB‡KvU wefv‡Mi `vwqZ I KZe¨ wQj, Ab¨_vq GKwU Amvsweavwb K ms‡kvab mvsweavb‡K KjwlZ Kwi‡Z cv‡i| D‡jL¨, GB mcxg †Kv‡Ui cwZwU wePviK msweavb I AvB‡bi i¶Y, mg_b I wbivcËvweavb Kwi‡Z Zvnv‡`i kc_Øviv eva¨|

D‡jL¨, Rbve wU GBP Lvb, G¨vW†fv‡KU, ZwKZ welqwU RvZxq msm‡`i we‡ePbvi Dci Qvwoqv w`evi Rb¨ gZ cKvk Kwiqv‡Qb|

RvZxq msm‡`i m`m¨M‡Yi mgM †`‡ki RbM‡Yi cwZwbwaZ K‡ib| msweavb mv‡c‡¶ msweavb ms‡kvab Kwievi ¶gZvI Zvnv‡`i iwnqv‡Q| wKš msm‡`i Kv‡Ri wbR¯ AMvwaKvi iwnqv‡Q| c¶vš‿i msweav‡bi e¨vL¨v I we‡klY Kwievi ¶gZv GKgvÎ mcxg ‡Kv†Ui

Dci b¨¯| †mB `wqZ I KZe¨ mcxg ‡KvU KLbB GovB‡Z cv‡i bv|

2004 mv‡j nvB‡KvU wefv‡Mi iv‡qi ci 7(mvZ) ermi AwZewnZ nBqv‡Q| BwZg‡a¨ GK c¶ †gvKvÏgvwU ïbvbxi cv_bv Kwi‡j, we‡kl Kwiqv †hLv‡b RwUj mvswewbK e¨vL¨vi ck RwoZ, †mB Avcxj ïbvbx Kiv c‡qvRb nq| iv‡ói Avi GKwU ¯vaxb wefv‡Mi Rb¨ mcxg †KvU Gi A‡c¶v Kiv mgxPxb b‡n|

‡h †Kvb †gvKvÏgvq ivR‰bwZK mgm¨v RwoZ _wK‡j I mcxg †KvU mvswewbK c‡k Dnvi wb¯úwË †h GovB‡Z cv‡i bv Zvnvi ¯c‡¶ US mcxg †Kv‡Ui fwgKv Av‡jvPbv Kiv hvq|

c_‡g Colegrove V. Green 328 US 549(1946) †gvKvÏgv Av‡jvPbv Kiv c‡qvRb| Illinois A½ivR¨ 51wU †Rjvq wef³ wQj| c‡Z¨KwU †Rjv nB‡Z A½iv‡R¨i wm‡bU I ivR¨ cwZwbwaMY wbewPZ nB‡Zb| Kv‡j Kv‡j kni¸wj‡Z Rb msL¨v eû¸‡Y ew× cvB‡j I Zvnv‡`i cwZwbwai msL¨v ew× bv cvIqvq Mvg GjvKvi mwnZ kni GjvKvi cwZwbwai msL¨v Askvbcv‡Z wefvR‡b Ab¨vh¨ AmgZv (unjust congressional apportionment) cwijw¶Z nq| GB Ab¨vh¨ AmgZv P¨v‡jÄ Kwi‡j mcxg †KvU Bnv GKwU ivR‰bwZK ck ewjqv cv_bv LvwiR K‡i| mcxg †Kv‡Ui msL¨v Mwiô wePviKM‡Yi c‡¶ Justice Frankfurter e‡jb †h ZwKZ Bm¨wU “of a peculiarly political nature and therefore not meet for judicial determination.”|

wKš 16 erm‡ii g‡a¨ cavb wePvicwZ Earl Warren Gi †bZ‡Z mcxg †KvU Baker V. Carr 369 US 186 (1962) †gvKvÏgvq Bnvi gZ cwieZb K‡i| cKZ c‡¶ Bnv bZb hM mwóKvix GKwU ivq| Justice Warren wb‡R I ewjqv‡Qb †h GB ivqwU Zvnvi Rxe‡bi me‡kô ivq| Bnv Tennessee A½ivR¨ nB‡Z AvMZ GKwU †gvKvÏgv| 1901 mv‡ji GKwU AvBb A½ivR¨wUi 95wU county Gi g‡a¨ cwZwbwai msL¨v Askvbcv‡Z wefvRb Kwiqv †`q| 1960 mv‡ji Av`gïgvix‡Z †`Lv hvq †h Mvg GjvKvi Zjbvq kni GjvKvi †jvK msL¨v eû¸b ew× cvß nB‡j I

†jvKmsL¨vi Askvbcv‡Z cwZwbwai msL¨v ew× Kiv nq bvB weavq Mvg I kni GjvKvi AskvbcvZ cwZwbwa‡Z AmgZvi mwó nBqv‡Q|

US mcxg †Kv‡Ui msL¨vMwiô wePviKM‡Yi c‡¶ gj ivqwU Justice Brennan c`vb K‡ib t

> "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.....
>
> We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

Dc‡iv³ iv‡qi mwnZ GKgZ †cvlY Kwiqv Justice Clark mswea v‡bi gj aviYv‡K cL¨vcb (project) K‡ib t

> "As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forebears fought and many died, namely that "to be fully comformable to the principle of right, the form of government must be representative." That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so

clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court."

cZxqgvb nq †h 1946 mv‡j unjust congressional apportionment wel‡q ivR‰bwZK ck RwoZ iwnqv‡Q GB IRnv‡Z mcxg ‡KvU ZwKZ Av‡e`bwU bvKP Kwi‡j I 1962 mv‡j GKB ai‡bi Av‡e`b Dc‡iv³ fv‡e mcxg ‡KvU we‡ePbv KiZt b¨vh¨ apportionment Kwievi Av‡`k c`vb K‡i|

Baker V. Carr ‡gvKÏgvi ivq m¤ú‡K Professor Keith E. Whittington wbæwjwLZ gše¨ K‡ibt

The famed legislative apportionment decision of 1962 is an example of the Court cutting through the "political thicket." Chief Justice Warren later regarded Baker v. Carr as "the most important case of my tenure on the Court". As governor of California, Warren had contributed to the preservation of malapportioned and gerrymandered legislative districts, which he later admitted "was frankly a matter of political expediency." "But I saw the situation in a different light on the Court. There, you have a different responsibility." From that perspective, he came to believe that he "was just wrong as Governor." The Court's willingness to intervene in the field was an abrupt departure from the traditional understanding of apportionment being a legislative and deeply political prerogative. (Political Foundations of Judicial Supremacy, Page-126).

ivR‰bwZK ev RbM‡Yi †KŠZn‡jvÏxcK †gvKvÏgvq GKRb wePvi‡Ki KZe¨ m¤ú‡K Northern Security Co. V. United States (1903) 193 US 197 †gvKvÏgvq wePvicwZ Oliver Wendell Holmes Zvnvi wfbgZmPK iv‡qi cvi‡¤ e‡jbt

"Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future but because of some accident of immediate over-whelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must

try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of it the same question arose upon an indictment for a similar act which excited no public attention and was of importance only to a prisoner before the court." (A‡av‡iLv c`Ë)|

Dennis V. United States 341 US 494 (1951) ‡gvKvÏgvq wePvicwZ Felix Frankfurter †gvKvÏgv wb¯úwË‡Z Av`vj‡Zi fwgKv m¤‡Ü wb‡gv³ gše¨ K‡ibt

".....Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." (A‡av‡iLv c`Ë)

Secretary of State for Education And Science V. Tameside Metropolitan Borough Council 1977 AC 1014 †gvKÏgvq Tameside Borough ‡Z wk¶v e¨e¯v bZb cPwjZ comprehensive c×wZ Abmv‡i Pwj‡e bv mbvZb Grammar School ¸wj Pvj _vwK‡e Bnv jBqv we‡iva | 1975 mv‡j †jevi KvDwÝjiMY msL¨vMwiô wQ‡jb| Zvnviv Tameside Borough †Z Comprehensive c×wZ Pvj Kwievi Rb¨ †K›`xq wk¶v gšxi wbKU c¯ve K‡ib| ZLb †K‡›`I †jevi miKvi ¶gZvq wQj| †K›`xq wk¶v gšx Zvnv 1944 mv‡ji AvBb Abmv‡i D³ c×wZi Ab‡gv`b c`vb K‡ib| Ab‡gv`b Abmv‡i mvaviY ¯‹j¸wj I K‡qKwU Grammar ¯‹j comprehensive ¯‹‡j if‡cvšwiZ nq| wKš 1976 mv‡j AbwôZ Borough wbevP‡b Tameside G KbRvi‡fwUf cwU msL¨vMwiôZv jvf K‡i| Zvnviv Aewkô Grammar ¯‹j¸wj‡K comprehensive ¯‹‡j if‡cvši Kwi‡Z A¯xKvi K‡i | Bnv Zvnv‡`i Ab¨Zg wbevPbx A½xKvi wQj| GB welqwU jBqv msL¨vMwiô KbRvi‡fwUf KvDwÝji Øviv MwVZ Borough Gi mwnZ †K›`xq †jevi miKv‡ii ivR‰bwZK gZ‰ØZZvi mwó nq Ges Borough Council †K›`xq miKv‡ii wb‡`k gvb¨ Kwi‡Z A¯xKwZ

Rvbvq| hw` I welqwU †K›`xq †jevi I Borough Gi KbRvi‡fwUf cwUi ivR‰bwZK gZv`‡ki we‡iva wKš †kl chš Bnv Av`vjZ chš Movq| AvBbMZ we‡ivawUi mwnZ †h `BwU ivR‰bwZK cwZc‡¶i gZv`‡ki we‡iva I †h RwoZ Zvnv Court of Appeal I Dcjw× K‡i| Lord Denning MR, Zvnvi iv‡q gše¨ K‡ib (ct 1021) t

> We, of course, in this court support neither side in this controversy: but we have to take notice that the political parties are concerned in it. This is shown by the dispute which is now before the court.

Geoffrey Lane L.J Zvnvi iv‡qi GKvs‡k gše¨ K‡ib (1033)t

> At the root of the dispute, and there is no advantage in closing one's eyes to the fact, are the two opposing views as to the better form of secondary education. Unfortunately the argument has become politically aligned, with the result that the true issues may sometimes become lost in the dust of political battle. (A‡avi‡iLv c`Ë)

`BwU ivR‰bwZK cwZc‡¶i g‡a¨ gjZt ivR‰bwZK gZv`‡ki we‡iva‡K h³ iv‡R¨i m‡ev"P Av`vjZ House of Lords wK `wó f½x‡Z wePvi K‡i ZvnvB mKj wePviKM‡Yi wk¶Yxq | Lord Russell of Killowen Dc‡iv³ Avcxj †gvKvÏgvq Zvnvi ivq Avi¤ K‡ib GB fv‡e (ct 1073) t 1977AC p-1073 :

> My Lords, I would remark upon some matters introductory to consideration of this appeal.
>
> 1. In my judicial capacity I must have no preference for a particular system of state supported education, whether mixed or comprehensive. In my personal capacity I have in fact no preference for any particular system, and this fact, while it may disable me from arriving at a conclusion that a particular view is wrong, may assist me in arriving at a correct conclusion as to whether a proposed course of action, motivated in whole or part by a particular view, is "unreasonable". In this latter respect I may indeed, because of my very neutrality, or if you please indifference, be in a position of relative advantage in concluding what may be considered unreasonable , while at the same time (though not paradoxically) being at a disadvantage in concluding which system is the better." (A‡avi‡iLv c`Ë)

wewZwKZ welq jBqv Av`vjZ I wePviK‡`i Av`k Ae¯vb wK nIqv DwPr †m m¤‡Ü S.P. Gupta V. President of India AIR 1982 SC 149 †gvKvÏgvq wePvicwZ P.N. Bhagwati Av‡jvK cvZ K‡ib (cô v-177)t

"1.....We find, and this is not unusual in cases of this kind, that a considerable amount of passion has been injected into the arguments on both sides and sometimes passion may appear to lend strength to an argument, but, sitting as Judges, we have to be careful to see that passion does not blind us to logic and predilections pervert proper interpretation of the constitutional provisions. We have to examine the arguments objectively and dispassionately without being swayed by populist approach or sentimental appeal. It is very easy for the human mind to find justification for a conclusion which accords with the dictates of emotion. Reason is a ready enough advocate for the decision one, consciously or unconsciously, desires to reach.....

.....We have therefore to rid our mind of any pre-conceived notions or ideas and interpret the Constitution as it is not as we think it ought to be, We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation. We must also remember that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time, Judicial response to the problem of constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when Judges are confronted with issues of momentous importance....." (A‡av‡iLv c`Ë)

GKB cm‡½ Federation of Pakistan V. Haji Muhammed Saifullah Khan, PLD 1989 SC 166, †gvKÏgvq wePvicwZ Nasim Hasan Shah Gi gše¨ cÖavb †hvM¨ (cô v-190)|

" The circumstance that the impugned action has political overtones cannot prevent the Court from interfering therewith, if it is shown that the action taken is violative of the Constitution. The superior Courts have an inherent duty, together with the appurtenant power in any case coming before them, to ascertain and enforce the provisions of the Costitution and as this duty is derivable from the express provisions of the Constitution itself the Court will not be deterred from performing its Constitutional duty, merely because the action impugned has political implications." (Aa†iLv c`Ë)|

‡h mKj †gvKvÏgvq ivR‰bwZK weZwKZ welqv`x RwoZ _v‡K †m mg¯ †¶‡Î I GKRb wePviK ïagvÎ msweavb I AvB†bi cwZ GKvM `wó wbe× ivwLqv ZwKZ welqwU wb¯úwË Kwi‡eb| wePviKMY wbevwPZ RbcwZwbwa b‡nb wKš RbMYB Zvnv‡`i Dci RbM‡Yi msweavb I AvBb Abmv‡i wePviKvh m¤úb Kwievi `vwqZ Acb Kwiqv‡Q| ivRbxwZwe`MY ivRbxwZ Kwi‡eb, wePviKMY ivRbxwZ ewRZ wePviKvh cwiPvjbv Kwi‡eb| mvgwqK ivR‰bwZK D‡ËRbv ev Av‡›`vjb wePviKMY‡K Av‡›`vwjZ Kwi‡e bv| Zvnv‡`i `wó mvsweavwbK b¨vq wePv‡ii Pole star Gi cwZ w¯i ivwL‡Z nB‡e| GB mvabvq Zvnv‡`i GKgvÎ nvwZqvi nB‡Z‡Q msweavb| ivR‰bwZK KUZK ev Av‡e‡M GKRb wePviK KLbB gj AvBbMZ Bm¨ nB‡Z weP¨r nB‡eb bv|

nvB‡KvU wefv‡Mi Full Bench Gi ivq nB‡Z cZxqgvb nq †h evsjv‡`‡ki `B cavb ivR‰bwZK `‡ji gnvmwPeØq ixU †gvKvÏgvq c¶f³ nBqvwQ‡jb| miKvi c‡¶ weÁ A¨vUYx-†Rbv‡ij Ges 6bs cwZev`x c‡¶ weÁ G¨vW†fv‡KU g‡nv`q wb`jxq ZËveavqK miKvi e¨e¯v Z_v ZwKZ msweavb ms‡kvab AvBb mg_b Kwiqv e³e¨ ivwLqvwQ‡jb| AÎ Av`vj‡ZI weÁ A¨vUbx †Rbv‡ijmn †ekxi fvM weÁ Amicus Curiae wb`jxq ZËveavqK miKvi e¨e¯v mg_b Kwiqv‡Qb|

Avgiv wePviKM‡Yi †Kvb we‡kl e¨e¯vi cwZ †Kvbi“c AbivM ev weivM †KvbUvB bvB| Z‡e Bnv ¯úóZB cZxqgvb nq, †h ivR‰bwZK `j eZgvb miKvi MVb Kwiqv‡Q Zvnviv Ges cavb we‡ivax `j DfqB wb`jxq ZËveavqK miKvi e¨e¯v Z_v ZwKZ ms‡kvab AvBb‡K mg_b Kwi‡Z‡Qb| Zvnv‡`i c‡Z¨‡Ki `jxq Av‡e‡Mi mwnZ GKgZ nB‡Z cvwi‡j Avgv‡`i cwikg A‡bKUvB jvNe nBZ wKš Avgv‡`i wePviKM‡Yi `vwqZ I KZe¨ AZ¨š mKwVb| wePviKMY m¤úY ivRbxwZ I Av‡eM ewRZ fv‡e ïagvÎ msweav‡bi Kwôcv_‡i m¤úY c¶cvZnxb fv‡e ZwKZ we‡ivawU wb¯úb

Kwi‡eb| wePviKMY MY‡fvU (plebiscite) gvidr wePvi K‡ib bv, Zvnviv wb‡fRvj hw³ I †nZ (reason) Gi Dci wbfi K‡ib|

Avgiv eZgvb mvsweavwbK weZ‡K Avcxj Kvix c‡¶ weÁ G¨vW†fv‡KU, A¨vUbx-†Rbv‡ij Ges weÁ amicus curiae M‡Yi e³e¨ AZ¨š g‡bv‡hvM mnKv‡i keY KwiqvwQ Ges Zvnv‡`i D‡ØM I AšwbwnZ evYx (message) Dcjwä Kwievi †Póv KwiqvwQ|

ZwKZ msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, msweav‡bi Av‡jv‡K e¨vL¨v I we‡klY KiZt Bnvi ˆeaZv wbi“cY Kiv nB‡e|

16| cvK-K_bt ewUk-ivR 190 ermi fviZe‡l ivRZ Kwievi ci 1947 mv‡j Indian Impendence Act, 1947, gvidr fviZ I cvwK¯vb bvgK `BwU ¯vaxb Dominion mwó nq| †gvnv¤§` Avjx wRbvn 1947 mv‡ji 11B AMvó Zvwi‡L cvwK¯v‡bi MYcwil‡`i (Constituent Assembly) c_g President wbevwPZ nBqv Zvnvi fvl‡Y cvwK¯vb‡K GKwU agwbi‡c¶ AvaywbK ivó wnmv‡e Mwoqv Zwjevi Avkvev` e¨³ K‡ib| 1947 mv‡ji 14B AMvó cvwK¯vb Ges 15B AMvó Zvwi‡L fviZ ¯vaxbZv jvf K‡i|

1948 mv‡j wRbvni gZ¨i ci cvwK¯vb µgvb‡q Bmjvg agwfwËK iv‡ó cwiYZ nB‡Z _v‡K| fviZ 1950 mv‡ji Rvbqvix gv‡m Bnvi msweavb MnY I †NvlYv KiZt cRvZ‡š cwiYZ nq| Ab¨w`‡K cvwK¯vb µgvMZ cvmv` loh‡ši wkKvi nB‡Z _v‡K Ges †MvôxZš ejer nq| MYcwil‡` ce evsjvi cwZwbwaZ 44 nB‡Z 38 G Kwg‡q Avbv nq Ges cwðg cvwK¯v‡bi ‡gvU cwZwbwa 26 nB‡Z ew× Kwiqv 32 Kiv nq| ZvnvQvov †ek K‡qKRb D`fvlx hvnviv wefvMce fvi‡Zi wewfb c‡`‡ki Awaevmx wQ‡jb Zvnvw`M‡K ceevsjvi †KvUv nB‡Z Constituent Assembly Gi cwZwbwa Kiv nq, †hgb, wjqvKZ Avjx Lvb, †Mvjvg †gvnv¤§` cgL| GB fv‡e cvwK¯v‡bi mwói mgq nB‡ZB cee‡½i cwZ Pig ˆelg¨gjK AvPiY nB‡Z _v‡K| hw` I mgM cvwK¯v‡b evsjvfvlx †jvK msL¨vMwiô nB‡j I D`‡K ivófvlv Kwievi wm×vš ceevsjvi Dci PvcvBqv

†`lqv nq, d‡j 1948 mvj nB‡ZB evsjv‡K Ab¨Zg ivófvlv Kwievi Rb¨ `vex I‡V| ce evsjv cKZ c‡¶ cwðg cwK¯v‡bi K‡jvbx‡Z i“cvšwiZ nq|

1956 mv‡j Islamic Republic of Pakistan Gi c_g mswevb MnxZ nq Ges 1959 mv‡ji †de“qvix gv‡m c_g mvaviY wbevPb Abwô Z nBevi K_v _v‡K, wKš cwK¯v‡bi ‡cwm‡W›U Major General Iskander Mirza 1958 mv‡ji 7B A‡±vei Zvwi‡L mgM †`‡k mvgwiK AvBb Rvix K‡ib| 27‡k A‡±vei Zvwi‡L cavb †mbvcwZ †Rbv‡ij AvBqe Lvb †cwm‡W›U‡K Acmviy Kwiqv wb‡RB ‡cwm‡W›U c` MnY K‡ib| AZtci, wZwb wb‡R‡K Field Martial c‡` c‡`vbwZ c`vb K‡ib| 1962 mv‡j mvgwiK AvBb cZ¨vnvi Kiv nq Ges bZb GK mswev‡bi AvIZvq To suit the genius of the people AR nv‡Z Basic Democracy ewjqv GK A™Z ai‡bi Z_vKw_Z MYZš cPjb Kiv nq| Aek¨ GB Basic Democracy aviYv†K I †`kx I we‡`kx wKQmsL¨K cwÛZ e¨wË“ AZ¨š cksmv K‡ib| 1966 mv‡ji Rb gv‡m †kL gwRei ingvb Zvnvi cL¨vZ 6 `dv `vex †ck Kwiqv ce cwK¯vb mn cwK¯v‡bi cvPwU c‡`‡ki Rb¨ ¯vqZ kvmb I mveRbxb †fvUvwaKv‡ii wfwË‡Z mvaviY wbevPb `vex K‡ib| BnvB ce cwK¯v‡bi RbM‡Yi cv‡Yi `vex nBqv I‡V| 1969 mv‡j ‡cwm‡W›U wdì gvkvj AvBDe Lvb cwK¯v‡bi cavb †mbvcwZ †Rbv‡ij Bqvwnqv Lv†bi wbKU mKj ¶gZv n¯vši K‡ib| 1962 mv‡ji mswevb evwZj nq| †`‡k Avevi I mvgwiK kvmb ejer Kiv nq| †Rbv‡ij Bqvwnqv Lvb cwK¯v‡bi †cwm‡W›U I cavb mvgwiK KgKZvi `vwqZ fvi MnY K‡ib|

AZtci Legal Framework Order Gi AvIZvq 1970 mv‡ji †klfv‡M ALÛ cwK¯v‡bi c_g I †kl mvaviY wbevPb Abwô Z nq| GB wbevP‡bi c_g I cavb `vwqZ wQj cwK¯‡bi Rb¨ GKwU mswevb cYqb Kiv|

‡K›`xq I ce cwK¯vb cv‡`wkK cwil` Dfq cwil‡`B †kL gwRei ingv‡bi †bZ‡Ë AvIqvgx jxM fwgam †fv‡U wbi¼k Rqjvf K‡i|

1971 mv‡ji 3iv gvP Zvwi‡L XvKvq MYcwil‡`i Awa‡ekb AvnŸvb Kiv nq| wKš †Rbv‡ij Bqvwnqv Lvb 1jv gv‡Pi GK †NvlYvq D³ Awa‡ekb Awbw`ó Kv‡ji Rb¨ ¯wMZ Kwi‡j ce cwK¯v‡bi RbMY †¶v‡f, `t‡L, †µva, nZvkvq dvwUqv c‡o| 7B gvP Zvwi‡L †kL gwRei ingvb Z`bxšb igbv †im‡Kvm gq`v‡b j¶ j¶ RbZvi m¤§‡L c`Ë fvI‡Y Ø¨_nxb fvIvq †NvlYv K‡ib †h ÔGev‡ii msMvg Avgv‡`i gwI“i msMvg, Gev‡ii msMvg ¯vaxbZvi msMvgÕ|

23‡k gvP cwK¯vb w`e‡m K¨v›U‡g›U¸wj e¨wZ‡i‡K ce cwK¯v‡bi meÎ ¯vaxb evsjv‡`‡ki cZvKv †kvfv cvq|

25‡k gvP w`evMZ iv‡Î mvgwiK evwnbx XvKv, PÆMvg I c‡`‡ki wewfb ¯v‡b AKm¥vr wbi¯ evOvjx‡`i Dci e¨vcK MYnZ¨v Avi¤ K‡i| GB mgqB 26‡k gv‡Pi c_g cn‡i †kL gwRei ingvb evsjv‡`‡ki ¯vaxbZv †NvlYv K‡ib|

1971 mv‡ji 10B Gwcj Zvwi‡L evsjv‡`‡ki miKvi MwVZ nq Ges Avbôvwb K fv‡e Proclamation of Independence gwRe bMi nB‡Z †NvlYv Kiv nq| BnvB evsjv‡`‡ki c_g mvswevwbK `wjj| GB `wj‡jB evsjv‡`‡ki cUfwgKv I fwel¨Z evsjv‡`‡ki i“c†iLv eYbv Kiv nBqv‡Q| ZvnvQvov, GB †NvlYvcÎ `wjj gvidr evsjv‡`‡ki RbMY‡K mKj ¶gZvi Drm wnmv‡e ¯xKwZ c`vb Kiv nq Ges GKwU MYcwil` mwó Kiv nq| GKB w`‡b Laws Continuance Enforcement Order Rvix nq| GB `wjj Øviv 1971 mv‡ji 26‡k gvP Zvwi‡L ejer mKj AvB‡bi ˆeaZv c`vb Kiv nq|

`xN bqgvm e¨vcx i³ ¶qx h‡× Ges GK mvMi i‡³i ga¨ w`qv 1971 mv‡ji 16B wW‡m¤i Zvwi‡L cwK¯vb †mbvevwnbx fviZ I evsjv‡`k Gi †hŠ_ †mbvevwnbxi wbKU AvZ¥mgcb K‡i| j¶

gwË“‡hv×vi Rxe‡bi wewbg‡q evsjv‡`‡ki cZvKv Dw Ç qgvb nq| evsjv‡`k ¯vaxb nq|

1972 mv‡ji 10B Rvbqvix Zvwi‡L cvwK¯v‡bi ew›`` kv nB‡Z RvwZi wcZv ivócwZ †kL gwRei ingvb XvKvq c`vcY K‡ib| 11B Rvbqvix Zvwi‡L Provisional Constitution of Bangladesh Order, 1972, Rvix nq| mswe avb cYq‡bi Rb¨ 22‡k gvP Zvwi‡L Constituent Assembly of Bangladesh Order, 1972, Rvix nq| MYcwil` ¯ízg mg‡qi g‡a¨ mswe avb iPbv I wewae× Kwiqv MnY K‡i| GB mswe avb 1972 mv‡ji 16B wW‡m¤i ZvwiL nB‡Z KvhKi nq|

17| mvgwiK kvmb t 1975 mv‡ji 20‡k AMvó Zvwi‡L evsjv‡`‡k mvgwiK AvBb Rvix nq| 15B AMvó ZvwiL nB‡Z Bnv KvhKi Kiv nq| 1979 mv‡ji 6B Gwcj ZvwiL ivZ 8Uvq cKvwkZ GK Proclamation Øviv mvgwiK AvBb cZ¨vnvi Kiv nq| Bnv ciw`b 7B Gwcj Zvwi‡Li evsjv‡`k †M‡R‡U cKvwkZ nq| Ri“ix AvBb 1979 mv‡ji 27‡k b‡f¤i Zvwi‡L cZ¨vnvi Kiv nq|

BwZg‡a¨ 6B Gwcj Zvwi‡L wØZxq msm`, mswe avb (cÂg ms‡kvab) AvBb 1979, gvidr 1975 mv‡ji 15B AMvó nB‡Z 1979 mv‡ji 9B Gwcj chš mKj mvgwiK AvB‡bi ‰eaZv c`vb K‡i| mcxg †KvU Aek¨ A‡bK wej‡¤ nB‡j I mswe avb (cÂg ms‡kvab) AvBb ewZj Kwiqv‡Q|

1982 m‡bi 24‡k gvP Zvwi‡L †jt †Rbv‡ij ûmvBb †gvnvg¥` Gikv` evsjv‡`‡ki ivóxq ¶gZv `Lj K‡ib Ges †`‡k cbivq mvgwiK kvmb ejer nq| evsjv‡`‡ki gvbl cbivq Zvnv‡`i bvMwiK ¯vaxbZv I AwaKvi nvivq|

1986 mv‡ji 11B b‡f¤i Zvwi‡L cYxZ mswe avb (mßg ms‡kvab) AvBb, 1986 gvidr PZ_ msm`, 1982 mv‡ji 24‡k gvP ZvwiL nB‡Z 1986, mv‡ji 11B b‡f¤i chš mKj mvgwiK AvB‡bi ^eaZv c`vb K‡i| mcxg †Kv‡Ui nvB‡KvU wefvM Aek¨ Avevi I D³

mvgwiK kvmb A‰ea †NvlYv Kwiqv mswevavb (mßg ms‡kvab) AvBb evwZj Kwiqv‡Q|

1988 m‡bi 9B Rb Zvwi‡L mswevavb (Aóg ms‡kvab) AvBb, 1988, gvidr cRvZ‡ši ivóag Bmjvg wbaviY Kiv nq Ges mswevav‡bi 100 Ab‡"Q` ms‡kvab KiZt nvB‡KvU wefv‡Mi ¯vqx †eÂ¸wj evsjv‡`‡ki wewfb kn‡i ¯vcb Kiv nq|

mcxg †Kv‡Ui Avcxj wefvM Anwar Hossain V. Government of Bangladesh 1989 BLD (Special Issue) †gvKvÏgvq Bnvi 2-9-1989 Zvwi‡Li iv‡q mswevav‡bi 100 Ab‡"Q‡`i ms‡kvab evwZj †NvlYv K‡i| AZtci, ivRavbxi evwn‡i Aew¯Z nvB‡KvU wefv‡Mi ¯vqx †eÂ¸wj XvKvq cZ¨veZb K‡i|

18| MYZ‡š cZ¨veZb t mgM evsjv‡`‡k cPÛ we‡¶vf I `evi Av‡›`vj‡bi g‡L ‡jt †Rbv‡ij ûmvBb ‡gvnv¤§` Gikv` 1990 mv‡ji 6B wW‡m¤i Zvwi‡L ivócwZ c` nB‡Z c`Z¨vM K‡ib| Bnvi c‡e `jgZ wbwe‡k‡l mKj ivR‰bwZK `j I †RvU evsjv‡`‡ki Z`vbxšb cavb wePvicwZ mvnvewÏb Avn†g`‡K GKwU wb`jxq I wbi‡c¶ miKv‡ii cavb wnmv‡e `vwqZ Mn‡Yi AvnŸvb Rvbvb| BwZg‡a¨ Dc-ivócwZ c`Z¨vM K‡ib| D³ kY¨ c‡` ZrKvjxb ivócwZ cavb wePvicwZ mvnvewÏb Avng`‡K Dc-ivócwZ c‡` wb‡qvM c`vb Kwiqv 6B wW‡m¤i Zvwi‡L Zvnvi wbKU ivócwZ Gikv` c`Z¨vM K‡ib| D³ Zvwi‡LB †`‡ki wZbwU cavb ivR‰bwZK †RvU I `‡ji ¯ZtùZ AvnŸv‡b mvov w`qv MYZš cbi"×v‡ii D‡Ï‡k Z`vbxšb cavb wePvicwZ mvnewÏb Avng` A¯vqx ivócwZ wnmv‡e wbi‡c¶ miKvi cwiPvjbvi `vwqZfvi MnY K‡ib|

1991 mv‡ji 27‡k †de"qvix Zvwi‡L evsjv‡`‡k GKwU mvaviY wbevPb Abwôz nq| GKwU ivR‰bwZK `j wbi¼m msL¨vMwiôZv jvf Kwiqv 20/3/1991 Zvwi‡L miKvi MVb K‡i|

1991 mv‡ji 10B AMv‡ói mswewavb (GKv`k ms‡kvab) AvBb, 1991, e‡j wePvicwZ mvnvewÏb Avng` cbivq evsjv‡`‡ki cavb wePvicwZ c‡` cZ¨veZb K‡ib|

1991 mv‡ji 18B †m‡Þ¤i Zvwi‡L ivR‰bwZK †RvU¸wji cewm×vš Abmv‡i mswewavb (Øv`k ms‡kvab) AvBb, 1991, wewae× nq| GB ms‡kvab AvBb evsjv‡`k mswewav‡b AZ¨š¿i“ZcY cwieZb Avbqb K‡i| mswewav‡bi PZ_ fv‡M 1g I 2q cwi‡”Q‡`i cwie‡Z 1g, 2q I 3q cwi‡”Q`¸wj cwZ¯wcZ nq| Bnv‡Z ivóe¨e¯vq †gŠwjK cwieZb mvwaZ nq| c‡ei Presidential System Gi cwie‡Z msm`xq ivóe¨e¯vq cbt cZ¨eZb K‡i| ZvnvQvov, KwZcq †¶‡Î ivócwZi e¨‡qi KZZ m¤wjZ mswewav‡bi 92K Ab‡”Q`wU wejß Kiv nq| Z‡e 70 Ab‡”Q`wU AviI m¤úmvwiZ Kiv nq|

AZtci, lô msm` 1996 mv‡ji 28‡k gvP Zvwi‡L ZwKZ mswewavb (Î‡qv`k ms‡kvab) AvBb, 1996 (1996 m‡bi 1bs AvBb) wewae× K‡i| mswewav‡bi GB ms‡kvab AvB‡bi ^eaZv eZgvb †gvKvÏgvi wePvh welq|

19| Rbve Gg AvB dvi“Kx, wmwbqi G¨vW†fv‡KU, Gi e³†e¨i mvigg t Rbve dvi“Kx, G¨vW†fv‡KU g‡nv`q e‡jb †h cRvZš, MYZš I wePvi wefv‡Mi ¯vaxbZv evsjv‡`k mswewav‡bi gj wfwË ev Basic Structure| RvZxq msm` mswewav‡bi Dc‡iv³ gj wfwË¸wj Le Kwi‡Z cv‡i bv, A_P, weÁ G¨vW†fv‡KU g‡nv`q e‡jb, ZwKZ mswewavb ms‡kvab AvBbwU Dc‡iv³ c‡Z¨KwU Basic Structure Le Kwiqv‡Q Ges RbM‡Yi mve‡fŠgZ aŸsm Kwiqv‡Q weavq ZwKZ ms‡kvabwU AmvswewavwbK I A‰ea|

wØZxq fvM
AvBbMZ Av‡jvPbv

AZci, mswewav‡bi Dc‡iv³ gj wfwË¸wj µgvb‡q Av‡jvPbv Kiv nBj|

20| MYZš‹t evsjv‡`k msweav‡bi c¯vebvi wØZxq `dvq eYbv Kiv nBqv‡Q †h mKj gnvb Av`k evsjv‡`‡ki exi RbMY‡K RvZxq gw³ msMv‡g AvZ¥b‡qvM I exi knx`w`M‡K cv‡YvrmM Kwi‡Z D™× KwiqvwQj Zvnvi Ab¨Zg nBj MYZš|

msweav‡bi wØZxq fv‡Mi 8 Ab‡”Q‡` ivó cwiPvjbvi †h mKj gjbxwZ eYbv Kiv nBqv‡Q Zvnvi g‡a¨ MYZš Ab¨Zg| ZvnvQvov, 11Ab‡”Q‡` ejv nBqv‡Q †h (evsjv‡`k) cRvZš nB‡e GKwU MYZš| Avcxj Kvix c‡¶ wb‡e`b Kiv nBqv‡Q †h MYZš msweav‡bi GKwU basic structure ev gj ˆewkó¨ ev KvVv‡gv wKš ZËveavqK miKvi aviYv msweav‡bi GB basic structure Gi mwnZ mvsNwlK| cKZc‡¶ msweav‡b MYZš †jLv _vwK‡j I ZËveavqK miKvi Avg‡j MYZš m¤úYfv‡e wejß _v‡K|

c_gZt MYZš basic structure wKbv Ges hw` basic structure nBqv _v‡K Z‡e wb`jxq ZËveavqK miKvi aviYv Bnvi mwnZ mvsNwlK wKbv Zvnv we‡klY Kwievi c‡e MYZš A_ wK, Bnvi BwZnvm wK, AvawbK h‡M Bnvi weeZb wK fv‡e nBj, Zvnv ms‡¶‡c Av‡jvPbv Kiv c‡qvRb|

cvPxb we‡ki cvq mKj †`‡k cavbZ ivRZš we`¨gvb wQj| ‡Kvb †Kvb †`‡ki AwaevmxMY ivRv‡K †`eZv Ávb KwiZ| Lóce cÂg kZvwã‡Z Mxm †`‡ki Athens bMi-iv‡ói ivR‰bwZK Ae¯vb‡K AvawbK ivR‰bwZK wPšvwe` I Aa¨vcKMY Democratic ev MYZvwšK ewjqv AvL¨vwqZ K‡ib|

MYZš ev Democracy kãwU DrcwË nBqv‡Q cvPxb Mxm †`‡ki ‘demokratia’ kã nB‡Z| MxK ‘demos’ A_ ‘RbMY’ I ‘Kratos’A_ ‘kvmb’| A_vr democracy ev demokratia ewj‡Z RbM‡Yi cZ¨¶ ev mivmwi kvmb †evSvBZ|

cvPxb Mxm †`‡k ¯vaxb bMi-iv‡ói Af`¨q nq| Lóce cÂg kZvwã‡Z H mKj bMi-iv‡ói AwaevmxMY †Kvb AvBb cYqb ev †Kvb mgm¨v mgvavb K‡í GKwÎZ nBqv †fvUvwaKvi Av‡ivc gvidr

AvBb cYqb KwiZ ev mgm¨v mgvavb KwiZ| Hi“c mgv‡e‡k (assembly) ‡h †Kvb wbevnx wm×vš, wePwiK Kvh Ges c‡qvRb gvwdK AvBb cYqb Kiv nBZ|

Aek¨ eZgvb bMi¸wji Zjbvq Z`vbxšb bMi ev ivó¸wji bvMwiK RbmsL¨v Le Kg †¶‡ÎB `k nvRv‡ii AwaK nBZ| ZLb bMi ivó ewj‡Z bMi I Dnvi wbKU PZcvk¯ MvgvÂj †evSvBZ| D‡jL¨, †mB mgq gwnjv I µxZ`vmMY bvMwiK wQ‡jb bv| hw` I mvaviY mgv‡ek¸wj‡Z wkw¶Z-Awkw¶Z, abx-`wi` wbwe‡k‡l mK‡ji mgvb †fvUvwaKvi _vwK‡j I ZLb mveRbxb mgZvi (equality) Afve wQj|

mgv‡e‡k (assembly) bvMwiKMY iv‡ói wewfb c‡` wbevwPZ nBZ| A‡bK mgq jUvwi gvidr wewfb c` weZiY Kiv nBZ| mKj KgKZvMY Zvnv‡`i Kvhvejxi Rb¨ Rbmgv‡e‡ki wbKU `vqe× _vwKZ|

Lóce cÂg kZvwã‡Z Mx‡mi G‡_Ý bMiiv‡ó GBi“c cZ¨¶ MYZš weKwkZ nq| G‡_‡Ýi ‡bZ‡Z Mx‡mi Ab¨vb¨ MYZvwšK bMi-ivó¸wj GKwÎZ nq| Z‡e Mx‡mi mKj bMi-iv‡ó MYZš wQj bv, †hgb, ¯úvUv| ¯úvUvq †Mvwó kvmb (Oligarchy) we`¨gvb wQj| cieZx‡Z ¯úvUv bMi-iv‡ói mwnZ h‡× G‡_‡Ýi civR‡qi ci Z`vbxšb cZ¨¶ MYZš µgk Ae¶q nB‡Z nB‡Z civµgkvjx †ivgK‡`i Avµg‡bi ci m¤úY †jvc cvq|

GBi“c NUbv Lóce 6ó kZvwã‡Z DËice fvi‡Z I NwUqvwQj| †`excmv` P‡Ævcva¨vq Zvnvi iwPZ Ô†jvKvqZ `kbÕ M‡š †`LvBqv‡Qb †h Hmgq ivRvkvwmZ ivR¨mg‡ni cvkvcvwk MY-kvwmZ eû Rbc` we`¨gvb wQj| kvK¨‡`i g‡a¨ cPwjZ A‡_ †Kvb ivRv wQj bv, kvmbe¨e¯v wQj MYZvwšK Ges †bZv nB‡Zb wbevwPZ| kvK¨‡`i mvaviY mfvM‡ni bvg wQj gšvMvi| †mLv‡b kvmb-cwiPvjbvi welq¸wj Av‡jvwPZ nBZ| gj I wj”Qvwe‡`i g‡a¨I GBiKg gšvMvi ev †jvK mfvi Aw¯Z wQj| whwb cavb wZwb nB‡Zb wbevwPZ, Zv‡K

ivRv AvL¨v †` Iqv nB‡j I KvhZ Zvnvi ghv`v wQj MxK AKb Gi b¨vq| wKš GB UvBevj MYZ‡ši KvVv‡gv jBqv Rbc`¸jx ¯vaxbfv‡e wUwKqv _vwK‡Z cv‡i bvB| gMa I †Kvk‡ji ivókwË“ Î“gvb‡q Zvnv‡`i Mvm KwiqvwQj|

AvawbK h‡M A‡bK ivR‰bwZK wPšvwe`MY cvPxb Mx‡mi bMi-ivó¸wji kvmb e¨e¯vq PgrKZ nBqv cZ¨¶ MYZš wnmv‡e AwfwnZ Kwi‡j I A‡b‡K Avevi Bnv‡K msL¨vMwi‡ôi Pig `tkvmb ev Mobocracy ewjqvI AwfwnZ Kwiqv‡Qb|

cvPxb Mx‡mi Ab¨Zg †kô `vkwbK Plato Z`vbxšb cPwjZ cZ¨¶ MYZš‡K wbcxobgjK ewjqvB g‡b Kwi‡Zb Ges Zvnvi wjwLZ ‘Republic’ M‡š †mBfv‡eB wPwÎZ KwiqvwQ‡jb| Zvnvi ¸i“ Socrates †K GBi“c MYmgv‡ek (Popular Assembly) nB‡ZB cvY`‡Û `wÛZ nB‡Z nBqvwQj| wkw¶Z, `vkwbKM‡Yi nv‡ZB †`‡ki kvmbfvi _vKv DwPZ ewjqv Plato g‡b Kwi‡Zb| Plato Gi QvÎ Aristotle I †mB h‡Mi GKRb †kô `vkwbK I wPšvwe` wQ‡jb| wZwb Zvnvi ‘Politics’ M‡š MYZš m¤‡Ü we¯vwiZ ch‡e¶Y c`vb Kwiqv‡Qb| wZwbI Z`vbxšb mg‡qi MYZš PPv m¤‡Ü mavibv †cvlY Kwi‡Zb bv| Z‡e Plato I Aristotle DfqB cPwjZ MYZš‡K GK ai‡bi mvgvwRK kvmb e¨e¯v ewjqv g‡b Kwi‡Zb|

cvPxb †iv‡g c_‡g Lóce 750 mvj nB‡Z Lóce 510 mvj chš ivRZš we`¨gvb wQj| Zrci cRvZš ¯vwcZ nq| Aek¨ AvawbK h‡Mi cRvZ‡ši aviYvi mwnZ Bnvi mvgvb¨B wgj cwijw¶Z nq| cKZc‡¶ Bnv wQj Oligarchic ev †MvôxZvwšK cRvZš| GB ai‡bi cRvZš Lóce 31 mvj chš †iv‡g we`¨gvb wQj| GBmgq Bsj¨vÛmn BD‡iv‡ci cvq mevs†k †ivgK Consul†`i Aax‡b GKbvqKZ cwZwôZ nq| Lóce 31 mv‡j Octavious †ivg mvgvR¨ cwZôv K‡ib| cvq 6 kZ ermi ci †ivg mvgv‡R¨i cZb nq Ges DË“ mvgv‡R¨i AšMZ BD‡iv‡ci wewfb ‡`‡k cavbZt ivRZš

(absolute monarchy) cwZwôZ nq| ivRvMY Divine right gZev` ev AwaKvi e‡j †`k kvmb KwiZ Ges mevs‡k Zvnv ^¯iZš wQj|

Z‡e Bsj¨v‡Û Rwg`vi (barons and knights) wekc (the clergy) I burgesses ‡`i GKai‡bi gnvmgv‡ek (Great Council of the Realm) nB‡Z ivRv civgk MnY Kwi‡Zb Ges h× ev Ab¨vb¨ we‡kl Kvi‡Y Zvnv‡`i gZvgZ jBqv c‡qvRbxq Ki Av‡ivc Kwi‡Zb| GB ai‡bi mgv‡ek ("estates") nB‡Z Parliament Gi mÎcvZ nq| 1215 mv‡j Magna Carta G ¯v¶i KiZt ivRv John Rwg`vi I Ab¨vb¨‡`i m¤§wZ e¨wZ‡i‡K Ki Av‡ivc bv Kivi cwZk"wZ c`vb KwiqvwQ‡jb| 14k kZ‡Ki †kl fvM nB‡Z Parliament cwZwbwaZgjK cwZôvwbK i"c cvB‡Z _v‡K| 1649 mv‡j ivRv Charles I Gi wki‡"Q‡`i ci Oliver Cromwell Bsj¨v‡Û GKwU Republican Commonwealth ¯vc‡bi e¨_ cqvm cvb wKš 1660 mv‡j ivRZš cbtcwZwôZ nq| 1688 mv‡ji †kl fv‡M ivRv James II wmsnvmb cwiZ¨vM Kwi‡j William III I Mary II ‡hš_fv‡e Bsj¨v‡Ûi wmsnvm‡b Av‡ivnb K‡ib| 1689 mv‡ji 25‡k A‡±vei Zvwi‡L weL¨vZ Bill of Rights cYxZ nq| Bnvi gva¨‡g Bsj¨v‡Û absolute Monarchy Gi Aemvb nq Ges mvsweavwbK ivRZš cwZwôZ nIqvq Bsj¨vÛevmxi AwaKvi Av`vq I ivR‰bwZK weRq mwbwðZ nq| GBiƒc ivR‰bwZK cwieZ‡b iv‡ói cKZ ¶gZv ivRvi cwie‡Z Parliament MnY K‡i wKš Bnv‡Z MYZš cwZôv cvq bv KviY ZLbKvi Parliament Gi †ewki fvM m`m¨ wQ‡jb †`‡ki Rwg`vi I cfvekvjx e¨wË"eM| ZvnvivB Parliament wbqšY Kwi‡Zb, mvaviY Rbgvb‡li cKZ ‡Kvb cfve Parliament Gi Dci ZLbI wQj bv| DË" ivR‰bwZK Ae¯v‡K †Mvôxkvmb ev Oligarchic ejv hvB‡Z cv‡i|

GB mgq Bsj¨v‡Û John Locke (1632-1704) bv‡g GKRb LeB bvgKiv wPšvwe‡`i Avwefve nq| Z`vbxšb mf¨RM‡Z Zvnvi ‡jLvi cfZ cfve cwoqvwQj| Q`¥bv‡g `BL‡Û wjwLZ Zvnvi Treatises on Civil Government 1690 mv‡j cKvwkZ nB‡j Zvnv mvaviY Rbgvb‡li †gŠwjK AwaKvi m¤‡Ü GK wece Avbqb K‡i| Zvnvi †jLbxi

gva¨‡g mvavi Y gvb‡l i mve‡f Šg Ë, bvMwi K ¯vaxb Zv I AwaKvi m¤‡Ü wZwbB mec_g †mv”Pvi nb| wb‡Ri Rxeb, ¯vaxb Zv I m¤ú‡` †h †Kvb gvb‡l i mnRvZ AwaKvi iwnqv‡Q ( inalienable rights) Ges miKvi †mB AwaKvi i¶v Kwi‡Z Pw³ e×| ‡h miKvi Zvnv i¶v Kwi‡Z e¨_ nq, RbMY ‡mB miKvi‡K ¶gZvP¨r Kwievi AwaKvix| miKvi hvnv‡Z ‡¯”QvPvix bv nBqv hvq, †m Kvi‡Y wZwb wbevnx ¶gZv I AvBb cYqY ¶gZvi c_KKiY Kwievi K_v e‡jb| hw` I Zvnvi †jLbx ivRZš‡KB mg_b KwiZ wKš wZwbB mec_g †`k I miKv‡ii g‡a¨ cv_K¨ wbYq K‡ib Ges miKvi ‘In the consent of the people’ Abmv‡i MwVZ nB‡e Zvnv I e‡jb|

GBfv‡e John Locke Gi †jLbxi gva¨‡g MYZš A¼wiZ nBqvwQj|

Bnvi wKQKvj ci dv‡Ý Jean Jaques Rousseau (1712-1778) bv‡g Avi GKRb wPšvwe` AwefZ nb| Zvnvi wjwLZ ‘The Social Contract’ †mB h‡Mi Ab¨Zg †kô KxwZ| Zvnvi gZev` wQj †h iv‡ói Awaevmx‡`i m¤§wZ e¨wZ‡i‡K †Kvb w¯wZkxj iv‡ói Aw¯Z wUwKqv _vwK‡Z cv‡i bv Ges iv‡ói Awaevmx KZK c`Ë ¶gZvB nBj ivó¶gZv| GBfv‡e kvmK I kvwm‡Zi m¤úK GKwU PwË“i Dci wbfikxj hvnv‡K Charter ev msweavb ejv nq| DË“ PwË“‡ZB kvwm‡Zi cwZ miKv‡ii `vwqZ I KZe¨ wbwnZ _vwK‡e| Rousseau GBfv‡e ga¨h‡M we`¨gvb ivRvi ¯Mxq AwaKv‡ii cwie‡Z iv‡ói kvwm‡Zi m¤§wZB ckvm‡bi wfwË GB gZev` cwZwôZ K‡ib| GB gZev` Abmv‡i ivRv kvwm‡Zi m¤§wZ Abmv‡iB ivó cwiPvjbv Kwievi ¶gZv cvß nb, Zvnvi †Kvb HkwiK ¶gZv bvB| RousseauB mec_g iv‡ó mvavi Y Rbgvb‡l i mve‡f Šg Z‡K GKwU mnRvZ AwaKvi (inalienable right) wnmv‡e cwZôvi cqvm cvb| Zvnvi †jLbxi gva¨‡gB mvavi Y Rbgvbl ivóxq Kv‡h Zvnv‡`i ivR‰bwZK AwaKv‡ii K_v mec_g Dcjwä K‡i| GBfv‡e eû kZ ermi ci MYZš Avevi bZb fv‡e Rousseau Gi †jLbxi gva¨‡g cbi“¾xweZ nBevi c_g

†mvcvb LwRqv cvq| The Social Contract gZev` Abmv‡i memvavi‡Yi m¤§wZ e¨wZ‡i‡K †Kvb AvBbB ‰ea b‡n, GB gZev` mec_g DwVqv Av‡m| wZwbB mec_g iv‡ói AvBb cYq‡b RbM‡Yi mivmwi fwgKv _vwKevi c‡hvRbxqZvi Dci †Rvi †`b|

m‡›`n bvB †h, hË“iv‡ói ¯vaxbZv msMvg Ges 1789 mv‡j Abwô Z divmx wece Rousseau Gi †jLbxi Øviv Mfxi fv‡e cfweZ nBqvwQj|

Z‡e ZLbI MYZš ewj‡Z Athens Gi mvaviY RbM‡Yi cZ¨¶ MYZš‡KB mK‡j ewSZ Ges Hobbes, Locke, Rousseau Gi gZ `vkwbKMY †KnB D³ cZ¨¶ MYZš‡K ev¯e m¤§Z ewjqv ( in positive terms) MnY K‡ib bvB| 18k kZ‡K ZLbKvi wkw¶Z wPšvwe`MY MYZš‡K G‡Kev‡iB h‡Mvc‡hvMx g‡b Kwi‡Zb bv, eiÂ cvPxb Kv‡ji GKwU APj ivR‰bwZK kvmb e¨e¯v ewjqv g‡b Kwi‡Zb| GKvi‡YB divmx wec‡e cZ¨¶ MYZš Mn‡Yi c‡¶ Kvnvi I †Zgb †Kvb Drmvn wQj bv|

GB mg‡q Abbe de Sieyes (1748-1836) cwZwbwaZgjK miKvi e¨e¯v cwZôv‡K wec‡ei cKZ D‡Ïk¨ ewjqv AewnZ K‡ib| wZwb ivRvi mve‡f Šg‡Zi cwie‡Z mvaviY RbM‡Yi mve‡f Šg‡Zi (Popular Sovereignty) Dci wfwË Kwiqv cwZwbwaZgjK miKv‡ii gZev‡`i (Concept) g‡a¨ GKwU mvgÄm¨ Avbqb K‡ib| Sieyes Z`vwbšb mg‡qi cUfwgKvq cZ¨¶ MYZš‡K Aev¯e ewjqv g‡b Kwi‡Zb Ges cwZwbwaZgjK ivó e¨e¯v‡K A‡bK †ekx KvhKi I djcm ewjqv g‡b Kwi‡Zb| Zvnvi g‡Z `Bfv‡e RbMY ivó¶gZvq Ask MnY Kwi‡Z cv‡i, c_gZt cZ¨¶ MYZvwšK ivó e¨e¯vq mivmwi Ask MnY, wØZxqZt RbM‡Yi cwZwbwaMY‡K RbM‡Yi c‡¶ `vwqZ c`vb gvidr kvmb e¨e¯v | Sieyes Gi g‡Z wØZxq e¨e¯vB GKwU AvawbK ivó e¨e¯vi Rb¨ A‡bK‡ekx KvhKi I †kq| KviY, GB c×wZ‡Z RbMY Zvnvi AwaKvi ¶b bv KwiqvB Bnvi cwZwbwa‡`i gva¨‡g ivó cwiPvjbvq Ask MnY Kwi‡Z cv‡i| Z‡e wZwb mivmwi ivRv‡K

wmsnvmbP¨Z Kwievi c‡¶ wQ‡jb bv, eiÂ ivRv wb‡R I RbM‡Yi cwZwbwaZ Kwi‡eb GBi“c gZev` Sieyes aviY Kwi‡Zb| GBi“c mg‡q 1792 mv‡ji 21 †k †m‡Þ¤i Zvwi‡L dv‡Ý cRvZš †NvwlZ nq|

Thomas Paine (1737-1809) H h‡Mi GKRb wewkó wPšvwe`| wZwb 1791-92 mv‡j `B L‡Û ‘Rights of Man’ bv‡g GKwU Mš iPbv K‡ib| GB M‡š, we‡kl Kwiqv 2q L‡Û miKvi c×wZ m¤ú‡K GKwU m¤úY be¨Zi e³e¨ iv‡Lb Ges e¨wË“ gvb‡li AwaKvi I cvPxb I gj MYZvwšK wPšavivi Dci AvawbK aviv ceZb K‡ib| wZwb cwZwbwaZgjK c×wZ‡K MYZ‡ši mwnZ mmsnZ (compatible) ewjqv g‡b Kwi‡Zb | mvaviY MYZ‡ši mgm¨v¸wj cwZwbwaZgjK c×wZi gva¨‡g `i Kwiqv AvawbK ivó e¨e¯vi Dc‡hvMx Kiv m¤e | wZwb †`Lvb †h MYZ‡ši mwnZ cwZwbwaZgjK c×wZ GKÎ Kwi‡j GKwU AvawbK miKv‡i D™Z mK‡ji ¯v_ i¶v Kiv m¤e| Rights of Man M‡š MYZš‡K ev¯e I MVbgjK wnmv‡e wZwb wPwÎZ Kwiqv‡Qb Ges cwZwbwaZgjK c×wZi mwnZ GK‡Î Bnv‡K AvawbK ivó e¨e¯vi mwnZ h‡Mvc‡hvMx ewjqv †`LvBqv‡Qb|

Maximilien Robespierre (1758-1798) divwm wec‡ei GKRb cavb bvqK, ivRbxwZwe` I wPšvwe`| wZwbB mec_g MYZš‡K wbtkZfv‡e miKvi c×wZ wnmv‡e MY¨ K‡ib| wZwb e‡jb †h MYZš Ggb GK c×wZ †hLv‡b RbMY AvB‡bi AvIZvq wb‡Ri `vwqZ cvjb Kwi‡Z cv‡i Ges †h mKj `vwqZ Zvnv‡`i c‡¶ mivmwi cvjb Kiv m¤e bq Zvnv Zvnv‡`i cwZwbwa gvidr m¤úb Kwi‡Z cv‡i| MYZš A_ cZ¨¶ kvmb b‡n, eiÂ,Bnv Avewk¨Kfv‡e cwZwbwaZgjK miKvi c×wZ| GBfv‡e Robespierre `B nvRvi ermi ci MYZš‡K c_g ev‡ii gZ cbtmÎe× KiZt (reformulated) MYZvwšK ivó e¨e¯v‡KB MnY‡hvM¨ e‡jb| cKZc‡¶, Hmgq MYZš‡K mec_g wZwbB cwZwbwaZkxj kvmb e¨e¯v (representative government) ewjqv g‡b K‡ib|

GBfv‡e `B nvRvi ermi c‡e jß MYZš cbivq AvaywbK wKš †Kej ZvwZKi“‡c dv‡Ý Avwe fZ nB‡j I †mLv‡b ZLb Bnv †gv‡UI MnxZ nq bvB, ei Â Bnvi ivR‰bwZK Abkxjb mxwgZ fv‡e ms‡kvaxZ AvKv‡i nB‡j I me c_g h³ iv‡ó Avi¤ nq|

1776 mv‡j h³ ivó ¯vaxbZv †NvlYv K‡i| 1781 mv‡j Bs‡iR †mbvcwZ Continental army Gi wbKU AvZ¥mgcb K‡i| GB ¯vaxbZv h× wece wQj bv ev MYZ‡ši Rb¨ h× wQj bv| Bnv wQj Bs‡iR‡`i KZZ nB‡Z ¯vaxbZvi h×, Z‡e Bs‡iR kvmK‡`i c¯v‡bi ci h³ iv‡ói ‡bZ¯vbxq †bZeM bZb †`‡ki kvmb e¨e¯v jBqv wPšv-fvebv Avi¤ K‡ib| G wel‡q Zvnviv Bsj¨vÛ I BD‡ivcxq wPšvwe` h_v Locke, Rousseau, Montesquieu, Thomas Paine I Ab¨vb¨‡`i †jLbxØviv AbcwYZ nb|

Av‡gwiKvi K‡jvwb¸wj ce nB‡ZB Royal Chartar Øviv kvwmZ nBZ| Kv‡RB Z`vbxšb 13 wU K‡jvbx¸wj‡K GKwU wjwLZ mswe avb gvidr cwiPvjbvi c¯ve Zvnviv mn‡RB MnY K‡ib| GB wel‡q 1787 mv‡j Philadelphia kn‡i GKwU mvswe avwbK Convention Avi¤ nq| ¯vaxbZvi c‡e Av‡gwiKvi K‡jvwb¸wj‡Z GKw`‡K ivRZš Ab¨w`‡K Awf RvZZš we`¨gvb wQj| The Federalist Papers G Publius bv‡g Z`vbxšb Av‡gwiKvi wewkó ivRbxwZwe` I wPšvwe` James Madison, Alexander Hamilton I John Jay we`¨gvb mvgvwRK †c¶vc‡U 1787 mv‡ji A‡±vei nB‡Z 1788 mv‡ji AMvó gv‡mi g‡a¨ bZb iv‡ói wewfb mvswe avwbK mgm¨vi Dci Av‡jvKcvZ K‡ib|

Rbgvb‡li mve‡fŠgZ wbwðZKiY wQj hË“iv‡ói msweav‡bi gj j¶¨| cRvZ‡ši AvKv‡i cwZwbwaZkxj MYZš‡K msweav‡bi Ašwbwn Z bxwZ wnmv‡e MnY Kiv nq| wKš msL¨vMwiôZv ‡hb ^¯ikvm‡b cwiYZ bv nq †mBi∫c Checks and belances ivLv nq| GB Kvi‡Y House of representatives Gi m`m¨MY mivmwi †fv‡U wbewPZ nB‡j I Senate m`m¨MY I ivócwZ wbevPb c‡iv¶ fv‡e Abôvb Kwievi weavb Kiv nq| ZvnvQvov, Congress, wbevnx we fvM I wePvi

wefvM c_KKi‡Yi gva¨‡g ¶gZvi c_KKiY (Seperation of Powers) wbwðZ Kiv nq| Z‡e c_gw`‡K Bsj¨v‡Ûi b¨vq ïagvÎ ¯vei m¤úwËi gvwjK‡`i g‡a¨B †fvUvwaKvi mxwgZ wQj| ZvnvQvov, gwnjv I Î“xZ`v‡mi ‡Kvb †fvUvwaKvi wQj bv| mveRbxb †fvUvwaKvi Pvj Kwi‡Z eû ermi A‡c¶v Kwi‡Z nBqvwQj| D`vibxwZK MYZš Avbqb Kwievi Rb¨ mswea v‡b c_g `kwU ms‡kvab gvidr evK-¯vaxbZv, msev`c‡Îi ¯vaxbZv, mgv‡e‡ki ¯vaxbZv, agxq ¯vaxbZv BZ¨vw` weavb Avbqb Kiv nq| µxZ`vm c_v we‡jvc Kwi‡Z hË“iv‡ó GKwU Mnh‡×i c‡qvRb nq| H Mnh‡×i mgqB 1863 mv‡j hË“iv‡ói ivócwZ Abraham Lincoln Gettysburg h×‡¶‡Îi GKwU Ask gZ †hv×v‡`i cwZ DrmM Kwi‡Z hvBqv Zvnvi fvl‡Y e‡jbt

> “that government of the people, by the people, for the people shall not perish from the earth.”

fvl‡Yi Dc‡ivË“ Ask‡KB AvaywbK MYZ‡ši msÁv wnmv‡e Awfwn Z Kiv nq|

AZtci 1865 mv‡j msweav‡bi Î‡qv`k ms‡kvabxi gvidr Î“xZ`vm c_v wejß †NvlYv Kiv nq Ges 1868 mv‡j PZ`k ms‡kvabx gvidr h³iv‡ói mKj bvMwiKM‡Yi g‡a¨ AvB‡bi `ó‡Z mgZv Avbqb Kiv nq|

GBfv‡e hË“iv‡ó mvsweavwbK MYZš (Constitutional democracy) ev Alexis de Tocqueville Gi fvlvq ‘A democratic republic exists in the United States’ (Democracy in America) cwZôvwbK i‚c jvf K‡i|

c‡eB D‡jL Kiv nBqv‡Q †h, Bsj¨v‡Û 1688 mvj Gi wece AbwôZ nBevi ci Ges 1689 mv‡j Bill of Rights cYxZ nBevi d‡j Z_vq cvjv‡g‡›Ui ‡kôZ ¯vwcZ nq, wKš GKw`‡K House of Lords Gi cY ¶gZv we`¨gvb _v‡K Ab¨w`‡K Commons mfvq I D”P †kYxiB cY cfve we`¨gvb _v‡K| wKš diwm wPšvwe`M‡Yi †jLbx Ges Bsj¨v‡Ûi Jeremy Bentham, John Stuart Mill, Thomas Hill Green cfwZ wPšvwe`MY Zvnv‡`i †jLbxi gva¨‡g Bsj¨vÛ‡K MYZvwšK I RbKj¨vYgjK ivó wnmv‡e cwZwôZ Kwi‡Z AvcvY †Póv Kwiqv‡Qb|

we‡kl Kwiqv ZLb Zvnv‡`i m¤§‡L h³ iv‡ói b¨vq GKwU mvswe avwbK MYZ‡ši D`vniY wQj| djk“wZ‡Z, 1832 mv‡j Reforms Act cYxZ nq| Bnv‡Z †fvUv‡ii msL¨v wKQUv we¯Z nq| Zrci 1867 I 1884 mv‡ji Reform Act Abmv‡i †fvUv‡ii msL¨vi cwiwa Avi I we¯Z nq| 1911 mv‡ji Parliament Act Gi gva¨‡g House of Lords Gi ¶gZv A‡bKvs‡k Le nq|

c_g gnvh‡× wecj msLK ^mwbK cvY nvivq hvnv‡`i †ekxi fv‡MiB ¯vei m¤úwË wQj bv| ck I‡V †h Zvnviv wK ïagvÎ ivRv I †`‡ki Rb¨B cvY w`‡Z‡Q, †h †`‡k Zvnv‡`i wb‡R‡`iB ‡fvUvwaKvi bvB| h³ iv‡ói ivócwZ Woodraw Wilson Bsj¨v‡Ûi c‡¶ h‡× †hvM`v‡bi KviY wnmv‡e e‡jb ‘to save democracy’| GB mKj †c¶vc‡U 1918 mv‡ji Representation of People Act Øviv mKj cvßeq¯‹ ci“l Ges 1928 mv‡ji Representation of People Act `viv mKj cvßeq¯‹ gwnjv †fvUvwaKvi cvß nb| ZvnvQvov, 1948 mv‡ji Parliament Act Øviv House of Lords Gi ¶gZv Avi I Le Kiv nq|

GBfv‡e Bsj¨v‡Û AwZ ax‡i RbM‡Yi cKZ mve‡fšgZ I AwRZ nq, hw` I King in Parliament Gi mve‡fšgZ ZvwZK fv‡e GLbI iwnqv‡Q| Bsj¨v‡Ûi GLb †mBai‡Yi MYZš cPwjZ †hLv‡b RbMY mKj ¶gZvi AwaKvix wKš Zvnviv Zvnv‡`i cwZwbwa gvidr †mB ¶gZv c‡qvM K‡ib| wbewPZ cwZwbwaMY miKv‡ii mKj Kv‡Ri Rb¨ RbM‡Yi wbKU `vqx _v‡Kb| hw` I Bnv ZvwZK fv‡e m¤úY msL¨vMwi‡ôi kvmb ZeI Zvnviv mvswe awbK Convention Øviv msL¨vjwNô RbM‡Yi GKK ev †hš_ AwaKvi eRvq iwL‡Z eva¨| msL¨vMwiô miKvi †h‡Kvb AvBb ev c`‡¶c jB‡Z AvBbMZ fv‡e ¶gZv cvß wKš †Kvb AvBbMZ i¶vKeP e¨wZ‡i‡KB ïagvÎ ‰bwZK AwaKv‡ii (moral rights) Abcw¯wZ‡Z Zvnviv ‡gŠwjK AwaKvi cwic›nx †Kvb c`‡¶c KLbB MnY Kwi‡e bv, †hgb, e¨wË“ ¯vaxbZv (Civil liberties), †gŠwjK AwaKvi mgn, †hgb, evK-¯vaxbZv, msev` c‡Îi ¯vaxbZv, mgv‡e‡ki ¯vaxbZv, agxq ¯vaxbZv BZ¨vw`| Bsj¨v‡Û GB

AwaKvi¸wj ei‡Ljvc Kwiqv †Kvb AvBb KLbB cYqb nB‡e bv | A‰bwZK AvBb cYq‡bi GKwU Pig D`vniY wnmv‡e Professor A.V. Dicey wbæwjwLZ fv‡e Leslie Stephen (Science of Ethics,1882) ‡K D×Z K‡ibt

> ".....If a legislature decided that all blue eyed babies should be murdered, the preservation of blue eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it. (Professor A. V. Dicey : Introduction To The Study Of The Law Of The Costitution, page-81).

ZvnvQvov, MYZwšK ivó e¨e¯vq Rbgvb‡li g‡a¨ Aw_K cv_K¨ KgvBqv Awbevi I c‡Póv _v‡K|

GBfv‡e kZ kZ erm‡ii c‡Póvq Bsj¨v‡Û cwZwbwaZ gjK MYZš, mvswe awbK MYZš I mvgvwRK MYZš cwZwôZ nq|

Dc‡iv³ ¸Yvejx †h mKj iv‡ói ivóe¨e¯vq cwZdwjZ nq Zvnv‡`iB Av`k MYZš ejv hvq| hw` I cw_ex‡Z eû †`k iwnqv‡Q hvnviv wb‡R‡`i MYZwšK ewjqv `vex K‡i| GgbwK mvgwiK ckvmK I ^¯ivkvmKMY I GBi"c `vex Kwiqv _v‡Kb| S.E. Finer Zvnvi 'The Man on Horseback' (1962) M‡š Ggb GKwU Zvwjkv c`vb Kwiqv‡Qbt

Nasser	:	Presidential Democracy
Ayub Khan	:	Basic Democracy
Sukarno	:	Guided Democracy
Franco	:	Organic Democracy
Stroessner	:	Selective Democracy
Trujillo	:	Neo-Democracy

(Bernard Crick : Democracy nB‡Z D×Z)

Dc‡ivË" ivó e¨e¯v¸wj‡Z RbM‡Yi †kô‡Zi †Kvb ¯vb bvB wKš DË" e¨e¯v¸wj‡K MYZš AvL¨vwqZ Kwi‡Z †`kx we‡`kx wPšvwe‡`i Afve nq bv, hw` I Avgv‡`i wb‡R‡`i AwfÁZvi Av‡jv‡K ejv hvq †h Bnvi GKwUI MYZš bq| Finer evwPqv _vwK‡j Zvnvi GB Zvwjkv AviI ewaZ nB‡Z cvwiZ|

AvaywbK h‡Mi †c¶vc‡U Justice V. R. Krishna Iyer, Zvnvi wjwLZ Law & Life c¯Z‡K MYZš¿ m¤‡Ü wbæwjwLZ gše¨ K‡ib t

> There are three different systems of democracy. The U.S. system is where the President matters most and the Congress cannot, except by impeachment, override his powers which are large. The Swiss system is where cantons are territorial subdivisions with State Power and are elected. They discharge governmental function and differ from the third pattern which is the Westminster system prevalent in the United Kingdom where the parties with Parliamentary majority rule with the Cabinet enjoying powers of administration and have a formal head of the nation like the queen.....” Page-34)

21| MYcRvZš¿ (**Republic)** t evsjv‡`k mswkøó wel‡q c¯vebvq MYcRvZšx evsjv‡`k cwZôvi K_v ejv nBqv‡Q| mswkøó wel‡q 1 Ab‡”Q‡` evsjv‡`k †h GKwU cRvZš¿ Zvnv †NvlYv Kiv nBqv‡Q| ZvnvQvov, mswkøó wel‡q c_g fvM, wØZxq fvM I mswkøó wel‡q meÎ evsjv‡`k †h GKwU cRvZš¿ Zvnv cbt cbt ejv nBqv‡Q|

Avcxj Kvix c‡¶ wb‡e`b Kiv nq †h evsjv‡`k ivó† h GKwU cRvZš¿ hvnv mswkøó wel‡q GKwU basic sturcture, wKš‘ ZËveavqK miKvi Avg‡j, mswkøó wel‡q cRvZš¿ †jLv m‡ZI, iv‡ói cRvZvwšK Pwi Î H mg‡q m¤úY Abcw¯Z _v‡K|

mswkøó wel‡q evsjv‡`k‡K ÔMYcRvZšx evsjv‡`kÕ bv‡g Awfwn Z Kiv nBqv‡Q| c_gZt ÔcRvZšÕ basic structure wKbv, wØZxqZt hw` Bnv mswkøó wel‡q basic structure nBqv _v‡K Z‡e ZËveavqK miKvi aviYv Bnvi mwnZ mvsNwlK wKbv Zvnv we‡klY Kwievi c‡e ÔcRvZšÕ A_ wK, Bnvi BwZnvm wK, Zvnv ms‡¶‡c Av‡jvPbv c‡qvRb|

j¨vwUb fvlvq res publica A_ ‘public good’ ev ‘public thing’| Bnvi A_ ‘republic’ ev ‘cRvZšÕ| ‘cRvZšÕ Ggb GKwU kvmb e¨e¯v hvnvi gj D‡Ïk¨ RbM‡Yi Kj¨vY mvab|

Thomas Paine Gi gZev` Abmv‡i ‘republicanism’ ev ‘cRvZvwšKZvÕ ‡Kvb ckvmb c×wZ bq, eiÂ, Bnv RbKj¨vY gjK GKwU miKv‡ii Av`k kvmb e¨e¯v| cRvZvwšKZv mgbZ nq, Pocock Gi fvlvq “a way of life given over to civic concerns and the ultimately activity of citizenship.”|

‘Republic government’ ev ‘cRvZwšK miKviÔ m¤‡Ü wZwb e‡jb “republican government is no other than government established and conducted for the interest of the public, as well individually as collectively”|

Paine Gi gZ Abmv‡i cRvZš †Kvb we‡kl ai‡bi kvmb cÖwZ‡Z mxgve× bq| Bnv cwZwbwaZkxj cÖwZi mwnZ I c‡qvM nB‡Z cv‡i|

Z‡e †h cÖwZB nDK, cRvZ‡š ivRvi ev †Kvb †Mvôxi Aw¯Z _vwK‡e bv Ges Bnv RbKj¨vY gjK nB‡Z nB‡e|

AvaywbK HwZnvwmKMY Lóce 510mv‡j †ivgK ivRv‡`i ivR‡Zi ‡kl nB‡Z Lóce 31mv‡j mgvU Octavious Gi mvgv‡R¨i cvi¤ Kvj chš republican period ev cRvZvwšK Kvj wnmv‡e wPwýZ ev Awfwn Z Kwiqv‡Qb| 7g †ivgK ivRv Tarquin AZ¨š AZ¨vPvix wQ‡jb| Lóce 510 mv‡j †iv‡gi AwaevmxMY ivRv Tarquin †K ivR¨ nB‡Z ewn¯‹vi K‡i| Patrician I Plebian Øviv MwVZ Comitia Centuriata `BRb Consul †K GK ermi Gi Rb¨ wbewPZ KwiZ| Consul A_ mnKgx | Zvnv‡`i ivRvi gZB ¶gZv wQj| cvq me mg‡qB AwfRvZ Patrician nB‡Z Consul wbewPZ nBZ, Kv‡RB cKZ ivR¨ ¶gZv AwfRvZ †ivgK‡`i g‡a¨B mxgve× wQj| GKvi‡Y wb‡R‡`i AwaKvi Av`v‡q Plebian †`i‡K cvq `BkZ ermi awiqv h× Kwi‡Z nBqvwQj| 479 ermi ci Lóce 31 mv‡j Octavious mvgvR¨ cwZôv K‡ib I Imperator Dcwa MnY K‡ib| Zvnvi kvmb e¨e¯v ïagvÎ bv‡gB cRvZš wQj wKš cKZc‡¶ cbivq ivRZš Avi¤ nq| GB fv‡eB †ivgK cRvZ‡ši Aemvb N‡U|

ga¨ h‡Mi †kl fv‡M BD‡iv‡c †i‡bmvi beRvMi‡Yi mgq BUvwji K‡qKwU bMi iv‡ó ¯í mg‡qi Rb¨ cRvZ‡ši cbtAvwefve N‡U| bMi¸wji g‡a¨ we‡kl Kwiqv Venice I Florence cavb | GBmKj bMi-iv‡ói PwiÎ wbY‡q HwZnvwmKMY D³ ivó¸wj‡Z ivRZš, †MvôxZš, GKbvqKZš BZ¨vw`i Abcw¯wZ ch‡e¶Y KiZt D³ ivó e¨e¯v‡K cRvZvwšK wnmv‡e wPwýZ K‡ib| H mKj bMi-iv‡ó ¯í

msLK e¨w³ mxwgZ †fvUvwaKv‡ii gva¨‡g wbevwPZ nBqv ivó cwiPvjbv Kwi‡Zb| Venice bMi-iv‡ó bvg gvÎ ev †LZvwe (Titular) ivó-cav‡bi Dcvwa wQj Doge|

Bsj¨v‡Û 1649 mvj nB‡Z 1660 mvj chš GK ai‡bi Commonwealth we`¨gvb wQj| 1649 mv‡j Charles I Gi wki‡”Q` Kiv nq| AZtci, Oliver Cromwell Bsj¨v‡Û Lord Protector Dcvwa MnY KiZt miKvi cwiPvjbv K‡ib| H ¯í mgq ivRZš Abcw¯Z _vwK‡jI GKK kvmb we`¨gvb wQj, Z‡e kvmKeM MYgvb‡li Kj¨v‡Yi †Póv Kwiqv wQ‡jb| we‡kl Kwiqv †fvUvwaKv‡ii †¶‡Î ¯vei m¤úwËi gvwjKvbv jBqv Putney debates G mvaviY ‰mb¨‡`i c¶ nB‡Z ck DÌvcb Kiv nBqvwQj †h Zvnviv †`‡ki Rb¨ h× Kwi‡e A_P m¤úwËi gvwjKvbv bv _vKvq Zvnv‡`i †fvUvwaKvi _vwK‡e bv, Bnv †Kb|

18k kZvwã‡Z Montesquieu I Rousseau cfwZ wPšvwe`M‡Yi †jLbxi cfZ cfve BD‡ivcxq †`k¸‡jvi Dci c‡o| µgvb‡q SwitzerlandG cRvZš mwó nq|

kvmbe¨e¯vq kvwm‡Zi Ab‡gv`b Ges MYgvb‡li AwaKvi GB `B gjbxwZ Av‡gwiKvb h³ ivó I dvÝ Dfq †`‡ki wece‡KB we‡kl fv‡e cfvweZ K‡i|

‡lvok kZvãx‡Z Bsj¨vÛ DËi Av‡gwiKvq 13wU K‡jvbx-ivó ¯vcb K‡i| K‡jvbx¸wji ivó ¶gZv Bsj¨v‡Ûi ivRv I cvjv‡g›U cwiPvjbv KwiZ| K‡jvbxi¸wji AwaevmxMY g‡b KwiZ †h, Bsj¨v‡Ûi ivRv Zvnv‡`i I ivRv wKš Bsj¨v‡Ûi cvjv‡g›U K‡jvbxi wbR¯ ‡Kvb e¨vcv‡i AvBb cYqb Kwi‡Z ev Ki Av‡ivc Kwi‡Z cv‡i bv KviY, †mLv‡b Zvnv‡`i †Kvb cwZwbwa wQj bv| BnvB wQj K‡jvbx¸wji mwnZ Bsj¨v‡Ûi we‡iv‡ai gj KviY| 1774 mv‡j K‡jvbx¸wji cwZwbwa mgev‡q c_g Continental Congress Gi GK mfv AbwôZ nq| Congress Zvnv‡`i `vex-`vIqv m¤‡Ü ivRvi wbKU Av‡e`b KiZt GKwU Declaration of Rights †ciY K‡i wKš mg‡SvZvi

cwie‡Z ivRv George III 1775 mv‡ji AMvó gv‡m GK Proclamation Øviv K‡jvbx¸wj‡K we‡`vnx ewjqv †NvlYv K‡ib| 1775 mv‡j MwVZ Continental Congress K‡jvbx¸wji †K›`xq ivó cwiPvjbvi ¶gZv MnY K‡i Ges †MU we‡U‡bi wei“‡× h‡×i wm×vš MnY K‡i| 1776 mv‡ji 4Vv RjvB Zvwi‡L Continental Congress AvBb AvKv‡i ¯vaxbZv †NvlYvi wejwU cvm K‡i| GB m‡½ †kl nq 13wU K‡jvbx‡Z wewUk Awac Z¨|

¯vaxbZv †NvlYvi gva¨‡g GKwU RvZxq miKvi ¯vwcZ nq| GB miKvi wb‡R‡K ¯vaxb I mve‡fŠg we‡ePbv K‡i| kvmb ¶gZv mmsnZ Kwievi j‡¶ Continental Congress GKwU Articles of Confederation MnY K‡i| 1781 mv‡j wewUk evwnbx Continental army Gi wbKU AvZ¥mgcY K‡i|

AZtci Continental Congress GKwU mswe avb cYq‡bi c‡qvRbxqZv Abfe K‡i| †mB j‡¶¨ K‡jvbxi wbewPZ cwZwbwaMY Øviv MwVZ GKwU Constitutional Convention 1787 mv‡j AvûZ nq|

H mg‡q mvswe avwbK mgm¨vejx jBqv †`‡ki ivRbxwZK I wPšvwe`MY BD‡ivcxq wPšvwe`M‡Yi fveaviv I †jLbx we‡ePbvq j‡qb| Alexander Hamilton, John Jay I James Madison wewfb mvswe avwbK mgm¨v jBqv ‘The Federalist Papers’ G Zvnv‡`i weÁ gZvgZ cKvk K‡ib|

GKw`‡K †K›`xq miKv‡ii ¶gZv Ab¨w`‡K 13wU A½ iv‡ói ¶gZvi we¯wZ, Dfq ckvm‡bi g‡a¨ checks and balances i¶Y, Av‡`Š MYZš _vwK‡e wKbv, _vwK‡j Bnvi e¨vwß KZ`i nB‡e Ges †fvUvwaKvi †Kvb chš cmvwiZ Kiv wVK nB‡e BZ¨vw` wewfb mgm¨v jBqv Philadelphia Gi Constitutional Convention G weZK nB‡Z _v‡K|

H mg‡q Bsj¨v‡Ûi cvjv‡g‡›Ui mve‡fŠgZ wQj wKš mvaviY RbM‡Yi wQj bv| wKš hË“iv‡ói mswe av‡b RbM‡Yi mve‡fŠgZ‡K gjbxwZ wnmv‡e MnY Kiv nq| †mB 18k kZvãx‡Z MYZš ewj‡Z

ZLb cvPxb Mxm †`kxq msL¨vMwi‡ôi MYZš †evSvBZ wKš Hi“c msL¨vMwi‡ôi megq ¶gZv Convention Gi wbKU MnY‡hvM¨ wQj bv|

h³ ivó miKv‡ii aiY wK nB‡e †m m¤‡Ü Av‡jvK cvZ Kwi‡Z wMqv James Madison 1787 mv‡j Federalist 10 G e‡jbt

> “..... A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. ..... In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. .....”

cieZx‡Z hË“iv‡ói mswkøó Av‡bi PZ_ Ab‡”Q‡`i 4 avivq GB iv‡ói aiY †h republican ev cRvZvwšK nB‡e Zvnv wbwðZ Kiv nq|

Madison 1791 mv‡j ‘Government’ bv‡g GKwU ce‡Ü ‡j‡Lbt

> “A republic involves the idea of popular rights. A representative republic *chuses* the wisdom, of which hereditary aristocracy has the *chance;* whilst it excludes the oppression of that form..... To secure all the advantages of such a system, every good citizen will be at once a centinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the authorities of the intermediate governments.”
> (Larry D. Kramer: The People Themselves, cô v-114 nB‡Z D×Z)

GBfv‡e AvaywbK we‡k mec_g GKwU cKZ cRvZvwšK †`k AvZ¥cKvk Kwij|

Minor V. Happerse H.88 US (21 Wall) 162(1874) ‡gvKvÏgvq US Supreme Court gwnjv‡`i †fvUvwaKvi bvB ewjqv eË“e¨ c`vb Kv‡j hË“ivó ‡h GKwU cRvZš Zvnv †NvlYv K‡i| Morrison R.Waite C.J., Zvnvi iv‡q e‡jbt

> “.....It is true that the United States guarantees to every State a republican form of government..... The guaranty is of a republican form of government..... ”

Duncan V. McCall 139 US 449 (page-219) (1891) ‡gvKvÏgvq US State Court Gi GLwZqvi m¤ú‡K Av‡jvPbv cm‡½ US Supreme Court hË“ivó †h GKwU cRvZš Ges MYgvblB †h mKj

¶gZvi Drm Zvnv eYbv K‡i | Melville Weston Fuller, C.J., Zvnvi iv‡q e‡jbt

> By the constitution , a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power; their governments, national and state , have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

GBfv‡e 1787 mv‡j cYxZ mswea v‡bi gva¨‡g cw_exi c_g cKZ cRvZš Bnvi hvÎv Avi¤ K‡i| µ‡g µ‡g cw_exi eû‡`k cRvZvwšK ivó e¨e¯v MnY K‡i|

1971 mv‡ji 10B Gwcj Zvwi‡L evsjv‡`k Bnvi Proclamation of IndependenceG Bnv‡K MYcRvZš i‡c †NvlYv Kwiqv‡Q| cieZx‡Z Bnvi mswea v‡bi c¯vebvq I c_g Ab‡"Q`B ÔMYcRvZšx evsjv‡`kÕ bvg †NvlYv Kwiqv‡Q|

22| wePvi wefv‡Mi ¯vaxbZv t cieZx ck ZËveavqK miKvi c×wZ‡Z me‡kl cavb wePvicwZ ev Avcxj wefv‡Mi Ab¨ ‡Kvb wePvicwZ‡K cavb Dc‡`óv c‡` wb‡qvM wePvi wefv‡Mi ¯vaxbZv‡K †Kvb fv‡e ¶b K‡i wKbv|

D‡jL¨ †h mswea vb (Î‡qv`k ms‡kvab) AvBb, 1996, Gi 3 aviv e‡j mswea v‡bi PZ_ fvM Gi 2q cwi‡"Q` Gi ci 2K cwi‡"Q`-Ôwb`jxq ZËveavqK miKviÕ mwb‡ewkZ Kiv nq| wePvicwZM‡Yi ga¨ nB‡Z cavb Dc‡`óv wb‡qvM msÎ"vš weavb 58M Ab‡"Q‡`i 3 I 4 `dvq eYbv Kiv nBqv‡Qt

58 M (1) .....

(2).....

(3) ivócwZ evsjv‡`‡ki Aemicvß cavb wePvicwZM‡Yi g‡a¨ whwb me‡k‡l Aemicvß nBqv‡Qb Ges whwb GB

Ab‡”Q‡`i Aaxb Dc‡`óv wbh³ nBevi †hvM¨ Zvnv‡K cavb Dc‡`óv wb‡qvM Kwi‡ebt

Z‡e kZ _v‡K †h, hw` Dl“iƒc Aemicvß cavb wePvicwZ‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`ói c` Mn‡Y Am¤§Z nb, Zvnv nBj ivócwZ evsjv`‡ki mekl Aemicvß cavb wePvicwZi Ae¨ewnZ c‡e Aemicvß cavb wePvicwZ‡K cavb Dc‡`óv wb‡qvM Kwi‡eb|

(4) hw` †Kvb Aemicvß cavb wePvicwZ‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`ói c` Mn‡Y Am¤§Z nb, Zvnv nBj ivócwZ Avcxj wefv‡Mi Aemicvß wePviKM‡Yi g‡a¨ whwb me‡k‡l Aemicvß nBqv‡Qb Ges whwb GB Ab‡”Q‡`i Aaxb Dc‡`óv wbh³ nBevi †hvM¨ Zvnv‡K cavb Dc‡`óv wb‡qvM Kwi‡ebt

Z‡e kZ _v‡K †h, hw` D³iƒc Aemicvß wePviK‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`ói c` Mn‡Y Amg¥Z nb, Zvnv nB‡j ivócwZ Avcxj wefv‡Mi Aemicvß wePviKM‡Yi g‡a¨ me‡k‡l Aemicvß Abiƒc wePvi‡Ki Ae¨ewnZ c‡e Aemicvß wePviK‡K cavb Dc‡`óv wb‡qvM Kwi‡eb|

Avcxj Kvix c¶ nB‡Z Rbve Gg AvB dvi“Kx I Rbve gnmxb ikx` g‡b K‡ib †h Dc‡ivË“ weavb Abmv‡i Aemicvß wePvicwZM‡Yi ga¨ nB‡Z cavb Dc‡`óv wb‡qvM c`vb wePvi wefv‡Mi ¯vaxbZv‡K †Kvb bv †Kvb fv‡e ¶b K‡i|

weÁ A¨vUbx-†Rbv‡ij Aek¨ Zvnv g‡b K‡ib bv| Zvnvi eË“e¨ †h wbi‡c¶ wbevP‡bi Rb¨ ZËveavqK miKvi c‡qvRb Ges cavb Dc‡`óv c‡`i Rb¨ cv³b cavb wePvicwZi †Kvb weKí bvB|

GwgKvm wKDwiqvM‡Yi g‡a¨ Rbve wU GBP Lvb, Wt Kvgvj †nv‡mb, wmwbqi G¨vW‡fv‡KUe›`, G cm‡½ †Kvb eË“e¨ iv‡Lb bvB|

Rbve iwdK-Dj nK, wmwbqi G¨vW†fv‡KU, cavb Dc‡`óv c‡`i Rb¨ Aemi cvß cavb wePvicwZ wb‡qvM wePvi wefv‡Mi ¯vaxbZv‡K ¶b Kwi‡e Zvnv A¯xKvi K‡ib bvB| wZwb ZËveavqK

miKvi e¨e¯v‡K ‘necessary evil’ AvL¨vwqZ KiZt ZËveavqK miKv‡ii Rb¨ weKí cavb Dc‡`óv I Dc‡`óveM m¤ú‡K c¯ve c`vb K‡ib|

Wt Gg.Rwni wmwbqi G¨vW†fv‡KU, cavb Dc‡`óv c‡` Aemicvß cavb wePvicwZi wb‡qvM wePvi wefv‡Mi ¯vaxbZvi cwicšx ewjqv g‡b K‡ib| wZwb weKí e¨e¯vi civgk c`vb K‡ib|

Rbve gvng`j Bmjvg, wmwbqi G¨vW†fv‡KU, Gi G cm‡½ eË“e¨ nBj †h †h‡nZ Aemicvß wePvicwZM‡Yi ga¨ nB‡Z cavb Dc‡`óv wb‡qvM Kiv nB‡e, Kv‡RB mcxg †KvU nB‡Z c¯vb Kwievi ci Zvnvi Hi“c wb‡qvM wePvi wefvM‡K †Kvb fv‡eB cfvweZ K‡i bv|

Rbve Gg Avwgi-Dj Bmjvg, wmwbqi G¨vW†fv‡KU, cavb Dc‡`óv c‡` cvË“b cavb wePvicwZi wb‡qvM †h wePvi wefv‡Mi ¯vaxbZvi cwicšx Zvnv A¯xKvi Kwi‡Z cv‡ib bvB|

Rbve †ivKbDwÏb gvng`, wmwbqi G¨vW†fv‡KU, e‡jb †h cavb Dc‡`óv c‡` cvË“b cavb wePvicwZi wb‡qv‡Mi †Kvb weKí bvB|

Rbve AvRgvjj †nv‡mb, wmwbqi G¨vW†fv‡KU, Ø¨_nxb fvlvq e‡jb cv³b cavb wePvicwZi cavb Dc‡`óv c‡` wb‡qvM wePvi wefv‡Mi ¯vaxbZvi cwicšx|

wePvi wefv‡Mi ¯vaxbZvi K_v mevB ewjqv _v‡Kb, wKš c_‡gB Dcjw× Kiv `iKvi wePvi wefv‡Mi ¯vaxbZv ewj‡Z cKZ c‡¶ wK †evSvq| ZvnvQvov, Bnvi iwnqv‡Q m`xN BwZnvm| wePvi wefv‡Mi ¯vaxbZv ARb KZ gnvgvb‡li KZ Z¨vM wZwZ¶vi dj Zvnv ms‡¶‡c nB‡j I Avgv‡`i Rvbv c‡qvRb| wePvi wefv‡Mi ¯vaxbZvi BwZnvm cKZc‡¶ gvbe mf¨Zvi BwZnvm|

‡h wePvi e¨e¯vq wePviKMY mecKvi cjäZv, Pvc I fq-fxwZ _vKv m‡Z I miKvi I Ab¨ mKj pressure group Gi Awfjvl I Kgcšvi D‡a _vwKqv wbfxK fv‡e ïagvÎ †`‡ki mswevab I AvBb

Abmv‡i wePvwiK Kvhµg wbwðZ K‡i Zvnv‡KB ¯vaxb wePvi we fvM ejv hvq|

GB wePvi we fv‡Mi gj †K›`we›` nB‡jb GKRb wePviK| Avewk¨K fv‡eB wZwb RbM‡bi ga¨ nB‡Z AvMZ GKRb mr I wkw¶Z gvbl nB‡eb| GKRb wePvi‡Ki Rb¨ ZvnvB h‡_ó bq| hLb wZwb wePvi‡Ki Avm‡b Avmxb nB‡eb ZLb Zvnv‡K ivM-weivM ewnfZ cv_‡ii b¨vq Abfw Znxb nB‡Z nq (Edmund Burke: cold neutrality of an impartial judge)| wKš GKRb wePvicwZI mvavib i³ gvs‡mi gvbl| Zvnvi I e¨w³MZ PvIqv-cvIqv, c‡qvRb I mgm¨v _vwK‡Z cv‡i| Zvnvi c‡i I GKRb wePviK‡K mecKvi c‡jvf‡bi m¤§‡L I m¤úY wbi‡c¶ I wb‡gvn fv‡e Zvnvi Dci AwcZ `vwqZ I KZe¨ cvjb Kwi‡Z nq| Zvnv‡K BnRvMwZK GgbwK cvi‡jŠwKK Rxe‡bi cwZI †gvnnxb fv‡e ïagvÎ b¨vq wePvi cwZôv Kwi‡Z nB‡e|

iv‡ói c¶ nB‡Z I GKRb wePviK‡K mecKvi ivóxq cwZKjZvi nvZ nB‡Z i¶v Kwievi Rb¨ Zvnvi PvKixi †gqv`Kvj mvswevwbK fv‡e wbw`ó Kwiqv †`Iqv nq| ZvnvQvov, Zvnvi †eZb fvZv I mwev`xI mswevb mi¶v c`vb K‡i| GB fv‡e iv‡ói c¶ nB‡Z I wePvi we fv‡Mi ¯vaxbZv A¶b ivwLevi c`‡¶c jIqv nq|

Z‡e wePvi we fv‡Mi ¯vaxbZvi eZgvb Ae¯v‡b Avbqb Kwi‡Z kZ kZ ¶YRb¥v gvb‡li nvRvi erm‡ii msMvg c‡qvRb nBqv‡Q|

AvovB nvRvi ermi c‡e Mxm †`‡ki wewfb bMi-ivó Ávb-weÁvb, `kb, AvB†bi Abkxj‡bi Rb¨ weL¨vZ wQj| †ivgK Kbmvj M‡Yi h‡M H †`‡k AvBb mgw× jvf K‡i| cbwUd ev †ivgK wePviKMY wePviKvh cwiPvjbv Kwi‡Zb| Z‡e H mg‡q †Kvb wjwLZ c_vMZ AvBb wQj bv| wjwLZ AvB‡bi Abcw¯wZ‡Z †cweqvb cRvMY cvqkB AwePv‡ii wkKvi nB‡Zb| Ae‡k‡l Zvnv‡`i `vexi g‡L GKwU Kwgkb Mxm †`‡ki Athens mn wewfb bM‡i Zvnv‡`i AvBb I c_v m¤‡Ü mg¨K Ávb jv‡fi Rb¨ †ciY Kiv nq| Zvnviv wdwiqv

Awmqv Lt ct 451 mv‡j AvBb I c_v¸wj 12 wU Table G AvBb mswnZv AvKv‡i cKvk K‡i| AZtci, mK‡j we`¨gvb AvBb m¤‡Ü ‡gvUvgwU GKwU aviYv cvb|

AwZ cvPxb Bsj¨v‡Ûi wePvi e¨e¯v AZ¨š¯j Ae¯vq wQj| 1066 mv‡j William the Conquerer Gi Bsj¨vÛ weR‡qi c‡i bigvb ivRvMY †`‡k GKwU mmsnZ ckvmb I wePvi e¨e¯v DbZ Kwievi cqvm cvb|H mgq The king is the fountain of justice GB cev` Abmv‡i ¯qs ivRv wePvivj‡q (King's Bench) Dc‡ekb KiZt wePvi Kvh cwiPvjbv Kwi‡Zb| h× weMn I bvbvb Kvi‡Y ivRKvh ew× cvB‡j µ‡g µ‡g ivRv durante bene placito (during good pleasure) (ivRvi mw`"Qvi Dci wfwË KiZt) kZvbmv‡i wePviK wb‡qvM c`vb Kwi‡Zb| Zvnviv ivRvi bv‡g I Zvnvi c¶ nBqv wePvi Kvh cwiPvjbv Kwi‡Zb| Z‡e ivRvi gZ¨i ci mKj wePviKMY ¯qswµqfv‡e Zvnv‡`i c` nvivB‡Zb| bZb ivRv cbivq bZb Kwiqv cQ›`gZ wePviK wb‡qvM c`vb Kwi‡Zb| ivRvi Amšwói KviY nB‡j wePviKMY Zvr¶wYK fv‡e eiLv¯Z nB‡Zb| Lord Chancellor Sir Thomas More ivRv Henry VIII Gi Av‡`‡k 16 ermi Tower G Aš ixb wQ‡jb, Zrci Zvnvi wki‡"Q` Kiv nq| cKZc‡¶, wePviKMY Ab¨ ivRKgPvix‡`i b¨vq ivRvi GKvš emse` †meK (servant) _vwKqv wb‡R‡`i‡K MweZ g‡b Kwi‡Zb | wKš †mB iKg mg‡q I 13k kZvãx‡Z ivRv Henry III Gi ivRZKv‡j Justice Henry de Bracton Zvnvi iwPZ Mš De Legibus G †j‡Lbt

> "Quod Rex non debet esse sub homine, sed sub Deo et Lege" (that the king should not be under man, but under God and the law)

Hi"c absolute monarchyi h‡M ivRvi GBi"c ¯vb wbaviY GKw`‡K Dc‡ivË" wePvi‡Ki PvwiwÎK `pZv Ab¨w`‡K ivRvi we‡`¨vrmvwnZv cgvY K‡i|

ivYx Elizabeth I Gi gZ¨i ci 1603 mv‡j James I Bsj¨v†Ûi wmsnvm‡b Av‡ivnb K‡ib| wZwb ¯Mxq AwaKvi e‡j (divine right) ivR¨ kvmb Kwi‡Z‡Qb ewjqv g‡b Kwi‡Zb | wZwb wb‡R‡K AvB‡bi D‡a

ewjqv g‡b Kwi‡Zb Ges Parliament e¨wZ‡i‡K ivRKxq Proclamation I Prerogative AwaKvi Øviv AvBb cYqb KiZt ivR¨ kvmb Kwievi gZ ‡cvlY Kwi‡Zb| GB wel‡q Court of Common Pleas Gi cavb wePvicwZ Sir Edward Coke Gi gZvgZ wRÁvmv Kwi‡j wZwb wbæwjwLZ gZvgZ cKvk K‡ib (1608 mvj) t

> "The law", he said "was the golden metwand and measure to try the causes of his subjects: and which protected his majesty in safety and peace." "The king in his own person cannot adjudge and case either criminal ..... or betwixt party and party." "The king cannot take any cause out of any of his courts and give judgment upon it himself." "The judgments are always given per curiam; and the judges are sworn to execute justice according to the law and customs of England." (Sir William Holdsworth : A History of English Law Vol. V page - 430 ZZxq g`Y 1945, nB‡Z D×Z)

wb‡Ri Rxeb wecb Kwiqv Pwwik Z ermi c‡e ivRvi m¤§‡L AvB‡bi GB fvl¨ c`vb Sir Edward Coke Gi PwiwÎK `pZv, mvnm Ges wePvi wefv‡Mi ¯vaxbZvi K_vB m¥iY KivBqv †`q|

GgbwK cvjv‡g›U KZK wewae× AvBbI hw` mvaviY AvB‡bi `wó‡Z A‰ea cZxqgvb nq Zvnv I ewZj Kwievi ¶gZv Av`vj‡Zi iwnqv‡Q ewjqv Dr. Bonham (1610) †gvKvÏgvq Coke †NvlYv K‡ibt

> "Where an Act of Parliament is against right and reason repugnant, or impossible to be performed, the common law will control and adjudge that Act to be void" (Lord Denning KZK wjwLZ What Next In The Law" cô v-319 nB‡Z D×Z)

AvB‡bi GKB ai‡Yi fvl¨ Day V. Savage (1614) †gvKÏgvq Hobart, C.J. e‡jbt

> "..... Even an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself, for jura natural sunt immutabilia and they are leges legumes" HWR Wade Gi Administrative Law, cÂg g`Y, 1982, c¯‡Ki 418 cô v nB‡Z D×Z)|

Common Law Gi †kôZ memgq Dc¯vcb Kwiqv Coke Gi wewfb ivq c`v‡bi Kvi‡Y ivRv James I wei ³ nBqv 1613 mv‡j Zvnv‡K Court of Common Pleas nB‡Z AcmviY KiZt King's Bench Gi cavb wePvicwZ wnmv‡e wb‡qvM c`vb K‡ib|

Colt and Glover V. Bishop of Coventry (Case of Commendams)(1616) ‡gvKvÏgvq wekc‡K commendam AvKv‡i ivRvi gÄix c`v‡bi Prerogative P¨v‡jÄ Kiv nq| we‡ivaxq welqwUi ¸i“Z Abaveb Kwiqv Court of Common Pleas, King's Bench Ges Court of Exchequer Gi 12 Rb wePviK mgb‡q MwVZ Exchequer Chamber Av`vj‡Z ïbvbx Avi¤ nq| H mgq ivRv jÛ‡bi ewn‡i Newmarket G Ae¯vb Kwi‡ZwQ‡jb| ‡h‡nZ ivRvi prerogative Gi welqwUI wePviaxb ‡mB‡nZ ivRv Attorney General Sir Francis Bacon gvidr Zvnvi eË“e¨ bv †kvbv chš ivq c`vb bv Kivi Rb¨ wePviKMY‡K wb‡`k c`vb K‡ib| wKš wePviKM‡Yi wbKU Bnv AvBb I Zvnv‡`i kc_ cwicšx cZxqgvb nIqvq Zvnviv wePviKvh ¯wMZ bv Kwiqv cwiPvjbv Kwi‡Z _v‡Kb| ivRv jÛ‡b †dir Awmqv mKj wePviKMY‡K WvwKqv AZ¨š †Î“avwbZ fv‡e wRÁvmv K‡ib †h fwel¨‡Z Zvnviv ivRvi B”Qv Abmv‡i †gvKvÏgv ¯nwMZ Kwi‡eb wKbv| Coke e¨wZZ mKj wePviKB ivRvi B”Qv Abmv‡i c`‡¶c jBevi A½xKvi c`vb K‡ib| wKš Coke ‡h DËi c`vb K‡ib Zvnv fwel¨r mKj wePvi‡Ki Rb¨ wk¶Yxq I AbKiYxq nBqv _vwK‡e| wZwb e‡jbt

> "When that happens, I will do that which it shall be fit for a Judge to do."

(Lord Denning wjwLZ What Next In The Law' Mš nB‡Z D×Z)

Sir Edward Coke wb‡Ri Rxe‡bi Dci SwK jBqv I fwel¨Z m¤vebv RjvÄwj c`vb Kwiqv wePvi wefv‡Mi ¯vaxbZv †mB absolute monarchy i h‡MI GBfv‡e mgbZ iv‡Lb| Bnvi wKQw`b ci 1616

mv‡j Sir Edward Coke ‡K cavb wePvicwZ c` nB‡Z eiLv¯ Kiv nq| cieZx Kv‡j wZwb House of Commons mfvi m`m¨ wbewPZ nb|

ivRv James I Gi gZ¨i ci Zvnvi ‡R¨ôcÎ Charles I 1625 mv‡j Bsj¨v‡Ûi wmsnvm‡b Av‡ivnb K‡ib| H mgq †¯úbi mwnZ h× Pwj‡ZwQj| H LiP wgUvBevi Rb¨ AwZwiË“ Ki Av‡ivc Kiv Qvovl wZwb Rbmvavi Y‡K FY c`v‡b eva¨ K‡ib Ges hvnviv FY c`v‡b A¯xKwZ RvbvB‡ZwQj Zvnvw`M‡K Kviv`Û c`vb Kiv nB‡ZwQj| King's Bench Gi Z`vbxšb cavb wePvicwZ Hifc Kvi`‡Ûi ‰eaZv c`vb Kwi‡Z A¯xKwZ RvbvB‡j Zvnv‡K I eiLv¯Z Kiv nq|

wKš mKj wePvicwZ Coke Gi b¨vq ghv`vcY wQ‡jb bv| Darnel Gi †gvKvÏgvq (1627) Darnel I Ab¨ K‡qKRb Habeas Corpus ixU Gi gva¨‡g Zvnv‡`i AšixY Av‡`k P¨v‡jÄ K‡ib| FY c`v‡b A¯xKwZi Kvi‡Y Zvnvw`‡K AšixY Kiv nBqwQj wKš cavb wePvicwZ Sir Nichols Hyde ivRvi ¶gZvi GBifc Ace¨envi‡i n¯‡¶c bv Kwiqv †gvKvÏgv LvwiR K‡ib| djk“wZ‡Z Prerogative of arbitrary commitment Gi gva¨‡g GKRb cRv‡K Awbw`óKvj AšixY iwL‡Z ivRvi GBifc ‡¯"QvPvigjK AwaKv‡ii wePvwiK ¯xKwZ c`vb Kiv nq|

ivRvi GBifc †¯"QvPvix AvPi‡Y mvavi Y RbMY AZ¨š ¶ã nBqv I‡V| Commons mfvq Coke Gi †bZ‡Z wewfb AwaKvi m¤wjZ Petition of Right wej AvKv‡i DÌvcb Kiv nq| DË“ we‡j †eAvBbx fv‡e UvKv Av`vq, †¯"QvPvi gjK AšixY, †emvgwiK †jvK‡K mvgwiK AvB‡b kw¯ c`vb BZ¨vw` wbwl× Kiv nq| ivRv c_‡g cej AvcwË Kwi‡jI c‡i Commons mfvi cPÛ Pv‡ci g‡L ivRKxq m¤§wË c`vb Kwi‡Z eva¨ nb| 1628 mv‡j ¯v¶wiZ GB Petition of Right Bsj¨v‡Ûi 2q weL¨vZ mvswevwbK `wjj|

1649 mv‡j Charles I Gi wki‡"Q` nq| 1660 mv‡j Charles II wmsnvm‡b Av‡ivnb K‡ib (restoration)| Charles II Zvnvi ivR‡Zi †klfv‡M AZ¨š †¯"QvPvix nBqv I‡Vb Ges wePvi wefvM‡K Zvnvi

†¯”QvPvi Kv‡h e¨envi Kwi‡Z _v‡Kb| 1685 mv‡j Zvnvi gZ¨i ci ivRv James II GKB fv‡e wb‡Ri ‡¯”QvPvwiZvi Kv‡h wePvi wefvM‡K e¨envi K‡ib| King’s Bench Gi cavb wePvicwZ Scrogg, George Jeffreys I Robert Wright ‡mB h‡M wePvwiK †¯”QvPvwiZv I AZ¨vPv‡ii cZxK wQ‡jb| Zvnviv AvB‡bi cKZ D‡Ï‡k¨ mwVK ‡c¶vc‡U AbmiY Kwievi cwie‡Z ivRvi †¯”QvPvix D‡Ï‡k¨‡K AMvaxKvi c`vb I b¨vh¨ cgvY KivUvB †hb Zvnv‡`i `wqZ g‡b Kwi‡Zb | Lord Chancellor c‡` wb‡qvM cvBqv Lord George Jeffreys ivRvi we‡ivaxq `‡ji cwZ Zvnvi AcQ›` Avi I cKU nBqv c‡o|

Godden V. Hales (1686) †gvKvÏgv ga¨hMxq ivRv‡`i dispensing ¶gZvi ‰eaZv m¤‡Ü wQj| GB Prerogative ¶gZv e‡j ivRv †Kvb we‡kl e¨w³ ev Acivaxi Dci mswkó AvB‡bi c‡qvM eÜ iwL‡Z cwi‡Zb| Common Pleas Av`vj‡Zi cavb wePvicwZ Sir Thomas Jones ivRvi D³ ¶gZv‡K ˆea g‡b Kwi‡Zb bv| wKš Zvnv‡K cwi®‹vi fv‡e RvbvBqv †`Iqv nq ‡h, Zvnvi gZ cwieZb Kwi‡Z nB‡e A_ev Zvnv‡K c`Z¨vM Kwi‡Z nB‡e| wePvicwZ Jones e‡jbt

> “For my place, I care but little. I am old and worn out in the service of the crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.”
>
> (Thomas Pitt Taswell-Langmead: English Constitutional History, Tenth Edition, page-402,note-h)

Gici Exchequer Av`vj‡Zi Chief Baron mn wZwb Ges Avi I `BRb wePviK eiLv¯ nb|

AZtci, ivRvi Dc‡ivË“ ¶gZvi c‡¶ ivq nq|

ivRv James II Gi wmsnvmb cwiZ¨v‡Mi (abdication) ci 1689 mv‡j mweL¨vZ Bill of Rights AvBb AvKv‡i cYxZ nq| GB AvBb Øviv absolute Monarchy Gi Aemvb nq, mvsweavwbK ivRZš cwZwôZ nq Ges King in

Parliament Gi mve‡fŠgZ AwRZ nq| Lord Chatham GB cm‡½ h_v_ fv‡eB e‡jbt

> "The Magna Carta (1215), the Petition of Right(1628) and the Bill of Rights (1689), together constitute the Bible of the English Constitution."

ivRv William III I ivYx Mary II 1689 mv‡j wmsnvmb Av‡ivn‡Yi ci wePviKMY‡K quamdiu se bene gesserint (during his good behaviour) k‡Z wb‡qvM c`vb Kwi‡Zb| A_vr wePviK †Kvb ¸i"Zi Aciva bv Kwi‡j AvgZ¨ Zvnvi c‡` envj _vwK‡Z cvwi‡eb| d‡j A‡nZK eiLv¯ nBevi m¤vebv bv _vKvq wePviKMY wbwe‡N Zvnv‡`i wePviKvh Kwi‡Z cvwi‡Zb| Ze GB wb‡qvM ivRvi mw`"Qvi Dc‡iB wbfi KwiZ|

AZtci, 1701 mv‡j Act of Settlement cYxZ nq| DË" AvB‡bi 7 avivq wePviK‡`i PvKixi †gqv` I †eZbv`x wbwðZ Kiv nq| DË" aviv wbæi"ct

> "(7) ..... Judge's commissions be made quamdiu se bene gesserint and their salaries ascertained and established but upon the address of both Houses of Parliament it may be lawful to remove them" (Thomas Pitt Taswell-Langmead: English Constitutional History,1946, page-518

Dc‡ivË" AvBb e‡j D"P Av`vj‡Zi wePviK‡`i wb‡qvM, PvKixi ‡gqv` BZ¨vw` †¶‡Î ivRv‡`i †m"QvPvwiZvi Aemvb N‡U Ges Zvnv‡`i ¯vaxbZv Z_v wePvi wefv‡Mi ¯vaxbZv A‡bKvsk wbwðZ Kiv nq|

1688 mv‡ji wec‡ei ci Bsj¨v‡Ûi wePvi wefv‡MI cwieZb Av‡m| Lord John Holt 1689 mv‡j King's Bench Gi cavb wePvicwZ c‡` wb‡qvMcvß nb| Sir Edward Coke Gi ci wZwbB AvB‡bi kvmb cwZôvq wbiwe"Qb fv‡e †Póv Kwiqv wMqvwQ‡jb| Coke †K ivRvi wei"‡× AvBbx jovB Kwi‡Z nBqvwQj Avi Lord Holt †K House of Lords I House of

Commons Gi we‡klwaKvi (Privilege) `vexi wei“‡× AvB‡bi kvmb cwZôvq Aweivg msMvg Kwi‡Z nBqv‡Q|

Rex V. Knollys (1695) ‡gvKÏgvq House of Lords Gi we‡klwaKvi (Privilege) Gi wei“‡× Av`vj‡Zi GLwZqv‡ii welqwU we‡eP¨ wQj| GB †gvKvÏgvq King's Bench wm×vš MnY K‡i †h Knollys GKRb peer weavq commoner wnmv‡e Zvnvi wei“‡× AvbxZ Awf‡hvM LwiR †hvM¨| wKš House of Lords c‡eB wm×vš MnY Kwiqvwj †h Knollys †Kvb Peer bb| G cm‡½ King's Bench Awfgz †cvlY K‡i †h †h‡nZ ivRv Knollys Gi c`ghv`vi welqwU wbi“cb Kwievi Rb¨ House of Lords G †ciY K‡ib bvB ‡m‡nZ H wel‡q wm×vš c`vb Kwievi †Kvb GLwZqvi House of Lords Gi wQj bv| ¯vfvweK fv‡eB House of Lords Gi Peer MY AZ¨š¶ã nBqv Lord John Holt †K e¨wË“MZ fv‡e House of Lords G Dcw¯Z nBqv Zvnvi Hi“c wm×v‡šÍi KviY `kvB‡Z wb‡`k †`b| D‡jL¨ †h House of Lords GK w`‡K Parliament Gi D”P K¶ Ab¨w`‡K m‡ev”P Av`vjZ| wKš Lord John Holt Zvnv Mvn¨ bv Kwiqv hwË“ †`Lvb ‡h writ of error gvidr House of Lords Gi m¤§‡L welqwU AvbôvwbK fv‡e DÌvcb Kiv bv nB‡j ‡Kvb Av`vj‡Zi wm×v‡š mivmwi n¯‡¶c Kwievi ‡Kvb ¶gZv House of Lords Gi I bvB | Av`vj‡Zi GLwZqvi m¤§‡Ü wZwb e‡jbt

> "If there was any such law and custom of Parliament ..... yet when this comes incidentally in question before them (the judges), they ought to adjudge, and inter-meddle with it, and they adjudge things of as high nature every day; for they construe and expound Acts of Parliament....."

House of Lords Gi wb‡`k m‡ZI KviY c`kb bv Kwievi †hŠwË“KZv m¤‡Ü wZwb e‡jbt

> ".....if the record was removed before the peers by error, so that it came judicially before them, he would give his reasons very willingly; but he gave them in this case, it would be of very ill consequence to all

judges hereafter in all cases."(Sir William Holdsworth: The History of English Law, vol.V1, page-271)

GB fv‡e Lord John Holt iv‡ói m‡ev"P cwZôv‡bi Dc‡i I Av`v‡j‡Zi †kôZ Z_v AvB‡bi †kôZ cwZwôZ K‡ib| Kvhwewa ewnfZ fv‡e m‡ev"P Av`vjZI †h Ab¨ †Kvb Av`vj‡Zi Kvhµ‡g n¯‡¶c Kwi‡Z cv‡i bv Zvnv cwZwôZ nq| House of Lords Gi Peer MY Lord Holt Gi Dci AZ¨š— µ× nB‡jI cieZx‡Z mK‡jB Zvnvi wm×v‡ši †hŠ³ KZv Dcjwä K‡ib|

Ashby V. White (1704) ‡gvKvÏgvq GKw`‡K House of Commons Gi we‡klwaKvi (Privilege) Ab¨w`‡K Av`vj‡Zi GLwZqv‡ii welqwU we‡eP¨ wQj| GB †gvKvÏgvq Aylesbury Gi GKRb burgess Ashby ‡K Aylesbury i †gqi †fvU c`vb Kwi‡Z bv w`‡j Ashby wbevPbx KgKZv White Gi wei"‡× †gvKvÏgv K‡ib| King's Bench Av`vj‡Zi cavb wePvicwZ Lord John Holt Zvnvi dissenting ev wfbgZmPK iv‡q e‡jb ‡h Parliament Gi we‡klwaKvi Av‡Q wK bvB Zvnv †h‡nZ GKwU AvB‡bi ck †m‡nZ Bnv‡K AvBbvbmv‡i wePvi Kwievi GLwZqvi nBj Av`vj‡Zi| Lord John Holt e‡jbt

> "But they say that this is a matter out of our jurisdiction and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the Queen and the people: but sure we may determine on a charter granted by the King or on a matter of custom or prescription, when it comes before us without encroaching on the Parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it…… We do not deny them their right of examining elections, but we must not be frighted, when a matter of property comes before us, by saying it belongs to the Parliament, we must exert the Queen's jurisdiction. My opinion is founded on the law of England." (Sir William Holdsworth: The History of English Law, Vol.V1, note-6, Page no. 271)

King's Bench Gi msL¨vMwiô wePvicwZMY Lord Holt Gi Dc‡ivË" g‡Zi mwnZ GKgZ bv nB‡jI House of Lords, Writ of error Gi gva¨‡g ïbvbx A‡š— Lord John Holt Gi wb‡æv³ gZvgZ MnY K‡ibt

> "……. there is a great difference between the right of the electors and the right of elected: the one is a temporary right to a place in parliament, pro hac vice; the other is a freehold or a franchise. Who has a right to sit in the House of Commons may be properly cognisable there ; but who has a right to choose is a matter originally established, even before there is a parliament. ……. The same law that gives him his right must defend it for him,……"
>
> (Thomas Pitt Taswell Langmead: English Constitutional History, Tenth Edition, 1946, page-650)

Parliament AvBb cYqb Kwi‡Z m‡ev"P ¶gZv cvß nB‡j I AvB‡bi e¨vL¨v I c‡qvM m¤‡Ü Povš wm×vš c`vb Kiv Av`vj‡Zi GLwZqvi, GB ivq Zvnv cwZwôZ K‡i|

Reg. V. Paty (1705) ‡gvKvÏgwU Bsj¨v‡Ûi mvswevwbK BwZnv‡mi Avi I GK PgKc` NUbv|

Ashby V. White ‡gvKvÏgvi iv‡qi ci Paty mn Aylesbury i cvP Rb burgess GKB ai‡bi †gvKvÏgv Zvnv‡`i GjvKvi cwj‡ki wei"‡×`v‡qi K‡i| wKš House of Commons Bnvi Aegvbbvi (Contempt) Awf‡hv‡M ev`x I Zvnv‡`i AvBbRxwe mKj‡KB Aš ixY K‡i| Zvnv‡`i gw³i Rb¨ King's Bench Av`vj‡Z Writ of habeas `v‡qi Kiv nB‡j msL¨vMwiô wePvicwZMY House of Commons Gi we‡klwaKv‡ii e¨vcv‡i Zvnviv wb‡RivB wm×vš jBevi Rb¨ ¶gZvevb GB ivq c`vb Kwiqv ixU LvwiR K‡ib| GKgvÎ cavb wePvicwZ Lord John Holt Zvnvi wfbgZmPK (dissenting) iv‡q House of Commons Gi we‡klwaKvi m¤‡Ü gZ cKvk K‡ib †h GB †¶‡Î ïagvÎ House of Commons Gi wm×vš (resolution) h‡_ó bq, Bnv AvBb AvKv‡i wewae× nB‡jB ïa eva¨Ki nB‡e, b‡Pr bq| wZwb e‡jbt

> "I will suppose, that the bringing of such actions was declared by the House Commons to be a breach of their privilege; that that declaration will not make that a breach of privilege that was not so before. But if they have any such privilege, they ought to shew precedent of it. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law... And if they

> declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration. This privilege of theirs concerns the liberty of the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people cannot be subjected to without an Act of Parliament"
>
> Hillaire Barnett: Constitutional And Administrative Law, Fourth Edition, 2002, page-563)|

ev`x I Zvnv‡`i AvBbRxweM‡Yi AšixY Gi AvBbMZ Ae¯vb m¤‡Ü Lord John Holt e‡jb †h House of Commons mwbw`ó KviY D‡jL ceK ev`x I Zvnv‡`i AvBbRxweMY‡K AšixYe× Kwiqv‡Q| †h‡nZ AšixY Kwievi KviY¸wji ˆeaZv cix¶v Kiv Av`vj‡Zi GLwZqvif³ Ges hw` D³ KviY¸wj ‰ea bv nq Zvnv nB‡j AšixY‡`i gw³ c`vb Kwievi Av‡`k w`‡Z cv‡i| wZwb e‡jbt

> "… the legality of the commitment depended upon the vote recited in the warrant ……. That this was not such an imprisonment as the freemen of England ought to be bound by; for that this, which was only doing a legal act, could not be made illegal by the vote of the House of Commons; for that neither House of Parliament, nor both Houses jointly, could dispose of the liberty or property of the subject; for to this purpose the Queen must join."(Sir William Holdsworth : A History of English Law, Vol.-V1, page-272, note-2, Second Edition, 1966)

King's Bench Gi msL¨vMwiô wePvicwZM‡Yi gZvg‡Zi wfwË‡Z ev`xc‡¶i Writ of habeas Corpus †gvKvÏgv LwiR nB‡j Zvnviv Writ of error gvidr House of Lords Gi m¤§‡L Avcxj `v‡qi Kwievi Rb¨ Av‡e`b Rvbvb| wKš House of Commons cbivq wm×vš MnY K‡i †h G‡¶‡Î Writ of error `v‡qi†hvM¨ bq Ges ivYxi wbKU Writ of error MnY bv Kwievi Rb¨ Av‡e`b Rvbvb| Ab¨ w`‡K House of Lords ivYx‡K Rvbvb †h Writ of error GKwU Writ of right ev ex debito justitiae (as a matter of right) ev AwaKvi weavq DË" Writ AvBbvbM fv‡e MnY‡hvM¨|

ivYx Anne Zrci House of Commons Gi Awa‡ekb ¯wMZ (prorogation) †NvlYv K‡ib| d‡j House of Commons Gi we‡klwaKvi `vexI ¯wMZ nBqv hvq| GB fv‡e wZwb `B c‡¶i g‡a¨ GB A‡kvfb

AvBbx h× eÜ K‡ib| djk“wZ‡Z ev`x I Zvnv‡`i AvBbRxweMY A š ixb nB‡Z g³ nb Ges House of Lords Gi ceeZx iv‡qi †cw¶‡Z wbevPb msµvš †gvKvÏgvq Zvnv‡`i c‡¶ ivq nq|

Dc‡i Av‡jvwPZ †gvKÏgv¸wj‡Z GKw`‡K AvB‡bi †kôZ Ab¨w`‡K Parliament Gi Dfq K‡¶i †kô‡Zi Ø›` cKvk cvq|

House of Commons g‡b K‡i †h Zvnv‡`i we‡klwaKvi (Privilege) Gi Ae¯vb AvB‡bi I Dc‡i| †h †Kvb AwaKvi‡K Zvnviv Zvnv‡`i we‡klwaKvi †NvlYv Kwiqv wm×vš jB‡j Zvnv Av`vj‡Zi Dci eva¨Ki nB‡e| 17k kZ‡Ki cvi¤ nB‡Z Stuart ivRvMY GKB fv‡e Zvnv‡`i Prerogative†K Common Law nB‡Z †kôZi (arcana imperii) (State Secret) Ges Av`vj‡Zi GLwZqvi ewnfZ g‡b Kwi‡Zb| 1688 mv‡j Parliament Gi mve‡fŠgZ cwZwôZ nB‡j Parliament Gi Dfq K¶B Zvnv‡`i we‡klwaKvi‡K †`‡ki AvBb nB‡Z I †kôZi we‡ePbv Kwi‡Zb Ges GKB fv‡e welqwU‡K Av`vj‡Zi GLwZqvi ewnfZ g‡b Kwi‡Zb|

Rex V. Knollys ‡gvKvÏgvq House of Lords Gi we‡klwaKv‡ii `vexi K_v ewj‡Z hvBqv Attorney General GKB fv‡e Stuart ivRv‡`i b¨vq arcana imperii kãwU e¨envi K‡ib|

Sir Edward Coke ‡K †h fv‡e ivRv James I Gi `vexKZ Prerogative Gi †kô‡Zi wei“‡× AvBbx h× Kwi‡Z nBqwQj Lord John Holt †K I GKB fv‡e Rex V. Knollys (1695) †gvKvÏgvq House of Lords Gi wei“‡× Ges Ashby V. White (1704) I Reg. V. Paty (1705) †gvKvÏgvq House of Commons Gi wei“‡× AvBbx h× Kwiqv AvB‡bi †kôZ I †h †Kvb we‡ivaxq wel‡q Av`vj‡Zi Povš wm×vš c`v‡bi GLwZqvi cwZôv Kwi‡Z nBqwQj|

1701 mv‡ji Act of Settlement Øviv D”P Av`vjZ mg‡ni ¯vaxbZv i¶vi c`‡¶c MnY Kiv nB‡j I ivRv ev ivYxi gZ¨i m‡½ m‡½ Privy Council mn mKj ivRKgKZv I wePviKM‡Yi PvKixi †gqv` mgvß

nBZ Ges bZb ivRv bZb Kwiqv Zvnvw`M‡K wb‡qvM c`vb Kwi‡Zb| GB ai‡bi cwµqv wePvi wefv‡Mi ¯vaxbZvi mwnZ h‡_vch³ I mwVK wQj bv| 1760 mv‡j ivRv George III Bsj¨v‡Ûi wmsnvm‡b Av‡ivnY Kwiqv Commissions and Salaries of Judges Act, 1760 (George III c. 23) AvBbØviv Dc‡iv³ c_v evwZj KiZt wePviKM‡Yi PvKixi †gqv` AvgZ¨ envj ivwLevi c`‡¶c MnY K‡ib| d‡j ivRv ev ivYxi gZ¨ wePviKM‡Yi PvKixi †gqv`‡K Avi †Kvb fv‡eB cfvweZ Kwiz bv| GB fv‡e ivRv Henry II Gi mgq nB‡Z †h wePvi e¨e¯v mmsnZ Kwievi cqvm jIqv nBqvwQj Zvnv µ‡g µ‡g ivRvi cfve ejq I Zrci ivR‰bwZK cfve ejq nB‡Z m¤úY g³ nq| ïagvÎ †Kvb ¸i“Zi Awf‡hv‡Mi Kvi‡Y Parliament Gi Dfq K‡¶i wm×vš e¨wZ‡i‡K wePviK‡`i PvKixi Aemvb m¤e wQj bv |

GB fv‡e Bsj¨v‡Ûi me‡kô e¨w³e‡Mi kZ kZ erm‡ii mvabv I †Póvi gva¨‡g Bsj¨v‡Ûi wePvi wefvM ¯vaxb nq Ges Rule of Law ev AvB‡bi kvmb cwZwôZ nBevi c_ mMg nq|

ga¨hM nB‡ZB Bsj¨v‡Û AvBb Bnvi †kôZ cKvk Kwi‡Z _v‡K| †mB mgq `B ai‡bi AvBb, mwóKZvi AvBb (Divine Law) I gvb‡li mwó AvBb (Man made Law), GB `B ai‡bi AvBbB cPwjZ wQj| Z‡e kvmK I kvwmZ mK‡jB GKB AvBb Øviv eva¨MZ wQj| GB Kvi‡Y 1250 mv‡j wjwLZ De Legibus G Justice Henry de Bracton ewj‡Z cvwiqv wQ‡jbt

> “In justitia recipienda minimo de regno suo (rex) comparatur”, (The law bound all the members of the State, whether rulers or subjects, and Justice according to law was due to all) (Sir William Holdsworth: A History of English law vol. X page – 647) |

‡`‡ki AvB‡bi cwZ mK‡ji k×v †ev‡ai Kvi‡YB AvR nB‡Z cvq QqkZ ermi c‡e I 1441 mv‡j i Year Book G wjwce× nBqvwQjt

> “The law is the highest inheritance which the King has; for by the law he and all his subjects are ruled, and if there was no law there would be no King and no inheritance.”

(Sir William Holdsworth: A History of English law, Vol. X Page-648)

16k kZvãx‡Z ivRv Henry VIII hw` I AZ¨š `webxZ ivRv wQ‡jb wKš †Kvb AvBb wewae× Kwievi c‡e wZwb I Parliament G ¯vaxb fv‡e Av‡jvPbv Kwi‡Z m‡hvM w`‡Zb hvnv‡Z mswkó AvB‡bi Øviv cRv‡`i Kj¨vY mvab nq| Sir William Holdsworth Gi fvlvqt

> In 1536 Henry VIII "came in among the burgesses in the Parliament and delivered them a bill which he desired them to weigh in conscience, and not to pass it because he gave it in, but to see if it be for the common weal of his subjects ;" (A History of English Law Vol. IV, page- 91)

ivRv wb‡R I AvBb gvb¨ Kwiqv Pwj‡Zb | 1538 mv‡j Lord Lisle GK c‡Î R‰bK Hussee †K e‡jbt

> "It had never been seen that the King would stop the course of his common law." (Sir William Holdsworth: A History of English Law, vol. IV, page- 201, note-7)|

H h‡M AvB‡bi Ae¯vb m¤ú‡K Starkey Zvnvi M‡š †j‡Lbt

> that the laws "must rule and govern the State, and not the prynce after his own lyberty and Wyle."
>
> (Sir William Holdsworth: A History of English Law, Vol. IV , Page-201, note-7)|

ivR f³ Attorney General Sir Francis Bacon 1609 mv‡j ivRv James I Gi Divine Right Gi `vexi mgq I Calvin Gi †gvKvÏgvq eË"e¨ Dc¯vcb Kwi‡Z wMqv e‡jbt

> "Law is the great organ by which the sovereign power doth
>
> move;"

wZwb ivRvi ¶gZv m¤‡Ü e‡jbt

> "although the King , in his person, be solutus legibus, yet his
>
> acts and grants are limited by law, and we argue them every
>
> day"
>
> (Sir William Holdsworth : A History of English Law
>
> Vol. IV, Page-201) |

GB fv‡e ax‡i ax‡i nB‡j I Bsj¨v‡Û wePvi we fv‡Mi ¯vaxbZv Z_v wePviKM‡Yi ¯vaxbZv w¯wZ jvf Kwi‡Z _v‡K|

1761 mv‡j ivRv George III wePviKM‡Yi ¯vaxbZv m¤‡Ü e‡jbt

> " he looked upon the independence and uprightness of the Judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the Crown" (House of Commons Journals, March,3, 1761, Sir William Holdsworth : A History of English Law, Vol. X , 1938 , page 644).

h‡M h‡M Bsj¨v‡Ûi †ekxi fvM ivRv‡`i AvBbgb¯‹Zv I mnvqZvq Ges Parliament KZK mg‡qvc‡hvMx AvBb cYq‡Yi gva¨‡g Bsj¨v‡Û wePviKMY ivRvi cvPxb wePvwiK ¶gZvq ¶gZvevb nBqv ivRvi c‡¶ wePviKvh cwiPvjbvi gva¨‡g AvB‡bi †kôZ i¶vi `vwqZ cvß nb Ges iv‡R¨ m‡ev"P ghv`vcY Ae¯v‡b cwZwôZ nb| ivRvi wePvwiK ¶gZvi GB axi wKš wbwðZ cwieZb I i"cvši m¤‡Ü Sir William Blackstone e‡jbt

> "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservation of the public liberty: which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason by the statute 16 Car. I c. 10 , which abolished the court of star chamber , effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then as evident from recent instances, might soon be inclined to pronounces that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.

(Sir William Holdsworth : A History of English Law, Vol. X, Page -417, 1938).

Blackstone gše¨ K‡ib †h i‚cvšwiZ wePvie¨e¯vq ZvwZKfv‡e ivRv †hb "is always present in all his Courts" (page-415) Ges wePviKMY cKZc‡¶ ivRvi mKj wePvwiK ¶gZvi Avavi wnmv‡e AvZ¥cKvk K‡ibt

> "At present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter……. (Sir William Holdsworth : A History of English Law, Vol.X, c_g g`Yt 1938,645-6, dU †bvU 10 nB‡Z D×Z)|

wesk kZvãxi c_g fv‡M Holdsworth Bsj¨v‡Ûi wePvi e¨e¯v m¤ú‡K e‡jbt

> "The courts are thus "the main preservation of public liberty" to a much greater extent than they were in the balanced eighteenth-century constitution. Any curtailment of their jurisdiction means the curtailment of the one security which the subject has against the arbitrary use of the great powers which all parties in the House of Commons vie with one another in conferring upon their leaders, the ministers."

(Sir William Holdsworth : A History of English Law, Vol. X, page- 417. 1938)|

ivRv, House of Lords I House of Commons Gi Zid †_‡K wewfb mgq Bsj¨v‡Ûi wePvie¨e¯vi Dci bvbvai‡Yi Pvc Avwmqv‡Q hvnv Dc‡i eYbv Kiv nBqv‡Q| Bnv e¨wZ‡i‡K wePvi wefvM‡K Ab¨ bvbv ¯vb nB‡Z I wewfb ai‡Yi Pv‡ci m¤§Lxb nB‡Z nBqv‡Q| A‡bK mgq D"Q•Lj RbZv nB‡Z I cej Pvc AvwmZ|

John Wilkes GK mgq House of Commons Gi m`m¨ wQ‡jb| wKš cieZxKv‡j wZwb House of Commons nB‡Z weZvwoZ nb| wZwb wb‡RB Zvnvi wb‡Ri GKgvÎ D`vniY wQ‡jb| gvbnvwbKi GKwU iPbvi Kvi‡Y Zvnvi wei"‡× GKwU †dŠR`vix †gvKvÏgv nq| †mB †gvKvÏgv nIqvq †`‡k e¨vcK wek•Ljvi mwó nq Ges wec‡¶ ivq nB‡j wek•Ljv AvI e¨vcK I Zxe ivqU AvKvi jB‡Z cv‡i ewjqv Rex V.

Wilkes (1770) ‡gvKvÏgvq Avk¼v cKvk Kwiqv King's Bench Gi m¤§‡L Zvnvi AvBbRxex wb‡e`b iv‡Lb| cavb wePvicwZ Lord Mansfield Zvnvi iv‡q hvnv e‡jb Zvnv meKv‡ji mKj †`‡ki wePviKM‡Yi Rb¨ wk¶Yxqt

> The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say '*fiat justitia, ruat caelum'*. The constitution trusts the King with reasons of State and policy: he may stop prosecutions; he may pardon offences; it is his, to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part, (in another place) in the addresses for that prosecution . We did not advise or assist the defendant to fly from justice: it was his own act; and he must take the consequences. None of us have been consulted or had any thing to do with the present prosecution. It is not in our power to stop it: it was not in our power bring it on. We cannot pardon. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences.
>
> I pass over many anonymous letters I have received. Those in print are public: and some of them have been brought judicially before the court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against these arrows. If, during this King's reign, I have ever supported his government and assisted his measures; I have done it without any other reward, than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves; without mixing in party or faction, and without my collateral views. I honour the King; and respect the people: but, many things acquired by the favour of either, are, in my account, objects not worth ambition, I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is

wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press : I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circumstances not unlike, *Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem.*

The threats go further than abuse: personal violence is denounced . I do not believe it: is not the genius of the worst men of this country, in the worst of times. But I have set my mind at rest. The last end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country: (for liberty is synonymous to law and Government). Such a shock, too, might be productive of public good: it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

Once for all, let it be understood, 'that no endeavors of this kind will influence any man who at present sits here'. If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is intitled to from substantial law and justice; but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection.

(Brian Harris: The Literature of the Law, 2003, page-6-7)

ïbvbx A‡š Wilkes †K 22 gv‡mi Kviv `Û I 1,000/= cvDÛ Rwigvbv Kiv nq| cieZx‡Z Lord Mansfield Gi evmfeb I e¨w³MZ jvB‡eix †cvovBqv †`Iqv nq wKš wZwb wPiKvj AvBb I b¨vqwePvi mgbZ iwLqv wMqv‡Qb|

A‡bK mgq Print I Electronic media we‡kl †Kvb wePvh wel‡qi c‡¶ I wec‡¶ bvbvb ai‡bi cPvi cPviYv PvjvBqv _v‡K| wePviKMY wePviK nB‡j I Zvnvivl gvbe mšvb | ˆeix cPvi

cPviYvi Kvi‡Y Zvnvivl cPÛ gvbwmK Pv‡ci wkKvi nB‡Z cv‡ib| d‡j †h b¨vqwePvi e¨vnZ nB‡Z cv‡i Zvnv cvqktB media wem¥Z nq|

h³ iv‡ói Boston kn‡i Louise Woodward bvgxq GKRb Bs‡iR au pair †K AvUgv‡mi GK †Q‡j‡K nZ¨v Kwievi Awf‡hv‡M Rwi Zvnv‡K hve¾xeb Kviv`Û c`vb K‡i| GB kvw¯i wei“‡× Louise Gi c‡¶ cej RbgZ Mwoqv I‡V Ges Zvnviv Rixi wm×vš evwZj Kwievi c‡¶ Av‡›`vjb Kwi‡Z _v‡K| Aci c‡¶ Avi GK`j Rixi wm×vš †K ¯vMZ RvbvB‡Z _v‡K| Electronic I print media Gi Kj¨v‡Y h³ ivó I h³ iv‡R¨ GB ivq jBqv †mBmgq 1998 mv‡j Zgj ˆn‰P mwó nq|

Massachusetts Superior Court Gi GKRb Associate Justice, Judge Hiller B. Zobel Zvnvi ivq GB fv‡e Avi¤ K‡ibt

> "The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible and deaf: inexorable to the cries of the defendant; 'deaf as an adder to the clamours of the populace'. His words ring true, 227 years later.
>
> Elected officials may consider popular urging and sway to public opinion polls. Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists and talk shows. In this country, we do not administer justice by plebiscite.
>
> A judge, in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to the prevalent demands."
>
> (Brian Harris : The Literature of the Law, Page 20-21, 2003) (A‡av‡iLv c`Ë)

227 ermi c‡e AvB‡bi †h bxwZ John Adams Zvnvi e³‡e¨ ewjqvwQ‡jb Zvnv †hgb AvRI a"e mZ¨ †Zgwb mZ¨ Judge Zobel Gi e³e¨|

cvPxbKv‡j we‡k ivRv, ev`kvn ev mgvU AšZ ZvwZKfv‡e b¨vq wePv‡ii cZxK wQ‡jb| cvPxb HwZn¨ Abmv‡i Zvnviv Zvnv‡`i ivRvwf‡lK Abôv‡bB (coronation) cRvM‡Yi cwZ b¨vqwePv†ii A½xKvi Kwi‡Zb| ¯vbxq wePviKM‡Yi iv‡qi wei“‡× me‡kl b¨vqwePv‡ii

cv_bv cRvMY †`‡ki ivRvi wbKUB KwiZ| GB Kvi‡Y Bsj¨v‡Û ivRv‡K 'Fountain of Justice' ejv nBZ| ‡gvNj mgvU Rvnv½xi 1605 mv‡j Zvnvi cvmv‡` GKwU ¯‡Yi k•Lj Gi mwnZ lvUwU N›Uv SjvBqv w`qvwQ‡jb hvnv‡Z Zvnvi †h †Kvb AZ¨vPvwiZ cRv Zvnvi wbKU mivmwi b¨vq wePvi cv_bv Kwi‡Z cv‡i|

mf¨Zvi m`xN BwZnvm cwiµg Kwi‡j cZxqgvb nB‡e ‡h hLbB wePvi wefv‡Mi c`öjb NwUqv‡Q ZLbB †`‡k AivRKZv GgbwK wec‡ei mwó nBqv‡Q|

1660 mv‡j Bsj¨v‡Û ivRZš cbenvj (Restoration) nB‡j Charles II Bsj¨v‡Ûi wmsnvm‡b Av‡ivnY K‡ib| wZwb Zvnvi ivR‡Zi c_g w`‡K †hvM¨ e¨w³‡`i during good behaviour k‡Z wePviK c‡` wb‡qvM c`vb K‡ib Ges wePvi wefvM Bnvi nƒZ m¤§vb wdwiqv cvB‡Z Avi¤ K‡i| wKš Zvnvi ivR‡Zi †klfv‡M Sir William Scrogg (1678) †K Court of Common Pleas Gi cavb wePvicwZ Ges Lord George Jeffrey (1683) ‡K King's Bench Gi cavb wePvicwZ wnmv‡e wb‡qvM c`vb Kiv nq| GB `B cavb wePvicwZi ‡gqv`Kv‡j wePvi wefv‡Mi Pig Ae¶q mvwaZ nq|

Lord Jeffrey Gi civg‡k ivRv 1684 mv‡j Robert Wright Gi b¨vq GKRb Ac`v_ AvBbRxwe‡K King's Bench G wePviK wnmv‡e wb‡qvM c`vb K‡ib| Zvnvi m¤‡Ü Z`vbxšb Lord Chancellor Guildford gše¨ KwiqvwQ‡jbt

> 'the most unfit person in England to be made a judge ……a dunce , and no lawyer , who is not worth a groat ……..'
>
> (David Pannick: Judges, 1988 , page -65)

1685 mv‡j James II Bsj¨v‡Ûi wmsnvm‡b Av‡ivnY K‡ib| GB mgq Duke of Monmouth ivRvi wei"‡× we‡`vn Kwi‡j K‡Vvi n‡¯ Zvnv `gb Kiv nq| Lord Jeffrey KL¨vZ 'Bloody Assizes' G we‡`vnx‡`i‡K wbgg fv‡e kvw¯ c`vb Kwiqv ivRvi wcqcvÎ nb| 1685 mv‡j ivRv

Zvnv‡K Lord Chancellor c‡` wb‡qvM c`vb K‡ib| H mgq ivRvi gbgZ gZvgZ bv nB‡j wePviKMY‡K mivmwi eiLv¯ Kiv nBZ| †hvM¨Zv ewnfZ fv‡e ivRv Zvnvi cQ›`gZ e¨wË“eM †K m¤úY ivR‰bwZK we‡ePbvq wePviK c‡` wb‡qvM c`vb Kwi‡Zb| Lord Chancellor wnmv‡e wePviK‡`i cwZ Lord Jeffrey Gi Dc‡`k wQj bM fv‡e `jxq t

> “Be sure”, he said, “ to execute the law to the utmost of its vengeance upon those that are now knowne, and we have reason to remember them, by the name of Whigs; and you are likewise to remember the sniveling trimmer; for you know that our Saviour Jesus Christ says in the Gospell, that ‘ they that are not for us are against us.’ (Sir William Holdsworth: A History of English Law Vol.VI Second Edition, 1937 Page-509)

hw` I Robert Wright wePvwiK A‰bwZK Zvi cZxK wQ‡jb wKš ivRv 1687 mv‡j Zvnv‡K King’s Bench Gi cavb wePvicwZ c‡` wb‡qvM c`vb K‡ib| GB mgq wePvi e¨e¯vi mvgwMK Pig Ae¶q Ges we‡kl Kwiqv Robert Wright Gi Awe‡ePK iv‡qi Kvi‡Y Bsj¨v‡Û 1688 mv‡ji wece ZivwbZ nq ewjqv A‡bK HwZnvwmK g‡b K‡ib|

h³ iv‡ói ¯vaxbZv †NvlYvq hw` I ‘all men are created equal’ †NvlYv Kiv nBqwQj wKš Dred Scott V. Sanford ( 1857) †gvKvÏgvq cavb wePvicwZ Roger Brooke Taney i †bZ‡Z 7-2 msL¨vMwiô wePvicwZM‡Yi gZvbmv‡i US Supreme Court †NvlYv K‡i †h wb‡Mviv †`‡ki bvMwiK bb weavq Zvnviv †Kvb †gvKvÏgv Kwi‡Z cv‡ib bv Ges µxZ`vm c_v ewZj Kwievi †Kvb ¶gZv Congress Gi I bvB | Supreme Court Gi GB ivq DË‡ii A½ivó¸wj‡Z ‡bwZevPK `wó fw½‡Z †`Lv nB‡j I `w¶‡Yi ivó¸wj‡Z ivqwU Zvnv‡`i weRq wnmv‡e Awfbw›`Z nq| fwel¨Z President cv_x Abraham Lincoln GK eË“Zvq cm½ µ‡g ivqwU m¤‡× e‡jbt ‘But we think the Dred Scott decision is erroneous’| cieZx wbevPbx cPviYvq `vmc_vi ˆbwZKZv I ˆeaZv cm½ evi evi DwVqv Av‡m Ges Abraham Lincoln President wbevwPZ nb| A‡b‡K ‡klvZ¥K fv‡e e‡jb †h, ‘It may fairly be said that Chief Justice Taney elected Abraham Lincoln to the Presidency (Charles Warren: The Supreme Court in United States History)|

cKZc‡¶ Abraham Lincoln President wnmv‡e 1861 mv‡j `vwqZ MnY Kwievi K‡qK gv‡mi g‡a¨B `w¶YvÂ‡ji Confederate MY we‡`vn †NvlYv K‡i Ges GK i³¶qx Mnh× Union †K cvq aŸs‡mi g‡L jBqv hvq| Aek¨ h‡×i GB Wvgv‡Wv‡ji g‡a¨B Lincoln 1863 mv‡ji 1jv Rvbqvix Zvwi‡L h³iv‡ói Kv‡jv gvbl‡`i Rb¨ Emancipation Proclamation G ¯v¶i K‡ib|

Emeritus Professor Henry J. Abraham Zvnvi 'The Judicial Process', Seventh Edition, 1998 ,M‡š Dred Scott ivq m¤‡Ü e‡jbt

> "Chief Justice Taney delivered the 7:2 opinion of the Court , which , as history would prove all too soon, did anything but settle the problem . Indeed, it acted as a catalyst in bringing on the Civil War" (Page-239).

Ab¨Î wZwb e‡jbt

> "…….. Taney, then in his eightieth year , lonely and frustrated, met his and the Court's judicial Waterloo in 1857 with his monumentally aberrant opinion in Dred Scott V. Sand ford,……. Dred Scott…..— dragged the Supreme Court of the United States into its lowest depths, and hastened the dawn of the Civil War and with it the Emancipation Proclamation and the Civil War Amendments" (XIII,XIV, and XV). (Page- 377) .

wesk kZvãxi wÎk `k‡K Rvgvbxi wePvie¨e¯v AZ¨š‡kvPbxq chv‡q Avwmqv `vovBqvwQj| wKš Hifc `ie¯v nBevi K_v wQj bv| KviY enËi Rvgvbxi mcvPxb wePvie¨e¯v †ivgK wePvie¨e¯vi Dci wfwË Kwiqv Mwoqv DwVqvwQj Ges Zvnv Bsj¨v‡ÛI Common Law Gi b¨vq AZ¨š DbZ I mg× wQj| bvrmx kvmb Avg‡j AvB‡bi Aa¨vcK I wePviKMY mge¨v‡q c‡ei b¨vq bxwZi Dci cwZwôZ AvBb e¨e¯v m¤úY wem¥Z nBqv A™Z GK bvrmx Jurisprudence ms¯‹wZ Mwoqv Zwjqv wQ‡jb hvnvi GKgvÎ D‡Ï k¨ wQj me‡¶‡Î bvrmx bxwZ ev¯evqb| †h mKj Aa¨vcK I wePviKM‡Yi g‡a¨ GB Acms¯‹wZ Mn‡Y mvgvb¨Zg KÚv cwijw¶Z nBZ Zvnv‡`i ïagvÎ mivmwi eiLv¯ Kiv bq cvqkt B Zvnv‡`i kvw¯ †fvM Kwi‡Z nBZ|

Professor Ingo Müller wjwLZ Hitlar's Justice : The Courts of the Third Reich, 1987 I Deborah Lucas Schneider KZK Abw`Z M‡š GB Ae¯v m¤‡× Av‡jvKcvZ Kivnqt

> "The law for Restoration of the Professional Civil Service had already done away with judges' security of tenure, since it allowed the government to dismiss from office all judges who were politically undesirably, or not "Aryan" or who would not undertake " to support the national state at all times and without reservation." (cô v-72)

Edward Kern (1933-34) I Ab¨vb¨‡`i D×Z Kwiqv wZwb ‡j‡Lbt

> "German law professors now informed them that " in the interest of consistent government, certain limits must be imposed" on the autonomy of the courts." (cô v72).

wePviK‡`i KiYxq m¤‡Ü Professor Georg Dahm (1934) e‡jbt

> "A Judge should therefore approach a case with " healthy prejudice" and "make value judgments which correspond to the National Socialist legal order and the will of the political leadership." (cô v-73)

wePviK‡`i mveavb Kwiqv AvBb Abl‡`i Dean Professor Erik Wall e‡jbt

> "In the everyday practice of law, genuine National Socialism is certainly best represented where the idea of the Fiihrer is silently but loyally followed".

Führer Gi miKv‡ii bxwZi cwZ wePviK‡`i cKZ eva¨evaKZv m¥iY KivBqv w`qv Rohling (1935) e‡jbt

> "Judges were "liberated" from their obligation to the law only to be constrained by an incomparably more restrictive" obligation to the main principles of the Führer's government."

mgM we‡k hLb AvBb wesk kZvwã‡Z Av`k I ^bwZKZvi wbwi‡L AMmigvb ZLb GKw`‡K wbevwPZ miKv‡ii digv‡qk gZ Rvgvbxi msm` AvBb cYqb Kwiqv‡Q , Ab¨w`‡K Rvgvbxi ew×Rxex m¤ú`v‡qi GBiƒc ^bwZK Ae¶q mf¨Zvi BwZnv‡m GKwU Kj¼gq Aa¨vq| ZvnvivB bvrmx miKv‡ii mKj cKvi AZ¨vPvi, AwePvi, †¯"QvPvi I gvbeZv we‡ivax KgKv‡Ûi Z_vKw_Z ZvwZK wfwË c`vb

KiZt Dc‡iv³ A‰bwZK KvhKjv‡ci AvBbx IRi c`v‡bi cqvm cvb| djk“wZ‡Z wØZxq gnvh‡×i mÎcvZ, †KvwU †KvwU gvb‡li cvYbvk Ges Ae‡k‡l Ôgnvb Õ Rvgvb RvwZi k•Ljve× Ae¯v|

BwZnvm Avgv‡`i GB wk¶v †`q †h ‡Kvb iv‡ó hLbB Supreme Court Z_v wePvi wefvM iv‡ói wbevnx wefvM I AvBb mfv‡K msweavb I AvB‡bi AvIZvq iwL‡Z e¨_ nq Ges wbevnx wefv‡Mi AvÁven nBqv `vovq ZLbB iv‡ó I bvMwiK‡`i Rxe‡b Pig wecwË †`Lv †`q|

Rvgvb †`k QvovI AviI A‡bK †`k iwnqv‡Q †hLv‡b mcxg †Kv‡Ui mgq‡cv‡hvMx c`‡¶c Mn‡Yi e¨_Zvi gvïj mgM RvwZ‡K ggwšK fv‡e c`vb Kwi‡Z nBqv‡Q|

1954 mv‡j cvwK¯vb †dWv‡ij †Kv‡Ui cavb wePvicwZ iwk` Aem‡i Mgb Kwi‡j ZLb me‡R¨ô wQ‡jb wePvicwZ Ave mv‡jn †gvnv¤§` AvKivg| wKš wZwb evOvjx wQ‡jb| AZcit †dWv‡ij †Kv‡Ui mKj wePvicwZ‡K AwZ µvš Kwiqv jv‡nvi nvB‡KvU Gi cavb wePvicwZ Muhammad Munir ‡K †dWv‡ij †Kv‡Ui cavb wePvicwZ c‡` mivmwi wb‡qvM c`vb Kiv nq|

H mg‡q cvwK¯v‡bi Mfbi †Rbv‡ij ‡Mvjvg †gvnv¤§` MYcwil‡`i msL¨vMwiô m`m¨M‡Yi Av¯vfvRb LvRv bvwRg Dwïb‡K cavbgšx c` nB‡Z eiLv¯ K‡ib Ges 1954 mv‡j Lmov msweavb MYcwil‡` `wLj Kwievi cv°v‡j MYcwil` fw½qv †`b|

Zrci, MYcwil‡`i w¯úKvi †gŠjfx ZwgR Dwïb Lvb wmÜ wPd †Kv‡U (nvB‡KvU) DË“ Av‡`‡ki ^eaZv P¨v‡jÄ Kwiqv †gvKvÏgv `v‡qi Kwi‡j wPd †KvU MYcwil` fw½qv w`evi Av‡`k A‰ea †NvlYv K‡i| cavb wePvicwZ Munir Gi †bZ‡Z †dWv‡ij †KvU Avcxj MnY K‡i Ges MYcwil` fw½qv w`evi Av‡`‡ki ‰eaZv c`vb K‡ib| ïa ZvnvB b‡n, Bnvi ci Z`vbxšb cvwK¯vb miKv‡ii ivócavb c‡` hvnvivB Avwmqv‡Qb Zvnv‡`i c‡Z¨‡Ki mecKvi A‰ea I A‰bwZK

Kvhvejx I c`‡¶‡ci ^eaZv wZwb c`vb K‡ib| wePvicwZ Munir Gi GB ai‡bi wePvwiK KvhKjvc GKgvÎ wesk kZvwãi 30 `k‡Ki Rvgvb wePviK‡`i KvhKjv‡ci mwnZ Zjbxq|

D‡jL¨ †h ivRv James II 1688 mv‡j PZw`‡K Am‡šv‡li Kvi‡Y Bsj¨v†Û gvkvj jÕ Rvixi gva¨‡g †`k kvmb Kwievi cwiKíbv KwiqvwQ‡jb wKš H mgq wePvi wefv‡Mi Pig Ae¶‡qi c‡il G e¨vcv‡i Zvnv‡K mg_b Kwievi gZ GKRb wePviKI mgM Bsj¨v‡Û cvIqv hvq bvB|

A_P mv‡o wZbkZ ermi ci State V. Dosso 1958 PLD SC 533 †gvKvÏgvq cavb wePvicwZ gwbi Gi †bZ‡Z Pakistan Supreme Court mvgwiK kvmb‡K ‰eaZv c`vb K‡i| wKš Munir C.J. fwjqv wMqvwQ‡jb ‡h Government of India Act, 1935 ev Indian Independence Act, 1947 , ¯vaxbZv cvß Dorminion ¸wj‡K mvgwiK AvBb Øviv kvmb Kwievi †Kvb weavb K‡i bvB|

14 ermi ci Asma Jilani V. Government of Punjab, PLD 1972 SC 139 †gvKvÏgvq Dosso Gi ivq over-rule (evwZj) nq| Yaqub Ali, J. evsjv‡`k ¯vaxb nBevi wcQ‡bi KviYvejx eYbv Kwi‡Z hvBqv e‡jbt

> "…… A National Assembly was yet to be elected under the 1956-Constitution when Mr. Iskander Mirza who had become the first President by a Proclamation issued on the 7th October 1958, abrogated the Constitution; dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country: General Muhammed Ayub Khan Commander-in-Chief of the Pakistan Army, was appointed as the Chief Administrator of Martial Law…....
>
> The judgment in State V. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the judgment was delivered on the 23rd October 1958, and he assumed to himself the office of the President. The judgments in the cases Maulvi Tamizuddin Khan; Governor-General Reference 1of 1955 and The State V. Dosso had profound effect on the constitutional development in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock……(page-219)

GB fv‡e cwK¯vb mcxg ‡Kv‡Ui Pig e¨_Zvi Kvi‡Y evOvjxi mó cwK¯vb‡K cwiZ¨vM Kwi‡Z nq Ges 1971 m‡bi 25‡k gv‡Pi w`evMZ iv‡Î †kL gwRei ingvb evsjv‡`‡ki ¯vaxbZv †NvlYv K‡ib|

cwK¯vb Avg‡ji wZË“ Awf ÁZvi Av‡jv‡K Avgv‡`i mswe avb c‡YZvMY mvswe awbK ‡kôZmn iv‡ói cRvZvwšK I MYZvwšK Pwi Î Ges Ab¨vb¨ gjbxwZ h‡Z¥i mwnZ mwb‡ewkZ K‡ib| wKš Zvnvi c‡il †kl i¶v m¤e nq bvB| mvgwiK evwnbxi wKQ msL¨K wec_Mvgx ˆmwbK 1975 mv‡ji 15B AMvó Zvwi‡L RvwZi RbK †kL gwRei ingvb‡K ¯cwiev‡i nZ¨v K‡i | L›`Kvi gkZvK Avn‡g` mswe avb f½ KiZt ivócwZi c` A‰ea fv‡e `Lj K‡ib| 20‡k AMvó Zvwi‡L wZwb mvgwiK AvBb Rvix K‡ib| 82 w`b wZwb ¶gZvq _v‡Kb| b‡f¤i gv‡mi c_g mßv‡n coup I counter coup nq| 8B b‡f¤i Gi Proclamation `‡ó cZxqgvb nq †h evsjv‡`‡ki cavb wePvicwZ Justice Abu Sadat Moahammad Sayem evsjv‡`‡ki ivócwZ I cavb mvgwiK ckvmK c‡` Awawôz nBqv‡Qb| GBifc wb‡qvMI mswe avb f½ KwiqvB Kiv nBqvwQj|

mv‡o wZbkZ ermi Av‡M ivRv James I Gi Proclamation Øviv AvBb cYq‡bi `vexi g‡L cavb wePvicwZ Sir Edward Coke ewj‡Z cwiqvwQ‡jbt

> “the king cannot change any part of the common law nor create any offence by his proclamation which was not an offence before , without Parliament; (the case of Proclamations ,1611)

(Sir William Holdsworth: A History of English law vol.1V, Page 296)|

A_P wesk kZvãxi †kl fv‡M Avwmqv evsjv‡`‡ki GKRb cavb wePvicwZ Ômswe avb I AvB‡bi i¶Y, mg_b I wbivcËwe avbÕ Kwievi cwie‡Z mswe avb f½Kwiqv ïagvÎ ivócwZi c` b‡n cavb mvgwiK ckvm‡Ki c`I MnY K‡ib| Zrci wZwb iv‡ói msm`

evwZj K‡ib| cieZx cvq mv‡o wZb ermi evsjv‡`k msm` wenxb Ae¯vq wQj| GLv‡bB †kl bq, ˆ¯iZvwšK mvgwiK ckvmKMY Zvnv‡`i cQ›` I c‡qvRb gZ Avgv‡`i gnvb mswevb wbweev‡` h‡_”Qv KvUv ‡Qov K‡ib|

GB cm‡½ 1944 mv‡j GK mfvq c`Ë US Circuit Court of Appeals Gi cavb wePvicwZ Justice Billing Learned Hand Gi gše¨ cYxavb‡hvM¨t

> “I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitutions, no law, no court, can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it”.

(Brian Harris: The Literature of the Law, 1998, page -330-40) (A‡av‡iLv c`Ë)

wesk kZvwãi wÎk `k‡Ki Rvgvbxi wePvi e¨e¯vq †mi‡c Ae¶q nBqwQj, cwK¯vb mcxg †Kv‡Ui †hi‡c Ae¶q nBqwQj, wesk kZvwãi mËi `k‡Ki †kl fvM I Avwk `k‡Ki c_g fv‡M AšZt mvswevwbK c‡k evsjv‡`‡ki m‡ev”P Av`vj‡Z I †Zgwb Ae¶q cwijw¶Z nq|

Dc‡ii GB Av‡jvPbvi KviY nBj †h Bsj¨v‡Û 16k, 17k I 18k kZvãx‡Z wePvi wefvM ivRvi wei“‡×, House of Lords Gi wei“‡×, House of Commons Gi wei“‡× µgvMZ msMvg Kwiqv AvB‡bi †h †kôZ cwZwôZ Kwi‡Z m¶g nBqwQj we‡k Avi †Kvb †`k Zvnv ARb Kwi‡Z cv‡i bvB, Ggb wK hË“iv‡ói b‡n|

1701 mv‡j Smith V. Browne ‡gvKvÏgvq Lord Holt e‡jbt

> “as soon as a Negro comes to England he is free; one may be a villein in England but not a slave” .

wKš GB K_v ewj‡Z US Supreme Court Gi AvovBk ermi jwMqwQj| Bnvi g‡a¨ µxZ`vm c_v c‡k Pvi ermi e¨vcx Mnh‡×

BDwbqb cvq aŸsm cvß nB‡Z ewmqvwQj| msweav‡bi 13Zg I 14Zg ms‡kvabx Kwievi c‡i I µxZ`vm c_vi AcQvqv hË“iv‡ó we`¨gvb _v‡K| 1954 mv‡j Brown V. Board of Education †gvKvÏgvq US Supreme Court c_g ev‡ii gZ mv`v gvbl I Kv‡jv gvb‡li g‡a¨ Segregation wbwl× †NvlYv K‡i|

KLb KLbI wePviK‡`i m‡Z¨i c‡¶ GKK fv‡e `vovB‡Z nq| 17k kZvãx‡Z Sir Edward Coke, 18k kZvãx‡Z Lord John Holt I Lord Mansfield Gi bvg m¥iYxq | wesk kZvãxi ga¨ fv‡M Lord James Richard Atkin I Zrci Lord Alfred Thompson Denning Gi bvg we‡kl fv‡e D‡jL †hvM¨|

Liversidge V. Sir John Anderson, 1942 AC 206, ‡gvKvÏgvq wØZxq gnvh‡×i cvi‡¤ Bsj¨v‡Ûi Defence (General) Regulation , 1939 Gi 18B †i¸‡jkv‡bi AvIZvq Liversidge ‡K wbeZbgjK AvUKv‡`k c`vb Kiv nq, KviY ¯ivógšx g‡b KwiqvwQ‡jb †h Liversidge kÎ“ZvfvevcbGKRb e¨wË“ nB‡Z cv‡ib| Liversidge Gi AvUKv‡`‡ki ˆeaZv Av`vj‡Z P¨v‡jÄ Kiv nBj| welqwU †klchš House of Lords G wm×v‡ši Rb¨ jIqv nq| 3/11/1941 Zvwi‡L †gvKvÏgvwUi ivq nq| H mgq wewfb iYv½‡b wgÎ kwË“ ch`¯ | GgbwK jÛb kni †evgvi AvNv‡Z ¶Z we¶Z | wewUk civkwË“ Pig `‡hv‡Mi m¤§Lxb| GgZ Ae¯v‡ZI House of Lords Gi msL¨vMwiô wePviKM‡Yi mwnZ wØgZ †cvlY Kwiqv Lord Atkin e‡jb (côv-244) t

> “I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive”.

Zrci wZwb e‡jb t

> “In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any

> attempted encroachments of his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." (A‡av‡iLv c`Ë)

Dcmsnv‡i wZwb e‡jb t

> " I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister." (A‡av‡iLv c`Ë)

AZtci, wZwb Zvnvi iv‡q Lewis Carroll wjwLZ 'Alice Through the Looking Glass' nB‡Z D×Z Kwiqv ‡KŠZK K‡ib (côv-245) t

> " 'When I use a word,'
>
> Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean, neither more nor less.' 'The question is' said Alice, 'whether you can make words mean so many different things'. 'The question is' said Humpty Dumpty, 'which is to be master - that's all".

Lord Chancellor Lord Simon ivq nB‡Z Lewis Carroll nB‡Z D×Z AskUK eRb Kwievi Rb¨ Lord Atkin †K Ab‡iva Kwi‡j wZwb DËi †`b t

> The present cases as I see them do not merely involve questions of the liberty of the particular persons concerned but involve the duty of the courts to stand impartially between the subject and the executive..... But I did mean to hit the proposed construction as hard as I could and to ridicule the method by which it is reached. I consider that I have destroyed it on every legal ground : and it seems to me fair to conclude with a dose of ridicule. I cannot think therefore that there are sufficient grounds for altering this prepared opinion."(Geoffrey Lewis : Lord Atkin, page-139)

Z‡e GB ivq cKwkZ nBevi ci Lord Atkin Zvnvi mnKgx Law Lords‡`i g‡a¨ GKiKg GKN‡i nBqv hvb| Zvnvi Kb¨v Mrs. Robson Rvbvb †h ivq †NvlYvi ci Lord Atkin Zvnvi Kb¨v‡K jBqv House of Lords Gi Dining Room G Lunch Gi Rb¨ hvb wKš Zvnv‡`i †Uwe‡j Avi ‡KnB e‡mb bvB | Lord Macmillan I Lord Romer Zvnv‡K bv †`wLevi fvb K‡ib| Lord Wright Zvnvi wcZvi eÜ wQ‡jb Ges cvqB Zvnv‡`i

evmfe‡b Mgb Kwi‡Zb| wKš‡mBw`b wZwb Zvnv‡`i wbKU w`qv Mgb Kwi‡j I †Kvb K_vB e‡jb bvB ei Â Lord Atkin ‡K D‡c¶v K‡ib|

GB wel‡q Lord Maugham Gi GK c‡Îi DË‡i Lord Atkin Bsj¨v‡Ûi wePvi wefv‡Mi gnvb HwZn¨ mgbZ ivwLqv DËi †`bt

> ".....I had not and have not any intention publicly to discuss any judgment once it has been delivered."(Geoffrey Lewis : Lord Atkin, page-145)

Z‡e A‡b‡K g‡b K‡ib †h 1944 mv‡j gZ¨i ce chš Lord Atkin Zvnvi cwZ GB AcgvbRbK e¨envi‡Yi K_v fwj‡Z cv‡ib bvB| (Professor Robert Stevens : Law and Politics . The House of Lords as a Judicial Body, 1978, page-287)

wbfxK fv‡e mZ¨ K_‡bi Rb¨ Lord Atkin Gi b¨vq GZ eo gv‡ci GKRb Ávbx I ¸Yx e¨w³‡K I GBi¸c Acgvb mn¨ Kwi‡Z nBqwQj| A_P 40 ermi ci IRC V. Rossministy Ltd. 1980 AC 952 †gvK Ïgvq House of Lords GBevi Liversidge V. Anderson †gvKv Ïgvq Lord Atkin Gi wfbgZB mwVK wQj ewjqv gše¨ K‡i|

GKRb wePviK‡K GB fv‡eB wePvi wefv‡Mi ¯vaxbZv mgbZ ivwL‡Z mvgvwRK fv‡e I nqivbx I Acgvb mn¨ Kwi‡Z nq|

Z‡e GKRb wePvi‡Ki Rbwcq Zvi cwZ AvKv•Lv _wK‡j Pwj‡e bv| e¨w³MZ jvf-†jvKmvb, fq-fxZi D‡aŸ DwVqv ïagvÎ b¨vq wePv‡ii w`‡K w¯i _wK‡Z nB‡e| Zvnv‡K AvBb kv‡¯ ercwË e¨wZi‡K mr I PwiwÎK `pZvi AwaKvix nB‡Z nB‡e, me cKvi cwZKjZvi g‡L I wbwfK fv‡e b¨vq wePv‡ii cZxK nB‡Z nB‡e| Alexis de Tocqueville Zvnvi 'Democracy in America' (1835) M‡š e‡jbt

> "The Federal judges must not only be good citizens, and men possessed of that information and integrity which are indispensable to magistrates, but they must be statesmen-politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, not slow to turn aside such encroaching elements as may threaten the supremacy of the Union and the obedience which is due to the laws"

wZwb AviI e‡jb t

> ".....of the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war."
>
> (K.C. Wheare : Modern Constitutions nB‡Z D×Z)

1829 mv‡j Virginia State Gi msweavb ms¯‹vi Kwievi Convention G Marshall, C.J. †K Ask MnY Kwi‡Z nBqvwQj| †mB Convention G wePvi wefv‡Mi ¯vaxbZv cm†½ wZwb GKRb ÁvbZvc‡mi b¨vq e‡jbt

> "The argument of the gentleman, he said, goes to prove not only that there is no such thing as judicial independence , but that there ought to be no such thing:- that it is unwise and improvident to make the tenure of the judge's office to continue during good behaviour. I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be more dear to her statesmen, and that the best interests of our country are secured by it. Advert, sir, to the duties of a judge. He has to pass between the government, and the man whom that government is prosecuting,- between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the performance of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security, and the security of his property, depends upon that fairness. The judicial department comes home in its effects to every man's fire side;- it passes on his property , his reputation, his life, his all. Is it not to the last degree important, that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience". "I acknowledge that in my judgment , the whole good which may grow out of this convention, be it what it may will never compensate for the evil of changing the judicial tenure of office." "I have always thought from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

(Horace Binney: An Eulogy on the Life and Character of John Marshall, 1853)|
(A‡av‡iLv c`Ë)

wePvi wefv‡Mi ¯vaxbZv m¤‡Ü John Marshall Gi GB Awfe¨w³ AvRI mZ¨|

wKš c_‡gB we‡ePbv Kiv c‡qvRb †h wePvi wefv‡Mi ¯vaxbZv ewj‡Z cKZ c‡¶ wK †evSvq|

wePvivjq ev Av`vj‡Zi †cŠiwnZ¨ K‡ib wePviK| Kv‡RB Zvnvi gvbwmK ¯vaxbZvB wePvi wefv‡Mi ¯vaxbZv mgbZ K‡i| b¨vqwePvi Kwi‡Z wePviK‡K GKw`‡K eRmg K‡Vvi Ab¨w`‡K Km‡gi gZ ‡Kvgj nB‡Z nq| Zvnvi gvbwmK kw³ wePvi wefv‡Mi kw³| wewUk fviZe‡l hLb mevB civaxb wQj ZLbI wKš wePvi wefvM ¯vaxb wQj KviY wePviKMY gvbwmK fv‡e ¯vaxb wQ‡jb| wePviKMY bvbvw`K nB‡Z gvbwmK ev mivmwi Pv‡ci ¯xKvi nB‡Z cv‡ib| hvnviv gvbwmK kw³ ev ¯vaxbZvi AwaKvix, Zvnviv GB mKj Pvc Ae‡njv Kwi‡Z cv‡ib| Thomas More, Sir Edward Coke, Lord John Holt cPÛ AZ¨vPvi, fq fxwZ I gvbwmK Pv‡ci g‡a¨I AvBb‡K mgbZ iwwLqv‡Qb| Lord Chancellor Thomas More †K 16 ermi Tower G AšixY iwwLevi ci wki‡”Q` Kiv nBqwQj wKš ivRv Henry VIII Zvnv‡K bxwZ åó Kwi‡Z cv‡ib bvB| Sir Edward Coke †K mZ¨K_‡bi Rb¨ King's Bench Gi cavb wePvicwZ c` nB‡Z c_‡g eiLv¯, Zrci Tower G mvZ gvm AšixY _vwK‡Z nq| cavb wePvicwZ Lord John Holt ‡K House of Commons I House of Lords nB‡Z cPÛ ˆeix e¨envi mn¨ Kwi‡Z nq| D”Q•Lj RbZv cavb wePvicwZ Lord Mansfield Gi evmfeb I Zvnvi e¨w³ MZ jvB‡eix †cvovBqv †`q| cavb wePvicwZ John Marshall I wePvicwZ Samuel Chase Awfmskb (Impeachment) Gi m¤ebv m‡Z I judicial review I mswea v‡bi †kôZ AKZf‡q †NvlYv Kwiqv wMqv‡Qb| GB mKj wePviKMY Zvnv‡`i gvbwmK kw³ I ¯vaxbZv ØvivB mZ¨‡K, AvBb‡K mcwZwôZ Kwi‡Z cvwiqvwQ‡jb| wesk kZvwã‡Z Lord Atkin GKN‡i nBqvI gvbwmK kw³‡Z D¾xweZ nBqv ewj‡Z cvwiqvwQ‡jb 'I protest even if I do it alone'|

wewUk fviZe‡l hLb mevB civaxb wQj ZLbI wePvi wefvM ¯vaxb wQj KviY wePviKMY gvbwmK fv‡e ¯vaxb wQ‡jb| cKZc‡¶

wePviKM‡Yi gvbwmK kw³B Zvnv‡`i‡K ¯vaxb iwLqvwQj| hvnviv gvbwmK fv‡e `ej ZvnvivB ‡Kej bvbvgwL Pv‡ci ¯xKvi nb|

wk¶v, mZZv, mvnm GKRb wePviK‡K gvbwmK kw³ †hvMvq| wZwb c‡qvR‡b e‡Ri b¨vq KwVb nB‡eb, c‡qvR‡b Km‡gi b¨vq †Kvgj nB‡eb| Zvnvi _vwK‡e 'cold neutrality of an impartial Judge' (Edmand Burke)| mecwi c‡qvRb mZ¨‡K memgq mgbZ ivLv| ‡m Kvi‡YB 'To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law' (Roger North,1651-1734)| Dc‡iv³ e³e¨ wePviKM‡Yi cwZI GKB fv‡e c‡hvR¨|

hLbB Avgiv ¯vaxb wePvi e¨e¯vi K_v ewje ZLbB Avgv‡`i g‡b iwL‡Z nB‡et 'Justice without power is unavailing; power without justice is tyrannical. Justice without power is gainsaid, because the wicked always exist; power without justice is condemned. We must therefore combine justice and power, making what is just strong, and what is strong just (Blaise Pascal, 1623-1662)| GKwU Kj¨vYagx iv‡ó BnvB mec_g c‡qvRb|

Oliver Wendell Holmes 'The Common Law' Gi Dci Zvnvi el"Zvq e‡jb :

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent normal and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become..... The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.
>
> (Henry J Abraham: The Judicial Process, cô¶ 11 nB‡Z D×Z)

cvq wZb hM c‡i Gompers v. United States (1914) †gvKvÏgvi iv‡q wePvicwZ Holmes e‡jb :

> The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth**. (Henry J. Abraham : The Judicial Process** cÖv 11 nB‡Z D×Z)|

wePviK‡`i `wqZ I KZe¨ m¤ú‡K 1610 mv‡j Sir Francis Bacaon e‡jbt

> It shall appear from time to time .....where the King's acts have been indeed against law, the course of law hath run, and the Judges have worthily done their duty. (Philip Hamburger: Law and Judicial Duty).

Professor Philip Hamburger wePviKM‡Yi `wqZ I KZe¨ m¤ú‡K e‡jbt

> English judges had a duty to decide in accord with the law of the land, including their constitution. This duty was part of the office of a judge, to which judges were bound by their oaths, and with their high ideal of this office and a sworn obligation to adhere to it, judges could find the strength to do their duty, even when it required them to hold unconstitutional acts void. .....The duty of the judges when holding government acts unconstitutional had the functional benefit of allowing them to enforce the constitution and thus preserve constitutional liberty. .....
>
> Americans inherited the common law ideals of law and judicial duty. If constitutions willed by the people were part of the law of the land, and if judges had a duty to decide in accord with the law of the land, American judges, like their English predecessors, had no choice but to decide the constitutionality of government acts. As put by the judges in Bayard v. Singleton, this was required by "the obligations of their oaths, and the duty of their office."".....By virtue of their office, judges had a distinctive authority in their cases not only to give judgment but also to expound law. The exposition of law had traditionally been recognized as pert of the office of judgment, and although the resolution of cases had always been the core of judicial office, this focus of judicial authority became more pronounced already in England under the pressure of ideals of

> lawmaking authority. After American statues spelled out the jurisdiction of the courts in terms of various actions, suits, causes, cases, or controversies, Americans grew especially accustomed to thinking about judicial office in such terms, and this tight conception of judicial office was all the more appealing when it came to seem a concrete manifestation of the separation of powers. **(Philip Hamburger: Law and Judicial Duty Page. 609,610, 612, 614).**

Bnv ejvi A‡c¶v iv‡Lbv †h GKRb wePviK‡K m¤úY wb‡gvn fv‡e Zvnvi wePvwiK Kvh Kwi‡Z nq| GB j‡¶ Zvnvi wbR¯ m¤ú³ Zv I eva¨evaKZvi D‡aŸ DwV‡Z nB‡e| gbbkxj e¨w³ wn‡m‡e GKRb wePvi‡Ki ivR‰bwZK wPšvaviv _vKv A¯vfvweK bq wKš Zvnv †hb KLbB Zvnvi wePvi Kvh‡K †Kvb fv‡e cfvweZ Kwi‡Z bv cv‡i †mw`‡K Zvnv‡K memgq mZK _vwK‡Z nB‡e| e¨w³MZ cQ›`-AcQ›`‡K Zvnvi wePvwiK `vwqZ I KZe¨ nB‡Z m¤úY wew”Qb Kiv wkwL‡Z nB‡e|

ZvnvQvov, GKRb wePviK‡K †`‡ki m‡ev”P AvBb mswea v‡bi cwZ k×vkxj nB‡Z nB‡e| AvBb, bwRi Ges Z_¨ I NUbvejxi Av‡jv‡K wePvi Kwi‡Z nB‡e| GLv‡b e¨w³MZ AwfgZ, cQ›` ev AcQ‡›`i †Kvb ¯vb bvB| ivR‰bwZK cwiw¯wZ‡Z msm` wewfb AvBb cvm Kwi‡Z cv‡i wKš †mB AvBb mswea v‡bi Kwócv_‡i m¤úY wb`jxq I ivRbxwZ ewnfZ fv‡e we‡ePbv Kwievi `vwqZ I KZe¨ mcxg †Kv‡Ui| ev¯e mgm¨vi Kvi‡Y wbevnx wefvM‡K I nq‡Zv wewfb wm×vš jB‡Z nq wKš Zvnvi AvBbx we‡klY Kwievi `vwqZ I wePvi wefv‡Mi| †mB `vwqZ I KZe¨ mswea vb mcxg †KvU Z_v mvgwMK fv‡e wePvi wefv‡Mi Dci Acb Kwiqv‡Q| †Kvb wePviK Zvnvi Dci AwcZ D³ i∫c `vwqZ ev KZe¨ cvjb Kwi‡Z e¨_ nB‡j wZwb mswea vb I AvBb f½ Kwi‡eb|

GfvweB GKRb wePviK‡K mecKvi †jvf I mewea cjäZvi D‡a DwV‡Z nq| Zvnv‡K cv_‡ii b¨vq AbfwZnxb nB‡Z nq| b¨vqwePvi cwZôvK‡í Zvnv‡K mewea RvMwZK I GgbwK cvi‡jŠwKK Rxe‡bi cwZ I †gvnnxb _vwK‡Z nB‡e| GBi∫c mKwVb gvb ARb

Kwievi Rb¨ GKRb wePviK‡K mviv Rxeb wb‡Ri mwnZ I mgv‡Ri mwnZ h× Kwi‡Z nq|

Z‡e wePviK I GKRb mvaviY gvbl, wZwb I mgv‡R emevm K‡ib| Zvnvi I PvIqv-cvIqv iwnqv‡Q| Zvnv‡K I wPišb mva I mv‡a¨i g‡a¨ mgbq Kwiqv Pwj‡Z hvBqv cvqkB e¨_ nB‡Z nq|

Justice Benjamin Cardozo Gi fvlvqt

> "Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them inherited instincts, traditional beliefs, acquired convictions, and the resultant is an outlook on life,a conception of social needs, a sense, in James' phrase, of 'the total push and pressure of the cosmos' which, when reasons are nicely balanced, must determine where the choice shall fall." (The Nature of the Judicial Process).

Gw`K w`qv mcxg †Kv‡Ui wePviKe‡›`i `wqZ I KZe¨ Avi I Kómva¨| GKw`‡K Zvnvw`M‡K msweavb I gxgvswmZ bwRi Abmv‡i AvB‡bi †kôZ‡K mgbZ I cevngvb iwL‡Z nq| Ab¨w`‡K m`v weeZbkxj mgv‡R AvBb †hb e× Rjvk‡q A‡eva¨ I gj¨‡evanxb KZ¸wj A_nxb g‡š cwiYZ bv nq †mB w`‡K I mRvM _wK‡Z nq| Pjgvb Rxeb I m`v cwieZbkxj mgv‡Ri gj¨‡ev‡ai cwZ mZZ `wó iwLqv AvB‡bi bZb bZb e¨vL¨v Øviv AvawbK h‡Mi m‡½ mvgÄm¨ mvab Kwievi `i"n `wqZ I KZe¨ GKRb wePvi‡Ki|

GB cm‡½ Lord Denning e‡j bt

> "Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick without thought to the overall design. He must be an architect-thinking of the structure as a whole- building for society a system of law which is strong, durable and just. It is on his work that civilised society itself deppends." Union of India V. Sankalchand AIR 1977 SC 2328 ‡gvKvÏgvq K Iyer J, Gi ivq nB‡Z D×Z)|

GLv‡b g‡b ivLv c‡qvRb †h BwZnv‡mi cwZwU ¯‡i B‡Ui Dci BU w`qv wekvj †mŠa wbgvY Kwievi b¨vq wePviKMY h‡M h‡M AvB‡bi DrKl mva‡bi `i“n Kvhmvab Kwiqv _v‡Kb| cKZc‡¶ mf¨Zvi Ab¨Zg †kô `vb nB‡Z‡Q AvBb|

cvq `BkZ ermi c‡e 1828 mv‡j Lord Chancellor, Lord Henry Brougham, House of Commons G QqN›Uv e¨wc Zvnvi e³Zvi GKvs‡k e‡jbt

> “It was the boast of Augustus..... that he found Rome of brick, and left it of marble; a praise not unworthy of a great prince, and to which the present reign also has its claims. But how much nobler will be the Sovereign’s boast, when he shall have it to say, that he found law dear, and left it cheap; found it a sealed book¯left it a living letter; found it the patrimony of the rich¯left it the inheritance of the poor; found it the two-edged sword of craft and oppression¯left it the staff of honesty and the shield of innocence” (Professor Robert Stevens: Law and Politics, 1978, page-24, note-93)

h³ivR¨, h³ivó I wewUk fviZe‡li D”P I wbæ Av`vj‡Zi wePviKMY AZ¨š K‡VviZv, `pZv I weP¶YZvi mwnZ wePvi Kvh cwiPvjbv Kwiqv AvBb‡K GKwU MwZkxj Rxeb avivq cwiYZ KwiqvwQ‡jb| wePviKMY wb‡RivB mgv‡Ri mK‡ji Av`k wnmv‡e wPwýZ nB‡Zb| wePviKgvÎB nb GK we‡kl m¤§v‡bi cvÎ|

wKš mg‡qi cwieZb NwUqv‡Q| †mB m‡½ cwieZb nBqv‡Q gvb‡li gj¨‡ev‡ai| eZgvb Ae¶qcvß gj¨‡evanxb gvb‡li ¶wqò mgv‡Ri wPÎ cùwUZ Kwi‡Z cvPkZ ermi c‡ei gbxwl Kexi Gi mvnvh¨ jB‡Z nqt

ÔÔevgnb Xvgb giL f‡q m` c‡p MxZv|
VM VMi e›` Av”Qv Lv‡e `tL cv‡e cwÛZv\
mvPv‡Kv gv‡i jvVv SUv RMr wcZvi|
‡Mvim Mwj Mwj †d‡i miv ^eV †eKvq\
mZx‡Kv bv †g‡j †avwZ M¯vb cn‡i Lvmv|

K‡n Kexiv †`L fvB `wbqvKv Zvgvmv \ÕÕ

evþY gL nq, A_P k‡` MxZv cvV K‡i| kV I cZvi‡Kiv DrKô Ab f¶Y K‡i, A_P cwÛ‡Ziv †Kej Kó cvq| †jv‡K b¨vq‡K `ÛvNvZ K‡i, A_P Ab¨vq‡K wcZer k×v Kwiqv _v‡K| c‡_ c‡_ ch¨Ub Kwiqv `» weµq Kwi‡Z nq, A_P miv GK ¯v‡b Aew¯Z _vwKqvB wewµZ nBqv hvq| cwZeZv mZx ¯xi GKLwb aZx wg‡j bv, A_P `ðvwiYx Kwgbxiv cKó cwi”Q` cwiavb K‡i| AZGe Kexi K‡nb, fvB! RM‡Zi †Kgb †KŠZK, †`L| (A¶qKgvi `Ët Kexi cšxq m¤ú`vq)

Pvwi kZ ermi c‡ei wePviKMY ivRvi wei“‡×, House of Lords I House of Commons wei“‡× msMvg Kwiqv AvB‡bi kvmb Kv‡qg KwiqvwQ‡jb| wesk kZvwãi Avwk `k‡K Avgv‡`i †`‡kI mvgwiK kvmb Avg‡j GKRb mvnmx wePviK‡K eiLv¯ Kiv nBqvwQj| GLb Avi †mB ai‡bi msMv‡gi c‡qvRb nq bv, GLb wePviKMY mZ¨ K_‡bi Rb¨ eiLv¯ nb bv, AšixY nB‡Z nq bv, Z‡e msMvg Ae¨vnZ iwnqv‡Q, †Kej aiY cwieZb nBqv‡Q|

c‡eB Av‡jvPbv Kiv nBqv‡Q †h GKRb wePvi‡Ki gvbwmK kw³B nBj wePvi wefv‡Mi ¯vaxbZvi gj wfwI Ges †mB kw³i wfwË nBj Zvnvi mZZv, Zvnvi wk¶v, Pig I cig GKwbô wbi‡c¶Zv| wKš mg‡qi cwieZb nBqv‡Q| c‡e Rbwcq wePvi‡Ki K_v †kvbv hvq bvB| gvbl K‡Vvi wePvi‡Ki K_v m¤§v‡bi mwnZ m¥iY KwiZ| A‡bK wePviK AvR Zvnv‡`i gvbwmK kw³ I ¯vaxbZv nvivBqv †dwj‡Z‡Qb| ‡mB mv‡_ wePvi wefv‡Mi ¯vaxbZvI bZb Kwiqv ¶b nB‡Z ewmqv‡Q| wePviKMY GKmgq mgv‡Ri Av`‡ki gvcKvwV wQ‡jb wKš eZgvb ¶wqò mgv‡R gj¨‡evanxb gvb‡li wf‡o wePviKMY‡K Avi Avjv`v Kwiqv †Pbv hvq bv|

Ab¨w`‡K eZgvb h‡Mi Edmand Burke, Sir Tej Bahadur Shopru, Sir Rashbihari Ghose, M. C. Sitalvad, S.R. Pal, Hamidul Haque Chowdhury, Asrarul Hossain cg‡Li kwbZ hw³ †hb c_ nvivBqv‡Q| GLbKvi A‡bK

cexY G¨vW†fv‡KU g‡nv`q forum shopping G j¾v †eva K‡ib bv| Aek¨ wePviKMYB Bnvi Rb¨ `vqx| GLb †hb 'The most indifferent arguments are good when one has a majority of bayonets' (Bismarck)|

GB ‡c¶vc‡U wePvi wefv‡Mi ¯vaxbZvi welqwU bZb Avw½‡K wPšv Kiv Acwinvh nBqv cwoqv‡Q|

Z‡e Avkvi K_v nBj GB †h GB ¶wqò gj¨‡evanxb mgv‡Ri ^bivk¨e¨ÄK cwiw¯wZi g‡a¨I ‡ewki fvM wePviK I AvBbRxwe GLbI Av`k I gj¨‡eva‡K awiqv ivwLevi Rb¨ cvYcY †Póv Kwi‡Z‡Qb| ZvnvivB fwel¨‡Zi cw_KZ|

ZvnvivB AvB‡bi †kôZ I AvB‡bi kvmb ¯vcb Ges b¨vqwePvi cwZôv Kwi‡Z AMYx fwgKv cvjb Kwi‡eb| BnvB nB‡e iv‡ói Ab¨Zg cavb gj ¯vcbv| GB Kvi‡YB wePvi wefv‡M cKZ ¯vaxbZv c‡qvRb | Rbwcq Zv bq, `‡ói `gb I wk‡ói cvjb I iv‡ói wewfb wefv‡Mi †¯"QvPvwiZvi nvZ nB‡Z mvaviY gvbl‡K i¶v Kiv Ges Zvnv‡`i mvsweavwbK AwaKvi cwZôv Kwievi Rb¨B wePvi wefv†Mi mZ¨Kvi ¯vaxbZvi GZ c‡qvRb| †m ¯vaxbZvi cvi‡¤B iwnqv‡Q gvbwmK ¯vaxbZv, gbb DrKlZv|

23| mvsweavwbK AvBb t kZ ermi ce nB‡Z Bnv a"e mZ¨ wnmv‡e cwZwôZ, †h ‡Kvb iv‡ó Bnvi msweavbB m‡ev"P AvBb| msweavbB iv‡ói mKj cwZôvb I c` mwó K‡i| AvawbK iv‡ó RbMYB mve‡fšg| †mB mve‡fšg RbM‡Yi Awfcvq , AvKv•Lv I wb‡`k Gi djk"wZB nB‡Z‡Q msweavb| GLv‡bB msweav‡bi †kôZ| evsjv‡`‡ki Supreme Court evsjv‡`‡ki msweav‡bi AwefveK| A_P GB Supreme Court I wesk kZvãxi mËi `k‡Ki †kl fvM I Avwk `k‡Ki c_g fv‡M Bnvi GKwUi ci GKwU ivq Øviv msweavb‡K Pig fv‡e Aebwgz Kwiqv‡Q|

wKš c_†g msweavb m¤‡Ü Rvbv c‡qvRb|

hË"iv‡ói msweav‡bi 6 Ab‡"Q` wbæi∫ct

……..

This Constitution, and the laws of the United States which shall be made in pursuance there of;……. shall be the supreme law of the land; and the judges in every state shall be bound thereby , anything in the Constitution or laws of any State to the contrary not with standing.

The Senators and Representatives before mentioned, and the member of the several state legislatures, and all executive and judicial officers, both of the United Sates and of the several states, shall be bound by oath or affirmation, to support this Constitution;……..”

h³ iv‡ói msweav‡bi †c¶vc‡U wePvicwZ St. George Tucker 1793 mv‡j (Kamper V. Hawkins) e‡jb †h msweavb nB‡Z‡Q t

“the voice of the people themselves, proclaiming to the world their resolution ..... to institute such a government, as, in their own opinion, was most likely to produce peace, happiness, and safety to the individual, as well as to the community.”

wZwb e‡jb ‡h msweavb nBj “the first law of the land” Ges t

“a rule to all the departments of the government, to the judiciary as well as to the legislature.”

msweavb m¤‡Ü wZwb Avi I e‡jb t “whatsoever is contradictory thereto, is not the law of the land.”

iv‡ói wewfb wefvM we‡kl Kwiqv wePvi wefvM m¤‡Ü wZwb e‡jbt

“Now since it is the province of the legislature to make, and of the executive to enforce obedience to laws, the duty of expounding must be exclusively vested in the judiciary. But how can any just exposition be made, if that which is the supreme law of the land be withheld from their view.”

(Larry D. Kramer: The People Themselves, cô v-101 nB‡Z D×Z)

‡mvqv `BkZ ermi c‡e US Circuit Court, Pennsylvania †Z Vanhorne’s Lessee V. Dorrance (1795) ‡gvKÏgvq mcxg †Kv‡Ui Justice William Paterson mswkó AvB‡bi mvswevwbK ˆeaZv cm‡½ msweav‡bi †kôZ m¤ú‡K Rix‡`i cwZ c`Ë eË“Zvq e‡jbt

“…….. What is Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of

fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void." (A‡av‡iLv c`Ë)

Justice Paterson Zvnvi e³‡e¨i †kl fv‡Me‡jbt

"…… The Constitution encircles, and renders it an holy thing.....It is sacred; for, it is further declared, that the Legislature shall have no power to add to, alter, abolish, or infringe any part of, the Constitution. The Constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed.

(Professor John B. Sholley : Cases on Constitutional Law, 1951, page 27,30 nB‡Z D×Z)| (A‡av‡iLv c`Ë)

Bnvi c‡e 'The Federalist' G Alexander Hamilton wjwce× K‡ibt

"No legislative act, therefore, contrary to the constitution can be valid. To deny this would be to affirm than the deputy is greater that his principal; that the servant is above his master, that the representatives of the people are superior to the people themselves; that man acting by virtue of powers may do not only what their powers do not authorize, but what they forbid..... the Constitutions ought to be preferred to the Statute, the intention of the people to the intention of their agents.' (Quoted from K.C. Wheare on Modern Constitutions cô v-60) (A‡av‡iLv c`Ë)

Justice Thomas M. Cooley Zvnvi wjwLZ 'A Treatise on The Constitutional Limitations' M‡š ÔmswevbÕ m¤‡Ü e‡jbt (cô v-2)

> "A constitution is sometimes defined as the fundamental law of a state, containing the principle upon which the government is founded, regarding the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised."

mvswevwbK Zv m¤ú‡K Martin Loughlin I Walker Gi wb‡æv³ el"e¨ cwbavb‡hvM¨ t

> Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives : that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty'; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established**.....(Martin Loughlin and Nail Walker : The Paradox of Constitutionalism, page-1).**

Marbury V. Madison (1803) ‡gvKvÏgvq cavb wePvicwZ John Marshall mswevb m¤‡Ü e‡jbt

> "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

(Professor John B. Sholley : Cases on Constitutional Law, 1951, Page-39,50 nB‡Z D×Z) (A‡av‡iLv c`Ë)

Fazlul Quader Chowdhury V. Mohammad Abdul Hoque PLD 1963 SC 486 †gvKÏgvq Hamoodur Rahman J. (as his Lordsihip then was) mswevb m¤‡Ü e‡jb (cô v-535)t

> "Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within

the four corners of the Constitution nor can anyone transgress the limits therein specified." (A‡av‡iLv c`Ë)

Asma Jilani V. Government of Punjab, PLD 1972 SC 139 ‡gvKÏgvq The Jurisdiction of Courts (Removal of Doubts) Order , 1969 (President's Order No. 3 of 1969) AWvi Gi Kvi‡Y Avmgv wRjvbxi wcZv gvwjK †Mvjvg wRjvbxi AšixY m¤ú‡K †Kvb Av‡`k c`v‡b GLwZqvi wenxb ewjqv jv‡nvi nvB‡KvU ivq c`vb Kwi‡j cvwK¯vb mcxg †KvU mvgwiK AvBb A‰ea ewjqv †NvlYv K‡i|

cvwK¯v‡bi cavb wePvicwZ Hamoodur Rahman GB cm‡½ e‡jb (cô v-199) t

> ".....General Agha Mohammad Yahia Khan had according to me, no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws ..."

Dcmsnv‡i Yaqub Ali, J. ‡Rbv‡ij Bqwnqv Lvb KZK ejer mvgwiK AvBb, ivócwZi ¶gZv MnY BZ¨vw` A‰ea †NvlYv K‡ib (cô v-238-39) t

> "The Martial Law imposed by Yahia Khan was, therefore, in itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.....Yahia Khan, therefore, assumed the office in violation of Article 16 of the Constitution to which he had taken oath of allegiance as Commander in Chief. It could not, therefore, be postulated that Yahia Khan had become the lawful President of Pakistan and was competent to promulgate orders and Ordinances in exercise of the legislative function conferred by the Constitution on the President. All Presidential Orders and Ordinances which were issued by him were, therefore, equally void and of no legal effect."

j¶ j¶ knx‡`i GK mvMi i‡Ë"i wewbg‡q evsjv‡`k ¯vaxbZv jvf K‡i| GK erm‡iiI Kg mg‡qi g‡a¨ Bnvi msweavb MnxZ nq| msweav‡bi 7 Ab‡"Q` msweav‡bi cvavb¨ †NvlYv K‡i|

7 Ab‡”Q` wbæi¡c t

7 (1) cRvZ‡ši mKj ¶gZvi gvwjK RbMY; Ges RbM‡Yi c‡¶ †mB ¶gZvi c‡qvM ‡Kej GB mswe av‡bi Aaxb I KZ‡Z KvhKi nB‡e|

(2) RbM‡Yi Awfcv‡qi cig Awfe¨w³ i¡‡c GB mswe avb cRvZ‡ši m‡ev”P AvBb Ges Ab¨ †Kvb AvBb hw` GB mswe av‡bi mwnZ AmgÄm nq, Zvnv nB‡j †mB AvB‡bi hZLvwb AmvgÄm¨cY, ZZLvwb evwZj nB‡e|

1973 m‡bi A.T. Mridha V. State 25 DLR (1973) 335 †gvKvÏgvq mcxg †Kv‡Ui nvB‡KvU we fvM mswe av‡bi †kôZ †NvlYv K‡i| D³ †gvKvÏgvq Badrul Haider Chowdhury, J. (as his Lordship then was) Ø¨_nxb fv‡e e‡jb (cô v-344)t

> “10. ..... The Constitution is the supreme law and all laws are to be tested in the touch stone of the Constitution (vide article 7). It is the supreme law because it exists, it exits because the Will of people is reflected in it.” (A‡av‡iLv c`Ë)

GKB fv‡e Md. Shoib V. Government of Bangladesh, 27 DLR (1975) 315 †gvKvÏgvq D.C. Bhattacharya, J. e‡jb (cô v-325)t

> “In a country run under a written Constitution, the Constitution is the source of all powers of the executive organs, of the State as well as of the other organs, the Constitution having manifested the sovereign will of the people. As it has been made clear in Article 7 of the constitution of the People’s Republic of Bangladesh that the Constitution being the solemn expression of the will of the people , is the Supreme law of the Republic and all powers of the Republic and their exercise shall be effected only under, and by the authority of, the Constitution . This is a basic concept on which the modern states have been built up”. (A‡av‡iLv c`Ë)

wbtm‡›`‡n BnvB mswe av‡bi mZ¨Kvi AvBbvbM Ae¯vb| wKš gvÎ K‡qK erm‡ii e¨e av‡b Avgv‡`i m‡ev”P Av`vjZ Bnvi GKwUi ci GKwU iv‡q Avgv‡`i m‡ev”P AvBb gnvb mswe avb‡K mvgwiK AvB‡bi Aat¯b (subordinate) wnmv‡e †NvlYv K‡i| GB ivq¸wj Avgv‡`i ivR‰bwZK , mvgvwRK, ^bwZK I wePvwiK gj¨‡ev‡ai Pig Ae¶‡qi mv¶¨ enb K‡i| A_P mcxg †KvU me Ae¯vq mswe avb‡K

mgbZ ivwLevi cweÎ `vwqZ enb Kwievi K_v wQj| GB ivq¸wj Avgv‡`i g‡b ivLv c‡qvRb ‡hb AšZ fwel¨‡Z Avgv‡`i GBi¦c c`öjb Avi bv nq|

Halima Khatun V. Bangladesh, 30 DLR (SC) 207 †gvKvÏgvwUi ivq nq 4.1.1978 Zvwi‡L| ZLb †`‡k mvgwiK AvBb ejer wQj | cwiZ¨³ m¤úwË †NvlYvi ˆeaZv jBqv ixU †gvKvÏgv `v‡qi Kiv nBqvwQj| welqwU Martial Law Regulation VII of 1977 Gi AvIZvf³ weavq Av`vj‡Zi GLwZqvi ewnfZt ewjqv ivó c‡¶ `vex Kiv nBqvwQj| evsjv‡`k mcxg †Kv‡Ui c‡¶ Fazle Munim , J. (as his Lordship then was) Zvnvi iv‡q e‡jb (cô v-218) t

> 18..... by clause (d) and (e) of the Proclamation made the Constitution of Bangladesh , which was allowed to remain in force, subordinate to the Proclamation and any Regulation or order as may be made by the President in pursuance thereof . ..... Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as the Supreme Law of the country. There is no doubt, an express declaration in Article 7(2) of the Constitution. ..... Ironically enough, this Article, though still exists, must be taken to have lost some of its importance and efficacy. In view of clauses (d), (e) and (g) of the Proclamation the supremacy of the Constitution as declared in that Article is no longer unqualified. In spite of this Article, no Constitutional provision can claim to be sacrosanct and immutable. The present Constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation."

State V. Haji Joynal Abedin 32 DLR AD (1980) 110 ‡gvKvÏgvwU‡Z 20/12/1978 Zvwi‡L ivq nq| ZLbI †`‡k mvgwiK AvBb ejer wQj | GKwU Special Martial Law Court KZK c`Ë `Ûv‡`‡ki ˆeaZv D³ ixU †gvKvÏgvq P¨v‡jÄ Kiv nBqvwQj | nvB‡KvU wefvM `Ûv‡`k ewZj Kwi‡jI Avcxj wefvM welqwU Av`vj‡Zi GLwZqvi ewnfZ ewjqv †NvlYv K‡i| Avcxj wefv‡Mi c‡¶ Ruhul Islam ,J. e‡jb (cô-122) t

> "18. From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a position subordinate to the Proclamation, in as much as the unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial Law Regulation or orders and other orders; and the Constitution was amended from time to time by issuing Proclamation. In the face of the facts stated above I find it difficult to accept the arguments advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammelled by the Proclamation and Martial Law Regulation".

Kh. Ehteshamuddin Ahmed V. Bangladesh 33 DLR (AD) (1981) 154 ixU †gvKvÏgvwU‡Z 17/3/1980 Zvwi‡L ivq nq| †`‡k ZLb mvgwiK kvmb cZ¨vnvi Kiv nBqv‡Q | DË" †gvKvÏgvq Special Martial Law Court KZK c`Ë ivq I `Ûv‡`‡ki ˆeaZv P¨v‡jÄ Kiv nBqvwQj | nvB‡KvU wefvM Bnv Zvnv‡`i GLwZqvi ewnfZ ewjqv ixUwU msw¶ß Av‡`‡k LvwiR K‡i| Avcxj wefvM ‡mB Av‡`k envj iv‡L | Ruhul Islam, J. msweav‡bi 7 Ab‡"Q` m‡Z I e‡jb (côv-163) t

> "16. ..... the supremacy of the Constitution cannot by any means compete with proclamation issued by the Chief Martial Law....."

nvRx Rqbvj Av‡ew`b †gvKvÏgvq c`Ë iv‡qi D×wZ c`vb Kwiqv Ruhul Islam, J. Avi I e‡jbt

> "18. ..... this Division has given the answer that the High Courts being creature under the Constitution with the Proclamation of Martial Law and the Constitution allowed to remain operative subject to the Proclamation and Martial Law Regulation, it loses its superior power to issue writ against the Martial Law Authority or Martial Law Courts."

evsjv‡`‡ki m‡ev"P Av`vj‡Zi Dc‡ivË" ivq cwoqv g‡b nB‡e †h mvgwiK ckvmK‡`i †bnvZ AbM‡n evsjv‡`‡ki m‡ev"P AvBb Bnvi cweÎ msweavb I m‡ev"P Av`vjZ †Kvb iK‡g we`¨gvb| mvgwiK kvmK‡`i cwZ evsjv‡`‡ki m‡ev"P Av`vj‡Zi GBi¡c bM Ae¯vb Pvwi kZ ermi c‡ei Bates's Cases G ( The Case of Impositions, 1606) ivRvi c‡¶ ivq c`v‡b wePviK Chief Baron Fleming I Baron Clarke

‡K I j¾v w`Z| Stuart ivRv‡`i mg‡q Zvnv‡`i c‡¶ i wePviKMY I GZUv bM nB‡Z cv‡ib bvB| eiÂ James II Zvnvi ivR‡Zi †kl fv‡M Martial Law c‡qvM Kwievi wPšv KwiqvwQ‡jb wKš Z`vbxšb wePvi wefv‡Mi Pig Ae¶q m‡Z I Zvnv‡K mg_b Kwievi gZ GKRb wePviK I Bsj¨v‡Û cvIqv hvq bvB| Avgv‡`i †mŠfvM¨ †h cÂg ms‡kvabx †gvKvÏgvq mcxg †KvU A‡bK wej‡¤ nB‡j I cwi®vi fvlvq †NvlYv Kwiqv‡Q †h mvgwiK AvBb ewjqv †Kvb AvBb bvB Ges mvgwiK AvBb KZc¶ ewjqv †Kvb KZc‡¶i Aw¯Z bvB | eis msweavb †`‡ki m‡ev”P AvBb| iv‡ói mKj wefvM I c` msweav‡bi mwó | †h †Kvb AvBb Zvnv whwbB cYqb Ki“b bv †Kb, msweav‡bi mwnZ mvsNwlK nB‡j Zvnvi †Kvb Aw¯ZB _vwK‡e bv | GB ivó Government of laws, government of men bq|

Anwar Hossian Chowdhury V. Bangladesh 1989 BLD (Special Issue) ‡gvKvÏgvq Avgv‡`i m‡ev”P Av`vjZ Avcxj wefvM GB c_g ev‡ii gZ ^¯ivPvix kvmK‡`i cwZ Bnvi RoZv cwiZ¨vM Kwi‡Z mg_ nq Ges mv`v‡K mv`v I Kv‡jv‡K Kv‡jv ewj‡Z mg_ nq| GB ivq msweavb‡K mgbZ Kwi‡Z I Bnvi †hvM¨ m‡ev”P ¯v‡b Awaôvb K‡i| wKš Zvnvi c‡iI GB ivq mvgwiK AvB‡bi wecwi‡Z msweav‡bi cKZ ¯vb wbYq Kwi‡Z e¨_ nq | Shahabuddin Ahmed , J. (as his Lordship then was) Zvnvi iv‡q nwjgv LvZb, nvRx Rqbvj Av‡ew`b , Gn‡Z lvgwÏb BZ¨vw` †gvKvÏgvq c`Ë iv‡qi cwZaŸwb Kwiqv e‡jb (cô v-118)t

> “272.....Bangladesh which got independence from Pakistan through a costly War of independence, which was fought with the avowed declaration to establish a democratic polity, under a highly democratic Constitution, met the same fate as Pakistan. Two Martial Laws covered a period of 9 years Out of her 18 years of existence. During these Martial Law periods the constitution was not abrogated but was either suspended or retained as a statute subordinate to the Martial Law Proclamations. Orders and Regulation.”

Avcxj wefvM msweav‡bi †kôZ mgbZ ivwL‡Z Avevi I e¨_ nq| Bnv wbwðZ fv‡e †NvlYv Kiv nB‡Z‡Q †h gnvb msweavb evsjv‡`‡ki m‡ev”P AvBb| Martial Law ewjqv †Kvb AvB‡bi Aw¯Z evsjv‡`‡k bvB|

24| mcxg †Kv‡Ui fwgKv I wePvwiK cbt we‡ePbvi ¶gZv

(Power of Judicial Review):

msweav‡bi Aax‡b msweavb ms‡kvabmn †h †Kvb AvBb cYq‡bi Abb¨ ¶gZv RvZxq msm‡`i iwnqv‡Q| eZgvb ixU †gvKvÏgvq ixU-`iLv¯Kvix msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, Gi ^eaZv msweav‡bi 102 Ab‡”Q‡`i Aax‡b nvB‡KvU wefv‡M P¨v‡jÄ Kwiqv‡Qb| GB †c¶vc‡U mcxg †Kv‡Ui nvB‡KvU wefv‡Mi Judicial Review Gi ¶gZvi †Mvovi K_v Ges D³ ¶gZvi e¨wß m¤‡Ü Av‡jvKcvZ Kiv c‡qvRb|

evsjv‡`k msweav‡bi lô fv‡M wePvi wefvM m¤‡Ü eYbv Kiv nBqv‡Q| 1g cwi‡”Q‡` mcxg †KvU, 2q cwi‡”Q‡` Aa¯b Av`vjZ I 3q cwi‡”Q‡` ckvmwbK UvBebvj m¤‡Ü eYbv Kiv nBqv‡Q|

94(1) Ab‡”Q` evsjv‡`k mcxg †KvU mwó Kwiqv‡Q| 94(1) Ab‡”Q` wbæi¡ct

> 94| (1) ÔÔevsjv‡`k mcxg †KvUÕÕ bv‡g evsjv‡`‡ki GKwU m‡ev”P Av`vjZ _vwK‡e Ges Avcxj wefvM I nvB‡KvU wefvM jBqv Zvnv MwVZ nB‡e|

101 Ab‡”Q‡` nvB‡KvU wefv‡Mi GLwZqvi I 102 Ab‡”Q‡` †gŠwjK AwaKvi ejerKiYmn wewfb Av‡`k I wb‡`k c`v‡b nvB‡KvU wefv‡Mi ¶gZv eYbv Kiv nBqv‡Q|

Avcxj wefvM evsjv‡`‡ki m‡ev”P Av`vjZ|

msweav‡bi 103, 104 I 105 Ab‡”Q‡` Avcxj wefv‡Mi GLwZqvi I wewfb ¶gZv eYbv Kiv nBqv‡Q| BnvQvov, 106 Ab‡”Q` Avcxj wefv‡Mi Dc‡`óvgjK GLwZqvi c`vb Kwiqv‡Q|

h³ ivóB mec_g msweav‡bi gva¨‡g wePvi wefvM ¯vcb K‡i| h³ iv‡ói msweav‡bi ZZxq Ab‡”Q‡`i c_g `dv h³ iv‡ói mcxg †KvU I Ab¨vb¨ Av`vjZ ¯vcb K‡i| c_g `dv wbæi¡ct

> “Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.
>
> .....”

Av`vj‡Zi GLwZqvi m¤‡Ü wØZxq `dvq eYbv Kiv nq| wØZxq `dv wbæi¡ct

> “Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,.....”

msweav‡bi GB ZZxq Ab‡”Q` mcxg †KvU‡K wePvwiK GLwZqvi I ¶gZv c`vb K‡i|

msweav‡bi lô Ab‡”Q` msweav‡bi †kôZ †NvlYv KiZt A½-ivómg‡ni wePviKM‡Yi Dci Zvnv‡`i mvsweavwbK `vwqZ Acb K‡i| lô Ab‡”Q‡`i mswkó Ask wbæi¡ct

> “This Constitution, and the laws of the United States which shall be made in pursuance thereof;..... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.....”

Z‡e msweavb mvaviY †Kvb AvBb bq| Bnv iv‡ói m‡ev”P AvBb| GB m‡ev”P AvBb iv‡ói wewfb wefvM I mKj mvsweavwbK c` mwó Ges Bnvi cavb `vwqZ I KZe¨ wbw`ó Kwiqv‡Q| ZvnvQvov, iv‡ói m‡ev”P AvBb GB msweav‡bi e¨vL¨v, we‡klY I mgbZ ivwLevi `vwqZ AwcZ nBqv‡Q wePvi wefv‡Mi Dci|

United States V. Morrison (2000) ‡gvKvÏgvq h³iv‡ói cavb wePvicwZ Rehnquist e‡jbt

"[T]he Framers crafted the federal system of government so that the people's rights would be secured by the division of power. Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitutions provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. It is thus a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution.

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text"

(Larry D. Kramer: The People Themselves, Popular Constitutionalism And Judicial Review, page-225 nB‡Z D×Z)

Judicial Review m¤‡Ü Professor Philip Hamburger e‡jb:

"Almost every day a judge in the United States holds a statute unconstitutional. This is "judicial review," and it often seems the central feature of American constitutional law.

American constitutions, however, are almost silent about judicial review. Even today, they scarcely mention the power of judges to decide constitutional questions. The power of judges to hold statutes unlawful and void is therefore a puzzle. Where does this power come from? and what is its character and scope?

The familiar answer to these questions comes in the form of a history of "judicial review." According to the conventional version of this history, the American people in the 1770s and 1780s discovered the principle of popular power and thereby invented written constitutions. The people, however, apparently did not foresee how their constitutions should be enforced. Fortunately---- so the story goes---- the judges discerned the possibility of enforcing constitutions in their cases, and they made some fitful experiments in this direction in the 1780s and then more confidently in the 1790s. Although they could draw upon earlier, English and colonial traditions, they had to develop the mechanism of reviewing enactments for their unconstitutionality, and they most decisively settled the authority of this new power in 1803 in *Marbury v. Madison."* (Philip Hamburger: Law and Judicial Duty, page-1)

1787 mv‡j h³ iv‡ói msweavb cYq‡bi convention G msweavb c‡YZvMY h³ iv‡ói Congress †K h³ iv‡R¨i Parliament Gi b¨vq megq ¶gZv m¤úb Kwi‡Z Pv‡n bvB| K‡jvbx¸wji cwZ h³ iv‡R¨i Parliament Gi e¨envi Zvnviv †gv‡UB wem‡Z nb bvB| Parliament †h K‡jvbx¸wji Dci wewfb mgq Stamp Act I Ab¨vb¨ Kiv‡ivc KwiZ Ges bvbv fv‡e Zvnv‡`i Dci KZZ c`kb KwiZ msweavb iPbvq Zvnv Zvnv‡`i we‡ePbv I wPšvi cðv‡Z wQj| Ggb wK Five Intolerable Act Rvix Kwievi ci I mKj cKvi `vex jBqv Continental Congress Gi c¶ nB‡Z GKwU Av‡e`b cÎ mivmwi h³ iv‡R¨i ivRvi wbKU ‡ciY Kiv nq KviY K‡jvbx¸wji RbMY Zvnv‡`i KgKv‡Û Parliament Gi µgvMZ n¯‡¶‡c Z¨³ wei³ nBqv DwVqwQj A_P ZLbI msL¨vMwiô RbMY h³ iv‡R¨i ivRv‡K Zvnv‡`i ivRv ewjqv MY¨ KwiZ wKš h³ iv‡R¨i Parliament Zvnv‡`i Dci AvBb wewae× Kwi‡e Zvnv mn¨ Kwi‡Z PwnZ bv|

GB mKj bvbvwea Kvi‡Y msweavb c‡YZvMY Congress †K memgq ¶gZv-m¤úb Kwievi cwie‡Z Charles Louis de Montesquieu Gi ZZ Abmv‡i ¶gZvi c_KKiY (separation of powers) Gi Dci g‡bv‡hvM w`qvwQ‡jb|

18k kZvãxi Aóg `k‡K judicial review m¤‡Ü mvaviY RbM‡Yi †Zgb †Kvb aviYv wQj bv | H mgq K‡jvbx¸wji wbR¯ GK ai‡Yi PvUvi ev msweavb wQj| mK‡ji GKwU mvaviY aviYv wQj †h msm` †Kvb A‰bwZK ev Amvswevwb K AvBb wewae× Kwi‡j cieZx wbevP‡b RbMY Zvnv‡`i †fvUvwaKvi c‡qvM Kwiqv Zvnvi Reve w`‡e| wKš Av`vj‡Zi I †h Amvswevwb K AvBb‡K A‰ea †NvlYv Kwievi m‡hvM iwnqv‡Q †m m¤‡Ü Le Kg msL¨K †jv‡Ki aviYv wQj, †m aviYvI wQj A¯úó|

hvnviv judicial review Gi ce³v wQ‡jb Zvnv‡`i e³e¨ wQj †h msweavb ïa AvBb bq Bnv m‡ev”P AvBb, wKš msm` cYxZ ‡Kvb

AvBb hw` mswewavb ewnfZ nq ev mvsNwlK nq Z‡e D³ AvBb A‰ea nB‡e Ges Av`vjZ Bnvi judicial review Gi ¶gZv e‡j Zvnv †NvlYv Kwi‡Z cv‡i| Z‡e GB ZZI †mB mgq †avqvmvcY wQj| msm` KZK wewae× †Kvb AvBb mswewavb cwicwš, Kv‡RB D³ AvBb AbmiY Kiv hvq bv, Ggb wb‡e`‡bi c‡iI †mB h‡M Av`vjZ †Kvb AvB‡bi mvswewavwbKZvi ck mvaviYZ GovBqv hvBZ| K`vwPr †Kvb A½-iv‡ói Av`vjZ †Kvb AvBb Amvswewavwb K ewj‡j cvqmB Bnv‡K msm` I ¯v_m¤ú³ e¨w³e‡Mi Zxe mgv‡jvPbvi m¤§Lxb nB‡Z nBZ| GgbwK mswkó wePviKM‡Yi Awfksmb (impeachment) nBevi m¤ebv †`Lv w`Z| A‡bK mgq ermiv‡š Zvnv‡`i Avi wePviK wbevPb Kiv nBZ bv|

wKš GB iKg ai‡Yi cwiw¯wZ‡ZI A‡bK mvnmx wePviK wQ‡jb hvnviv meiKg Ae¯v‡ZI AvB‡bi fvlv‡ZB ivq w`‡Zb|

Commonwealth V. Caton (1782) ‡gvKvÏgvq wePviK George Wythe e‡jbt

> " I shall not hesitate, sitting in this place, to say, to the general court, *Fiat Justitia, ruat coelum;* and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to constitution, will say, to them, here is the limit of your authority; and, hither, shall you go but no further." (A‡av‡iLv c`Ë)

"(Larry D. Kramer: The People Themselves, Popular Constitutionalism and judicial Review, Oxford University Press, cô v-64 nB‡Z D×Z)

Dc‡iv³ †gvKvÏgvU Virginia A½iv‡R¨ D™Z nBqwQj| wekvmNvZKZvi Aciv‡a wZbRb Avmvgxi gZ¨`Û nB‡j Zvnv‡`i Av‡e`‡bi †cw¶‡Z House of Delegates Zvnv‡`i ¶gv K‡i wKš Senate ¶gv Kwi‡Z A¯xKvi K‡i| Treason Act Gi AvIZvq Dfq K¶B ¶gvi Av‡e`b gÄi Kwi‡j Avmvgxi ¶gv cvBevi weavb iwnqv‡Q, wKš D³

A½-iv‡ói msweavb ¶gv Kwievi ¶gZv A½-iv‡ói Governor A_ev House of Delegates †K c`vb Kwiqv‡Q|

GB cwiw¯wZ‡Z wePviK George Wythe I James Mercer AvBbwUi mvswevwbKZv e¨vL¨v Kwi‡Z Pvwn‡j I wePviK Peter Lyons Bnvi we‡ivwaZv K‡ib| Ab¨ cvPRb wePviK I GB ck GovBqv hvb|

cieZx‡Z House of Delegates Gi mwnZ Senate GKgZ nB‡j welqwU Avmvgx‡`i c‡¶ wb¯úwË nq|

Trevett V. Weeden (1786) ‡gvKvÏgvwU‡Z Rhode Island A½- iv‡ói GKwU AvB‡b e¨emvqx‡`i KvM‡Ri †bvU MnY Kwievi eva¨evaKZv mwó K‡i| Bnv‡K Amvsweavwb K`vex Kiv nq KviY D³ †bv‡Ui Dci DÌvwcZ `vexi wePvi Rix e¨wZ‡i‡K mvaviY †gvKvÏgvq nB‡Z cv‡i|

ev`xc‡¶i †KŠïwj James Varnum Zvnvi hw³ ZK Dc¯vcb Kwi‡Z wMqv e‡jb t

> “But as the legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people?- I answer..... the people themselves will judge, as the only resort in the last stages of oppression. But when [legislators] proceed no further than merely to enact what they may call laws, and refer those to the Judiciary Courts for determination, then, (in discharge of the great trust reposed in them, and to prevent the horrors of a civil war, as in the present case) the Judges can, and we trust your Honours will, decide upon them.”

(Larry D. Kramer iwPZ Mš The People Themselves nB‡Z D×Z, cô v-63)|

(A‡av‡iLv c`Ë)

Dc‡iv³ †gvKvÏgvq DÌvwcZ mvswevwbK ck GovBqv hvBqv GLwZqv‡ii c‡k Av`vjZ †gvKvÏgvwU LvwiR K‡i| wKš GZ`m‡Z I A½-ivówUi Governor GB c‡k msm‡`i we‡kl Awa‡ekb Avnevb K‡i Ges msm` wePviK‡`i wbKU e¨vL¨v `vex K‡i| wePviKMY c_‡g Zvnviv “accountable only to God and (their) own conscience” ewjqv †invB cvb

bvB| eiÂ msm` Zvnv‡`i Amšwó wjwce× Kwiqv mgM Bench wU eiLv¯ Kwievi c¯ve we‡ePbvi Rb¨ MnY K‡i| AZtci, wePviKMY wjwLZ fv‡e " disclaim(ing) and totally disavow(ing) any the least power or authority, or the appearance thereof, to contravene or control the constitutional laws of the state." ewjqv AvcvZZt †invB cvb| Z‡e wePviK‡`i cieZx wbevP‡bi mgq GKRb e¨wZZ Ab¨ †KnB wbevwPZ nb bvB|

Bnv Aek¨ mK‡ji ¯xKvh wQj msweavb mK‡ji Rb¨ mg fv‡e c‡hvR¨ Ges iv‡ói mKj wefvM msweavb Øviv eva¨ wKš Zvnvi A_ Bnv bq †h wePvi wefvM Ab¨ ‡Kvb wefv‡Mi Dci KZZ Kwi‡Z cv‡i, KviY †Kvb wefvMB Ab¨ †Kvb wefvM nB‡Z ‡kôZi bq| iv‡ói mKj wefv‡Mi mvsweavwbK Ae¯vb nBj †h GB wefvM¸wj mKjB RbM‡Yi Aaxb I Zvnv‡`i †meK| hw` msm` msweavb ewnfZ KvR K‡i Z‡e Zvnv ZZveavb Kwievi `vwqZ RbM‡Yi| RbMY wbevP‡bi gva¨‡g msm` m`m¨‡`i Revew`wnZv wbwðZ K‡i| hw` wePvi wefvM msm‡`i wewae× †Kvb AvBb m¤‡Ü e³e¨ c`vb K‡i Z‡e mvaviYfv‡e Zvnv nB‡e iv‡ói Ab¨ GKwU mg¸i"Z m¤úb wefv‡Mi Kvhµ‡g n¯‡¶c Kiv| A‡b‡Ki g‡Z †h‡nZ A½- iv‡ói msm` AvBb cYq‡Y ¶gZvcvß †m‡nZ BnviB AvB‡bi ˆeaZv cix¶v Kwievi GLwZqvi iwnqv‡Q| Avevi A‡b‡Ki g‡Z cKZc‡¶ †h †Kvb AvBb ev †h †Kvb welq we‡klY Kwievi Povš ¶gZv RbM‡Yi Ges RbMY wbevP‡bi mg‡qB mK‡ji Reve`vwnZv wbwðZ K‡i|

Thomas Jefferson msweavb j•Nb NUbvejx we‡klY Kwievi Rb¨ RbM‡Yi Convention Avnev‡bi c¯ve KwiqvwQ‡jb| A‡b‡K 'council of censors' Gi c¯ve KwiqvwQ‡jb hvnviv mvZ ermi Aši Aši msweav‡bi Ae¯vb cix¶v Kwi‡e|

ZLbI A‡b‡K Rbwcq mve‡fŠg‡Zi Rb¨ judicial review c‡qvRb ewjqv g‡b Kwi‡Zb| †h‡nZ msweavb m‡ev"P AvBb, †m‡nZ msweavb ewnfZ †h ‡Kvb AvBb A‰ea| cKZ c‡¶ Zvnv AvBbB b‡n|

GiKg ai‡bi †Kvb AvBb hw` Av`vj‡Zi m¤§‡L †ck nq Z‡e Av`vjZ D³ AvB‡bi mvswevwbK Ae¯vb D‡c¶v Kwi‡Z cv‡i bv | hw` Dnv ^ea nq Z‡e Zvnv DÌvwcZ NUbvejx ev we‡ivaxq wel‡qi Dc‡i c‡qvM Kwi‡e, hw` A‰ea nq, Z‡e Zvnvl †NvlYv Kwi‡Z mvswevwbK fv‡e eva¨|

mswevb Ges mswevb mgbZ ivwL‡Z Av`vj‡Zi GBi∫c fwgKv 1780-90 `k‡K cvq m¤úY AcwiwPZ wQj| Dc‡iv³ ZvwZK Ae¯vb LeB ¯í msL¨K AvBb‡Ái g‡a¨ †avqvmv AvKv‡i mxgve× wQj| GiKgB GKRb wQ‡jb James Iredell | 1786 mv‡j Zvnvi g‡°j Bayard 1777 mv‡j h³ iv‡ói ¯vaxbZv h×Kvjxb mg‡q ev‡RqvßKZ Zvnvi m¤úwË †dir cvBevi Rb¨ †gvKvÏgv Kwi‡j weev`xc¶ Zvnv LvwiR Kwievi Rb¨ GB Kvi‡Y cv_bv Rvbvq †h ceeZx erm‡i AvBb Kwiqv D³ i∫c ev‡RqvB Kiv m¤úwË †dir c`vb wbwl× nBqwQj| Iredell D³ AvB‡bi mvswevwbK ‰eaZv Av`vj‡Zi we‡ePbvi Rb¨ DÌvcb Kwi‡Z Pwn‡ZwQ‡jb|

wZwb 'An Elector' GB QÙbv‡g cwÎKvq AmvswevwbK AvBb A‰ea †NvlYv Kwi‡Z Av`vj‡Zi ¶gZv cm‡½ GKwU ceÜ †j‡Lb| Iredell ‡j‡Lb t

> "[T]hat though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the mean time, their act, whatever it is, is to be obeyed as a law [by the judges]; for the judicial power is not to presume to question the power of an act of Assembly."
>
> (Kramer : The People Themselves, page-61)

Ab¨mKj cwZKvi Achvß `vex Kwiqv Iredell e‡jb †h mswevb RbM‡Yi mve‡fŠgZ †NvlYv K‡i Ges Zvnv nB‡Z Av`vj‡Zi judicial review Gi ¶gZv D™Z nBqv‡Qt

> "For that reason, an act of Assembly, inconsistent with the constitution, is *void,* and cannot be obeyed, without disobeying the superior law to which we

were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being *judges for the benefit of the whole people,* not *mere servants of the Assembly."*

(Kramer : The People Themselves, page-61-62)

Iredell Gi hw³ wQj †h iv‡ói m‡ev"P ev gj AvBb RbMY KZK iwPZ| Bnv msm` KZK cYxZ Ab¨ AvBb nB‡Z m¤úY c_K Ges judicial review Gi ¶gZv Av`vjZ D³ RbM‡Yi AvBbx cwZwbwa wnmv‡e c‡qvM Kwi‡Z ¶gZvcvß| ZvnvQvov Amvswe awbK AvBb c‡qvM Kiv nB‡Z A¯xKvi Kwiqv Av`vjZ eiÂ RbM‡Yi mvswe awbK wb‡`k cvjb Kwi‡e| RbM‡Yi c‡¶ judicial review Gi ¶gZv c‡qvM Kwiqv Av`vjZ cw_Z cwZKvi kwš cY fv‡e mswe av‡bi AvIZvq c`vb Kwi‡Z cv‡i| AZtci, †Kvb AvB‡bi cwZev‡` RbM‡Yi cwZ‡iva ev Ab¨ †Kvb wec‡ei c‡qvRb nq bv|

Iredell Gi GB mKj hw³ Bayard V. Singleton (1786) ‡gvKvÏgvq we Á wePviKMY MnY K‡ib Ges Zvnvi c‡¶ ivq c`vb K‡ib |

D‡jL¨, James Iredell cieZx Kv‡j h³ iv‡ói mcxg †Kv‡Ui wePviK wbh³ nBqwQ‡jb|

Bayard V. Singleton (1786) ‡gvKvÏgwU North Carolina A½iv‡ó D™Z nBqwQj| 1777 mv‡j Bayard Gi m¤úwË ev‡RqvB nBqwQj| 1785 mv‡j wewae× GKwU AvB‡b Hi"c ev‡RqvB m¤úwË †dir c`vb wbwl× Kiv nq| 1786 mv‡j H m¤úwË wdwiqv cvBevi Rb¨ Bayard †gvKvÏgwU Kwi‡j weev`xc‡¶ Dnv LwiR Kwievi cv_bv Kiv nq | wKš Lwi‡Ri cv_Yv `"Z gÄi bv Kivq msm` wePviK‡`i WwKqv cvVvq Ges Zvnv‡`i wei"‡× Awf‡hvM cwZwôZ nq| Aek¨ Zvnv‡`i kw¯ c`vb Kiv nB‡Z Ae¨vnwZ †`Iqv nq|

BwZg‡a¨ †gvKvÏgwU LwiR Kwievi Rb¨ wØZxqevi Av‡e`b Kiv nB‡j wePviKMY welqwU‡Z wm×vš c`vb GovBevi †Póv K‡ib,

wKš Zvnv m¤e bv nIqvq 1787 mv‡ji †g gv‡m hLb Philadelphia kn‡i mswevb msµvš Convention Awa‡ekb Avi¤ nq ZLb A‡bKUv Awb”QK fv‡e wb‡gv³ Av‡`k c`vb Kwiqv weev`x c‡¶i `wLjKZ †gvKvÏgv Lwi‡Ri `iLv¯ LwiR K‡ib t

“..... that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.....

That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without further election of the people, from thence transmit the dignity and authority of the legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.”

(Noel T. Dowling : Cases on Constitutional Law, 1954, cô v-72-73) (A‡av‡iLv c`Ë)

wKš Dc‡iv³ ivq c`v‡bi ci A½-ivówU‡Z cPÛ cwZev` DÌvwcZ nq Ges msm` wePviK‡`i †eZb ew× eÜ K‡i| Z‡e gj †gvKvÏgvwU‡Z Rix ev`xc‡¶ gZvgZ cKvk Kwi‡j Ae¯v ¯vfvweK nBqv Av‡m|

GBiƒc Awb ðqZv I bvbv iKg Uvbv‡cv‡o‡bi g‡a¨ judicial review ZZ ax‡i ax‡i `vbv ewa‡Z Avi¤ K‡i| Larry D. Kramer Gi fvlvq (cô v-57-58)t

> "This combination of factors- more active government, more explicit constitutions, more constitutional conflict and arguably unconstitutional laws, and, above all, a heightened sense of popular sovereignty- could be interpreted in different ways, and it pulled people in different directions as they confronted the new experience of managing a constitutional republic. The resulting tensions shaped the first concept of judicial review." (The People Themselves)

Dc‡iv³ Ab‡"Q` nB‡Z cZxqgvb nq †h h³iv‡ói mswevb m‡ev"P AvBb Ges A½iv‡R¨i mswevb ev AvB‡b hvnvB _vKK bv †Kb D³ A½iv‡R¨i wePviKMY h³iv‡ói mswevbØviv eva¨|

h³iv‡ói mswev‡bi ZZxq I lô Ab‡"Q‡` Bnv wbwnZ (Implicit) iwnqv‡Q †h mcxg †Kv‡Ui wePviKMY mswevb ms‡kvab AvBb, Congress KZK wewae× AvBb Ges A½iv‡ói mswevb I wewae× AvB‡bi mvswevwbK ^eaZv we‡ePbv I cix¶v, judicial review Gi gva¨‡g Kwi‡Z cvwi‡eb| Ab¨w`‡K, A½iv‡ói wePviKMY A½iv‡ói mswevb I wewae× AvB‡bi mvswevwbK ^eaZv cix¶v I we‡ePbv GKBiƒc GLwZqvi PPvi gva¨‡g Kwi‡Z cvwi‡eb| ZvnvQvov, mcxg †KvU A½ivR¨ nB‡Z AvbxZ Avcxj¸wj I we‡ePbv Kwi‡Z cvwi‡e|

1787 mv‡j Federal Convention mswevb iPbv Kwievi ci Dnv A½ivómgn KZK Ab‡gv`b chvq _vwKevi mgq PUBLIUS Q`¥bv‡g Alexander Hamilton, 1788 mv‡ji 28‡k †g Zvwi‡L Federalist No. 78 G wePvi wefv‡Mi ¯vaxbZv I ¶gZv m¤‡Ü †j‡Lbt

> ".....
>
> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice not other way than through the medium of courts of justice, whose duty it must be to declare all acts

contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

.....

It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

.....

The independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

.....

.....

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.

.....

D‡jL¨, 1787 mv‡j hLb h³ iv‡ói mswe avb iPbv Kiv nq ZLb Av`vj‡Zi judicial review Gi avivYv AcwiwPZ wQj| h³ iv‡R¨ 1689 mv‡j Bill of Rights cYxZ nBevi ci King in Parliament Gi mve‡fŠgZ cwZôv nq| AZci, Parliament KZK cYxZ AvBb ivRvi ¯v¶‡ii ci mvaviY fv‡e Av`vjZ c‡qvM Kwi‡Z eva¨ wQj| h³ iv‡R¨ AvB‡bi GB a¨vb avivYv †gvUvgwU meÎ cPwjZ wQj| Parliament G wewae× AvB‡bi ^eaZv Av`vj‡Z DÌvc‡bi avivYvI †mB

h‡M wQj bv| †mB mgq h³ iv‡ó ivRbxwZwe` I cwÛZ e¨w³MY wePvi we fv‡Mi ¯vaxbZv I judicial review m¤‡Ü †h Mfxi wPšv fvebv Kwi‡Zb Zvnv msweavb I Dc‡i ewYZ Federalist No. 78 †_‡K cZxqgvb nq|

AZci, Federalist No. 81 G Alexander Hamilton judicial review m¤‡Ü e‡jbt

> "This doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State government.....
>
> These considerations teach us to applaud the wisdom of those State who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men....."
>
> To avoid all inconveniencies, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

A½ivó KZK msweavb Ab‡gv`bKv‡j Ggb ai‡bi D¾j I ev¯e AvBbx Av‡jvPbv h³iv‡ói wewfb kn‡i ZLb Pwj‡ZwQj| GgbwK Federalist we‡ivax `j I judicial review ‡K mg_b Kwiqv wQj| Brutus QÙbv‡g Robert Yates ‡j‡Lbt

> " [T]he judges under this constitution will control the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress. They are to give the constitution an explanation, and there is no power above them to set aside their judgment..... The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void."

18k kZvãx‡Z h³ivó ¯vaxb nBevi c‡e cvq mKj K‡jvbx ivó¸wji wbR¯ msweavb wQj| msweav‡bi mwnZ mvsNwlK †Kvb AvBb

K‡jvbx iv‡ói Av`vj‡Z DÌvwcZ nB‡j Zvnv A‰ea we‡ewPZ nBZ| A‡bK mgq D³ iv‡qi wei“‡× h³ iv‡R¨i Privy Council G Avcxj `v‡qi Kiv nBZ|

c_g Congress Bnvi Judiciary Act, 1789, wewae× K‡i| Bnvi 25 avivq A½ivR¨mg‡ni Av`vj‡Zi mvswewbKZv m¤ú‡K iv‡qi wei“‡× mcxg †Kv‡U Avcx‡ji weavb KiZt D³ Av`vj‡Z judicial review Gi ¶gZv wbwðZ K‡i|

Professor William Treanor M‡elYv Kwiqv †`LvBqv‡Qb †h 1788 mvj nB‡Z 1803 mvj chš A½ivR¨mg‡n 38wU †gvKvÏgvq AvB‡bi ^eaZv DÌvwcZ nBqvwQj|

Hayburn's case (1792) G wZbwU Federal Circuit Court Congress KZK wewae× GKwU AvBb mswewa‡bi ZZxq Ab‡”Q‡`i mwnZ mvsNwlK weavq ZwKZ AvBbwU Amvswewa‡bK ewjqv wm×vš MnY K‡i| KviY D³ AvB‡bi AvIZvq wePviKMY‡K ‡cbkb Av‡e`bc‡Îi Dci wm×vš MnY Kwievi `vwqZ Acb Kiv nBqvwQj hvnv wePvwiK Kvh wQj bv Ges Separation of Powers Z‡Zi mwnZ mvsNwlK wQj| mcxg †Kv‡U Avcxj wePvivaxb _vKv Kvjxb mg‡q Congress AvBbwU ewZj K‡i weavq mcxg †Kv‡U Povš wm×vš nq bvB|

United States V. Yale Todd ‡gvKvÏgvq Hayburn's caseG DÌvwcZ ZwKZ AvB‡bi AvIZvq †cbkb c`vb Kiv nBqvwQj weavq mcxg †KvU Zvnv ewZj K‡i|

Hylton V. United States (1796) †gvKvÏgvq mec_g mcxg ‡Kv‡U Congress KZK wewae× GKwU AvB‡bi ^eaZv DÌvwcZ nq Z‡e mcxg †KvU AvBbwU ^ea ‡NvlYv K‡i|

ZvnvQvov, Ware V. Hylton (1796) †gvKvÏgvq mec_g A½iv‡ói wewae× GKwU AvBb‡K mcxg †KvU A‰ea †NvlYv K‡i|

Calder V. Bull (1798) ‡gvKÏgvq Justice Samuel Chase e‡jb t

" If any act of congress, or of a legislature of a state, violates those constitutional provisions, it is unquestionably void....."

Cooper V. Telfair (1800) ‡gvK Ï gvq Justice Chase e‡j bt

"It is indeed a general opinion-it is expressly admitted by all this bar and some of the judges have, individually in the circuits decided, that the Supreme Court can declare an act of Congress to be unconstitutional, and therefore invalid, but there is no adjudication of the Supreme Court itself upon the point".

1791 mv‡j Georgia A½iv‡ói Grand Jury †K wb‡`k c`vb Kv‡j (Charging the jury) Circuit Court Gi wePvicwZ James Iredell †Kvb AvBb hw` mswevb cwicšx nq Zvnv e¨vL¨v Kwi‡Z hvBqv e‡j bt

"The courts of Justice, in any such instance coming under their cognizance, are bound to resist them, they having no authority to carry into execution any acts but such as the constitution warrants."

(Kramer : The People Themselves, cô v-104)

GKB fv‡e 1795 mv‡j Vanhorne's Lessee V. Dorrance ‡gvKv Ï gvq Grand Jury ‡K wb‡`k c`vb Kv‡j wePvicwZ Paterson e‡j b t

"I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both Legislators and Judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the Judiciary in this country is not a subordinate, but co-ordinate, branch of the government."

(Kramer : The People Themselves, cô v-104)

wePvicwZ Samuel Chase 1800 mv‡j Pennsylvania Grand Jury †K wb‡`k c`vb Kv‡j Judicial Power m¤‡Ü e‡j b t

"is *co-existent, co-extensive, and co-ordinate with, and altogether independent* of, the *Legislature & the Executive;* and the Judges of the Supreme, and District Courts are bound by their *Oath of Office,* to regulate their Decisions *agreeably to the Constitution.* The Judicial

> power, therefore, are the only *proper* and *competent* authority to decide whether any Law made by Congress; or any of the State Legislatures is contrary to or in Violation of the *federal* Constitution."

(Kramer : The People themselves, cô v-134-35)

GB cUfwgKvq 1803 mv‡j mcxg †Kv‡U Marbury V. Madison †gvKvÏgvi ïbvbx nq|

President John Adams Zvnvi Aemi Mn‡Yi AíKvj c‡e justice of the peace c‡` †ek wKQ msL¨K e¨w³ eM‡K wb‡qvM c`vb K‡ib| wb‡qv‡Mi mKj Avbôvwb KZv m¤úb KiZt wb‡qvMcÎ cvq mK‡ji wbKU †ciY Kiv nB‡j I mgqvfv‡e William Marbury Gi wbKU ‡ciY Kiv m¤e nBqvwQj bv| BwZg‡a¨ Thomas Jeferson ivócwZ c‡` `wqZ fvi MnY K‡ib| Zrci Marbury Gi wb‡qvMcÎ Avi ‡ciY Kiv nq bvB| GB cwiw¯wZ‡Z Marbury wbæ Av`vj‡Z †gvKvÏgv `v‡qi bv Kwiqv mivmwi mcxg †Kv‡U †gvKvÏgv `v‡qi Kwiqv Zvnvi wb‡qvMcÎ †ciY Kwievi Rb¨ h³iv‡ói Z`wbšb Secretary of State, James Madison Gi Dci GKwU writ of mandamus cv_Yv K‡ib|

The Judiciary Act, 1789 Gi 13 aviv mcxg †KvU‡K writ of mandamus mn original †gvKvÏgv ïbvbx Kwievi GLwZqvi c`vb K‡i| mZivs GB AvB‡bi AvIZvq mcxg †KvU Marbury Gi †gvKvÏgv ïbvbx Kwi‡Z cwiZ wKš h³iv‡ói mswea v‡bi ZZxq Ab‡"Q‡`i 2q `dvi AvIZvq ivó`Z msµvš †gvKvÏgv Ges Ggb †gvKÏgv †hLv‡b GKwU A½ivó c¶ iwnqv‡Q, †mB ai‡Yi †gvKvÏgv `v‡qi Kiv hvq| ZvnvQvov, Ab¨ †h ai‡bi †gvKvÏgvi K_v ejv nBqv‡Q Zvnvi g‡a¨ mandamus msµvš Avcxj †gvKÏgvq GLwZqvi _wK‡j I original †gvKvÏgvq ïbvbx Kwievi GLwZqvi wQj bv| GgZ Ae¯vq ¯úóZB cZxqgvb nq †h mswea v‡bi ZZxq Ab‡"Q` †h ¶gZv mcxg †KvU‡K c`vb Kwiqv‡Q Judiciary Act, 1789 Gi 13 aviv Bnv‡K Zvnvi AwZwi³ ¶gZv c`vb Kwiqv‡Q|

GB ‡c ¶vc‡U mcxg †Kv‡Ui c‡¶ cavb wePvicwZ John Marshall e‡jbt

"The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have frame written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige then to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?

It is emphatically the province and duty of the judicial department to say what the law is.

.....The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it rises?

This is too extravagant to be maintained. ..... Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitution, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." (Professor Noel T. Dowling on the 'Cases on Constitutional Law Fifth Edition, 1954, at pages-95-97). (A‡av‡iLv c`Ë)

Dcmsnv‡i Marshall, C.J. e‡jbt

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

(Professor Noel T. Dowling : Cases on Constitutional Law, page-275)

(A‡av‡iLv c`Ë)

D‡jL¨ †h William Marbury h³iv‡ói mswea v‡bi †kôZ A_ev mcxg †Kv‡Ui Judicial review Gi ¶gZv m¤‡Ü †gv‡Ul Drmvnx wQ‡jb bv, wZwb ïagvÎ Zvnvi wb‡qvM cÎwU †ciY Kwievi Rb¨ Secretary of State Gi Dci GKwU mandamus ev mcxg †Kv‡Ui wb‡`k cv_bv Kwiqv wQ‡jb| wKš mcxg †KvU Zvnvi †¶vf we‡ePbv Kwi‡Z hvBqv AZ¨š m‡PZbfv‡e Congress Gi GKwU AvBb evwZj †NvlYv K‡i| Congress Gi wewae× AvB‡bi ^eaZv m¤ú‡K mcxg †Kv‡Ui judicial review Gi ¶gZv c‡qv‡Mi BnvB mZ¨Kvi cvi¤ wQj| AvB‡bi BwZnv‡m Bnv wQj GKwU gvBj djK NUbv| wbtm‡›`‡n Bnv GKwU

AvBbx gnvwece| Judicial review Gi ¶gZv µgvb‡q we‡ki mKj Av`vjZ c‡qvM Kwi‡Z Avi¤ K‡i|

Professor Alexander Bickel h_vZB Zvnvi 'The least Dangerous Branch' M‡š ewjqv‡Qb t

> "T[]he institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped and maintained; and the Great Chief Justice, John Marshall,¯not singlehanded, but first and foremost¯ was there to do it and did. If any social process can be said to have been "done" at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act the decision in the case of *Marbury v. Madison."*

Professor William E. Nelson Zvnvi Marbury V. Madison M‡ši Introduction G e‡jb t

> "*Marbury v. Madison* will long remain a foundational case for understanding the work and jurisprudence of the Supreme Court of the United States. In an 1803 opinion by Chief Justice John Marshall, the Court explicitly ruled for the first time that it possessed what we now call the power of judicial review, or jurisdiction to examine whether legislation enacted by Congress is consistent with the Constitution.
>
> .....Thus, *Marbury v. Madison* was a truly seminal case, which ultimately has conferred vast power on the Supreme Court of the United States and on other constitutional courts throughout the world. What makes the case even more important is the absence of any clear plan on the part of the Constitution's framers to provide the Court with this power."

Marbury V. Madison ‡gvKvÏgvi ivq m¤ú‡K Professor Charles G. Haines e‡jbt

> ".....Marshall, who was an ardent Federalist, was aware of a rising opposition to the theory of judicial control over legislation, and he no doubt concluded that the wavering opinions on federal judicial supremacy needed to be replaced by a positive and unmistakable assertion of authority."
>
> (Rabert K. Carr: The Supreme Court and Judicial Review nB‡Z DØZ, cô v-70)

Marbury V. Madison ‡gvKvÏgv we‡klY Kwiqv Professor Robert K. Carr e‡jbt

".....Marshall chose to base his decision upon the much broader ground that the Court must refuse to enforce any act of Congress which it considers contrary to the Constitution, regardless of whether the act is one pertaining to the work of the judiciary or dealing with some other matter altogether..... (cô v-68)

.....It refrained from exercising a power which Congress had granted to it and which in the case at hand it might have used in partisan fashion to accomplish an act of judicial interference with the conduct of administrative affairs of the government by the President of the United States and his first assistant, the Secretary of State. In other words, the Court might have tried to force Jefferson and Madison to give Marbury his commission, and Federalists the country over would have applauded. But instead, in an act of seeming self-abnegation, the Court said "No" and dismissed the case for want of jurisdiction. .....(cô v-69)

..... In other words, Marshall was invoking that power for the first time at just such a moment when the Fathers probably intended it should be exercised. Jefferson had become president and his party had won control of Congress. The opposition had obtained complete control of the political branches of the government. Is it not obvious that from the point of view of the Founding Fathers and the Federalist party the time had come to point out that the Constitution as a higher law did place restraints upon Congress and that the Supreme Court as guardian of the Constitution had power to enforce those restraints.

In *Marbury v. Madison* we see Chief Justice Marshall suggesting that the Supreme Court was duty-bound as a matter of unescapable principle to enforce thee Constitution as a symbol of restraint upon congressional authority through the exercise of its power of judicial review". (cô v-71)

(Supreme Court and Judicial Review, Publisher: Rinehart de Company INC. New York)

(A‡av‡iLv c`Ë)

mcxg †Kv‡Ui GLwZqvi cm‡½ Cohens V. Virginia (1821) ‡gvKvÏgvq cavb wePvicwZ John Marshall e‡jbt

" It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary

cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

(A‡av‡iLv c`Ë)

Justice Robert H. Jackson mcxg †Kv‡Ui KZZ ev AwaKvi m¤‡Ü Harvard wekwe`¨vj‡q 1954 mv‡j 'The Supreme Court as a Unit of Government' wk‡ivbv‡g Godkin e³Zv c`vb Kwievi Rb¨ c¯wZ MnY KwiqvwQ‡jb wKš D³ e³Zv c`vb Kwievi c‡eB Zvnvi gZ¨ nq| cieZx‡Z wekwe`¨vjq KZc¶ e³Zvi LmovwU gw`Z Kwiqv cKvk K‡ib| Dnvi Ask we‡kl wbæi¡ct

"What authority does the Court possess which generates this influence? The answer is its power to hold unconstitutional and judicially unenforceable an act of the President, of Congress, or of a constituent state of the Federation. That power is not expressly granted or hinted at in the Article defining judicial power, but rests on logical implication. It is an incident of jurisdiction to determine what really is the law governing a particular case or controversy. In the hierarchy of legal values, If the higher law of he Constitution prohibits what the lower law of the legislature attempts, the latter is a nullity; otherwise, the Constitution would exist only at the option of Congress. Thus it comes about that in a private litigation the Court may decide a question of power that will be of great moment to the nation or to state". (Justice Robert H. Jackson of U.S. Supreme Court, published by Harverd University Press, 1955, at page-22)

(A‡av‡iLv c`Ë)

Av`vjZ AvB‡bi ˆeaZv wePvi Kwi‡e, AvB‡bi weP¶YZv bq| Noble State Bank V. Haskell 219 US 575, 580 (1911) †gvKvÏgvq wePvicwZ Oliver Wendell Holmes, Jr. e‡jb t

"We fully understand....the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern."

Terminiello V. City of Chicago 337 US 1, 11(1949) ‡gvKvÏgvq wfbgZ †cvlY Kwiqv wePvicwZ Felix Frankfurter e‡jb t

"We do not sit like kadi under a tree, dispensing justice according to consideration of individual expediency."

wePvi cwµqv ev judicial process m¤‡Ü wePvi cwZ Benjamin N. Cordozo Zvnvi wjwLZ 'The Nature of the Judicial Process' c¯‡K e‡jb (cô v-112-113)t

" My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.

‡gvKvÏgvq wm×vš Mn‡Y GKRb wePvi‡Ki `wqZ I KZe¨ m¤ú‡K wePvi cwZ Cordozo e‡jb (cô v-141)t

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to " the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."

AvBb c‡qv‡M fj åvwš I wePvi‡Ki Ae¯vb m¤ú‡K wePvi cwZ Cordozo Dcmsnv‡i e‡jb (cô v-178-79)t

" The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.

Povš wePv‡i cZxqgvb nq, †h ‡Kvb †`‡ki Av`vj‡Zi ¶gZvi cKZ Drm msweavb Z_v RbMY KviY msweav‡bi c¯vebv 'We, the

people of the United States' A_ev ÔAvgiv evsjv‡`‡ki RbMYÕ ('We the people of Bangladesh ) RbM‡Yi c‡¶ GB wbisKk KZZmjf I mk× Awfe¨w³ eYbv KiZt h³ivó I evsjv‡`‡ki msweav‡bi cvi¤| RbM‡Yi bv‡g c¯vebvi GBiƒc cvi¤ cgvY K‡i †h RbMYB mve‡fŠg| msweav‡bi gva¨‡g RbMYB Pvwnqv‡Q †h iv‡ó Ggb GKwU ¯vaxb wePvi e¨e¯v _vwK‡e hvnv Congress ev RvZxq msm` Ges wbevnx KZc¶ Øviv †Kvbfv‡eB cfvevwbZ nB‡e bv| RbMY GLbI wekvm K‡i ‡h mKj mxgve×Zv m‡ZI mcxg †KvU, msweavb KZK wbwðZ, Zvnv‡`i AwaKvi I ¯vaxbZv mgbZ ivwLevi Rb¨ mev‡c¶v wekvmfvRb I c¶cvZnxb i¶K Ges mvweKfv‡e wePvi wefvM RbM‡Yi †kl fimv|

GB Kvi‡YB h³iv‡ói ivócwZMY †hgb Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Roosevelt, Dweight D. Eisenhour AZ¨š cfvekvjx nIqv m‡ZI mcxg †Kv‡Ui ¶gZv †Kvbfv‡e nvm K‡ib bvB hw` I Bnvi ivqØviv Zvnviv A‡bK mg‡qB weeZ nBqv‡Qb| ZvnvQvov, 'Scarecly any political question arises in the United States that is not resolved sooner or later into a judicial question'(Alexis de Tocqueville, 1848) | wKš mecKvi ivR‰bwZK m¼U m‡ZI h³iv‡ói mcxg ‡KvU c¶cvZnxb fv‡e msweavb mgbZ ivwLqv Rbgvb‡li AwaKvi i¶vq fwgKv ivwLqv‡Q| mvaviY fv‡e msm` KZK wewae× †Kvb AvB‡bi cwZ mcxg ‡Kv‡Ui †Kvb Abxnv _v‡K bv| hw` †Kvb e¨w³ ¶ä nBqv †Kvb AvB‡bi ^eaZv Av`vjZ DÌvcb K‡i ïagvÎ †m¶‡ÎB msweav‡bi Av‡jv‡K mcxg ‡KvU ZwKZ AvB‡bi ^eaZv wePvi we‡ePbv Kwiqv _v‡K| wKš mecKvi ivR‰bwZK m¼U m‡ZI mcxg †KvU c¶cvZnxb fv‡e msweavb mgbZ ivwLqv Rbgvb‡li AwaKvi i¶vq wbwfK I `p fwgKv ivwLqv‡Q| GB Lv‡bB mcxg †Kv‡Ui ¯vZšZv | It is living voice of the Constitution (Bryce) | RbM‡Yi msweavb mó mcxg ‡KvU RbM‡YiB cwZôvb|

msweav‡bi cvavb¨ I msweavb wePvi wefvM‡K wK `vwqZ I KZe¨ Acb Kwiqv‡Q †m m¤‡Ü Special Reference No. 1 of 1964 (AIR 1965 SC 745) †gvKvÏgvq fviZxq mcxg †KvU we‡ePbv K‡i| cavb wePvicwZ P.B. Gajendragadkar e‡jb (cô v-762-63) t

> "39..... The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers.....
>
> 41. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Art.368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers, and Judges all take oathe of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.
>
> 42. There is another aspect of this matter which must also be mentioned; whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain

of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validly of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country; .....

.....

....."

"129. If the power of the High Courts under Art. 226 and the authority of this Court under Art. 32 are not subject to any exceptions, then it would be futile to content that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in that behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental right, and so, in the existence of the said judicial power itself is necessarily involved the right of the citizens to appeal to the said power in a proper case." (A‡av‡i Lv c`Ë)

Professor O. Hood Phillips Zvnvi Mš Constitutional and Administrative Law', Seventh Edition (1987) wK c×wZ‡Z GKwU AvB‡bi ˆeaZv we‡ePbv Kiv nq Zvnv eYbv Kwiqv‡Qbt

".....the federal courts have jurisdiction to declare provisions of state constitutions, state legislation and federal legislation repugnant to the Federal Constitution. It is not strictly accurate to say that the Courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist or that an alleged wrong has been committed because a certain statue relied on is unconstitutional."

(A‡av‡i Lv c`Ë)

Asma Jilani V. Government of Punjab, PLD 1972 SC 139 ‡gvKvÏgvwU GKwU habeas corpus †gvKvÏgv nB‡Z D™Z nq| gvwjK †Mvjvg Rxjvbx‡K 1971 mv‡ji Martial Law Regulation 78 Gi AvIZvq AšixY Kiv nq| nvB‡KvU 'The Jurisdiction of Courts (Removal of Doubts) Order, 1969

(President's Order No. 3 of 1969)' Gi Kvi‡Y A š i x Y Av‡`‡k n¯‡¶c Kwi‡Z A¯xKvi K‡i| Avcxj †gvKvÏgvq mcxg †KvU President's Order No. 3 of 1969 I Martial Law Regulation 78 Dfq‡KB A‰ea †NvlYv K‡i| cavb wePvicwZ Hamoodur Rahman e‡jb (cô v-197) t

"This provision, as very appropriately pointed out by Mr. Brohi, strikes at the very root of the judicial power of the Court to hear and determine a matter, even though it may relate to its own jurisdiction. The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by this and other Courts of superior jurisdiction in all civilised countries....." (A‡av‡i Lv c`Ë)

fviZxq mcxg †KvU †Kvb ms¶ä e¨w³i cÎ‡K I fviZxq mswe av‡bi 32 Ab‡"Q‡`i AvIZvq Av‡e`bcÎ wnmv‡e MY¨ KiZt AvBb Abmv‡i b¨vq wePvi Kwievi Rb¨ c`‡¶c MnY Kwiqv‡Q| Amnesty International Gi wbKU nB‡Z GKwU telegram cvß nBqv cwK¯vb mcxg †KvU gvbeZwe‡ivax I Am¤§vbRbK weavq cKv‡k¨ dvwm w`evi Av‡`k ¯wMZ K‡i|

wePvicwZ Robert H. Jackson GKB gZ †cvlY Kwi‡Zb| wZwb Dc‡i ewYZ Zvnvi Godkin e³Zvq e‡jb |

> ".....Thus it comes about that in a private litigation the Court may decide a question of power that will be of great moment to the nation or to a State."

Fazlul Quader Chowdhury V. Muhammad Abdul Haque, PLD 1963 SC 486 †gvKvÏgvq cavb wePvicwZ A.R. Cornelius GKB ai‡Yi gše¨ K‡ib (cô v-503) t

> " The duty of interpreting the Constitution is, in fact a duty of enforcing the provisions of the Constitution in any particular case brought before the courts in the form of litigation."

cZxqgvb nq, †h †Kvb †gvKvÏgvq ïbvbx cm‡½ †Kvb AvB‡bi mvswe avwbKZvi ck DÌvwcZ nB‡j mcxg ‡KvU †m m¤‡Ü wbwjß

_vwK‡Z cv‡i bv| †h‡nZ mvswevwbK ckwUI AvB‡bi ck †m‡nZ mKj c¶‡K †bvwUk c`vb ceK Zvnv wbimb KivUvB evÃbxq| Aek¨ eZgvb †gvKvÏgvwU Rb¨v_gjK, G†¶‡Î I DÌvwcZ mKj AvB‡bi ck Av‡jvPbv KivB †kq|

D‡jL¨, ms¶ä e¨w³ ev Zvnvi c‡¶ hw` mwVK AvB‡bi ck DÌvcb Kiv m¤e bvI nq ZeI DÌvwcZ NUbvejxi Dci mwVK AvBb Av‡jvPbv I Zvnv c‡qvM Kiv wePvi‡Ki `vwqZ I KZe¨| Zvnv Kwi‡Z hvBqv hw` †Kvb AvB‡bi ^eaZvi ck DÌvwcZ nq Z‡e Zvnv GovBqv bv hvBqv Dfq c¶‡K †mB ck m¤‡Ü IqvwKenvj KiZt AvB‡bi ckwU wbimb Kiv evÃbxq| GB c×wZ h³ivó I fviZxq mcxg †KvU AbmiY Kwiqv _v‡K| h³iv‡R¨ GgbwK GKwU †gvKvÏgvq GKwU wej AvB‡b cwiYZ nBevi c‡eB Av`vjZ Zvnvi ^eaZv we‡ePbv K‡i|

R V. H.M. Treasury ex parte Smedley, (1985)1 All ER 589 ‡gvKvÏgvq Parliament Gi cZ¨¶ Ab‡gv`b e¨wZ‡i‡K msh³ Znwej nB‡Z A_ c`vb welqwU Court of Appeal G DÌvwcZ nB‡j Sir John Donaldson MR e‡jbt

> “.....Before considering Mr. Smedley”s objections.....I think that I should say a word about the respective roles of Parliament and the courts. Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purpose. It therefore behoves the courts to be over sensitive to the paramount need to refrain form trespassing on the province of Parliament or, so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing on the province of the courts.....It is the function of Parliament to legislation is necessarily in written form. It is the function of the courts to construe and interpret that legislation. Putting it in popular language, it is for Parliament to make the laws and for the courts to tell the nation, including members, of both Houses of Parliament, what

> those laws mean..... At the present moment, there is no Order in Council to which Mr. Smedley can object as being unauthorized.....In many, and possibly most, circumstance the proper course would undoubtedly be for the courts to invite the applicant to renew has application if and when an order was made, but in some circumstances an expressions of view on questions of law which would arise for decision if Parliament were to approve a draft may be of service not only to the parties, but also to each House of Parliament itself. This course was adopted in R v Electricity Comrs, ex P London Electricity Joint Committee Co (1920) Ltd. (1924) 1 KB 171, (1923) All ER Rep 150. In that case an inquiry was in progress, the cost of which would have been wholly wasted if , thereafter, the minister and Parliament had approved the scheme only to be told at that late stage that the scheme was ultra vires."

(A‡av‡iLv c`Ë)

Av`vjZ b¨vq wePvi Kwievi Rb¨ Bnvi mnRvZ D‡ØM nB‡Z Ggb fv‡e AvBb we‡klY Kwi‡Z cqvm cvq hvnv Parliament wb‡R I mwVK g‡b Kwiqv _v‡K| HWR Wade Gi fvlvq (côv-418) t

> "The Courts may presume the Parliament, when it grants powers, intends them to be exercised in a right and proper way. Since Parliament is very unlikely to make provision to the contrary, this allows considerable scope for the courts to devise a set of canons of fair administrative procedure , suitable to the needs of the time". (The underlining are mine).(Quoted from H.W.R. Wade: 'Administrative Law' Fifth Edition, 1982).

(A‡av‡iLv c`Ë)

D‡jL¨, nvRvi ermi c‡e Bsj¨v‡Ûi ivRv‡K fountain of justice ejv nBZ Ges wZwbB iv‡R¨i m‡ev"P wePvicwZ wQ‡jb| µ†g µ†g wePvi Kv‡hi `vwqZ fvi ivRvi wb‡qvMcvß wePviKM‡Yi Dci b¨¯— nB‡Z _v‡K Ges wePviKMYB iv‡R¨i wePvi Kvh cwiPvjbv Kwi‡Z _v‡Kb|

1603 mv‡j ivYx Elizabeth I Gi gZ¨i ci Scotland Gi ivRv James I wnmv‡e Bsj¨v‡Ûi wmsnvm‡b Av‡ivnY K‡ib| c‡ei Plantagenet I Tudor ivRv‡`i Avg‡j Bsj¨v‡Û AvBb Av`vj‡Zi cfZ DbœZ nq| Zvnvivl †¯"QvPvix wQ‡jb e‡U wKš †gvUvgwU AvBb gvb¨ Kwiqv

Pwj‡Zb| wKš ivRv James I ¯Mxq AwaKv‡i wmsnvm‡b Av‡ivnY Kwiqv‡Qb ewjqv g‡b Kwi‡Zb| wZwb wePviK‡`i ivRKgPvix ewjqv g‡b Kwi‡Zb, GgbwK wePvwiK wel‡q I wePviK‡`i wm×v‡ši Dci ivRvi wm×vš Povš ewjqv g‡b Kwi‡Zb| ivRvi Kvhµg AvBb Øviv wbqwšZ nB‡e GB cKvi e³e¨ wZwb ivR‡`vn ewjqv g‡b Kwi‡Zb| GB mKj wel‡q Court of Common Pleas Av`vj‡Zi cavb wePvicwZ Sir Edward Coke Gi mwnZ Zvnvi µgvMZ gZ‰ØZZv nBZ| wePvwiK e¨vcv‡i ivRvi ¶gZv m¤‡Ü Prohibitions del Roy (1608) †gvKvÏgvq Coke e‡jb t

> "The king cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party.....but these matters ought to be determined and adjudged in some court of justice according to the law and custom of England....."

> "God has endowed your Majesty with excellent science as well as great gifts of nature, you are not learned in the laws of this your realm of England. That legal causes which concern the life or inheritance, or goods or fortunes, of your subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience before a man can attain to the cognizance of it."

(John Hostettler : Sir Edward Coke, cô v-69-70)

ivRv wb‡R‡K m‡ev"P wePviK `vex Kwiqv e‡jb t

> "inferior Judges were his shadows and ministers.... and the King may, if he please, sit and judge in Westminster Hall in any court there, and call their judgments in question. The King being the author of the Lawe is the interpreter of the Lawe" (Sir William Holdsworth : A History of English Law, Vol. V, Page -428 note-5).

ivRv Henry III Gi Avg‡j King's Bench Gi wePvicwZ Bracton †K D×Z Kwiqv Coke DËi K‡ibt

> "the King is below no man, but he is below God and the law; ...the King is bound to obey the law, though if he breaks it his punishment must be left to God".(John Hostettler: Sir Edward Coke, page-69-71)

Sir Edward Coke GB fv‡e Pvwi kZ ermi c‡e wePvi wefvM‡K ivRvi †¯”QvPvwiZvi nvZ nB‡Z i¶v K‡ib|

wePvi cwZ Yaqub Ali GB cm‡½ e‡jb (cô v-237)

“As both President’s Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law. Neither would be recognized by Courts as law.”

Marbury V. Madison (1803) ‡gvKvÏgvq HwZnvwmK iv‡qi ci h³ iv‡ói mcxg †KvU mswe avb‡K e¨vL¨v we‡klY KiZt mgbZ ivwLqv‡Q| President Woodrow Wilson mswe avb‡K ‘a vigorous taproot’ wnmv‡e Av L¨vwqZ Kwiqv‡Qb| h³ iv‡ó mvswe avwbK Kvhµg wKfv‡e Dbqb nBj Zvnv Lord Denning Gi GKwU gše¨ nB‡Z Dcjwä Kiv hvq| wZwb Zvnvi ‘What Next In The Law’ c¯‡K h³ iv‡ói AvBb I Bnvi `kg cavb wePvi cwZ Charles Evans Hughes m¤‡Ü e‡jbt

“The rule in the United States is not contained in their Constitution itself. It is a judge-made rule. It was stated by Chief Justice Marshall in 1803 in the Marbury case. Later on Charles Evans Hughes, the tenth Chief Justice, in 1908 firmly declared:

We are under a Constitution, but the Constitution is what the judges say it is and the judiciary is the safeguard of our liberty and our property under the Constitution.’

Their Constitution nowhere provides that it shall be what the judges say it is. Yet it has become the most fundamental and far reaching principle of American constitutional law.”(Lord Denning: ‘What Next In The Law’ at page-318 of First Indian Reprint, 1993).

(A‡av‡iLv c`Ë)

wePvi wefv‡Mi ¯vaxbZv I wePviK‡`i Ae¯vb m¤‡Ü S.P. Gupta V. President of India AIR 1982 SC 149 †gvKvÏgvq wePvi cwZ P. N. Bhagwati Zvnvi Abc‡gq iPbv‰kjx‡Z e‡jb (cóv-197)t

“.....The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle

which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers. The Judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It we may again quote the eloquent words of Justices Krishna Iyer:

"Independences of the Judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.....

..... Judges should be of stern stuff and tough fibre, unbending before power, economic or political and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution."

(A‡av‡iLv c`Ë)

GB fv‡e mvZ kZ ermi ce nB‡Z Bracton Zrci Coke, Holt, Mansfield b¨v‡qi K_v, AvB‡bi K_v, AvB‡bi kvm‡bi K_v ewjqv wMqv‡Qb| Zvnviv ewjqv wMqv‡Qb †h Sovereign king I AvB‡bi D‡aŸ

bb| Zvnviv †mB cvPxb Kv‡j I wePvi we fv‡Mi ¯vaxbZv mgbZ iwLqv wMqv‡Qb|

nvB‡KvU I mcxg †Kv‡Ui Judicial review Gi ¶gZv m¤ú‡K L. Chandra Kumar V. Union of India, AIR 1997 SC 1125 †gvKvÏgvq cavb wePvicwZ Ahmadi C.J. I Av‡jvPbv Kv‡j e‡jb (cô v- 1148)t

73. "We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, Dr. B. R. Ambedkar, the chairman of the Drafting Committee of the Constituent Assembly stated as follows (CAD, Vol. VII, p. 953):

"If I was asked to name any particular Article in this Constitution as the most important – an Article without this Constitution would be a nullity- I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its impotence."

78. The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. (#) These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review..

The judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations.....

We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the

power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."

(A‡av‡iLv c`Ë)

Kesavananda Bharati V. State of Kerala, AIR 1973 SC 1461 ‡gvKvÏgvq wePvicwZ H.R. Khanna mcxg †Kv‡Ui wePvwiK cbwe‡ePbv ev judicial review Gi ¶gZv m¤‡Ü e‡jb (cô- 1899)t

"1541.....The machinery for the resolving of disputes as to whether the Central Legislature has trespassed upon the legislative field of the State Legislature have encroached upon the legislative domain of the Central Legislature is furnished by the courts and they are vested with the powers of judicial review to determine the validity of the Acts passed by the legislatures. The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable. As long some fundamental rights exits and are a part of the Constitution, the power of judicial review has also to be exercise with a view to see that the guarantees afforded by those rights are not contravened."

(A‡av‡iLv c`Ë)

Smt. Indira Nehru Gandhi V. Shri Raj Narain, AIR 1975 SC 2299 ‡gvKvÏgvq mswÎavb I mcxg †Kv‡Ui ¶gZv Ges basic structure m¤‡Ü wePvicwZ M.H. Beg e‡jb (cô- 2455)t

"622. If the constituent bodies, taken separately or together, could be legally sovereign, in the same way as the British Parliament is, the Constitutional validity of no amendment could be called in question before us. But, as it is well established that it is the Constitution and not the constituent power which is supreme here, in the sense that the Constitutionality of Constitution cannot be called in question before us, but the exercise of the constituent power can be we have to judge the validity of exercise of constituent power by testing it on the anvil of constitutional provisions. According to the majority view in Kesavanada's case (supra), we can find the test primarily in the Preamble to our Constitution.

623. A point emphasized by J. C. Gray (See: "Nature & Sources of Law" p. 96) is that unless and until Courts have declared and recognised a law as enforcible it is not law at all. Kelsen (See: "General Theory of Law & State" p. 150) finds Gray's views to be extreme. Courts, however, have to test the legality of laws, whether purporting to be ordinary or constitutional, by the norms laid down in the constitution. This follows from the Supremacy of the Constitution. I mention this here in answer to one of the questions set out much earlier: Does the "basic structure" of the constitution test only the validity of a constitutional amendment or also ordinary laws? I think it does both because ordinary law making itself cannot go beyond the range of constituent power. At this stage, we are only concerned with a purported constitutional amendment. According to the majority view in Kesavanda Bharati's case (AIR 1973 SC 1461) the preamble furnishes the yard-stick to be applied even to constitutional amendments."

(A‡av‡iLv c`Ë)

Minerva Mills Ltd. V. Union of India, AIR 1980 SC 1789 ‡gvKvÏgvq cavb wePvicwZ Y.V. Chandrachud AvB‡bi ^eaZv wbY‡q mcxg †Kv‡Ui ¶gZv Av‡jvPbv cm‡½ e‡jb (cô- 1799) t

"Our Constitution is founded on a nice balance of power among the three wings of State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws."

(A‡av‡iLv c`Ë)

Minerva Mills Ltd. V. Union of India, AIR 1980 SC 1789 ‡gvKvÏgvq wePvicwZ P.N. Bhagwati Zvnvi wfbg‡Z mcxg †Kv‡Ui mvswewbK Ae¯vb I judicial review Gi ¶gZv I cKwZ m¤‡Ü gše¨ K‡ib (cô- 1825-26)t

".....if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature

within the limits of the power conferred upon them by the Constitution. This power of judicial renew is conferred on the judiciary by Arts. 32 and 226 of the Constitution.....

.....The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited. and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law." The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by Legislature shall not be liable to called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned no any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judges of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therfore inevitable follow that clause (4) of Art. 368 is unconstitutional and void as damaging the basic structure of the Constitution."

(A‡av‡i Lv c`Ë)

Fertilizer Corporation Kamgar Union (Regd.) V. Union of India (1981) 1 SCC 568 ‡gvKvÏgvq cavb wePvicwZ Y.V. Chandrachud mcxg †Kv‡Ui ¶gZv m¤ú‡K Av‡jvKcvZ K‡ib (cô-574)t

"11.....The jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violatied. A right without remedy is a legal conundrum of a most grotesque kind....."

(A‡av‡iLv c`Ë)

Raja Ram Pal V. Hon'ble Speaker, Lok Sabha (2007) 3 SCC 184 †gvKvÏgvq msweavb I judicial review m¤‡Ü Av‡jvPbv Kiv nq| wePvicwZ C.K. Thakker G cms‡M e‡jb (cô-429)t

"651. We have written Constitution which confers power of judicial review on this Court and on all High Courts. In exercising power and discharging duty assigned by the Constitution, this Court has to play the role of a "sentinel on the *qui vive*" and it is the solemn duty of this Court to protect the fundamental rights guaranteed by Part III of the Constitution zealously and vigilantly.

652. It may be stated that initially it was contended by the respondents that this Court has no *power* to consider a complaint against any action taken by Parliament and no such complaint can *ever* be entertained by the Court. Mr Gopal Subramanium. appearing for the Attorney General, however, at a later stage conceded (and I may say, rightly) the jurisdiction of this Court to consider such compliant, but submitted that the Court must always keep in mind the fact that the power has been exercised by a coordinate organ of the State which has the jurisdiction to regulate its own proceedings within the four walls of the House. Unless, therefore, this Court is convinced that the action of the House is unconstitutional or wholly unlawful, it may not exercise its extraordinary jurisdiction by reappreciating the evidence and material before Parliament and substitute its own conclusions for the conclusions arrived at by the House.

653. In my opinion, the submission is well founded. This Court cannot be oblivious or unmindful of the fact that the legislature is one of the three organs of the State and is exercising the powers under the same Constitution under which this Court is exercising the power of judicial review. It is, therefore, the duty of this Court to ensure that there is no abuse or misuse of power by the legislature without overlooking another equally important consideration that the

Court is not a superior organ or an appellate forum over the other constitutional functionary. This Court, therefore, should exercise its power of judicial review with utmost care, caution and circumspection.

(A‡av‡iLv c`Ë)

BwZc‡e Asma Jillani V. Government of Punjab †gvKvÏgvwU chv‡jvPbv Kiv nBqv‡Q| G¶‡Y cwK¯vb mcxg †Kv‡Ui Ab¨ K‡qKwU †gvKvÏgv chv‡jvPbv Kiv nBj|

State V. Zia-ur-Rahman, PLD 1973 SC 49 ‡gvKvÏgvq cavb wePvicwZ Hamoodur Rahman mcxg †Kv‡Ui mvswewbK Ae¯vb e¨vL¨v K‡ib (côv-69) t

"This is a right which it acquires not de hors the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself."

(A‡av‡iLv c`Ë)

mcxg †Kv‡Ui `wq‡Zi aiY m¤ú‡K wZwb e‡jb (côv-70) t

"The exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do so, because, the judicial power is superior in degree or dignity to the legislative power, but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution as a paramount law whenever a legislative enactment comes into conflict with it because, it is its duty to see that the Constitution prevails. It is only when the Legislature fails to keep within its own Constitutional limits, the judiciary steps in to enforce compliance with the Constitution. This is no dubt a delicate task as pointed out in the case of Fazlul Quader Chowdhury v. Shah Nawaz, which has to be performed with great circumspection but it has nevertheless to be performed as a sacred Constitutional duty when other State functionaries disregard the limitations imposed upon them or claim to exercise power which the people have been careful to withhold from them." (A‡av‡iLv c`Ë)

AZci, Hamoodur Rahman, C.J. mswe av‡bi †c¶c‡U mcxg †Kv‡Ui Ae¯vb Zwjqv a‡ib (cô v-71) t

> "I for my part cannot conceive of a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This well be no part of its function of interpretation. Therefore, in may view, however solemn or sacrosanct a document, if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution. At any rate, the Courts created under the Constitution will not have the power to declare any provision of the constitutor itself as being the violation of such a document. If in fact that document contains the expression of the will of the vast majority of the people, then the remedy for correcting such a violation will lie with the people and not with the judiciary.....If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot the substantive provisions thereof. This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment but generally not in the case a first or a new Constitution, unless the powers of the Constitution-making body itself are limited by some supra-Constitutional document."
>
> (A‡av‡iLv c`Ë)

hw` I mswe avb I AvB‡bi Dc‡iv³ cvÄj we‡klY cwK¯v‡bi 1972 mv‡ji Interim Constitution Gi cUfwgKvq Kiv nBqwQj Zel Bnvi weÁZv I h_v_Zv m¤‡Ü Avgv‡`i †Kvb m‡›`n bvB|

Sindh High Court Bar Association V. Federation of Pakistan, PLD 2009 SC 879 ‡gvKvÏgvq cwK¯vb mcxg †Kv‡Ui 14 Rb gvbbxq wePviK mgb‡q MwVZ †eÂ mvgwiK kvm‡bi †c¶vc‡U judicial review ZZ chv‡jvPbv K‡ib| cavb wePvicwZ Iftikhar Muhammad Chowdhury e‡jb (cô v-1180) t

"169.....it is the clear that the power of judicial review is a cardinal principle of the Constitution. The Judges, to keep the power of judicial review strictly judicial, in its exercise, do take care not to intrude upon domain of the other branches of the Government. It is the duty of the judiciary to determine the legality of executive action and the validity of legislation passed by the Legislature."

(A‡av‡iLv c`Ë)

‡ek K‡qKwU †gvKvÏgvi ivq ch‡e¶Y Kwiqv wZwb e‡jb (cô v-1198) t

"171.....it is a fundamental principle of our jurisprudence that Courts must always endeavour to exercise their jurisdiction so that the rights of the people are guarded against arbitrary violations by the executive. This expansion of jurisdiction is for securing and safeguarding the rights of people against the violations of the law by the executive and not for personal aggrandizement of the courts and Judges. It is this end that the power of judicial review was being exercised by the judiciary before 3rd November, 2007. Indeed the power of judicial review was, and would continue to be, exercised with strict adherence governing such exercise of power, reaming within the sphere allotted to the judiciary by the Constitution."

(A‡av‡iLv c`Ë)

Secretary, Ministry of Finance V. Masdar Hossain (2000) (VIII) BLT (AD) 234, ‡gvKvÏgvq evsjv‡`k mcxg †Kv‡Ui cavb wePvicwZ Mustafa Kamal wePvi wefv‡Mi ¯vaxbZv m¤‡Ü Ø¨_nxb fvlvq e‡jb (cô v-257-258) t

"44.....The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasised by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence....."

(A‡av‡iLv c`Ë)

wZwb Ab¨Î e‡jb (cô v-263-64)t

"60.....When Parliament and the executive, instead of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher Judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of Kudrat-E-Elahi Panir Vs. Bangladesh , 44 DLR (AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution."

(A‡av‡iLv c`Ë)

GKB cm‡½ wePvi cwZ Latifur Rahman (as his Lordship then was) e‡jb (cô v-271) t

"76. The written Constitution of Bangladesh has placed the Supreme Court in the place of the guardian of the Constitution itself. It will not countenance to any inroad upon the Constitution. A reference to Articles 94, 95 and 147 of the Constitution clearly reveal the independent character of the Supreme Court."

(A‡av‡iLv c`Ë)

msweavb Ges Amvsweavwb K AvBb‡K A‰ea †NvlYv Kwi‡Z mcxg †Kv‡Ui ¶gZv cm‡½ nvB‡KvU wefvM, Bangladesh Italian Marble Works Limited V. Government of Bangladesh 14 BLT (Special Issue) 2006 †gvKvÏgvq †NvlYv K‡i (cô v-189-190) t

"In this part of the world we generally follow the common law principles but Bangladesh has got a written Constitution. This Constitution may be termed as controlled or rigid but incontradistinetion to a Federal form of Government, as in the Untied States, it has a Parliamentary form of Government within limits set by the Constitution. Like the United States, its three grand Departments, 'the Legislature makes, the Executive executes and judiciary construes the law' (Chief Justice Marshall), constituting a trichotomy of power in the Republic under the Constitution. But the Bangladesh Parliament lacks the omnipotence of the British Parliament while the President is not the executive head like the U.S. President but the Prime Minister is, like British Prime Minister. However, all the functionaries of the Republic owe their existence, powers and functions to the Constitution. 'We, the people of Bangladesh', gave themselves this Constitution which is conceived of as a fundamental or an organic or a Supreme Law rising loftly high above all other laws in the country and Article 7(2) expressly spelt

out that any law which is inconsistent with this Constitution, to that extent of the inconsistency, is void. As such, the provisions of the Constitution is the basis on which the vires of all other existing laws and those passed by the Legislature as well as the actions of the Executive, are to be judged by the Supreme Court, under its power of judicial review. This power of judicial review of the Supreme Court of Bangladesh is, similar to those in the United States and in India.

This is how the Legislature, the Executive and the Judiciary functions under the Constitutional scheme in Bangladesh. The Constitution is the undoubted source of all powers and functions of all three grand Departments of the Republic, just like the United States and India.

It is true that like the Supreme Courts in the United States or in India, the Supreme Court of Bangladesh has got the power of review of both legislative and executive actions but such power of review would not place the Supreme Court with any higher position to those of the other two branches of the Republic. The Supreme Court is the creation of the Constitution just like the Legislature and the Executive. But the Constitution endowed the Supreme Court with such power of judicial review and since the Judges of the Supreme Court have taken oath to preserve, protect and defend the Constitution, they are obliged and duty bound to declare and strike down any provision of law which is inconsistent with the Constitution without any fear or favour to any body. This includes the power to declare any provision seeking to oust the jurisdiction of the Court, as ultra vires to Constitution." (A‡av‡i Lv c`Ë)

GB cm‡½ wbDwRj¨v‡Ûi Wellington G Aew¯Z Victoria University †Z c`Ë Lord Johan Steyn Gi e³Zv cwYavb‡hvM¨| wZwb House of Lords Gi GKRb wePviK| wZwb Zvnvi e³Zvq e‡jb t

"In Britain the press frequently criticise the power exercised by unelected Judges. It is suggested that it is anti-democratic. This is a fundamental misconception. The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principle of majority rule. the second is that in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and between the state and individuals. Where a tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a democracy to delegate to an impartial and independent judiciary this adjudicative function. Only such a judiciary acting in accordance with principles of institutional integrity, and aided by a free and courageous legal profession, practicing and

academic, can carry out this task, notably in the field of fundamental rights and freedoms. Only such a judiciary has democratic legitimacy. The judiciary owes allegiance to nothing except the constitutional duty of reaching through reasoned debate the best attainable judgments in accordance with justice and law. This is their role in the democratic governance of our countries. At the root of it is the struggle by fallible judges with imperfect insights for government under law and not under men and women."

(A‡av‡iLv c`Ë)

K‡jvwbqvj h‡M Av‡gwiKvi RbMY h³ iv‡R¨i ivRv I Parliament Gi kvm‡bi wei"‡× h× KwiqvwQj| Kv‡RB mswewavb iPbv Kwievi mgq Zvnviv H ai‡bi ^¯ikvm‡bi K_vB g‡b ivwLqvwQj| Stamp Act BZ¨vw`i wei"‡× cwZev` Kwievi mgq Zvnviv miKv‡ii wei"‡×B cwZev` Kwiqv‡Q, AvBbwU P¨v‡jÁ Kwievi K_v wPšv K‡i bvB| ¯vaxbZvi ci wewfb A½iv‡R¨ mswewavb Ab‡gv`b Kwievi mg‡q I msm` mswewavb cwicšx AvBb †h Av‡`Š cYqb Kwi‡Z cv‡i bv Zvnv Zvnviv wPšvI K‡i bvB|

mswewavb wQj RbM‡Yi ^Zix gj AvBb (fundamental law) | Bnv wQj ckvmKMY‡K ev iv‡ói wbevnx wefvM‡K wbqš‡b ivwLevi AvBb| 18k kZvãxi Awwk `k‡K †ekxi fvM †jvK‡`iB wPšvaviv wQj †h Congress hw` mswewavb cwicšx †Kvb AvBb cYqb K‡i, Zvi Rb¨ Zvnviv RbM‡Yi wbKU `vqx _vwK‡e, Av`vj‡Zi wbKU bq| wKš 1790 `k‡Ki ga¨fvM nB‡Z aviYv e`jvB‡Z _v‡K| Av`vjZ RbM‡Yi cwZwbwa wnmv‡e mswewavb we‡klb Kwi‡Z Avi¤ K‡i|

mswewavb f½ Kwiqv msm` hw` †Kvb AvBb cYqb K‡i Z‡e Bnv †eAvBbx KvR nB‡e Ges wePviKMY hw` ‡mB AvBb c‡qvM K‡i Z‡e Zvnviv I †eAvBbx KvR Kwi‡e|

‡Kvb †gvKvÏgvq hLbB †Kvb AmvswewavwbK AvB‡bi Dci wbfi Kiv nq ZLbB mvswewavwbK mxgvbv wbaviY Av`vj‡Zi wePvh welq nBqv `vovq|

msweavb f½ Kwievi †h †Kvb c‡Póv eÜ Kwievi `vwqZ wePviKM‡Yi, GgbwK hw` RbM‡Yi GKwU enr Ask I Zvnv Kwi‡Z Drmvwn Z †eva K‡i|

Dc‡i ewYZ bvwZ`xN Av‡jvPbvq Judicial Review Gi †Mvovi K_v Ges wKfv‡e GB ¶gZv hI“iv‡ói jurisprudence Gi Ask nBj Ges Zrci mgM we‡ki wewfb D”P Av`vjZ GB ¶gZv c‡qvM Kwi‡Z _v‡K Ges Bnvi mxgve×Zv wK Zvnv eYbv Kiv nBqv‡Q|

Commonwealth v. Caton (1782) nB‡Z wewfb †gvKvÏgvi gva¨‡g Judicial Review Z‡Zi µgweKvk Marbury v. Madison (1803) †gvKvÏgvq cbZv jvf Kwiqv‡Q †hLv‡b cavb wePvicwZ John Marshall Ø¨_nxb fvlvq e‡jb ‘It is emphatically the province and duty of the judicial department to say what the law is’| McCulloch v. Maryland (1819) †gvKvÏgvq cavb wePvicwZ Marshall e‡jb, “we must never forget, that it is a constitution we are expounding.”| Cohens V. Virginia (1821) †gvKÏgvq Marshall mcxg‡Kv‡Ui `vwqZ m¤‡Ü e‡jb, “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”

Judicial Review Gi †¶‡Î h³iv‡ói mcxg‡Kv‡Ui GB Av`wkK ¶gZv we‡ki cvq mKj †`‡ki Av`vjZ MnY KiZt b¨vq wePvi wbwðZ Kwi‡Z‡Q| fviZ, evsjv‡`k I cwK¯v‡bi mcxg‡KvU GKB fveavivq Abcwb Z| Dc‡i wewfb iv‡qi gva¨‡g Zvnv Av‡jvPbv Kiv nBqv‡Q|

wbtm‡›`‡n ejv hvq, evsjv‡`k ivó GKwU cRvZš, Bnvi ivó e¨e¯nv MYZvwšK, GB iv‡ói gvwjK mve‡fšg RbMY| msweav‡bi GBiƒc c‡Z¨KwU PvwiÎK ˆewkó¨ nBj msweav‡bi Basic structure| Bnv wbwðZ| ZvnvQvov, wePvi wefv‡Mi ¯vaxbZv nBj Avi GKwU Basic structure hvnv ¶b Kwievi AwaKvi Kvnvi I bvBÑRvZxq msm` I msweav‡bi GB Basic structure ¶b Kwi‡Z cv‡i bv|

GB Dcgnv‡`‡k fviZ, evsjv‡`k I cvwK¯v‡bi wePvi e¨e¯vq mvaviYZ Common Law ZZ AbmiY Kiv nq| evsjv‡`‡k GKwU wjwLZ I Mšf³ mswe avb iwnqv‡Q| Bnv controlled ev rigid A_vr `¯úwieZbxq| we‡kl c×wZ AbmiY mv‡c‡¶ GB mswe avb ms‡kvab Kiv nq| h³iv‡ó Federal ai‡bi ivóe¨e¯v we`¨gvb| evsjv‡`‡k Bnvi mswe av‡bi AvIZvq msm`xq MYZš we`¨gvb| Z‡e h³iv‡ói b¨vq evsjv‡`k iv‡ói I wZbwU gwngvwbZ ¯¤ iwnqv‡Q, †hgb, RvZxq msm`, wbevnx wefvM I wePvi wefvM| iv‡ói GB wZbwU wefvM G‡K Ac‡ii fvimvg¨ eRvq iv‡L| RvZxq msm` AvBb cYqb K‡i, wbevnx wefvM Zvnv KvhKi K‡i Ges wePvi wefvM Z_v mcxg †KvU mswe av‡bi AvIZvq AvBbwU cYqb Kiv nBqv‡Q wKbv I wbevnx wefvM AvBb Abmv‡i mwVK fv‡e KvhKi Kwiqv‡Q wKbv Zvnv ch‡e¶Y ev wbix¶Y Kwi‡Z cv‡i, Z‡e, mcxg ‡KvU mvaviYZ †Kvb ms¶ã e¨w³i Av‡e`b we‡ePbv Kwiqv Hi“c c`‡¶c MnY Kwiqv _v‡K|

1689 mvj nB‡Z h³iv‡R¨ King in Parliament mve‡fŠg| wKš h³ivR¨ BD‡iwcqvb BDwbq‡b c‡ek Kwievi c‡i Zvnv ejv hvq wKbv Zvnv‡Z m‡›`n Av‡Q| Lord Johan steyn Gi g‡Z ‘There was a clash between community law and a later Act of the United Kingdom Parliament. Within the Community legal order, the Queen in Parliament is not sovereign. Community law is supreme’.

evsjv‡`‡ki mswe avb mv‡c‡¶ h³iv‡R¨i Parliament Gi a¨vb aviYv I bxwZ AbmiY Kwievi GKwU cqvm iwnqv‡Q| h³iv‡R¨i cavbgšxi b¨vq evsjv‡`‡ki cavbgšxI miKvi cavb| ivócwZ nB‡Z‡Qb ivó cavb| wZwb h³iv‡ói President Gi b¨vq wbewPZ bb| wZwb msm` m`m¨MY`viv wbewPZ nBqv _v‡Kb|

evsjv‡`‡ki RbMYB mve‡fŠg| Ab¨ mKj c`vwaKvix e¨w³ RbM‡Yi cwZwbwa e‡U| ÔAvgiv, evsjv‡`‡ki RbMYÕ †h mswe avb iPbv Kwiqv‡Qb I MnY Kwiqv‡Qb Zvnv wbwðZ fv‡e evsjv‡`‡ki

m‡ev”P AvBb| BnvB evsjv‡`‡ki †gŠwjK I Organic AvBb| Ab¨ mKj AvBb msweavb mv‡c‡¶ we`¨gvb I Zvnv‡`i Ae¯vb| msweav‡bi 7 Ab‡”Q` cwi¯‹vi I wbwðZ fv‡e †NvlYv Kwiqv‡Q, Ab¨ †h ‡Kvb AvBb msweav‡bi mwnZ AmvgÄm¨cY nB‡j Zvnv mivmwi evwZj nB‡e|

GB ‡c¶vc‡U msm` KZK wewae× AvBb I wbevnx KZc‡¶i †h ‡Kvb c`‡¶c hw` msweav‡bi mwnZ AmvgÄm¨cY nq †mB AvBb ev Av‡`k ev c`‡¶c mcxg ‡KvU Bnvi judicial review Gi ¶gZve‡j evwZj ev ultra vires †NvlYv Kwi‡Z cv‡i| judicial review Gi GB ¶gZv h³ivó I fvi‡Zi mcxg †Kv‡Ui b¨vq evsjv‡`‡ki mcxg ‡Kv‡Ui I we`¨gvb iwnqv‡Q|

GB mcxg ‡KvU RvZxq msm` I wbevnx KZc‡¶i b¨vq msweav‡bi mwó| iv‡ói gwngvwbZ GB wZbwU wefvMB G‡K A‡b¨i cwiciK Ges †Kvb GKwU wefvMB Ab¨ wefvM nB‡Z †kôZi bq| †Kvb wefv‡MiB wbR¯ ‡Kvb ¶gZv bvB| RbMYB mKj ¶gZvi Drm| RbM‡Yi mó msweav‡bi gva¨‡g I mv‡c‡¶ Zvnviv ¶gZvevb|

msweavb nB‡Z Drmvwi Z mcxg ‡KvU msweavb KZK c`Ë ¶gZvq ¶gZvevb| mcxg ‡Kv‡Ui wePviKMY Zvnv‡`i wbhw³i mgq Ôevsjv‡`‡ki msweavb I AvB‡bi i¶Y, mg_b I wbivcËv weavb Kwie Õ ewjqv kc_ MnY K‡ib| msweav‡bi 7, 26, 101 I 102, 103, 104 I 105 Ab‡”Q` I Dc‡iv³ kc‡_i Kvi‡Y mcxg †Kv‡Ui Dfq wefvM msweavb cwicwš† h ‡Kvb AvBb Bnvi judicial review Gi ¶gZve‡j evwZj Kwi‡Z cv‡i| GB ¶gZv mcxg ‡Kv‡Ui ¶gZv mxwgZKiY I msweavb ms‡kva‡bi ‡¶‡Î I GKB fv‡e c‡hvR¨|

MYZ‡ši ¯v‡_ I c‡qvR‡b wePvi wefv‡Mi GBiƒc ¶gZv MYZvwšK we‡k ¯xKZ| iv‡ó msL¨vMwi‡ôi †¯”QvPvi ¶gZv c‡qv‡Mi nvZ nB‡Z msL¨vjwNô RbMY‡K i¶v Kwievi Rb¨B msweavb I ¯vaxb wePvi wefvM c‡qvRb| cKZc‡¶ miKvi I RbM‡Yi ga¨Lv‡b

wePvi wefv‡Mi Ae¯vb hvnv‡Z wePvi wefvM RbM‡Yi AwaKvi I ¯v_ mswe avb I AvBb Abmv‡i i¶v Kwi‡Z cv‡i|

GB cm‡½ Professor Keith E. Whittington Gi el“e¨ cwbavb‡hvM¨ t

The most basic normative question to be asked is whether judicial supremacy is essential to constitutionalism. Many scholars and judges have assumed that it is. The Rehnquist Court was clear in identifying the judicial authority as the ultimate interpreter of the Constitution with the capacity of a constitution to constrain political actors, who could otherwise alter or ignore the terms of the Constitution at will as it suited their immediate needs. Likewise, the Warren Court asserted that judicial supremacy was an "indispensable feature of our constitutional system." Challenges to judicial supremacy thus appear to be attacks on constitutionalism itself. Without judicial supremacy, "the civilizing hand of a uniform interpretation of the Constitution crumbles" and the "balance wheel in the American system" would be lost. Many scholars have therefore been distressed to find that judicial supremacy has not been more widely accepted and more politically effective. The rejection of judicial supremacy is tantamount to the rejection of judicial independence. Gerald Rosenberg, for example, has argued that the judiciary is least likely to resist political initiatives precisely "when it is the most necessary" to do so, when the Court's interpretations are being challenged. The prior assumptions of the judicial supremacy model of constitutionalism render political pressure on the judiciary deeply problematic and the supposed foundations of constitutional values quite insecure. (Keith E. Whittington: Political Foundations of Judicial Review, Page-13).

25| wbevPb Kwgkb t ‡`‡k wbevPb Abôvb Kwievi GKK `vwqZ wbevPb Kwgk‡bi | mswe av‡bi mßg fv‡M wbevPb msµvš we avbvejx wjwce× iwnqv‡Q| mswe av‡bi 119 Ab‡"Q‡` wbevPb Kwgk‡bi `vwqZ eYbv Kiv nBqv‡Q| 119 Ab‡"Q` wbæi∫ct

119| (1) ivócwZ c‡`i I msm‡`i wbevP‡bi Rb¨ †fvUvi-Zvwj Kv c¯ZKi‡Yi ZËveavb, wb‡`k I wbqšY Ges Abi∫c wbevPb cwiPvjbvi `vwqZ wbevPb Kwgk‡bi Dci b¨¯_vwK‡e Ges wbevPb Kwgkb GB mswe avb I AvBbvbhvqx

(K) ivócwZ c‡`i wbevPb Abôvb Kwi‡eb;

(L) msm`-m`m¨‡`i wbevPb Abôvb Kwi‡eb ;

(M) msm‡` wbevP‡bi Rb¨ wbevPbx GjvKvi mxgvbv wbaviY Kwi‡eb ; Ges

(N) ivócwZi c‡`i Ges msm‡`i wbevP‡bi Rb¨ †fvUvi-Zvwj Kv c¯Z Kwi‡eb|

(2) Dcwi-D³ `dvmg‡n wbavwiZ `vwqZmg‡ni AwZwi³ †hifc `vwqZ GB msweavb ev Ab¨ †Kvb AvB‡bi Øviv wbavwiZ nB‡e, wbevPb Kwgkb †mBifc `vwqZ cvjb Kwi‡eb|

ZvnvQvov, 126 Ab‡"Q` Abmv‡i mKj wbevnx KZc‡¶i KZe¨ wbevPb Kwgkb‡K Bnvi KZe¨ cvj‡b meiKg mnvqZv c`vb Kiv|

evsjv‡`k msweav‡bi cvi‡¤B ejv nBqv‡Q †h Bnv GKwU MYcRvZvšxK evsjv‡`k A_vr evsjv‡`k iv‡ói e¨vcv‡i evsjv‡`‡ki RbMY mve‡fŠg| ZvnvivB G †`‡ki GKgvÎ gvwjK| Z‡e Zvnviv Zvnv‡`i GB mve‡fŠgZ mivmwi c‡qvM Kwi‡Z cv‡ib bv, Zvnv‡`i cwZwbwa msm`-m`¨MY gvidr cKvk Kwiqv _v‡Kb| msm`-m`¨ evwQqv jBevi cKó cšv nBj wbevPb|

Avgv‡`i †`‡k GB wbevPb cšvi cPjb GKkZ erm‡iil AwaK|

Lord Ripon fviZe‡li Governor-General nBqv Awmevi ci "Resolution of 1882" MnY KiZt ¯vbxq miKvi cwZôvb¸wji DbwZi c`‡¶c MnY K‡ib| Bengal Local Self-Government Act, 1885 gvidr wZb ¯Zi wewkó ¯vbxq miKvi ¯vcb Kwievi c`‡¶c jIqv nq| ‡Rjvi Rb¨ †Rjv †evW, gnvKgvi Rb¨ †jvKvj †evW Ges BDwbq‡bi Rb¨ BDwbqb KwgwU | †Rjv †ev‡Wi ‡ewki fvM m`m¨ miKvi KZK g‡bvbxZ nB‡jI wKQ msL¨K m`m¨ wbevwPZ nBZ| †jvKvj †evW Aek¨ wKQKvj c‡i wejß nBqv hvq|| BDwbqb KwgwUi m`m¨MY wbevwPZ nBZ| 1919 mv‡ji Bengal Village Self Government Act Øviv BDwbqb KwgwUi bvg cwieZb Kwiqv BDwbqb †evW Kiv nq Ges 9 Rb m`‡m¨i g‡a¨ 3 Rb miKvi KZK g‡bvbxZ nBZ, Aewkó 6 Rb m`m¨ BDwbq‡bi U¨v· c`vbKvix Awaevmx KZK wbevwPZ nBZ| GB

fv‡e GB‡`‡ki AwaevmxMY 1885 mvj nB‡Z ZYgj chv‡q wbevP‡bi mwnZ cwiwPZ wQj|

ZvnvQvov, Government of India Act , 1935 , Gi AvIZvq 1937 mv‡j fviZe‡li wewfb c‡`‡k wbevPb gvidZ cv‡`wkK miKvi cwZwôZ nq| G.†K.dRjj nK evsjvi cavbgšx wbevwPZ nb| Avevi 1946 mv‡ji wbevP‡b gmwjg jxM fwgam weRq ARb K‡i| 1954 mv‡j Z`vbxšb ce cwK¯v‡b wbevPb nq| 1970 mv‡j Z`vbxšb cwK¯v‡bi c_g I †kl mvaviY wbevPb nq| Kv‡RB evsjv‡`‡ki gvbl wbevP‡bi m‡½ fvj fv‡e cwiwPZ|

wKQ wKQ wbevPb msÎ“vš we‡iva DÌvcb nB‡j wbevPbx UvBe¨bvjB Zvnv wb¯úwË Kwievi Rb¨ h‡_ó wQj| wKš mgm¨vwU Zxe AvKvi aviY K‡i gv¸iv Dc-wbevPb‡K †K›` Kwiqv| D³ Dc-wbevPb mwVK fv‡e cwiPvjbv Kwi‡Z wbevPb Kwgk‡bi ggvwšK e¨_ZvB wQj mgm¨vi gj KviY| wKš †mB mgm¨v mgvavb Kwievi cwie‡Z `B ermi hveZ †`ke¨vcx cej MYAv‡›`vj‡bi g‡L msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, wU MnxZ nq|

D³ AvB‡bi D‡Ïk¨ m¤ú‡K †Kvb m‡›`n bvB †h msm` mr D‡Ï‡k¨B D³ AvBb cYqb Kwiqv GKwU wbi‡c¶ I mô wbevPb Abôvb Kwi‡Z Z`vbxšb wbevPb Kwgkb I miKv‡ii Pig e¨_Zv cwZweavb K‡í GKwU wb`jxq ZËveavqK miKvi MV‡bi weavb ˆZix KwiqvwQj|

26| msweavb ms‡kvab-Kvnv‡K e‡j t msweavb hLb iPbv Kiv nq ZLbB Bnv aviYv Kwiqv jIqv nq †h msweavbwU wPiKvj Avengvb KvjZK we`¨gvb _vwK‡e| KviY msweavb iv‡ói gj ev fundamental ev basic AvBb| Bnv iv‡ói m‡ev”P AvBbI e‡U| Z‡e hM I mg‡qi mv‡_ cwieZb nq gvb‡li Avkv AvKv•Lv, c‡qvRb GgbwK mgm¨viI| ‡mB weeZbkxj mgv‡Ri c‡qvR‡b KLbI KLbI

mswevavb ms‡kva‡bi c‡qvRb nB‡Z cv‡i| Z‡e mswevav‡bi gj I †gŠwjK Ask KLbB cwieZb‡hvM¨ bq|

mswevavb mvaviY AvBb nB‡Z m¤úY c_K, KviY Bnv nB‡Z iv‡ói mKj ¶gZv Drmvwi Z, Ggb wK ms‡kvab Kwievi weavbI| mvaviY AvBb ms‡kvab Kwi‡Z ‡Kvb we‡kl weavb bv _vwK‡jI mswevavb ms‡kvab Kwi‡Z we‡kl Kvhwewa _v‡K, Z‡e AwjwLZ mswevavb I wjwLZ nB‡jI hw` flexible nq, Z‡e †h †Kvb mvaviY AvB‡bi b¨vq RvZxq msm` ev Parliament Gi mvaviY †fvUvfwU‡Z msL¨vMwiô gZvg‡Z Zvnv ms‡kvab Kiv hvq| GB¸wj mcwieZbxq| wKš† h mswevavb rigid Zvnvi †Kvb weavb ms‡kvab ev cwieZb Kwi‡Z we‡kl c`‡¶c Mn‡Yi c‡qvRb nq, ‡m‡¶‡Î RvZxq msm` mvaviY msL¨vMwi‡ôi gZvg‡Zi wfwË‡Z cwieZb Kwi‡Z cv‡i bv, `B ZZxqvsk msL¨vMwi‡ôi gZvgZ c‡qvRb nq| †m¸wj `¯úwieZbxq mswevavb|

evsjv‡`k mswevav‡b mswevavb-ms‡kva‡bi weavb mswevav‡bi `kg fv‡M Aew¯Z| mswevav‡bi weavb ms‡kva‡bi ¶gZv 142 Ab‡”Q‡` eYbv Kiv nBhv‡Q| mcxg †KvU KZK mswevavb cÂg ms‡kvab †gvKvÏgvi iv‡qi ci 142 Ab‡”Q` wbæi“c t

[142| GB mswevav‡b hvnv ejv nBqv‡Q, Zvnv m‡ËI-

(K) msm‡`i AvBb-Øviv GB mswevav‡bi †Kvb weavb ms‡hvRb, cwieZb, cwZ¯vcb ev iwnZKi‡Yi Øviv ms‡kvwaZ nB‡Z cvwi‡e; Z‡e kZ _v‡K †h,

(A) Abifc ms‡kvabxi Rb¨ AvbxZ †Kvb we‡ji m¤úY wkibvgvq GB mswevav‡bi †Kvb weavb ms‡kvab Kiv nB‡e ewjqv ¯úóifc D‡jL bv _vwK‡j wejwU we‡ePbvi Rb¨ MnY Kiv hvB‡e bv;

(Av) msm‡`i †gvU m`m¨-msL¨vi Ab¨b `B-ZZxqvsk †fv‡U MnxZ bv nB‡j Abifc †Kvb we‡j m¤§wZ`v‡bi Rb¨ Zvnv ivócwZi wbKU Dc¯vwcZ nB‡e bv;

(L) Dcwi-D³ Dcv‡q †Kvb wej MnxZ nBevi ci m¤§wZi Rb¨ ivócwZi wbKU Zvnv Dc¯wcZ nB‡j Dc¯vc‡bi mvZ w`‡bi g‡a¨ wZwb wejwU‡Z m¤§wZ `vb Kwi‡eb, Ges wZwb Zvnv Kwi‡Z Amg_ nB‡j D³ †gqv‡`i Aemv‡b wZwb wejwU‡Z m¤§wZ `vb Kwiqv‡Qb ewjqv MY¨ nB‡e|]

....

GLb Ôms‡kvabÕ I Ôms‡kvwaZÕ k‡ãi A_ we‡ePbv Kiv hvDK|

evsjv GKv‡Wgx nB‡Z cKvwkZ Ôe¨enwiK evsjv Awfav‡bÕ DwjwLZ kã `wUi wbæwjwLZ A_ eYbv Kiv nBqv‡Q t

ms‡kvab t weïwØKiY, cweÎKiY, ms¯«vi (Pwii ms‡kvab), fjåwš `ixKiY (†jLv ms‡kvab)

ms‡kvwaZ t weïw×KZ, wbfjxKZ, ms‡kvab Kiv n‡q‡Q Ggb|

PjwšKv evsjv Awfav‡b Ôms‡kvabÕ A_ cwi‡kvab, weïw×-m¤úv`bv|

Black's Law Dictionary (Eighth Edition) G 'amendment' A_ wbæwjwLZ fv‡e Kiv nBqv‡Q t

amendment : A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif, a change made by addition, deletion, or correction; esp., an alteration in wording,amendment by implication. A rule of construction that allows a person to interpret a repugnant provision in a statute as an implicit modification or abrogation of a provision that appears before it. US v. Walden377 US 95, 102. n. 12 (1964)

Chambers Dictionary ‡Z amendment I amend kãØ‡qi wbæwjwLZ A_ Kiv nq t **Amendment:**

Correction; improvement an alteration or addition to a document, agreement etc.; an alteration proposed on a bill under consideration; a counter-proposal or counter motion put before a meeting.

Amend:

to free from fault or error; to correct, to improve, to alter in detail, with view to improvement (eg a bill before parliament); to rectify, to cure, to mend, to grow or become better; to reform; to recover.

Oxford Dictionary and Thesaurus, Edited By Sara Tulloch, 1997 †Z amendment I amend kãØ‡qi wbæwjwLZ A_ Kivnqt

Amendment:

A minor improvement in a document (esp. a legal or statutory one), an article added to the US Constitution.

Amend:

Make minor improvements in (a text or a written proposal), correct an error or errors in (a document), make better, improve.

The Corpus Juris Secundum. G 'amendment' I 'amended' kã¸wji A_ wbæwjwLZ fv‡e Kivnqt

Amendment:

In general use, the word has different meanings which are determined by the connection in which it is employed, but it necessarily connotes a change of some kind, ordinarily for the better, but always a change or alteration. It has been said that the word implies somethig upon which the correction, alteration, improvement, or reformation can operate, something to be reformed, corrected, rectified altred or improved; a reference to the matter amended; usually a proposal by persons interested in a change, and a purpose to add something to or withdraw something so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment; and may include several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject. The word has been defined or employed as meaning a change of something; a change or alteration for the better; a continuance in a changed form; a correction of detail, not altering the essential form or nature of the matters amended, nor resulting in complete destruction; a correction of errors or faults; a material change; an addition, alteration or subtraction; an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed ; an alteration or change; an improvement; a reformation; a revision; a substitution; the act of freeing form faults; the act of making better , or of changing for the better; the supplying of a deficiency.

Amended:

The term implies the existence of an original, a defect therein, and of certain new facts to be added thereto, or a restatement in a more accurate and legal manner, so that it is no longer indentical with the original text: but also it involves the superseding of the original and in this respect is

to be distinguished from "supplemental" which ordinarily implies only something added to and to be read with the original.

ZwKZ Î‡qv`k ms‡kvab AvB‡b 58 K Ges mswea v‡bi PZ_ fv‡Mi bZb 2K cwi‡"Q‡` 58L, 58M, 58N I 58O Ab‡"Q`¸wj mwb‡ewkZ Kiv nBqv‡Q| ZvnvQvov 61, 99 I 123 Ab‡"Q` ms‡kvab Kiv nBqv‡Q|

cZxqgvb nq †h ¯xKZ fv‡eB Dc‡iv³ 58K nB‡Z 58O chš Ab‡"Q`¸wj bZb fv‡e msh³ nBqv‡Q Ges Aewkó 61 I 99 Ab‡"Q`¸wj AvswkK ms‡kvab Kiv nBqv‡Q, Avi 123 Ab‡"Q‡`i (3) `dv bZb fv‡e cwZ¯vwcZ nBqv‡Q|

58K Ab‡"Q` wb`jxq ZËveavqK miKvi †gqv` g‡a¨ 55(1),(2) I (3) Ab‡"Q‡`i KvhKvwiZv ¯wMZ Kwiqv‡Q| ZvnvQvov, 48(3) Ab‡"Q` Abmv‡i cavbgšxi civgk I 141K(1) I 141M(1) Ab‡"Q` Abmv‡i Zvnvi cwZ¯v¶i MnYv‡š Kvh Kivi weavbmgn I AKvhKi Kiv nBqv‡Q|

Rbve Gg AvB dvi"Kx wb‡e`b K‡ib †h Dc‡iv³ ¯xKZ mswea vb ms‡kva‡bi ¯vfvweK cwiYwZ wnmv‡e iv‡ói gj wfwË cRvZš I MYZš ZËveavqK miKvi †gqv` g‡a¨ †jvc cvBqv‡Q| ZvnvQvov, wZwb e‡jb ZËveavqK miKv‡ii cavb Dc‡`óv c‡` Aemicvß cavb wePvicwZ/wePvicwZM‡Yi wb‡qv‡Mi †h weavb ZwKZ ms‡kvabxi gva¨‡g Pvj Kiv nBqv‡Q, Zvnvi Kvi‡b †Kejgv Î `jxq AvbMZ¨ we‡ePbvq jBqv D"P Av`vj‡Z c‡Z¨K wePviK wb‡qv‡Mi †Póv Kiv nB‡Z‡Q hvnv‡Z fwel¨‡Z whwbB cavb wePvicwZ nDb bv †Kb A_ev whwbB Avcxj we fv‡Mi wePviK wnmv‡e wb‡qvM cvb bv †Kb, wZwb †hb wb‡qvMKvjxb ¶gZvmxb ivR‰bwZK `‡ji cwZ AbMZ e¨w³ n‡qb| BnvQvov, we‡ivax ivR‰bwZK `j I Zvnv‡`i AbMZ ew×RxexMY ev msev`c Î mgn cieZx m¤ve¨ cavb Dc‡`óv‡K KwíZ cwZc¶ fvweqv Ggb Ki"wPcb el"e¨ c`vb Kwi‡Z‡Qb Ges Ggb msev` cwi‡ekb Kwi‡Z‡Qb, hvnv‡Z wePvi

wefv‡Mi m¤§vb I ghv`v fjwÚZ nB‡Z‡Q Ges GKB Kvi‡b wePvi wefv‡Mi ¯vaxbZvI ¶wZM¯ nB‡Z‡Q|

27| mswe avb ms‡kvab-mvaviY Av‡jvPbv t eZgvb †gvKvÏgvq mswe av‡bi Î‡qv`k ms‡kva‡bi ^eaZv DÌvwcZ nBqv‡Q| nvB‡KvU wefv‡Mi Full Bench mswe av‡bi 8, 48, 56 I 57 Ab‡”Q†`i †Kvb ms‡kvab (amendment) nq bvB ewjqv Awf gZ cKvk Kwiqv‡Q, wKš 58K nB‡Z 58O Ab‡”Q` mgn †h mswe avb ms‡kva‡bi gva¨‡g mswe av‡b mwb‡ewkZ nBqv‡Q I mswe av‡bi Dci mwb‡ewkZ GB Ab‡”Q`¸wji cfve wK Ges GB Ab‡”Q`¸wj mswe av‡bi †Kvb basic structure Gi mwnZ mvsNwlK wKbv, hvnv GB †gvKvÏgvi gj wePvh welq, †m m¤‡Ü c‡qvRbxq e¨vL¨v-we‡klY c`vb K‡i bvB| GKvi‡Y D³ iv‡qi Dci wm×vš c`vb Kwievi c‡e AvBb I mswe avb ms‡kvab cm‡½ GKwU mvaviY Av‡jvPbv c‡qvRb|

GKwU cwZôvb ev msMV‡bi D‡Ïk¨, wewfb wefvM I Bnvi KgPvix‡`i `vwqZ I KZe¨, G‡K Ac‡ii mwnZ cvi¯cwiK m¤úK Ges mvweKfv‡e cwZôvbwU cwiPvjbvi Rb¨ c‡qvRbxq wewfb KvhcYvjx I bxwZgvjvi mgwó‡K mvaviY A‡_ Dnvi mswe avb e‡j| Bnv †`‡ki Avcvgi RbM‡Yi †gŠwjK I MYZvwšK AwaKvi mg‡ni i¶vKeP|

ivóI GKwU cwZôvb ev eû cwZôv‡bi mgwó| Bnvi †`kxq I AvšRwZK wewfbgLx KgKvÛ cwiPvjbv Kwi‡Z c‡qvRbxq †gŠwjK bxwZgvjvi mgwó‡K iv‡ói mswe avb e‡j|

wePvicwZ gnv¤§` nvweei ingvb I Aa¨vcK Avwbm¾vgvb KZK msKwjZ I m¤úvw`Z ÔAvBb-kã‡KvlÕ G Ômswe avb‡KÕ wbæwjwLZ fv‡e msÁvwqZ Kiv nBqv‡Q (cô v-228) t

> mswe avb we. mvaviY A‡_ mswe avb nBj †Kv‡bv cwZôvb ev msMVb cwiPvjbvi †gŠj bxwZgvjv| ivR‰bwZK cwifvlvq mswe avb nBj iv‡ói †gŠj I m‡ev”P AvBb|

mswe av‡b iv‡ói wewfb msMVb cwiPvjbvi †gŠwjK bxwZgvjv wjwce× _v‡K| miKv‡ii ¶gZv I `vwqZ, RbM‡Yi †gŠwjK AwaKvi, miKvi-c×wZ, wewfb miKvwi cwZôvb Kxfv‡e cwiPvwjZ nB‡e, Zvnv mswe av‡b wjwce× _v‡K| mswe avb‡K iv‡ói m‡ev"P AvBb ewjqv gvb¨ Kiv nq| mswe av‡bi ‡gŠj bxwZgvjvi cwicšx †Kv‡bv AvBb cYxZ nB‡Z cv‡i bv|wjwLZ bv AwjwLZ GBw`K we‡ePbvq mswe avb‡K `B †kYxf³ Kiv nq| AwaKvsk †`‡ki mswe avbB wjwLZ I Mšf³| Avevi mswe avb AwjwLZ I nq| wKQ †gŠwjK AvBb, c_v,ce-AwfÁZv mswe av‡bi g‡Zv MY¨ nq| †hme mswe avb mvaviY AvB‡bi g‡Zv AvBbmfv cwieZb Kwi‡Z cv‡i, †m¸wj mcwieZbxq| Avi †hme mswe avb ms‡kvab Kwi‡Z we‡kl e¨e¯v Mn‡Yi c‡qvRb nq, AvBbmfv mvaviY msL¨vMwi‡ôi gZvg‡Zi wfwË‡Z cwieZb Kwi‡Z cv‡i bv, †m¸wj `®úwieZbxq mswe avb|

Professor O. Hood Phillips wjwLZ Constitutional and Administrative Law M‡š mswe avb‡K wbæwjwLZ fv‡e wPwÎZ Kwiqv‡Qb (cô v-5) t

> "The word "constitution" is used in two different senses, the abstract and the concrete. The constitution of a state in the abstract sense is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen. A "constitution" in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained."

cKZ c‡¶ h³ iv‡R¨i †Kvb wjwLZ mswe avb bvB| Bnv gjZ AwjwLZ nB‡j I Bnvi I KZK †gŠwjK mvswe avwbK `wjj iwnqv‡Q, †hgb, Magna Carta (1215). Petition of Right (1628) I Bill of Rights (1689)| Lord Chatham Gi g‡Z D³ mvswe avwbK `wjj¸wj 'together constitute the Bible of the English Constitution' | ZvnvQvov, iv‡ói c‡qvRb Abmv‡i wewfb mg‡q Bnvi mve‡fŠg King in Parliament AvBb cYqb Kwiqv _v‡K| ZvnvQvov, Bnvi cvPxb Custom (c_v) I mg× Convention (mvswe avwbK ixwZ ev HwZn¨) iwnqv‡Q|

G m¤‡Ü Professor K.C. Wheare e‡jbt

The British Constitution is the collection of legal rules and non-legal rules which govern the government in Britain. The legal rules are embodied in statutes like the Acts of Settlement ..... the various Representation of the People Acts.....the Judicature Acts, and the Parliament Acts of 1911 and 1949.....orders and regulations issued under the prerogative or under statutory authority; and they may be embodied in the decisions of courts. The non-legal rules find expression in such customs or conventions as that the Queen does not refuse her assent to a bill duly passed by Lords and commons or that a Prime Minister holds office because and for so long as he retains the confidence of a majority in the House of Commons. All there rules are part of the British Constitution." (Modern Constitutions page-1-2) |

GKB fv‡e New Zealand I Israel iv‡óiI †Kvb wjwLZ mswevavb bvB|

Ab¨w`‡K wjwLZ I Mšf³ mswevavb m¤‡Ü Professor Wheare e‡jbt

'The Constitution' then, for most countries in the world, is a selection of the legal rules which govern the government of that country and which have been embodied in a document. (Mordern Constitutions, page-2) |

‡h mKj mswev‡bi Ask¸wj mvaviY AvB‡bi b¨vq msm` KZK mn‡R cwieZbxq Ges mswev‡b ewYZ we‡kl e¨e¯v Mn‡Yi gva¨‡g †h mKj mswevavb cwieZb †hvM¨ †mB wfwË‡Z I mswevavb‡K flexible I rigid GB `B †kYx‡Z wef³ Kiv hvq| Dc‡iv³ if¢cK bvg¸wj Lord Bryce Zvnvi Studies in History and Jurisprudence M‡š c`vb Kwiqv‡Qb|

A.V. Dicey Zvnvi Law of the Constitution (10th edition) M‡š 'flexible' mswevavb m¤‡Ü e‡jbt

"one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body."

'rigid' mswevavb m¤‡Ü wZwb e‡jbt

"one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."

mswev‡bi †kYxfw³ m¤‡Ü Professor K.C. Wheare e‡jbt

"Constitutions may be classified according to the method by which they may be amended. We may place in one category those constitutions which may be amended by the legislature through the same process as any other law and we

may place in another category those constitutions which require a special process for their amendment." (Modern Constitutions, page-15)|

mswevavb ms‡kvab m¤úwKZ Av‡jvPbvq h³ iv‡ói D`vniY LeB cvmswMK|

c‡eB D‡jL Kiv nBqv‡Q †h h³ iv‡ói ¯vaxbZv h‡×i mgq Continental Congress Bnvi Articles of Confederation gvidr K‡jvbx ivó¸wji `vwqZ, KZe¨ I m¤úK wbYq Kiv nBqvwQj| cieZx‡Z h³ iv‡ói mswevavb iPbv Kiv nBj| GB mswevavb m¤‡Ü US Supreme Court †NvlYv K‡it

"The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument" (Downes V. Bidwell,1901, 182 US 244, 288) (Quoted from Cases on Constitutional Law by Professor Noel T. Dowling, Fifth Edition 1954, page-398).

Bnv GKwU rigid mswevavb A_vr ms‡kvab ev cwieZb Kwi‡Z we‡kl e¨e¯vi c‡qvRb| ms‡kva‡bi D³ we‡kl e¨e¯v mswev‡bi cÂg Ab‡"Q‡` eYbv Kiv nBqv‡Q| Bnv‡Z `BwU av‡ci gva¨‡g mswevavb ms‡kva‡bi K_v ejv nBqv‡Q| ZvnvQvov, mswkó State Gi Am¤§wZ‡Z Senate K‡¶ State cwZwbwaZ‡Z †Kvb ZviZg¨ ms‡kvabxi gva¨‡g I Avbqb Kiv hvq bv| Congress Gi ¶gZvi GB mxgve×Zv h³ iv‡ói mswev‡bB wjwce× iwnqv‡Q|

c_g gnvh× I wØZxq gnvh‡×i AšeZxKvjxb mg‡q BD‡iv‡c eû msL¨K bZb ivó Rb¥ jvf K‡i| GB †`k¸wji c‡Z¨KwUiB wjwLZ mswevavb iwnqv‡Q|

mvaviYZ AwjwLZ mswevavb¸wj flexible Ges wjwLZ I Mšf³ mswevavb¸wj rigid nBqv _v‡K| Z‡e Bnvi e¨wZµg I iwnqv‡Q| Singapore Gi mswevavb wjwLZ nB‡j I Bnv m¤úYfv‡e flexible| Australiai c‡Z¨KwU State Gi wjwLZ mswevavb _vwK‡j I Bnvi †ekxi fvM weavb¸wj flexible|

German Federal Republic Gi mswea‡bi KZK Ab‡"Q` Ges Republic of Cyprus Gi KZK gj Ab‡"Q` AcwieZbxq |

hw` I msweavb cwieZ‡bi wewa e¨e¯vi Dci wfwË Kwiqv Bnv‡K bvbv fv‡e †kYxf³ Kwievi cqvm j Iqv nBqv‡Q wKš c‡qv‡Mi †¶‡Î A‡bK mg‡qB Bnv mswkó iv‡ói cKZ MYZš PPvi Dc‡iB Zvnv gj Zt wbfi K‡i| GKwU mZ¨Kvi MYZvwšK iv‡ó GKwU mvaviY AvBb wewae× Kwievi c‡e A‡bK mg‡qB RbgZ hvPvB Gi e¨e¯v j Iqv nq Ges msm‡` Zvnv Pj‡Piv wePvi we‡ePbv Kiv nBqv _v‡K wKš wjwLZ msweavb _vKv m‡Z I A‡bK iv‡ó Bnvi msweavb cwieZ‡b ‡Zgb ‡Kvb MYZvwšK PPv cwijw¶Z nq bv|G cm‡½ O. Hood Phillips Gi gše¨t

> "..... for it depends on political and psychological factors . It may be more difficult to pass a British statute amending the law relating to the sale of intoxicating liquors or the opening of shops on Sunday than to pass a French statute reducing the period of office of the President of the Republic from seven to five years." (Constitutional and Administrative Law, Seventh Edition, page-7)

G e¨vcv‡i evsjv‡`‡ki AwfÁZv Avi I ggvwšK| Bnvi GKwU rigid msweavb iwnqv‡Q| wKš GLv‡b mvgwiK kvmKMY cvqmB Ô‡`k i¶vÕ Kwievi ZvwM‡` msweavb ewnfZ I A‰eafv‡e ivóxq ¶gZv `Lj K‡ib Ges m¤úY GLwZqvi wenxb I †eAvBbx fv‡e wb‡R‡`i c‡qvRb wgUvBevi D‡Ï‡k¨ cQ›`gZ msweavb KvUv‡Qov Kwiqv _v‡Kb| nv/bv †fv‡U cvq kZ fvM †fvU Zvnv‡`i c‡¶ c‡o| Zvnviv wbwðZ fv‡e ivócwZ wbevwPZ nb| msm‡` I Zvnvi ivR‰bwZK `j e¨wZµgnxbfv‡e wecjZg msL¨vMwiô Avmb jvf K‡i| Zrci, msm‡`i c_g Awa‡ek‡bi c_g w`bB K‡qK wgwb‡Ui g‡av msweav‡bi ms‡kvab¸wj Aejxjvµ†g msweav‡bi Ask nBqv hvq| GB NUbvejx Avgiv msweavb (cÂg ms‡kvab) AvBb I msweavb (mßg ms‡kvab) AvBb Gi †¶‡Î cZ¨¶ KwiqvwQ|

hvnv nDK, mKj rigid msweav‡bi †¶‡Î msweavb ms‡kva‡bi weavb msweav‡bB ch³ ivLv nq| h³ iv‡ói msweav‡bi cÂg Ab‡”Q‡` msweavb ms‡kvab Kwievi weavb mwb‡ewkZ Kiv nBqv‡Q Zvnv Dc‡i Av‡jvPbv Kiv nBqv‡Q|

msweav‡bi mvaviY Pwi Î m¤§‡Ü Professor K.C. Wheare e‡jbt

> "Constitutions, when they are framed and adopted, tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of the society at that time. Moreover they do not necessarily reflect political or legal beliefs and interests only. They may embody conclusions or compromises upon economic and social matters which the framers of the Constitution have wished to guarantee or to proclaim. A Constitution is indeed the resultant of a parallelogram of forces-political, economic, and social-which operate at the time of its adoption."
>
> (Modern Constitutions, page-67)

msweavb c‡YZvMY, †m †h †`‡kiB nDb, wbtm‡›`‡n Zvnviv Ávbx, ¸Yx I cwÛZ e¨w³ | wKš BnvI A¯xKvi Kiv hvq bv †h Zvnviv Zvnv‡`i h‡Mi cwZwbwaZ K‡ib| Zvnviv Zvnv‡`i h‡Mi `kb, wPšvaviv I ZLbKvi cwiw¯wZ‡Z iv‡ói cv‡qvRb‡K AMvwaKvi c`vb KiZt msweavb iPbv Kwiqvwb‡jb| mg‡qi mwnZ wPšvaviv I c‡qvR‡bi cwieZb nB‡Z cv‡i| †mB ev¯eZvi wbwi‡L A‡bK mgqB msweavb ms‡kvab mg‡qi `vex nBqv `ovB‡Z cv‡i| †mB m¤ve¨Zvi K_v m¥iY ivwLqvB msweavb c‡YZvMY msweav‡bB Bnv ms‡kvab Kwievi weavb I c×wZ wjwce× K‡ib|

GB cm‡½ Professor Carl J. Friedrich e‡jb t

> "No "countervailing power" or other amorphous influence, no matter how effective, satisfies the requirements which the concept of a constitution is meant to denote. The ideological justifications for such a system, as well as the thoughts associated with its practice, embody the meaning of constitutionalism. Although some of these ideological and behavioral projections have treated a constitution as a static given, as something which never or very rarely changes, a constitution is, on the contrary, a *living* system. To be sure, the basic structure or pattern may remain even though the different component parts may undergo significant alterations. How very different is the American Congress today than it was after 1787; how profound are the alterations which the British Parliament

has undergone during the same period! And yet, both still constitute vital parts of the evolving constitution."

(Carl J. Friedrich : Constitutional Government And Democracy, page-29 nB‡Z D×Z)

Professor K.C. Wheare mswevb ms‡kvab jBqv GB fv‡e ck DÌvcb K‡ibt

"If it is almost a platitude that Constitutions are the product of their times, it is also true that times change. Do Constitutions change with them? How rapidly do they change, and by what processes? Does it happen often that there is grave disharmony between a Constitution and the society whose political processes it is intended to regulate.?"

(Modern Constitutions, page-70)

‡h †Kvb ms‡kvabx AvB‡bi ˆeaZv wePvi Kwi‡Z †M‡j AvBbwUi gj D‡Ïk¨ ev Pith and substance we‡ePbv Kiv Ri"ix| Pith and substance Gi ‰eaZvi Dc‡iB AvBbwUi ˆeaZv A‡bKvs‡kB wbfi K‡i|

Attorney General for Canada V. Attorney General for Ontario 1937 AC 355 ‡gvKvÏgvq Employment and Social Insurance Act, 1935, Gi gva¨‡g bvMwiK AwaKvi ¶b Kiv nq ewjqv `vex Kiv nB‡j Privy Council AvBbwU‡K A‰ea †NvlYv K‡i| Lord Atkin Zvnvi iv‡q e‡jb (cô v-367)t

"..... Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colorable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid" (A‡av‡i Lv c`Ë)

Dc‡iv³ †gvKvÏgvq ZwKZ AvBbwU we‡ePbvq †`Lv hvq ‡h Bnvi cKZ pith and substance wQj c‡`‡ki bvMwiK AwaKv‡ii cwicšx| GB Kvi‡YB ZwKZ AvBbwU A‰ea †NvlYv Kiv nq|

Gallagher V. Lynn 1937 AC 863 ‡gvKvÏgvq wm×vš nq †h AvBb mfv †Kvb A‰ea welq e¯Z jBqv †Kvb AvBb wewae× Kwi‡Z cv‡i bv| Lord Atkin e‡jb (cô-869-70)t

> "It is well established that you are to look at the "true nature and character of the legislation" Russell v. The Queen (I) " the pith and substance of the legislation." If, on the view of the statute as whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of legislature. An Act may have a perfectly lawful object, e.g. to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject." (A‡av‡iLv c`Ë)

c‡eB D‡jL Kiv nBqv‡Q †h h³iv‡ói mswevb wjwLZ I rigid| Dnvi cÂg Ab‡"Q` mswevb ms‡kvab msµvš | gj mswevbwU‡Z †gvU 7(mvZ) wU Ab‡"Q` iwnqv‡Q| mswevb iwPZ I MnxZ nq 1787 mv‡ji 17B †m‡Þ¤i Zvwi‡L | AZtci, GK GK Kwiqv cv³b 13wU K‡jvbx-A½ivó¸wj mswevb Ab‡gv`b (Ratification) K‡i| mswev‡bi gj 7wU Ab‡"Q` KLbI ms‡kvab nq bvB | ms‡kvabx gvidr c_g 10wU Ab‡"Q‡`i mshw³KiY Ab‡gvw`Z nBqv mswev‡bi Ask nq 1791 mv‡ji 15B wW‡m¤i Zvwi‡L| GB ms‡kvabx¸wj‡K gvb‡li †gŠwjK AwaKvi i¶v‡_ Avbqb Kiv nBqvwQj| GB Kvi‡YB GB `kwU Ab‡"Q`‡K ejv nq The Bill of Rights| AZtci, MZ †mvqv `BkZ erm‡i gvÎ 17wU ms‡kvabx Avbv nq| A½ivó¸wj Ab‡gv`‡bi ci ms‡kvabx¸wjI mswev‡bi Ask nBqv hvq|

MZ †mvqv `BkZ erm‡ii BwZnv‡m h³ivó‡K µxZ`vm mgm¨v, Mnh×, A_‰bwZK mgm¨v, wØZxq gnvh× BZ¨vw` A‡bK eo eo ms¼UKvj AwZevwnZ Kwi‡Z nBqv‡Q wKš gj mswevb m¤úY A¶Z iwnqv‡Q| eiÂ ms‡kvabx¸wj mswevb‡K AviI gwngvwbZ Kwiqv‡Q|

GB Kvi‡Y †Kvb †Kvb ms‡kvabxi Ab‡gv`‡bi c×wZMZ welq jBqv ‡gvKvÏgv nB‡j I ms‡kvabxi welqe¯ jBqv KLbI ‡Kvb †gvKvÏgv nq bvB | GB Kvi‡Y †Kvb ms‡kvabxi vires ev ˆeaZv jBqv US Supreme Court Gi ‡Kvb ivq †`Lv hvq bv |

h³ iv‡ói mswe av‡bi †c¶vc‡U McCulloch V. Maryland (1819) †gvKvÏgvq cavb wePvicwZ John Marshall mswe avb m¤‡Ü e‡jbt

"A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be under stood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those object be deduced from the nature of the objects themselves." (Robert E. Cushman: Leading Constitutional Decisions, 13th Edition, Page-10)

mswe av‡bi KZZ m¤ú‡K Professor K.C. Wheare e‡jbt

"If we ask what moral basis a Constitution can claim as law the answer would seem to be that it can command the authority which all law commands in a community. Whatever theory of morals may be invoked to determine and define obedience to the law will apply also to the law of the Constitution. But we may go further than this and say that there is an argument for asserting that a Constitution can command obligation on an additional ground. It is, by its nature, not just an ordinary law. It is fundamental law, it provides the basis upon which law is made and enforce. It is a prerequisite of law and order. There is indeed a moral argument for saying that a Constitution commands obedience because it is by its nature a superior or supreme law. This argument represents, in the moral field, the logical argument adopted in the legal filed by Chief Justice Marshall in *Marbury V. Madison*. A Constitution cannot be disobeyed with same degree of lightheartedness as Dog Act. It lies at the basis of political order; if it is brought into contempt, disorder and chaos may soon follow.

Just as, in the legal sphere, the logical argument for a Constitution's being supreme law supplemented by the argument that the people, either directly or through a constituent assembly, is a supreme law-giver, so also in the moral sphere it is sometimes argued that a Constitution commands obligation because it expresses the will of the people. What the people has laid down is binding upon every individual".

(Modern Constitutions, page-62-63) (A‡av‡iLv c`Ë)

mswe avb ms‡kvab m¤ú‡K Professor K.C. Wheare Avi I e‡j bt

"Constitutions are influenced by what people think of them, by their attitude to them. If a Constitution is regarded with veneration, if what it embodies is thought to be *prima facie* right and good, then there exists a force to preserve the Constitution against lighthearted attempts to change it. Though the formal process of amendment is there, it will be seldom and hesitatingly invoked. The Constitution of the Untied States occupies some such position in the eyes of the citizens. They regard it with great respect, if not with veneration. In natural reaction to this attitude, those who wish to see the Constitution amended are led to speak with exasperation of the Myth' of the Constitution which opposes so strong a resistance to attempts to carry through even minor reforms." (Modern Constitutions, page-77) (A‡av‡iLv c`Ë)

mswe avb ms‡kvab cm‡½ KvbvWvi Aw f ÁZv I eYbv Kiv hvB‡Z cv‡i| wesk kZvwãi wÎk `k‡K mgM cw_ex e¨vcx A_‰bwZK g›`v Avi¤ nq| KvbvWv GB g›`vi wkKvi nq Ges KvbvWv miKvi g›`v †gvKv‡ejvq bvbvi ƒc c`‡¶c jB‡Z eva¨ nq| †`‡ki A_‰bwZK Ae¯vi DbwZ K‡í cv‡`wkK miKvi ¸wj‡KI Aww_K mnvqZv c`v‡bi c‡qvRb nq| wKš KvbvWv miKv‡ii mvswe avwbK ¶gZvi g‡a¨ _vwKqv Hi ƒc A_‰bwZK c`‡¶c Mn†Yi m‡hvM wQj bv| GgZ Ae¯vq 1940 mv‡j KvbvWv miKvi Bnvi mswe avb ms‡kvab Kwi‡Z eva¨ nq|

GB fv‡e mvaviYZt c‡qvR‡bi ZvwM‡` mswe avb ms‡kvab Kiv nq| Z‡e †Kvb AvBb cYxZ nB‡j ev mswe avb ms‡kvab Kwiqv †Kvb AvBb cYxZ nB‡j Zvnv gj mswe av‡bi mwnZ mvsNwlK wKbv, †mB wePvwiK `vwqZ mcxg †Kv‡Ui Dci b¨¯ | Marbury V. Madison (1803) †gvKvÏgvq cavb wePvicwZ John Marshall e‡j bt

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to

the Constitution, disregarding the law; the court must determine which of these confliction rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply." (Professor John B. Sholley : Cases on Constitutional Law, page-39, 48) (A‡av‡iLv c`Ë)

1950 mv‡j fvi‡Zi msweavb KvhKix nq| fvi‡Zi ¯vaxbZvi ci ciB KlK I cRvmvavi‡bi Kj¨vbv‡_ Rwg`vix c_v wejwßmn Kwl-fwg m¤Üxq wewfb AvBb cYqb Kiv nq| H AvBb¸wji mvsweavwbK ˆeaZv jBqv wewfb iv‡R¨i nvB‡Kv‡U eû msL¨K †gvKvÏgv nB‡j miKv‡ii fwg ms¯‹vi cwiKíbv evavM¯ nBqv c‡o| fwg ms¯‹vi `"Z AvMvBqv jBevi D‡Ï‡k¨ 1951 mv‡j fvi‡Zi msweav‡bi c_g ms‡kvabx The Constitution (First Amendment) Act, 1951 gvidr Article 31A, Article 31B I Schedule IX msweav‡b msh³ Kiv nq| GLv‡b D‡jL¨, msweav‡bi 368 Ab‡"Q‡` ewYZ we‡kl Kvhwewa mv‡c‡¶ fviZxq Parliament Gi Dci msweavb ms‡kva‡bi ¶gZv (constituent power) AwcZ iwnqv‡Q| Shankri Prasad Singh Deo V. Union of India AIR 1951 SC 458 †gvKÏgvwU‡Z fvi‡Zi mcxg †KvU msweav‡bi Dc‡iv³ ms‡kvabx¸wji mvsweavwbK ‰eaZv mec_g we‡ePbv K‡i| we‡ivawU fviZxq msweav‡bi 13(2) Ab‡"Q‡` ewYZ 'law' kãwUi AvIZvq mvsweavwbK AvBbI Aš—f³ wKbv ZvnvB gj we‡eP¨ welq wQj| ïbvbx A‡š— mcxg †KvU mvsweavwbK AvBb D³ 'law' kãwUi Aš—f³ bq ewjqv ZwKZ mvsweavwbK ms‡kvabxwU ˆea ewjqv ivq c`vb K‡i| cZxqgvb nq †h †gŠwjK AwaKvi I msweav‡bi 368 Ab‡"Q`mn D³ Ab‡"Q‡` ewYZ we‡kl Kvhwewa mv‡c‡¶ Parliament msweav‡bi †h †Kvb Ask ev weavb ms‡kvab Kwi‡Z ¶gZvcvß|

28| msweavb ms‡kvab I **Basic Structure** ZZt

cwK¯v‡bi c_g msweavb 1956 mv‡ji 23‡k gvP Zvwi‡L KvhKix nq|

cv‡`wkK msm` PjvKvjxb mgq MfYi Zvnv fvw½qv w`‡Z ¶gZvcvß wKbv GB mvswewavwbK ck jBqv cwK¯v‡bi ivócwZ cwK¯vb mcxg †Kv‡Ui gZvgZ Rvwb‡Z Pvwnqv GKwU Reference ‡ciY Kwi‡j MfYi Gi †mBi¡c †Kvb ¶gZv bvB ewjqv mcxg †KvU gZ cKvk K‡i| cavb wePvicwZ Muhammad Munir Zvnvi gZvgZ c`vb Kv‡j wb‡ævl“ gše¨ K‡ib (Reference by the President PLD 1957 SC219=9 DLR SC178) (cô v- 190 DLR) t

> “33. .....The Constitution defines the qualifications which a candidate for election to the Provincial Assembly, or a voter in a constituency for such Assembly, must possess; but Mr. Manzur Qadir would give to the President under Article 234 the power to destroy, though for a temporary period, the very basis of the new Constitution by claiming for him the power to form the constituencies and to order the preparation of electoral rolls in direct violation of the Constitution merely to implement the decision of a Governor.” (A‡av‡iLv c`Ë)

Dc‡iv³ e³‡e¨ ‘the power to destroy..... the very basis of the new Constitution’ K_v,wj we‡kl cwYavb‡hvM¨| mswev‡bi †h wKQ †gŠwjK welq _vwK‡Z cv‡i ZvnviB GKwU Bw½Z Dc‡iv³ gše¨ nB‡Z cvlqv hvq|

Muhammad Abdul Haque V. Fazlul Quader Chowdhury PLD 1963 Dhaka 669 †gvKvÏgvq wePvicwZ Syed Mahbub Murshed mswev‡bi †kôZ m¤‡Ü wb‡ævi³ gše¨ K‡ib (cô v- 695)t

> “53.....A Constitution is a solemn and sacred document of seminal and supremel consequence, partaking the nature of almost scriptura sanctity, embodying, as it usually does, the final will and testament of the sovereign authority that resides in the people and providing the manner and norms of the Government of a nation. It therefore, assumes something of the immutability of the laws of the Medes and the Persians. It is not subject to easy change which is usually effected by a special and somewhat difficult process. In the present Constitution the provisions with regard to “amendment” of the Constitution have been enumerated in Articles 208 to 210. We may note that it requires a two-thirds majority of the Legislature to effect an amendment in the constitution.” (A‡av‡iLv c`Ë)

cwK¯v‡bi ivócwZ KZK †cwiZ Reference G cavb wePvicwZ Muhammad Munir Gi Dc‡i ewYZ gše¨ D‡jL Kwiqv wePvicwZ Syed Mahbub Murshed e³e¨ iv‡Lb (cô- 698 M) t

"62..... The aforesaid dictum of the Supreme Court of Pakistan is a pointer that in the case before us the power of "adaptation" does not extend to the wiping out of vital provision of the Constitution to implement a decision of the members of the Assembly who were invited to be Ministers." (A‡av‡iLv c`Ë)

Dc‡iv³ e³‡e¨ '.....a vital provision of the Constitution' K_v¸wj ¸i"ZcY | mswea v‡bi I †h 'vital provision' iwnqv‡Q Zvnv wePvicwZ Murshed Gi Dc‡iv³ gše¨ nB‡Z cZxqgvb nq|

ZvnvQvov, ivR‰bwZK mgm¨v mgvav‡bi Rb¨ mswea vb ms‡kvab Kiv hvq bv Bnv I wZwb Zvnvi iv‡q D‡jL K‡ib (cô- 704)

"78. The text of Article 224 (3) is very clear and unambiguous. It does not permit alterations of the provisions of the Constitution for a solution of a political situation brought about by some members of the National Assembly who refused to accept appointments as Ministers, if such appointments entailed cessation of their membership of the Assembly." (A‡av‡iLv c`Ë)

Dc‡iv³ iv‡qi wei"‡× cwK¯vb mcxg †Kv‡U Avcxj nq| Avcx‡ji iv‡q (PLD 1963 SC486) cavb wePvicwZ A.R. Cornelius e‡jb (cô-512) t

"The impression is clear and unavoidable that the ground of expediency was based on a desire to accede to the wishes of certain persons, probably a fairly small number of persons, but the Constitution was not intended to be varied according to the wishes of any person or persons. Anything in the nature of "respecting of person", unless provided by the Constitution itself, would be a violation of the Constitution, and if the Constitution were itself altered for some such reason, and that in a substantial, and not merely a machinery aspect, there would clearly be an erosion, a whittling away of its provisions, which it would be the duty of the superior Courts to resist in defence of the Constitution. The aspect of the franchise, and of the form of Government are fundamental features of a Constitution and to alter them, in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the

given Constitution into force, but to bringing into effect an altered or different Constitution." (A‡av‡iLv c`Ë)

Dc‡iv³ e³†e¨ 'The aspect of the franchise, and of the form of, Government are fundamental features of a Constitution' g š e¨ mvswe avwb K fv‡e AZ¨š ¿i"Z cY | mswe av‡bi †h 'fundamental feature' iwnqv‡Q ZvnvB Dc‡iv³ g š e¨ nB‡Z cKvk cvq|

ivócwZ KZK †cwiZ 1957 mv‡j i Reference †gvKvÏgvq Dc‡i D×Z cavb wePvicwZ Muhammad Munir Gi g š e¨ D‡jL Kwiqv Cornelius C.J. e‡jb (cô v-512)t

" In that passage, there clearly appears a determination on the part of the Court to resist any attempt to manipulate the constitution in order to suit a particular person, and at the same time to insist that nothing should be permitted which derogates from the "very basis" of the Constitution or is in direct violation of the Constitution." (A‡av‡iLv c`Ë)

cavb wePvicwZi Dc‡iv³ e³†e¨ 'the " very basis" of the Constitution' K_v¿wj DwVqv Avwmqv‡Q hvnv mvswe avwb K fv‡e AZ¨š ¿i"Z cY|

GKB Avcxj †gvKvÏgvq wePvicwZ Fazle-Akbar cavb wePvicwZi mwnZ GKgZ ‡cvlY Kwiqv e‡jb (cô v-524)

"From the language of the Article it is abundantly clear that this Article was never meant to bestow power on the President to change the fundamentals of the Constitution. Our Constitution has provided for a Presidential form of government and the President by the impugned order has introduced a semi-Parliamentary form of Government. As already stated, this Article 224(3) was never meant to bestow power on the President to change the fundamentals of the Constitution. However wholesome the intention and however noble the motive may be the extra-constitutional action could not be supported because the President was not entitled to go beyond the Constitution and touch any of the fundamental of Constitution." (A‡av‡iLv c`Ë)

Dc‡iv³ e³‡e¨ 'the fundamentals of the Constitution' kã¿wj 3(wZb) evi DwVqv Avwmqv‡Q| mswe av‡bi †h †gŠwjK wKQ welqe¯ iwnqv‡Q Zvnv Dc‡iv³ e³e¨ nB‡Z cwZfvZ nB‡Z‡Q|

wePvi cwZ Hamoodur Rahman Zvnvi iv‡q msweavb I msweavb c`Ë mve‡fŠg ¶gZv m¤‡Ü e‡jb (cô v- 535)t

".....The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rule for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not be found within the four corners of the Constitution nor can anyone transgress the limits therein specified." (A‡av‡i Lv c`Ë)

ivócwZ KZK 'difficulties' Acmv iY cm‡½ wePvi cwZ Hamoodur Rahman e‡jb (cô v-536)t

"It could, in may view , have no possible relation to a difficulty which arose de hors the Constitution, as for example, a political difficulty which necessitated an alteration in the basic structure of Government as originally contemplated by the constitution."(A‡av‡i Lv c`Ë)

Dc‡iv³ e³‡e¨ GB mec_g 'basic structure' K_wU e¨enƒZ nq hvnv mvswe avwb K fv‡e LeB ¸i"Z cY|

wZwb mswe av‡bi gj welqe¯ (main feature) m¤‡Ü e‡jb (cô v-538)t

"The main feature of the Constitution, therefore, is that a Minister should not be a member of the House, he should have no right to vote therein, nor should his tenure of office be dependent upon the support of the majority of the members of the Assembly nor should he be responsible to the Assembly. This is an essential characteristic of a Presidential form of Government and Mr. Brohi appearing on behalf of the respondent has called it the "main fabric" of the system of government sought to be set up by the present Constitution. An alternation of this "main fabric", therefore, so as to destroy it altogether cannot, in my view, be called an adaptation of the Constitution for purpose of implementing it." (A‡av‡i Lv c`Ë)

Dc‡iv³ e³‡e¨ msweavb cm‡½ 'main feature' I 'main fabric' kã¸wj e¨enƒZ nBqv‡Q hvnv mvswe avwb K ¸i"Z enb K‡i|

cZxqgvb nq, mswewav‡bi †h ‡Kvb †gŠwjK welq _vwK‡Z cv‡i †m m¤‡Ü mec_g cwK¯v‡bi XvKv nvB‡KvU I cieZx‡Z mcxg †KvU D‡jL K‡i|

Sajjan Singh V. State of Rajasthan AIR 1965 SC 845 ‡gvK Ï gvq fviZxq mcxg †KvU Constitution (Seventeenth Amendment) Act, 1964 †K ˆea †NvlYv K‡i| wKš wePvicwZ M. Hidayatullah I J.R. Mudhalkar Zvnv‡`i c_K c_K iv‡q mswewav‡bi basic feature ms‡kvab Kiv hvq wKbv Zvnv jBqv mskq cKvk K‡ib| wePvicwZ Hidayatullah mswewav‡bi 368 Ab‡”Q‡`i cwimi ev e¨wß Av‡jvPbv K‡ib|

GKB cm‡½ cwK¯vb mcxg †Kv‡Ui Dc‡i ewYZ ivq D‡jL Kwiqv wePvicwZ Mudhalkar e‡jb (cô-864)t

> “(59) The Constitution has enjoined on every member of Parliament before entering upon his office to take an oath or make an affirmation to the effect that he will bear true faith and allegiance to the Constitution. On the other hand under Art. 368 a procedure is prescribed for amending the Constitution. If upon a literal interpretation of this provision an amendment even of the basic features of the Constitution would be possible it will be a question for consideration as to how to harmonies the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonised by excluding from the procedure for amendment, alteration of a basic feature of the Constitution?”
>
> .....
>
> .....
>
> “(66) Before I part with this case I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country: to know whether the basic features of Constitution under which we live and to which we owe allegiance are to endure for all time – or at least for the foreseeable future – or whether they are no more enduring than the implemental and subordinate provisions of the Constitution.” (A‡av‡iLv c`Ë)

Golak Nath V. State of Punjab AIR 1967 SC 1643 ‡gvKvÏgvwU 11(GMvi) Rb wePvicwZ mgb‡q mcxg ‡Kv‡Ui GKwU enËi †eÂ ïbvbx K‡i| Golak Nath †gvKvÏgvi c‡e mcxg ‡Kv‡Ui Awfgv wQj †h Parliament

mswe av‡bi 368 Ab‡”Q‡`i kZ mv‡c‡¶ †gŠwjK AwaKvi I 368 Ab‡”Q`mn mswe av‡bi †h ‡Kvb Ab‡”Q` ms‡kvab Kwi‡Z ¶gZvevb, wKš Golak Nath †gvKvÏgvi ivq GB Awfg‡Zi cwieZb Av‡b| D³ †gvKvÏgvq wePviKM‡Yi 6-5 MwiôZvq mswe avb ms‡kva‡bi c‡k c‡ei mKj ivq¸wj AwZw`ó (overrule) nq| †NvlYv Kiv nq †h mswe av‡bi ZZxq fv‡M ewYZ †gŠwjK AwaKvi mgn 368 Ab‡”Q‡`i AvIZvq ms‡kvab Kiv hvq bv, Kwi‡Z nB‡j MYcwil` Avnevb Kwiqv bZb mswe avb cYq‡bi c‡qvRb nB‡e|

Aek¨ The Constitution (24th Amendment) Act, 1971, Gi gva¨‡g 13 Ab‡”Q‡` (4) Dc-Ab‡”Q` Ges 368 Ab‡”Q‡`i mwnZ (1) Dc-Ab‡”Q` msh³ KiZt Golak Nath †gvKvÏgvi ivq wbeZb (supersession) Kiv nq|

His Holiness Kesavananda Bharati Sripadagalvaru V.State of Kerala AIR 1973 SC 1461 †gvKvÏgvq wePviKM‡Yi 7-6 MwiôZvq hw` I Dc‡iv³ mswe avb ms‡kvabx ˆea †NvlYv Kiv nq Ges Golak Nath ‡gvKvÏgvi ivq AwZw`ó (over-rule) Kiv nq wKš mcxg †KvU Constitution (25th Amendment) Act, 1971, A‰ea †NvlYv Kwiqv 31 wm Ab‡”Q‡`i wØZxq Ask‡K evwZj K‡i| KviY D³ ms‡kvabx gvidr Av`vj‡Zi ˆePvwiK cYwe‡ePbv (judicial review) Gi ¶gZv hvnv mswe av‡bi GKwU Basic structure Zvnv niY Kiv nBqvwQj|

D³ †gvKvÏgvq fviZxq mcxg †KvU wb‡`k `vb K‡i †h mswe av‡bi basic structure ev fundamental feature e¨wZ‡i‡K Parliament 368 Ab‡”Q‡`i AvIZvq Ab¨ †h ‡Kvb weavb ms‡kvab Kwi‡Z cv‡i wVKB wKš Zvnv Ggbfv‡e Kwi‡Z nB‡e hvnv‡Z gj mswe av‡bi cwiPq (identity) ¶b bv nq|

Golak Nath ‡gvKvÏgvq mKj †gŠwjK AwaKvi mswe av‡bi basic structure †NvlYv Kwiqv Zvnvi †KvbUvB ms‡kvab†hvM¨ b‡n ejv nBqvwQj wKš Kesavananda ‡gvKvÏgvq Hifc e¨vcK †NvlYv cwinvi

Kwiqv cwZwU ‡gvKvÏgvq DÌwcZ welqwU basic structure Gi AvIZvq Av‡m wKbv Zvnv we‡ePbv Kwievi ¶gZv msi¶Y K‡i| †hgb †gŠwjK AwaKvi AšMZ m¤úwËi AwaKvi Golak Nath ‡gvKÏgvq basic structure wnmv‡e MY¨ Kiv nq wKš Kesavananda †gvKÏgvq Zvnv Kiv nq bvB, eiÂ, m¤úwËi AwaKvi msµvš wel‡q mvsweavwbK ms‡kvabx Awbevi ¶gZvi ¯xKwZ c`vb Kiv nq|

Kesavananda Bharati V. State of Kerala etc AIR 1973 SC 1461 ‡gvKvÏgvq mswea v‡bi 368 Ab‡”Q‡`i AvIZvq msweavb ms‡kvab m¤ú‡K cavb wePvicwZ S.M. Sikri e‡jb (cô v- 1534) t

> “291. What is the necessary implication from all the provision of the Constitution?
>
> 292. It seems to me that reading the Preamble , the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the econmic, social and political justice mentioned in the Preamble , the importance of directive principles, the non-inclusion in Article 368 of provisions like Arts. 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word “amendment” in the widest sense.
>
> 293. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.
>
> 294. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression “amendment of this Constitution” has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.
>
> 295. This conclusion is reinforced if I consider the consequences of the contentions of both sides. The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purpose make the Constitution unamedable or extremely rigid. This would no doubt invite

extra-constitutional revolution. Thereafter, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

.....

297. For the aforesaid reasons, I am driven to the conclusion that the expression "amendment of this Constitution" in Art. 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest.

.....

.....

299. If this meaning is given it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen." (A‡av‡i Lv c`Ë)

mswe av‡bi basic structure m¤‡Ü Sikri C.J. e‡jb (cô v- 1535)t

"302. The learned Attorney General said that every provision of the Constitution is essential; other wise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic forms of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution."

303. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

304. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed."

(A‡av‡i Lv c`Ë)

368 Ab‡”Q` I Bnvi Proviso e¨vL¨v Kwi‡Z wMqv Sikri,C.J. e‡jb (cô v- 1552)t

“408.....The meaning of the expression “Amendment of the Constitution” does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two thirds majority to simple majority. Similarly it cannot get rid of the true meaning of the expression “Amendment of the Constitution” so as to derive power to abrogate fundamental rights.”(A‡av‡i Lv c`Ë)

Dcmsnv‡i Sikri,C.J. e‡jb (cô v 1565)t

“492. To summarise, I hold that :

(a).....

(b).....

(c) The expression “amendment of this Constitution” does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.

(d).....

.....”

(A‡av‡i Lv c`Ë)

368 Ab‡”Q‡`i AvIZvq mswe avb ms‡kvab I basic structure m¤‡Ü wePvi cwZ J.M. Shelat I A.N. Grover e‡jb(cô v-1603) t

“599. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.
2. Republican and Democratic form of Government and sovereignty of the country.
3. Secular and federal character of the Constitution.

4. Demarcation of power between the legislature, the executive and the judiciary.

5. The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

6. The unity and the integrity of the nation."

600. The entire discussion from the point of view of the meaning of the expression " amendment" as employed in Article 368 and the limitations which arise by implications leads to the result that amending power under Art. 368 is neither narrow nor unlimited. On the footing on which we have proceeded the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every Article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity." (A‡av‡i Lv c`Ë)

mswe avb ms‡kva‡bi D‡Ïk¨ I Bnvi mxgv m¤‡Ü we Á wePvi cwZ K.S. Hegde I A.K. Mukherjea e‡jb (cô v- 1628-1629) t

"681. There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adopt the Constitution to respond to the growing needs of the people. We have earlier seen that by using the amending power, it is theoretically possible for Parliament to extend its own life indefinitely and also, amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards. A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest.

682. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or Fundamental features of the Constitution such as the sovereignty of India, the democratic character of our policy, the unity of the country, the essential features of the individual freedoms secured to the citizens.

.....

....

683. In the result we uphold the contention of Mr. Palkhivala that the word "amendment" in Article 368 carries with it certain limitation and further,

that the power conferred under Article 368 is subject to certain implied limitations though that power is quite large." (A‡av‡iLv c`Ë)

Dcmsnv‡i weÁ wePvicwZØq e‡jb (cô v- 1648) t

"759. In the result we hold :

"(1) .....

.....

(3) Though the power to amend this Constitution under Article 386 is a very wide power, it does not yet include this power to destroy or emasculate the basic elements or the fundamental features of the Constitution.

.....

....."

(A‡av‡iLv c`Ë)

mswe av‡bi ms‡kvabxi mxgv e¨vL¨v Kwiqv wePvicwZ P.Jaganmohan Reddy Zvnvi iv‡qi Dcmsnv‡i e‡jb (cô v- 1776) t

"1222. I now state my conclusions which are as follows:

(1) .....

(2) Twenty-fourth Amendment: The word 'amendment' in Art 368 does not include repeal. Parliament could amend Art. 368 and Art. 13 and also all the fundamental rights and though the power of amendment is wide, it is not wide enough to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution. Parliament cannot under Art. 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution and on the Constitution placed by me, the Twenty-fourth Amendment is valid, for it has not changed the nature and scope of the amending power as it existed before the Amendment.

.....

....."

(A‡av‡iLv c`Ë)

368 Ab‡”Q‡`i AvIZvq mswe avb ms‡kvab I Bnvi e¨vwß jBqv Av‡jvPbv Kv‡j wePvi cwZ H.R. Khanna e‡jb (cô- 1859)t

"1437. We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word "amendment". Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the constitution and replace it by an entirely new constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the constitution necessarily contemplates that the constitution has not to be abrogated but only changes have to be made in it. The word " amendment" postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment , the old constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old constitution? It means the retention of the basic structure or framework of the old constitution. A mere retention of some provisions of the old constitution even though the basic structure or framework of the constitution has been destroyed would not amount to the retention of the old constitutions. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution. It would not be competent under the grab of amendment , for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the constitution does not furnish a pretence for subverting the structure of the constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

1438. The words "amendment of this Constitution" and "the Constitution shall stand amended" in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form.

The language of Article 368 thus lends support to the conclusion that one cannot while acting under that article, repeal the existing Constitution and replace it by a new Constitution.

1439. The connotation of the brought out clearly by Pt. Nehru in the course of his speech in support of the First Amendment wherein he said that "a Constitution which is responsive to the people's will, which is responsive to their ideas , in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it". It is, therefore, plain that what Pt. Nehru contemplated by amendment was the varying of the Constitution "here and there" and not the elimination of its basic structure for that would necessarily result in the Constitution losing its identity.

.....

1445. Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights. During the course of years after the constitution comes into force, difficulties can be experienced in the working of the constitution. It is to overcome those difficulties that the constitution is amended. The amendment can take different forms. It may some times be necessary to repeal a particular provision of the constitution without substituting another provision in its place. It may in respect of a different article become necessary to replace it by a new provision. Necessity may also be felt in respect of a third article to add some further clauses in it. The addition of the new clauses can be either after repealing some of the earlier clauses or by adding new clauses without repealing any of the existing clauses. Experience of the working of the constitution may also make it necessary to insert some new and additional articles in the constitution. Likewise, experience might reveal the necessity of deleting some existing articles. All these measures, in my opinion, would lie within the ambit of the power of amendment. The denial of such a broad and comprehensive power would introduce a rigidity in the constitution as might break the constitution. Such a rigidity is open to serious objection in the same way as an unamendable constitution." (A‡av‡i Lv c`Ë)

Dcmsnv‡i wZwb e‡jb (cô v-1903)t

"1550. I may now sum up my conclusions relating to power of amendment under Art. 368 of the Constitution.....

(i).....

.....

.....

(iv) Provision for amendment of the Constitution is made with a view to overcome the difficulties which may be encountered in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of governments. If no provision were made for amendment of the Constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.

.....

.....

(vii) The power of amendment under Art. 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

.....

.....

(x) Apart from the part of the Preamble which relates to the basic structure or framework of the Constitution, the Preamble does not restrict the power of amendment.

.....

....." (A‡av‡iLv c`Ë)

Kesavananda Bharati ‡gvKvÏgvq msweavb cYq‡b MYcwil‡`i ¶gZv Ges cYxZ msweav‡bi AvIZvq c`Ë Parliament Gi msweavb ms‡kvabxi ¶gZvi g‡a¨ cv_K¨ wbYq Kiv nBqv‡Q| MYcwil` bZb GKwU msweavb iPbv Kwi‡Z cvwi‡jl Parliament Gi †mBi"c †Kvb ¶gZv bvB| Parliament msweav‡bi AvIZvq _vwKqv msweavb ms‡kvab Kwi‡Z cv‡i e‡U wKš mvaviYfv‡e msweav‡bi †Kvb basic structure cwieZb ev ms‡kvab Kwi‡Z cv‡i bv| ZvnvQvov, 368 Ab‡"Q‡`l AcZ¨¶ mxgve×Zv iwnqv‡Q|

Kesavananda Bharati Gi ‡gvKvÏgvi ratio decidendi ev wm×v‡šÍi †nZ Smt. Indira Nehru Gandhi V. Shri Raj Narayan AIR 1975 SC 2299 †gvKvÏgvq msL¨vMwiô (3-2) wePvicwZM‡Yi iv‡q MnxZ nq| The Constitution (Thirty-ninth Amendment) Act, 1975, gvidr 329-G Ab‡”Q` msweav‡b msh³ Kiv nq| Dc‡iv³ †gvKvÏgvq 329-G Ab‡”Q‡`i 4 I 5 `dvi ˆeaZv DÌvcb Kiv nq| 329-G Ab‡”Q` cavbgšx I ¯úxKvi Gi wbevPb msµvš | 4 `dv Øviv cavbgšxi wbevP‡bi ˆeaZv †Kvb Av`vj‡Z DÌvcb Kiv nB‡Z g³ ivLv cm‡½, mô I wbi‡c¶ wbevPb Ges AvB‡bi kvmb‡K basic structure w¯i KiZt msL¨vMwiô wePvicwZM‡Yi Awfg‡Zi mwnZ GKgZ nBqv wePvicwZ H.R. Khanna e‡jb (cô-2351)t

.....

.....

> 210..... The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases..... What is prohibited cannot become permissible because of its being confined to one matter.

wePvicwZ Khanna 329A Ab‡”Q‡`i 4`dv evwZj Kwi‡Z wMqv e‡jb (cô-2355)t

> “213. As a result of the above. I strike down clause (4) of Article 329A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution.....”

msweav‡bi e¨vL¨v c`v‡b mcxg †Kv‡Ui fwgKv Ges msweav‡bi †kôZ m¤ú‡K wePvicwZ M.H. Beg e‡jb (cô-2394-95)t

"394. Citizens of our country take considerable pride in being able to challenge before superior Courts even an exercise of constituent power, resting on the combined strength and authority of Parliament and the State legislatures. This Court when properly called upon by the humblest citizen, in a proceeding before it, to test the Constitutional validity of either an ordinary statute or of Constitutional amendment, has to do so by applying the criteria of basic constitutional purpose and constitutionally prescribed procedure. The assumption underlying the theory of judicial review of all law making, including fundamental law making is that Courts, acting as interpreters of what has been described by some political philosophers (See. Bosanqut's "Philosophical Theory of the State" Chap. V. p. 96-115) as the "Real Will" of the people, embodied in their Constitution and assumed to be more lasting and just and rational and less liable to err than their "General Will" reflected by the opinions of the majorities in Parliament and the State Legislatures for the time being, can discover for the people the not always easily perceived purposed of their Constitution. The Courts thus act as agents and mouthpieces of the "Real Will" of the people themselves. ..... Neither of the three constitutionally separate organs of State can, according to the basic scheme of our Constitution today, leap out side the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical and natural meaning of the principle of Supremacy of the Constitution." (A‡av‡i Lv c`Ë)

Basic structure e¨vL¨v Kwi‡Z wMqv wePvi cwZ Y.V. Chandrachud e‡jb (cô v-2465) t

"665. I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that : (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

(A‡av‡i Lv c`Ë)

339-G (4) Ab‡"Q` m¤ú‡K wZwb gše¨ K‡ib (cô v-2469)t

" 679..... The plain intendment and meaning of clause (4) is that the election of the two personages will be beyond the reach of any law, past or present. What follows is a neat logical corollary. The election of the Prime Minister could not be declared void as there was no law to apply to that election;

the judgment of the Allahabad High Court declaring the election void is itself void; and the election continues to be valid as it was before the High Court pronounced its judgment."

.....

.....

682. It follows that clause (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the Rule of Law."

mswe av‡bi basic structure e¨vL¨v Kwiqv wePvi cwZ Y.V. Chandrachud e‡jb (cô v-2465) t

"664. ..... For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance....."

.....

.....

692. .....Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter 1, Part X1 of the Constitution and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'- this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution." (cô v-2472)

(A‡av‡i Lv c`Ë)

Minerva Mills Ltd. V. Union of India AIR 1980 SC 1789,‡gvKv Ï gvq Constitution (42nd Amendment) Act, 1976 Gi 4 I 5 avivi mvswe awbK ^eaZv D Ìwc Z nq| D³ ms‡kvabx Øviv mswe av‡bi 368 Ab‡"Q‡` 4 I 5 `dv msh³ Kiv nq| D³ weavb Øviv Av`vj‡Zi ^ePwiK cbtwe‡ePbv ev Judicial review Gi ¶gZv iwnZ Kwievi cqvm cvIqv nq

weavq fvi‡Zi mcxg ‡KvU 4-1 msL¨vMwiôZvq D³ ms‡kvabx evwZj K‡i|

msL¨vMwiô wePvicwZM‡Yi c‡¶ cavb wePvicwZ Y.V. Chandrachud mswea v‡bi c¯vebv Ges 368 Ab‡"Q‡`i e¨wß Av‡jvPbv cm‡½ e‡jb (cô v-1798) t

"21, In the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. Clause (5) confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition. The theme song of the majority decision in Kesavananda Bharati is:

'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is precious heritage; therefore, you cannot destroy its identity.

The majority conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or misgivings generate if it only means this and no more. The Preamble assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of 'Fraternity assuring the dignity of the individual and the unity of the Nation. The newly introduced clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever." No constituent power can conceivably go higher than the sky high power conferred by cl. (5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend."

(A‡av‡iLv c`Ë)

368 Ab‡”Q‡`i mxgve×Zv m¤ú‡K wZwb e‡jbt

"22. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one." (A‡av‡iLv c`Ë)

mswe avb ms‡kvab gvidr 368 Ab‡”Q‡`i mwnZ msh³ 4 I 5 `dvi gva¨‡g Av`vj‡Zi judicial review Gi ¶gZv i`-iwnZ cm‡½ Chandrachud, C.J. e‡jb (cô v- 1799) t

"26. The newly introduced Clause (4) of Art. 368 must suffer the same fate as Clause (5) because the two clauses are inter-linked. Clause (5) purports to remove all limitations on the amending power while Clause (4) deprives the courts of, their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Art. 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power."(A‡av‡iLv c`Ë)

ZwKZ ms‡kva‡bi cfve m¤ú‡K Chandrachud, C.J. e‡jb (cô v- 1807) t

"63.....On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31.C. The startling consequence which the amendment has produced is that even if a law is in total defiance of the mandate of Article 13 read with

Articles 14 and 19, its validity will not be open to question so long as its object is to secure directive principle of State Policy.....”

Waman Rao V. Union of India AIR 1981 SC 271 ‡gvKvÏgvq fviZxq msweav‡bi 31A, 31B I 31C Ab‡”Q` ¸wj ˆea †NvlYv Kwi‡Z hvBqv mcxg †KvU Kesavananda Bharati I Indira Gandhi ‡gvKvÏgvq c`Ë iv‡qi gj¨vqb K‡i| cavb wePvicwZ Y.V. Chandrachud wbæi“c gše¨ K‡ib t

“16. The judgment of this Court in Kesavananda Bharati (AIR 1973 SC 1461) provoked in its wake a multi-storied controversy, which is quite understandable. The judgment of the majority to which seven out of the thirteen Judges were parties, struck a bridle path by holding that in the exercise of the power conferred by Article 368, the Parliament cannot amend the Constitution so as to damage or destroy the basic structure of the Constitution. The seven learned Judges chose their words and phrases to express their conclusion as effectively and eloquently as language can do. But, at this distance of time any controversy over what was meant by what they said is plainly sterile. At ‘this distance of time’, because though not more than a little less than eight years have gone by since the decision in Kesavananda Bharati was rendered those few years are packed with constitutional events of great magnitude. Applying the ratio of the majority judgments in that epoch-making decision, this Court has since struck down constitutional amendments which would otherwise have passed muster. For example, in Smt. Indira Gandhi v. Raj Narain, (1976) 2 SCR 347: (AIR 1975 SC 2299), Article 329A (4) was held by the Court to be beyond the amending competence of the Parliament since, by making separate and special provisions as to elections to Parliament of the Prime Minister and the Speaker, it destroyed the basic structure of the Constitution. Ray C.J. based his decision on the ground that the 39th Amendment by which Art. 329A was introduced violated the Rule of Law (p.418); Khanna J. based his decision on the ground that democracy was a basic feature of the Constitution, that democracy contemplates that elections should be free and fair and that the clause in question struck at the basis of free and fair elections (pp. 467 and 471); Mathew J. struck down the clause on the ground that was in nature of legislation ad hominem (p. 513) and that it damaged the democratic structure of the Constitution (p. 515); while on of us, Chandrachud J., held that the clause was bad because it violated the Rule of Law and was an outright negation of the principle of equality which is a basic feature of the Constitution (pp.663-665). More recently, in Minerva Mills (AIR 1980 SC 1789), clauses (4) and (5) of Article 368 itself were held unconstitutional by a unanimous Court, on the ground that they destroyed certain basic features of the Constitution like judicial

review and a limited amending power, and thereby damaged its basic structure. The majority also stuck down the amendment introduced to Article 31C by Section 4 of the 42nd Amendment Act, 1976.

17.....The law on the subject of the Parliament's power to amend the Constitution must now be taken as well-settled, the true position being that though the Parliament has the power to amend each and every article of the Constitution including the provisions of Part III, the amending power cannot be exercised so as to damage or destroy the basic structure of the Constitution. It is by the application of this principle that we shall have to decide upon the validity of the Amendment by which Article 31A was introduced. The precise question then for consideration is whether Section 4 of the Constitution (First Amendment) Act, 1951 which introduced Article 31A into the Constitution damages or destroys the basic structure of the Constitution.

18. In the work-a-day civil law, it is said that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original: you cannot by an amendment transform the original into the opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law. What were the basic postulates of the Indian Constitution when it was enacted? And does the 1st Amendment do violence to those postulates? Can the Constitution as originally conceived and the amendment introduced by the 1st Amendment Act not endure in harmony or are they so incongruous that to seek to harmonies them will be like trying to fit a square peg into a round aperture? Is the concept underlying Section 4 of the 1st Amendment an alien in the house of democracy?—its invader and destroyer? Does it damage or destroy the republican framework of the Constitution as originally. devised and designed ?

Kesavananda Bharati, Indira Gandhi, Minerva Mills I Waman Rao ‡gvKvÏgv¸wji ivq nB‡Z cZxqgvb nq ‡h Parliament Gi A‡hŠw³K ¶gZve× basic structure Z‡Zi mwnZ mvsNwlK nB‡Z cv‡i KviY Hi¡c ¶gZv e×i mwnZ gj mswea‡bi cKwZI cwieZb nB‡Z cv‡i|

P. Sambamurthy V. State of Andhra Pradesh AIR 1987 SC 663 ‡gvKvÏgvq 371-wW Ab‡"Q‡`i (5) `dvi mvswealwbK ^eaZv DÌvcb Kiv nq| D³ mvswealwbK ms‡kvab ivR¨ miKvi‡K ckvmwbK UvBebv‡ji ivq cwieZb ev i` Kwievi ¶gZv c`vb K‡i| mcxg ‡KvU D³

mvsweavwbK ms‡kvab A‰ea †NvlYv K‡i| cavb wePvicwZ P.N. Bhagwati e‡jb (côv-667) t

> "4..... It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be opon to the State Government to defy the law and yet to get away with it. The Proviso to Cl. (5) of Art. 371D is therefore clearly violative of the basic structure doctrine." (A‡av‡iLv c`Ë)

GBevi Avgiv Anwar Hossain Chowdhury V. Bangladesh 1989 BLD (Spl.) 1 †gvKÏgvU Av‡jvPbv Kwie| GB †gvKÏgvq msweavb (Aóg ms‡kvab) AvBb, 1988, Gi mvsweavwbK ^eaZv DÌvcb Kiv nq|

evsjv‡`k †mbvevwnbxi Chief of Staff Lieutenant General H.M. Ershad NDC, PSC, 1982 mv‡ji 24‡k gvP Zvwi‡L wØZxqev‡ii gZ evsjv‡`‡k mvgwiK kvmb Rvix K‡ib| wZwb cavb mvgwiK ckvmK wnmv‡e evsjv‡`k miKv‡ii megq ¶gZv `Lj K‡ib| wZwb Proclamation Rvixi gva¨‡g iv‡ói m‡ev"P AvBb msweav‡bi Kvhµg ¯wMZ K‡ib Ges Martial Law Proclamations, Orders I Regulation Øviv †`k cwiPvjbv Avi¤ K‡ib| 1982 mv‡ji Martial Law Order No. 11 Øviv wZwb XvKvmn †`‡ki wewfb ¯v‡b nvB‡KvU wefv†Mi ¯vqx †eÂ ¯vcb K‡ib| 1986 mv‡ji 10B b‡f¤i Zvwi‡L GK Proclamation gvidr mvgwiK kvmb cZ¨vnvi Kiv nq Ges msweavb cbi"×vi nq| 1988 mv‡ji 9B Rb Zvwi‡L msweavb (Aóg ms‡kvab) AvBb, 1988, msm‡` wewae× nq| D³ AvBb Øviv msweav‡bi 100 Ab‡"Q` ms‡kvab Kiv nq|

ms‡kvwaZ 100 Ab‡”Q` gvidr XvKv gnvbMimn †`‡ki wewfb †Rjvq nvB‡KvU wefv‡Mi 6(Qq) wU ¯vqx †eÂ ¯vcb Kiv nq|

Anwer Hossain Chowdhury V. Bangladesh 1989 BLD (Spl.) †gvKvÏgvq mswewav‡bi 100 Ab‡”Q` ms‡kva‡bi ^eaZv GB Kvi‡Y DÌvcb Kiv nq ‡h ZwKZ ms‡kvab mswewav‡bi 142 Ab‡”Q‡`i AvIZvq msm‡`i ms‡kvab ¶gZvewnfZ Ges D³ ms‡kvabØviv mswewav‡bi GKwU basic structure aŸsm Kiv nBqv‡Q|

nvB‡KvU wefvM ixU †gvKvÏgvwU msw¶ß Av‡`kØviv LwiR K‡i| Avcxj ïbvbx A‡š Avcxj wefvM mswewav‡bi ZwKZ ms‡kvabwU 3-1 msL¨vMwiôZvq A‰ea †NvlYv K‡i|

mswewav‡bi 142 Ab‡”Q‡`i AvIZvq msm‡`i mswewavb ms‡kva‡bi ¶gZv cm‡½ wePvicwZ Badrul Haider Chowdhury (as his Lordship then was) e‡jb BLD (Spl.) (cô v- 88)t

> “165. The Attorney General argued that the amending power is a constituent power. It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power.
>
> 166. The argument is untenable. The Attorney General argued this point keeping an eye on Article 368 of the Constitution of India which says that “Parliament may in exercise of its constituent power amend” etc. which was inserted by amendment following certain observations in the Golak Nath case. The amendment therefore recognised the distinction between an ordinary law and a constitutional amendment. It will not be proper to express any opinion as to the merit of any constitutional amendment made in Constitution of another country. It will be enough that our Constitution does not make such distinction. Secondly, our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself. For this reason, the Preamble, Article 8, had been made unamendable- it has to be referred to the people! At once Article 7 stares on the face to say. “All power in the Republic belongs to people”, and more, “their exercise on behalf of the people shall be effected only under, and by the authority, of this Constitution” To dispel any doubt it says: “ This Constitution is as the solemn expression of the will of the people” You talk of law?- it says: it is the Supreme law of the Republic and any other law inconsistent with this Constitution will be void. The Preamble says “it is our

sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh". The constituent power is here with the people of Bangladesh and Article 142(1A) expressly recognises this fact. If Article 26 and Article 7 are read together the position will be clear. The exclusiduary provision of the kind incorporate in Article 26 by amendment has not been incorporated in Article7. That shows that 'law' in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution. The contention of the Attorney General on the non-obstante clause in Article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric. It may be noticed that unlike 1956 Constitution or Sree Lanka Constitution there is no provision in our Constitution for replacing the Constitution." (A‡av‡iLv c`Ë)

mswe av‡bi †kôZ I 'amendment' k‡ãi A_ e¨vL¨v Kwiqv wePvicwZ Chowdhury e‡jb (cô v-96)t

"195.It must control all including amending legislation. The laws amending the Constitution are lower than the Constitution and higher than the ordinary laws. That is why legislative process is different and the required majority for passing the legislation is also different (compare Article 80(4) and Article 142(1)(ii). What the people accepted is the Constitution which is baptised by the blood of the martyrs. That Constitution promises 'economic and social justice' in a society in which ' the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any a name-'basic feature' or whatever, but that is the fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself-namely , the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7. Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament , but nevertheless it is a power within and not outside the Constitution.

196. The argument of the learned Attorney General that the power of amendment as given in Article 142 'Notwithstanding anything contained in this Constitution' is therefore wide and unlimited. True it is wide but when it is claimed 'unlimited' power what does it signify? –to abrogate? or by amending it can the republican character be destroyed to bring monarchy instead ? The Constitutional power is not limitless-it connotes a power which is a constituent

power. The higher the obligation the greater is the responsibility- that is why the special procedure (long title) and special majority is required. Article 7(2) says – " if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void". The appellants have contended that the integral part of the Supreme Court is the High Court Division. By amendment this Division has been dismantled into seven courts or regional courts. Before we proceed further, let us understand what is meant by 'amendment'. The word has latin orgin 'emendere'- to amend means to correct." (A‡av‡iLv c`Ë)

wePvicwZ Chowdhury mswe avb ms‡kvab e¨vL¨v Kwi‡Z hvBqv Walter F. Murphy wjwLZ Constitutions, Constitutionalism and Democracy Mý nB‡Z wbæwjwLZ Ask D×Z K‡ib (cô v-96)t

"196.....Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature-that is an amendment operates within the theoritical parameters of the existing Constitution. But a proposal that would attempt to transform a central aspect of the nature of the compact and create some other kind of system-that to take an extreme example, tried to change a constitutional democracy into a totalitarian state-would not be an amendment at all, but re-creation, a re-forming , not merely of the covenant but also of the people themselves. That deed would lie beyond the scope of the authority of any governmental body or set of bodies, for they are all creatures of the Constitution and the peoples agreement. In so far as they destroy their own legitimacy". (A‡av‡iLv c`Ë)

mswe av‡bi 100 Ab‡"Q‡`i ZwKZ ms‡kvabwU evwZj (ultra vires) †NvlYv Kwi‡Z hvBqv wZwb e‡jb †h ZwKZ ms‡kvabwU mswe av‡bi 7 Ab‡"Q` mn Ab¨vb¨ we av‡bi mwnZ mvsNwlK| mswe av‡bi basic structure m¤‡Ü wZwb e‡jb (cô v-111)t

"256.....Now if any law is inconsistent with the Constitution (Article 7) it is obviously only the judiciary can make such declaration. Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable. Unlike some other Constitution, this Constitution does not contain any provision "to repeal and replace" the Constitution and therefore cannot make such exercise under the guise of amending power.

257. The impugned amendment in a subtle manner in the name of creating "permanent Benches" has indeed created new courts parallel to the High Court Division as contemplated in Articles 94, 101, 102. Thus the basic structural pillar, that is judiciary, has been destroyed and plenary judicial power

of the Republic vested in the High Court Division has been taken away."(A‡av‡iLv c`Ë)

Dcmsnv‡i wZwb e‡jb (cô-112)t

"259. To sum up :(1) The amended Article 100 is ultra vires because it has destroyed the essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of permanent Benches conferring full jurisdictions, powers and functions of the High Court Division.

(2) Amendment Article 100 is ultra vires and invalid because it is inconsistent with Article 44, 94, 101 and 102 of the Constitution. The amendment has rendered Articles 108, 109, 110, 111 and 112 nugatory. It has directly violated Article 114.

(3).....

....."

(A‡av‡iLv c`Ë)

wePvicwZ Shahabuddin Ahmed (as his Lordship then was) Zvnvi iv‡q mswea v‡b ewYZ 'amendment' kãwU wbæi¡c fv‡e e¨vL¨v K‡ib (cô-141) t

"336.....The word 'amendment' or 'amend' has been used in different places to mean different things; so it is the context by refering to which the actual meaning of the word 'amendment' can be ascertained. My conclusion, therefore, is that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does mean its abrogation or destruction or a change resulting in the loss of its original identity and character. In the case of amendment of a constitutional provision "amendment" should be that which accords with the intention of the makers of Constitution."

(A‡av‡iLv c`Ë)

ms‡kvab ^ea nBevi kZ Ges mswea v‡bi basic structure m¤‡Ü wZwb e‡jb (cô-143) t

"341. There is however a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the Constitution it shall have to pass through some test, because it is not enacted by the people through a Constituent Assembly. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practising any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution that its co-

existence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structures is accepted , the amendment has not destroyed any basic structure of the Constitution."

(A‡av‡iLv c`Ë)

ZwKZ ms‡kvabwU msweav‡bi Ab¨vb¨ weavbvejxi mwnZ we‡ePbv Kwiqv wePvicwZ Ahmed e‡jb (cô v-154) t

"373. Now considering the impugned Article as a whole along with the other Articles related thereto. I am to see what is the position that emerges. Independent of the contentions that basic structure of the Constitution has been altered and the amendment has transgressed the limit of amending power, I find that the amended Article is in serious conflict with the other Articles and the conflict is so uncompromisable that if it is allowed to stand, other Articles stand amended by implication. Repeal or amendment by necessary implication, though permissible in ordinary statutes, is not so permissible in a Constitution like ours because of the mandatory procedural bar....."

(A‡av‡iLv c`Ë)

msweav‡bi gj wfwË m¤‡Ü wZwb e‡jb (cô v-155-56)t

"376. Main arguments against the Impugned Amendment are that a basic structure of the Constitution has been destroyed and its essential features have been disrupted. There is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be identified. Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble. Felix Frankfurter, in his book "Mr. Justice Holmes" said:

Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the world. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society.

I shall also keep in mind the following observation of Conrad in " Limitation of Amendment Procedure and the Constitutional power"- "Any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority". He has further stated that the amending body may effect changes in detail, adopt the system to the changing condition but "should not touch its foundation". Similar views have been expressed by

Carl J. Friedman in “Man and his Govt.”, Crawford in his ‘Construction of Statutes’ and Cooly in his ‘Constitutional Limitation”.

(A‡av‡iLv c`Ë)

mswewavb ms‡kvab c‡k basic structure Z‡Zi fwgKv m¤‡Ü wePvicwZ Ahmed e‡jb (cô-156) t

“377. Main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structure of a Constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the Constitution. There is no disputed about it, as there is no dispute that this basic structure cannot be wiped out by amendatory process.....If by exercising the amending power people’s sovereignty is sought to be curtailed it is the constitutional duty of the Court to restrain it and in that case it will be improper to accuse the Court of acting as “supper- legislators”. Supremacy of the Constitution as the solemn expression of the will of the people, Democracy, Republican Government , Unitary State, Separation of power, Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution the Republic cannot be replaced by Monarchy, Democracy by Oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. Principle of separation of powers means that the sovereign authority is equally distributed among the three organs and as such one organ cannot destroy the others. These are structural pillars of the Constitution and they stand beyond any change by amendatory process.....”

(A‡av‡iL c`Ë)

mswewavb ms‡kva‡bi mxgv Ges basic structure m¤‡Ü wePvicwZ Ahmed e‡jb (cô-157) t

“378..... As to implied limitation on the amending power, it is inherent in the word “amendment” in Art. 142 and is also deducible from the entire scheme of the Constitution. Amendment of the Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution.”

(A‡av‡iLv c`Ë)

Basic structure Z‡Zi †c¶vcU Av‡jvPbv Kwi‡Z hvBqv wePvicwZ M.H. Rahman (as his Lordship then was) e‡jb (cô-169) t

"435.The doctrine of basic stricture is one growing point in the constitutional jurisprudence. It has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion without sending the Bill to any select committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment."

AvB‡bi kvmb I mswea v‡bi c¯vebv m¤‡Ü wePvicwZ Rahman e‡jb (cô v-171) t

"443. In the case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself."

Subesh Sharma V. Union of India AIR 1991 SC 631 GKwU Rb¯v_gjK †gvKvÏgv| GB †gvKvÏgvq fviZxq mcxg †KvU I nvB‡Kv‡U wePviK‡`i kY¨c‡` wb‡qvM c`vb cv_bv Kiv nq| mswea v‡bi Basic structure ZZ m¤‡Ü mcxg †KvU e‡j (cô v-646) t

"44. Judicial Review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional policy. This essential constitutional doctrine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. On the contrary what is necessary is an interpretation sustaining the strength and vitality of Judicial Review....."

(Av‡av‡iLv c`Ë)

S.R Bommai V. Union of India AIR 1994 SC 1918 ‡gvKvÏgvq fvi‡Zi ivócwZ KZK mswea v‡bi 356 Ab‡"Q‡`i AvIZvq Proclamation Rvix KiZt ivR¨ miKvi ewZj Kwiqv ivócwZi kvmb Rvix ¯vcb cm‡½ mcxg †Kv‡Ui judicial review Gi ¶gZv m¤ú‡K wePvicwZ K. Ramaswamy e‡jb (cô v-2036)t

"162..... It owes duty and responsibility to defend the democracy. If the Court, upon the material placed before it finds that the satisfaction reached by the Presidents is unconstitutional highly irrational or without any nexus, then the Court would consider the contents of the proclamation or reasons disclosed

therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the proclamation. In that event the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently Proclamation issued under Art. 356 would be declared unconstitutional....." (A‡av‡iLv c`Ë)

Dcmsnv‡i wZwb e‡jb (cô v-2047) t

'192. This Court as final arbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this Court/ High Court to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. The judicial review, therefore, extends to examine the constitutionality to the Proclamation issued by the President under Article 356. It is a delicate task, though loaded with political over-tones, to be exercised with circumspection and great care....."

(A‡av‡iLv c`Ë)

mswe av‡bi c¯vebv I basic structure m¤‡Ü wePvicwZ K. Ramaswamy e‡jb (cô v-2045) t

"183. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic feature of the Constitution." (A‡av‡iLv c`Ë)

mswe av‡bi ms‡kvab gvidr wKQ Tribunal ¯vcb Kwiqv nvB‡KvU I mcxg ‡Kv‡Ui GLwZqvi Le Kwievi cqvm jIqv nB‡j L. Chandra Kumar V. Union of India AIR 1997 SC 1125 †gvKvÏgvq ZwKZ ms‡kvabx¸wj DÌvcb Kiv nq| Judicial Review c‡k nvB‡KvU I mcxg ‡Kv‡Ui mvswe avwbK Ae¯vb m¤ú‡K cavb wePvicwZ A.M. Ahmedi e‡jb (cô v-1149-50)t

"78. The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. (#) These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review..... The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate Courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence..... We therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."
(A‡av‡i Lv c`Ë)

State of Rajasthan V. Union of India AIR 1997 SC 1361 ‡gvKvÏgvq fviZxq mswea v‡bi 356 Ab‡"Q‡`i (1) `dvi AvIZvq ivócwZi ¶gZvi e¨vwß Ges †Kvb cwiw¯wZ‡Z mcxg †KvU D³ ¶gZv c‡qv‡M n¯‡¶c Kwi‡Z cv‡i Zvnv Av‡jvPbv Kiv nBqv‡Q|

ivócwZ KZK mvswea vwbK c`‡¶c Mn‡Yi †¶‡Î †gvKvÏgv nB‡j Zvnv ivR‰bwZK ck weavq mcxg †Kv‡Ui fwgKv m¤ú‡K wePvicwZ P.N. Bhagwati e‡jb (cô v-1412) t

"143..... Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground

why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power....."

(A‡av‡iLv c`Ë)

ivR‰bwZK ck m‡Z I †Kvb †¶‡Î n¯‡¶c Kiv mcxg †Kv‡Ui AvBbMZ eva¨evaKZv Zvnv eYbv Kwiqv wePvicwZ P.N. Bhagwati e‡jb (cô v-1413) t

"143..... It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare "Judicial hands off". So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is Supreme lex, the paramount law of the land, and there is no department or branch of Government above or beyond it. Every organ of Government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.....

Where there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of Government, is committed the conservation and furtherance of democratic values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the Court.....

The Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this Country. There are indeed numerous decisions of this Court where

constitutional issues have been adjudicated upon though enmeshed in questions of religious tenets, social practices, economic doctrines or educational polices. The Court has in these cases adjudicated not upon the social, religious, economic or other issues, but solely on the constitutional questions brought before it and in doing so, the Court has not been deterred by the fact that these constitutional questions may have such other overtones or facets. We cannot, therefore, decline to examine whether there is any constitutional violation involved in the President doing that he threatens to do, merely on the facile ground that the question is political in tone, colour or complexion."
(A‡av‡iLv c`Ë)

Constitution (Seventy-seven Amendment) Act, 1995 I Constitution (Eighty-fifth Amendment) Act, 2001 Gi gva¨‡g mswe avb ms‡kvab KiZt 16(4-G) Ab‡"Q` ms‡hvRb Kiv nq| D³ ms‡kva‡bi gva¨‡g PvKix‡Z c‡`vbwZi †¶‡Î mgv‡Ri cðvrc` As‡ki Rb¨ †R¨ôZvmn c` msi¶‡Yi weavb Kiv nq|

M. Nagraj V. Union of India (2006) 8 SCC 212 ‡gvKvÏgvq Dc‡iv³ 16(4-G) Ab‡"Q‡`i ˆeaZv DÌvcb Kiv nq| Av‡e`bKvix c¶ nB‡Z hw³ DÌvcb Kiv nq †h D³ ms‡kvab Amvswe avwbK, basic structure ZZ Ges 14 Ab‡"Q‡` ewYZ AvB‡bi `wó‡Z mgZvi mwnZ mvsNwlK| ïbvbxA‡š fviZxq mcxg †KvU 16(4-G) Ab‡"Q`‡K GKwU mg_xKiY weavb (enabling provision) wnmv‡e MY¨ Kwiqv e‡j †h mswkó ivR¨ ïagvÎ mgv‡Ri cKZ cðvrc` As‡ki Rb¨ m‡ev"P 50% †¶‡Î GBiƒc c` msi¶Y Kwi‡Z cvwi‡e weavq ZwKZ weavbwU ˆea | D³ iv‡q mswe avb I basic structure Av‡jvPbvq DwVqv Av‡m|

mswe av‡b basic structure wKfv‡e Bnvi Dcw¯wZ cKvk K‡i Zvnv Av‡jvPbv Kwi‡Z hvBqv wePvicwZ S.H. Kapadia e‡jb (cô v-242)t

"22.....The concept of a basic structure giving coherence and durability to a constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principle in their own right. It is not based on literal wording.

.....

.....

24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

26.....axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values....."

(A‡av‡iLv c`Ë)

Basic structure ZZ mvswe avwbK cwiwPwZ ev cKwZi Dci wbfi Kwiqv Zvnv e¨vL¨v Kwi‡Z hvBqv wePvi cwZ Kapadia e‡jb (cô v-244)t

"28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati v. State of Kerala* it has been observed that " one cannot legally use the Constitution to destroy itself". It is further observed "the personality of the Constitution must remain unchanged". Therefore, this Court in *Kesavananda Bharati* while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity....."

(A‡av‡iLv c`Ë)

mvswe avwb K welqv`x jBqv wm×vš c`v‡bi mwnZ b¨vqbxwZ I Av`k RwoZ _v‡K ewj‡Z hvBqv wePvicwZ Kapadia e‡jb (cô v-245)t

> "30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every *major constitutional* case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the *good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance".*

mswe avb ms‡kva‡bi ^eaZv wbi¡cY m¤‡Ü wePvicwZ Kapadia e‡jb (cô v-246) t

> "35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged."
> (A‡av‡iLv c`Ë)

I.R. Coelho V. State of T.N. (2007) 2 SCC 1 ‡gvKvÏgvq ck wQj ‡h 24-4-1973 Zvwi‡L Kesavananda ‡gvKvÏgvq basic structure ZZ D™e nBevi ci †gŠwjK AwaKv‡ii e¨vwß nB‡Z, mswe av‡bi beg Zdmx‡j msh³ bZb AvBb¸wj 31-we Ab‡"Q‡`i AvIZvq, Parliament msi¶Y Kwi‡Z cv‡i wKbv|

fviZxq mcxg ‡Kv‡Ui 9Rb wePviK mgb‡q MwVZ GKwU enr †eÂ wm×vš MnY K‡i †h c_‡g beg Zdmx‡j AvbxZ mKj c_K AvBb c_K fv‡e cix¶v Kwiqv †`wL‡Z nB‡e †h mswkó AvBbwU mswe av‡bi ZZxq fv‡M ewYZ †gŠwjK AwaKv‡ii mwnZ mvsNwlK wKbv| hw` mvsNwlK nq Z‡e cix¶v Kwi‡Z nB‡e †h Zvnv mswe av‡bi basic structure †K Le K‡i wKbv| hw` Zvnv K‡i Z‡e beg Zdmx‡j ewYZ AvBbwU ewZj nB‡e|

ivqwU mswe avb, Bnvi ms‡kvab I basic structure Z‡Zi Dci Av‡jvK cvZ Kwiqv‡Q|

mvswe avwb K Zv m¤‡Ü cavb wePvi cwZ Y.K. Sabharwal e‡j b (cô v-79) t

"43. The principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance mode of the separation of powers; it requires a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes."

.....

.....

109. ..... The constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it.

(A‡av‡i Lv c`Ë)

Basic structure m¤‡Ü cavb wePvi cwZ Sabharwal e‡j b (cô v-102)t

"114. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of the basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case"

(A‡av‡i Lv c`Ë)

mswe avb ms‡kvab m¤‡Ü wZwb e‡j b (cô v- 104) t

"124. Since power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals of the Constitution.

125. The question can be looked at from yet another angle also. Can Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in *Kesavananda Bharati case* as a result of which secularism, separation of power, equality etc., to cite a few examples, would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution....."

(A‡av‡iLv c`Ë)

AvB‡bi kvmb (Rule of Law) I wePvi wefv‡Mi fwgKv m¤‡Ü cavb wePvicwZ Sabharwal e‡jb (cô v-105) t

"129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject of the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."

(A‡av‡iLv c`Ë)

mswe avb ms‡kva‡bi mxgve× Zv m¤‡Ü wZwb e‡jb (cô v-109) t

"144. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the Judiciary."

Basic structure Gi †¶‡Î judicial review Gi fwgKv m¤‡Ü cavb wePvicwZ Sabharwal e‡jb (cô v-109-10) t

"147. The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of

standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder."

(A‡av‡iLv c`Ë)

GKRb weÁ amicus curiae Awf‡gZ cKvk Kwiqv‡Qb †h msweavb (Î‡qv`k ms‡kvab) AvBb m¤úwKZ wggvsmv RvZxq msm‡` nIqv DwPZ, Av`j‡Z bq|

`BkZ ermi c‡e h³ iv‡ó mvsweavwbK c‡k GB iKg ai‡YiB gZ wQj wKš mvsweavwbK ck wK fv‡e ax‡i ax‡i mcxg †Kv‡Ui Judicial Review ¶gZvi AvIZvq Av‡m Zvnvi G"g weKvk Ges we‡kl Kwiqv ivóxq h‡š cwZwbwaZkxj MYZ‡ši gva¨‡g wewfb †`ki RbM‡Yi mvsweavwbK m¤ú³Zv c¯dwUZ Kwievi D‡Ï‡k¨ iv‡qi GB fv‡M MYZš, cRvZš, wePvi wefv‡Mi ¯vaxbZv, msweav‡bi †kôZ¨, msweavb ms‡kvab I Basic Structure ZZ Ges mcxg ‡Kv‡Ui fwgKv m¤‡Ü GKwU mvaviY Av‡jvPbv Kiv nBqv‡Q|

ZZxq fvM

RbMY, msweavb I msweavb (Î‡qv`k ms‡kvab) AvBb,1996 Av‡jvPbv

29| mvsweavb I RbMY t m¥Ze¨ †h ewUk-iv‡Ri ivRZKv‡j evsjv‡`kmn mgM fviZel civaxb wQj| wKš Government of India Act, 1935, Gi AvIZvq mxwgZ AvKv‡i nB‡j I ¯ivR c`vb Kiv nq | fviZevmx Zvnv‡`i †fvUvwaKvi cvq| Zvnviv Zvnv‡`i wb‡R‡`i cwZwbwa‡K †fvU c`vb Kwiqv wbevPb KiZt cv‡`wkK AvBb mfvq †ciY K‡i| e¯Zt GB fv‡e cwZwbwa gvidr fviZevmx AvBb mfvq Zvnv‡`i Dcw¯wZ Dcjwä K‡i|

ewUk-iv‡Ri ivRZKv‡j ¯vaxbZv Av‡›`vjb e¨wZ‡i‡K AvBb-k•Ljv cwiw¯wZ Lvivc wQj GUv ejv hvq bv | mgM fviZe‡l

AvawbK wk¶v e¨e¯v, wePvi e¨e¯v, ¯v¯¨ e¨e¯v, †hvMv‡hvM e¨e¯vi cfZ DbœZ nq| Bnvi c‡iI fviZevmx fvi‡Zi gwjK wQ‡jb bv| mKj cKvi m‡hvM mweav m‡ZI Zvnviv wQ‡jb wbR †`‡k cievmx Ges kvwmZ| we‡`kx kvm‡Ki k•Ljvg³ nBqv ¯vaxbZv cvB‡Z cvq 50 erm‡ii Av‡›`vjb jvwMqv wMqvwQj|

fviZ I cwK¯vb `BwU †`k ¯vaxb nBj| fvi‡Z MYgvb‡li ¯vaxbZv I AwaKvi cwZwôZ nB‡jI cwK¯vb †Mvôx Zš I cvmv`-loh‡ši wkKvi nBj| ceevsjv ¯vaxKvi nvivBj, cvÄv‡ei K‡jvbx‡Z cwiYZ nBj| GBevi gvZfvlvi Av‡›`vjb, ¯vqË kvm‡bi Av‡›`vjb, mveRbxb ‡fvUvwaKvi Z_v RbM‡Yi mve‡fŠg‡Zi Av‡›`vjb Avi¤ nBj| GB Av‡›`vjb ¯vaxbZvi h‡× Z_v gw³h‡× cwiYZ nBj| j¶ j¶ gvb‡li AvZ¥Z¨v‡Mi ga¨ w`qv ¯vaxb evsjv‡`k GK mvMi i‡³i wewbg‡q Rb¥MnY Kwij|

evsjvi gvbl ewUk kvmb‡K †fv‡j bvB, cwK¯vbx‡`i wbt‡¯úlY, AwePvi, AZ¨vPvi nB‡Z Zvnviv wPiZ‡i gw³ Pvwnqv‡Q| Zvnviv Ggb GK evsjv‡K Pvwnqv‡Q †hLv‡b †KnB civaxb _wK‡e bv, †kvlY _wK‡e bv, mKj gvb‡li mgAwaKvi _wK‡e, mKj cKvi ivóxq I mvgvwRK †kvlY nB‡Z Zvnviv gw³ cvB‡e| cKZ MYZš cwZôv cvB‡e| GB Kvi‡Y evsjv‡`k msweav‡bi c¯vebvq Zvnv‡`i ïa ¯vaxbZv bq, gw³i AvwZ dwUqv DwVqv‡Q, MYZ‡ši K_v, cRvZ‡ši K_v, †kvlYg³ mgv‡Ri K_v, agwbi‡c¶Zvi K_v, gvbevwaKv‡ii K_v, m‡evcwi †h j¶ gw³‡hv×v‡`i AvZ¥Z¨v‡Mi wewbg‡q evsjv‡`k gw³ cvBqv‡Q, ZvnvB wjwce× nBqv‡Qt

c¯vebv

Avgiv, evsjv‡`‡ki RbMY, 1971 Lxóv‡ãi gvP gv‡mi 26 Zwi‡L ¯vaxbZv †NvlYv Kwiqv RvZxq gw³i Rb¨ HwZnvwmK msMv‡gi gva¨‡g ¯vaxb I mve‡fŠg MYcRvZšx evsjv‡`k cwZwôZ KwiqvwQ;

Avgiv A½xKvi Kwi‡ZwQ †h, †h mKj gnvb Av`k Avgv‡`i exi RbMY‡K RvZxq gw³ msMv‡g AvZ¥b‡qvM I exi knx`w`M‡K cv‡YvrmM Kwi‡Z DØ× KwiqvwQj-RvZxqZvev`,

mgvRZš, MYZš I agwbi‡c¶Zvi †mB mKj Av`k GB mswewa‡bi gjbxwZ nB‡e;

Avgiv A½xKvi Kwi‡ZwQ †h, Avgv‡`i iv‡ói Ab¨Zg gj j¶¨ nB‡e MYZvwšK c×wZ‡Z Ggb GK †kvlYgË“ mgvRZvwšK mgv‡Ri cwZôv-†hLv‡b mKj bvMwi‡Ki Rb¨ AvB‡bi kvmb, †gŠwjK gvbewaKvi Ges ivR‰bwZK, A_‰bwZK I mvgvwRK mvg¨, ¯vaxbZv I mwePvi wbwðZ nB‡e;

Avgiv `pfv‡e †NvlYv Kwi‡ZwQ †h, Avgiv hvnv‡Z ¯vaxb mËvq mgw× jvf Kwi‡Z cvwi Ges gvbeRvwZi cMwZkxj Avkv-AvKv•¶vi mwnZ m½wZ i¶v Kwiqv AvšRvwZK kvwš I mn‡hvwMZvi †¶‡Î cY fwgKv cvjb Kwi‡Z cvwi, †mBRb¨ evsjv‡`‡ki RbM‡Yi Awfcv‡qi Awfe¨w³ ¯ifc GB mswewa‡bi cvavb¨ A¶b ivLv Ges Bnvi i¶Y, mg_b I wbivcËvweavb Avgv‡`i cweÎ KZe¨;

GZØviv Avgv‡`i GB MYcwil‡`, A`¨ †Zi kZ EbAvkx e½v‡ãi KwZK gv‡mi AvVvi ZwiL, †gvZv‡eK Ewbk kZ evnvËi Lxóv‡ãi b‡f¤i gv‡mi Pvi Zvwi‡L, Avgiv GB mswewavb iPbv I wewae× Kwiqv mg‡eZfv‡e MnY Kwijvg|

Dc‡i ewYZ ÔÔAvgiv, evsjv‡`‡ki RbMY,ÕÕ Kvnviv GB RbMY? evsjv‡`‡ki gw³‡hv×v, KlK, kwgK, QvÎ, wk¶K, AMwYZ Rbgvbl, RbZv, ZvnvivB GB ÔÔAvgiv, evsjv‡`‡ki RbMYÕÕ| Zvnv‡`i mó MYcwil` mK‡ji Avkv, AvKv•Lv I AwaKv‡ii gZ cZxK wnmv‡e GB mswewavb iPbv Kwiqv‡Q| cKZc‡¶, GB mswewavb ÔÔ Avgiv, evsjv‡`‡ki RbMYÕÕ GiB mwó |

AvovB nvRvi ermi c‡e Aristotle Zvnvi The ‘Politics’ G mswewavb I AvBb m¤úK m¤‡Ü e‡jbt

> “..... for the laws are , and ought to be, relative to the constitution, and not the constitution to the laws. A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community”. (Translated by B. Jowett)

wjwLZ mswewa‡bi cm½ DÌvwcZ nB‡j c_‡gB h³iv‡ói mswewa‡bi K_v Avgv‡`i g‡b Av‡m|

¯vaxbZv h×Kvjxb mg‡q 1777 mv‡j Continental Congress h³iv‡R¨i mwnZ Pjgvb h× I Bnvi Avblw½K mgm¨v mgvavb I

mn‡hvwMZvK‡í 13wU K‡jvbxi g‡a¨ GKwU Avbôvwb K AvZvZ ev m¤úK Mwoqv Zwjevi c‡qvRbxqZv Abfe K‡i| GB j‡¶¨ GKwU Articles of Confederation cYqb Kiv nq| Bnv 1781 mv‡j mKj K‡jvbxØviv Ab‡gvw`Z nq| BwZg‡a¨ h× †kl nq| GKwU ¯vaxb iv‡ói c‡qvR‡bi Zjbvq D³ Articles of Confederation Achvß ewjqv cZxqgvb nq| GgZ Ae¯vq Bnv‡K ms‡kvab Kwievi wm×vš nq| †mB j‡¶ Continental Congress wewfb K‡jvbx ivó nB‡Z Philadelphia kn‡i Abwôze¨ Federal Convention G cwZwbwa †ciY Kwi‡Z Ab‡iva K‡i|

GB mgq meÎ ivRbxwZwe` I cwÛZ e¨w³ M‡Yi g‡a¨ Avmb ms‡kvab jBqv Avjvc Av‡jvPbv Pwj‡Z _v‡K | h_vmg‡q 1787 mv‡ji †g gv‡m Convention Gi Awa‡ekb Avi¤ nq| eû Av‡jvPbvi ci c‡e w¯iKZ Articles of Confederation ms‡kva‡bi cwie‡Z GKwU cYv½ mswe avb iPbv KivB wm×vš nq Ges 16 mßv‡ni Av‡jvPbvi ci 1787 mv‡ji 17B †m‡Þ¤i Zvwi‡L mswe avbwU Dcw¯Z cwZwbwaMY ¯v¶i K‡ib| GB mg‡q †`‡ki ivRbxwZwe` I cwÛZ e¨w³ MY bZb mswe av‡bi wewfb w`K jBqv c Î cwÎKvq Av‡jvPbv Kwi‡Z _v‡Kb| Bnvi g‡a¨ The Federalist Papers G Alexander Hamilton, John Jay I James Madison Gi b¨vq L¨vZbvgv e¨w³ eM bZb mswe av‡bi wewfb ¸i“Z cY w`K jBqv Publius Q`¥bv‡g cwÛZ cY Av‡jvPbv K‡ib| †mvqv `BkZ ermi c‡i I Bnv GLbI ¸i“Z enb K‡i|

mswe av‡bi ‡kôZ Z_v RbM‡Yi ‡kôZ m¤ú‡K Alexander Hamilton 1788 mv‡ji 28‡k †g Zvwi‡L Federalist No.78 ‡j‡Lbt

> “..... No legislative act, therefore contrary to the Constitution, can be valid. To deny this , would be to affirm, that the deputy is greater than his principal; that the servant is above his master ; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorise, but what they forbid.

..... It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded, by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two , that which has the superior obligation and validity ought , of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute , the intention of the people to the intention of their agents." (A‡av‡i Lv c`Ë)

AvaywbK iv‡ói g‡a¨ hË“iv‡ói msweavb mev‡c¶v civZb| Bnvi c¯Zvebvi c_‡gB RbM‡Yi †kôZ †NvlYv Kiv nBqv‡Q| Bnvi cvi‡¤B ejv nqt

'We the people of the United States..... do ordain and establish this constitution for the United States.'

ZLb wKš h³iv‡ó Congress ev President †Kvb ms¯vB Rb¥jvf K‡i bvB| wewfb K‡jvbx ivó¸wj nB‡Z Rbmvavi‡Yi cwZwbwaMY Philadelphia Convention G RbM‡Yi c¶ nB‡Z msweav‡bi GB c¯vebv †NvlYv KiZt msweavb cYqb Kiv nq hvnv cieZx‡Z mKj A½ivó Ab‡gv`b K‡i| A_vr RbMYB GB msweav‡bi iPwqZv|

h³iv‡ói ¯vaxbZv h×Kvjxb mg‡q Colony¸wji RbM‡Yi ¶gZv, Article of confederation iPbvi cUfwgKv, NUbvejx I Bnvi AvBbMZ ˆeaZv m¤‡Ü Ware V. Hylton (1796) †gvKÏgvq US Supreme Court Gi c‡¶ Justice Samuel Chase e‡jbt

"It has been inquired what powers Congress possessed from the first meeting, in September,1774, until the ratification of the Articles of Confederation on the 1st of March,1781. It appears to me that the powers of Congress during that whole period were derived from the people they represented, expressly given, through the medium of their State conventions or State legislatures;....."

(Thomas M. Cooley : A Treatise on the Constitutional Limitations page-7) (A‡av‡i Lv c`Ë)

H GKB †gvKvÏgvq RbM‡Yi ¶gZv m¤ú‡K Justice Chase e‡jb t

"There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the Untied States was established;....."
(A‡av‡i Lv)

Martin V. Hunter's Lessee (1816) ‡gvKvÏgvq U.S. Supreme Court Gi c‡¶ Justice Joseph Story e‡jb t

"The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority.

..... The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

(Professor John B. Sholley: Cases on Constitutional Law1951, page-52-53) (A‡av‡i Lv c`Ë)

GB Kvi‡YB McCulloch V. Maryland (1819) †gvKvÏgvq US Supreme Court Gi cavb wePvi cwZ John Marshall e‡jbt

"From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; .....It required not the affirmance, and could not be nagatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

It is the government of all; its powers are delegated by all; it represents all, and acts for all". (Cushman: Leading Constitutional Decisions, 13th Edition). (A‡av‡iLv c`Ë)

Gibbons V. Ogden (1824) †gvKvÏgvq RbM‡Yi ¶gZv I mswe avb m¤‡Ü cavb wePvicwZ John Marshall e‡jb t

"This instrument contains an enumeration of powers expressly granted by the people to their government."
(Professor John B. Sholley: Cases on Constitutional Law, 1951, Page-109)

cvq GKB ai‡bi K_v Justice Stanley Mathews 1885 mv‡j Yick Wo V. Peter Hopkins 118 US 356 †gvKvÏgvi iv‡q Ø¨_nxb fvlvq †NvlYv Kwiqv wQ‡jb t

"When we consider the nature and the theory of our institution of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts"

GB fv‡e RbMY KZK mswe avb cYqb cm‡½ Professor K.C. Wheare e‡jbt

ÒÒMost modern Constitution have followed the American model and the legal and political theory that lies behind it. The people, or a constituent assembly acting on their behalf, has authority to enact a Constitution. This statement is regarded as no mere flourish. It is accepted as law. The Courts of the Irish Free State spoke of the Constitution of 1922 as having been enacted by the people, and the Courts of Eire speak in the same way of the Constitution of 1937. The Supreme Court of the United States regards the people as having given force of law to the Constitution." (Modern Constitution, 1975) (A‡av‡iLv c`Ë)

1922 mv‡j Avqvij¨v‡Ûi mswe avb cYxZ nq| m‡¤§j‡bi wbe vwPZ m`m¨MY Irish Free State Gi Rb¨ GKwU mswe avb iPbv K‡ib|

m‡¤§j‡bi m`m¨MY RbMY KZK ¶gZv cvß nBqv in the exercise of undoubted right H mswe avb iPbv Kwiqv‡Qb ewjqv g‡b K‡ib|

c_g gnvh‡×i ci Rvgvb †`‡k Weimar Constitution Gi cvi¤ GB fv‡et

"The German People,..... has given itself this Constitution"|

Czechoslovak Republic Gi mswe avb Gi Avi¤ wbæi¡c t

"We, the Czechoslovak nation, have adopted the following Constitution for the Czechoslovak Republic".

Estonia ‡`‡ki mswe avb Gi Avi¤t

"The Estonian people.....has drawn up and accepted through the Constituent Assembly the Constitution as follows".

Poland Gi mswe avb Gi Avi¤t

"We, the Polish nation,.... do enact and establish in the Legislative Sjem of the Republic of Poland this Constitutional law."

cZxqgvb nq †h c_g gnvh‡×i ci BD‡iv‡ci wewfb ivó RbMY‡KB mswe avb móv, `vZv I c‡YZv wnmv‡e ¯xKwZ c`vb Kwiqv‡Q| wØZxq gnvh‡×i ci GKB aviv eRvq _v‡K| 1946 mv‡j Jugoslavia i mswe avb Bnvi Constituent Assembly cYqb K‡i| West German Federal Republic Bnvi mswe av‡b †NvlYv K‡i †ht

"the German people has, by virtue of its constituent power , enacted this basic law of the Federal Republic of Germany".

fvi‡Zi 1950 mv‡ji mswe av‡bI `vex Kiv nBqv‡Q †h mswe avb cYqb Kwievi ¶gZv I AwaKvi RbM‡Yi wbKU nB‡Z Awwmqv‡Q| Bnvi cvi¤ ejv nq t

'We , the people of India,.....in our Constituent Assembly this twenty-sixth day of November, 1949, do hereby , adopt ,enact and give to ourselves this constitution.'

Dc‡ii wewfb †`‡ki mswe av‡bi D`vniY nB‡Z cZxqgvb nq †h, RbM‡Yi cwZwbwa wnmv‡e MYcwil` mswe avb cYqb Kwievi Rb¨ RbMY KZK ¶gZvcvß| Z‡e mswe avb cYqb nBqv †M‡j RbMYmn

mK‡j B DË“ msweavbØviv eva¨| Fourth French Republic Gi msweavbI RbM‡Yi †kôZ I msweav‡bi eva¨evaKZv m¤‡Ü Av‡jvKcvZ K‡i| Bnvi 3q Ab‡”Q` wbæi¡c t

> “National sovereignty belongs to the French people. No section of the people nor any individual may assume its exercise. The people exercise it in constitutional matters by the vote of their representatives and by the referendum. In all other matters they exercise it through their deputies in the National Assembly, elected by universal, equal, direct, and secret suffrage.”
> (K.C. Wheare : Modern Constitution, page-62) (A‡av‡iLv c`Ë)

Fifth French Republic Gi msweavbI RbM‡Yi †kôZ I mve‡fŠgZ wbwðZ Kwiqv‡Q| msweav‡bi 2q I 3q Ab‡”Q` wbæi¡c t

> Article 2 :
> .....
> .....
> The principle of the Republic shall be government of the people, by the people and for the people.
> Article 3:
> National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.
> .....
> .....”
> (A‡av‡iLv c`Ë)

GB cm‡½ h³ iv‡ói msweav‡bi Preamble m¤‡Ü Professor Edward S. Corwin h_v_B ewjqv‡Qb t

> “The Preamble is the prologue of the Constitution. If proclaims the source of the Constitution’s authority and the great ends to be accomplished under it.
>
> From the Preamble we learn that the Constitution claims obedience, not simply because of its intrinsic excellence or the merit of its principles, but because it is ordained and established by the people.....
> The people are the masters of the Constitution–not the reverse.”
> (Professor Edward S. Crown : Understanding the Constitution, 1949, page-1).

Dc‡ii GB m`xN Av‡jvPbv nB‡Z cZxqgvb nq †h †mvqv `BkZ ermi c‡e h³ iv‡ói ¯vaxbZv h×Kvjxb I ZrcieZx cwZwU ‡¶‡Î h³ iv‡ói RbM‡Yi Dcw¯wZ Dcjwä Kiv hvq| RbMY Continental Congress G Zvnv‡`i cwZwbwa gvidr Dcw¯Z wQj, RbMY ¯vaxbZv h× Kwiqvwj, h× †k‡l Philadelphia Convention G K‡jvbx iv‡ói cwZwbwa‡`i gva¨‡g I RbMY Dcw¯Z _vwKqv h³ iv‡ói mswevavb iPbv Kwiqv‡Q| A½ ivó¸wji convention G RbMYB mswevavb Ab‡gv`b (ratify) Kwiqv‡Q| h³ iv‡ó mKj ¶gZvi Drm †h RbMY Zvnv US Supreme Court weMZ `BkZ ermi c‡e cbt cbt †NvlYv Kwiqv‡Q| Bnvi ci eû iv‡ó mswevavb iwPZ nBqv‡Q | cwZwU iv‡ói mswevav‡b RbMYB †h ¶gZvi Drm Ges RbM‡Yi cwZwbwa Z_v RbMbB †h mswevavb iPbv Kwiqv‡Q ZvnvB evisevi †NvwlZ nBqv‡Q| mKj †`‡ki mswevav‡b RbMYB ¶gZvi gj †K›`we›`|

30| evsjv‡`k mswevav‡b RbMY-cUfwgKv t evsjv‡`k mswevavbI Bnvi †Kvb e¨wZµg bq| evsjv‡`k iv‡ói ‡K›`we›`‡Z iwnqv‡Q Bnvi RbMY| 1971 mv‡j RbMYB gw³h× Kwiqv ¯vaxbZv wQbvBqv Avwbqv‡Q| evsjv‡`k mswevavb evsjvi RbM‡Yi AvKv•Lv I Awfe¨w³i ¯xKwZ| mswevavb iv‡ói m‡ev”P AvBb KviY Bnv RbM‡Yi Awfcv‡qi cwZdjb| †mLv‡bB mswevav‡bi †kôZ| cKZc‡¶ Avgv‡`i mswevav‡bi meÎ Rwoqv iwnqv‡Q RbMY| evsjvi RbMYB evsjv‡`k iv‡ói gj Pvwj Kv-kw³| mswevavb †mB kw³i evnb|

GB evsjvi RbMY fviZe‡l cwK¯vb bv‡g GKwU ivó Pvwnqvwj| 1946 mv‡j evsjvi RbMY Zvnv‡`i †fvUvwaKvi c‡qvM Kwiqv gmjgvb‡`i Rb¨ wbw`ó 119wU Avm‡bi g‡a¨ 116wU Avmb gmwjg jxM‡K c`vb Kwiqv cwK¯vb `vex mdjfv‡e m¤§‡L jBqv Av‡m| cKZc‡¶ gmwjg jx‡Mi GB fwgam weRq fviZe‡l cwK¯vb mwó K‡i|

cwK¯vb mwó‡Z †hgb evsjvi RbM‡Yi m‡ev”P Ae`vb iwnqv‡Q wVK †Zgwb fv‡e evsjv‡`k mwó‡Z I evsjvi RbM‡Yi ïa Ae`vb bq Pig Z¨vM I m‡ev”P gj¨ w`‡Z nBqv‡Q|

1948 mv‡j fvlv Av‡›`vj‡bi cvi¤ | 1952 mv‡ji 21‡k †de“qvix Zwi‡L gvZfvlv evsjvi Rb¨ G‡`‡ki gvbl Rxeb w`j| BwZnvm mwó Kwij| †mB BwZnv‡mi †mvcvb evwnqv AvR 21‡k †de“qvix AvšRwZK gvZfvlv w`em|

cwK¯vb Avgj wQj evsjvi Rb¨ eÂbvi BwZnvm| cwK¯vb mwói ci ce evsjvi bZb bvgKiY nBj ce cwK¯vb| c_g nB‡ZB G‡`k cvmv` loh‡ši wkKvi nBj| Z‡e 1954 mv‡ji cv‡`wkK wbevP‡b RbMY c_g m‡hv‡MB gmwjg jxM‡K cee½ nB‡Z cvq wbwðý Kwiqv †`q| wKš msL¨vMwiô c‡`k nBqvI cwðg cwK¯v‡bi mwnZ Bnv‡K Parity gvwbqv jB‡Z eva¨ Kiv nBj| eû loh‡ši ci 1956 mv‡j cwK¯v‡b GKwU mswevab nBj e‡U wKš 1959 mv‡ji †de“qvix gv‡m AbwôZe¨ mvaviY wbevPb Abôvb nBevi K‡qK gvm c‡e 1958 mv‡ji 7B A‡±vei Zwi‡L mgM †`‡k mvgwiK AvBb Rvix nBj| ce cwK¯v‡bi cavb ivR‰bwZK `j¸wji cvq mKj †bZv‡K AšixY Kiv nBj| ce cwK¯v‡bi RbMY Pig fv‡e AZ¨vPwiZ I wb‡¯úwlZ nB‡Z jvwMj| cwK¯v‡bi Awaevmx‡`i ‘genius’ Abmv‡i 1962 mv‡ji msweav‡bi gva¨‡g ‘Basic democracy’ ewjqv GK A™Z MYZš Pvj nBj hvnv Basic I bq democracy I bq hw` I wKQ msL¨K AwZ Drmvnx †`kx I we‡`kx cwÛZ e¨w³ Bnv‡K ab¨ ab¨ Kwi‡Z jvwM‡jb|

1966 mv‡j Z`wbšb ce cwK¯v‡bi GKwU cavb ivR‰bwZK `j 6 `dv wfwËK ¯vqZ kvmb Ges Universal Franchise ev mveRbxb †fvUvwaKvi `vex Kwij| evsjvi RbMY Zvnv mevšKi‡Y mg_b c`vb Kwij| µ‡g µ‡g Av‡›`vjb †eMevb nB‡Z jvwMj Ges Pig ¸i“Zi AvKvi aviY Kwi‡j cvmv` loh‡ši bvqK cwieZb nBj| 1962

mv‡j i msweavb f½ Kwiqv †Rbv‡i j Bqvwnqv Lvb cvwK¯v‡bi †cwm‡W›U nB‡j b|

1970 mv‡j i †k l fv‡M ALÛ cvwK¯v‡bi mec_g I me‡k l mvaviY wbevPb Abwô Z nBj | wbevP‡bi Ab¨Zg cavb D‡Ïk¨ wQj mgM cvwK¯v‡bi Rb¨ GKwU msweavb cYqb Kiv| wbevP‡b GKwU ivR‰bwZK `j ce cvwK¯v‡bi Rb¨ wbw`ó 169wU Avm‡bi g‡a¨ 167wU Avmb jvf Kwiqv mgM cvwK¯v‡b GKK msL¨vMwiô Zv jvf K‡i| 1971 mv‡j i 3iv gvP Zvwi‡L XvKvq msm` Awa‡ek‡bi ZvwiL †NvlYv Kiv nBqvwQj | cwðg cvwK¯vb nB‡Z msm` m`m¨MY GK GK Kwiqv XvKvq AvMgb Kwi‡ZwQ‡j b GB mgq AKm¥vr 1jv gvP Zvwi‡L †Rbv‡i j Bqvwnqv Lvb Awbw`ó Kv‡j i Rb¨ Awa‡ekb ¯wMZ †NvlYv K‡ib| mgM evsjv‡`k †¶v‡f `t‡L dvwUqv cwoj | 6`dv `vex 1`dv ¯vaxbZvi `vex‡Z cwiYZ nBj | 7B gvP Zvwi‡Li fvl‡Y †kL gwRei ingvb mKj‡K c¯Z nBevi Avnevb RvbvB‡j b| ÒGev‡ii msMvg Avgv‡`i gwl“i msMvg, Gev‡ii msMvg ¯vaxbZvi msMvgÓ GB A‡gvN evYx D”Pvi‡bi ga¨ w`qv wZwb †mw`b Zvnvi fvlY †k l K‡ib|

23‡k gvP cvwK¯vb w`em wQj wKš Hw`b K¨v›Ub‡g›U e¨vwZZ mgM ce cvwK¯v‡bi meÎ ¯vaxb evsjvi cZvKv †kvfv cvB‡ZwQj | 25‡k gvP w`evMZ iv‡Î cw_exi BwZnv‡mi RNY¨Zg MYnZ¨v XvKvq I evsjvi wewfb ¯nv‡b Abwô Z nBj | 26‡k gv‡Pi c_g cn‡iB †kL gwRei ingvb evsjv‡`‡ki ¯vaxbZv †NvlYv K‡ib|

Bnvi cieZx bq gvm evOvjxi AvZ¥Z¨v‡Mi BwZnvm| evsjvi mvaviY RbMY A¯ aviY Kwiqv j¶ Rxe‡bi wewbg‡q evsjvi ¯vaxbZv wQbvBqv Av‡b| Bnv wQj cKZB Rbh×| 1949 mvj nB‡Z c_‡g m`xN mvswevwbK msMvg, Zrci, RbM‡Yi mkm msMv‡gi Kvi‡YB evsjv‡`k msweav‡bi meÎB RbM‡Yi Dcw¯wZ j¶¨ Kiv hvq|

31| mvswe avwb K KvVv‡gv t-

c¯vebv t evOvjx RvwZi cwiwPwZ, ˆewkó¨ Ges mswe av‡bi D‡Ïk¨, Av`k I gjbxwZ hvnvi Dci wfwË Kwiqv GB ivó cwZwôZ nBqv‡Q Zvnvi GKwU msw¶ß wKš¿iZcY eYbv c¯vebvq Kiv Kwiqv‡Q| cKZ c‡¶ c¯vebv‡K mswe av‡bi Touch Stone wnmv‡e eYbv Kiv nq| mswe av‡bi wewfb As‡ki cwiwPwZ wb‡æ c`vb Kiv nBj|

c_g fvMt evsjv‡`k †h GKwU MYcRvZšx ivó, RbMY GB iv‡ói gvwjK Ges mswe av‡bi cavb¨ m¤ú‡K †NvlYv GB fv‡M c`vb Kiv nBqv‡Q|

wØZxq fvMt wØZxq fv‡M ivó cwiPvjbvi gjbxwZ mgn eYbv Kiv nBqv‡Q|

ZZxq fvM t GB fv‡M evsjv‡`‡ki RbM‡Yi we`¨gvb †gŠwjK AwaKvi mg‡ni ¯xKwZ c`vb Kiv nBqv‡Q|

PZ_ fvM t GB fv‡M iv‡ói wbevnx we fv‡Mi wewfb mvswe avwbK c` †hgb- ivócwZ, cavbgšxmn Bnvi gwš mfv, ZËveavqK miKvi, ¯vbxq kvmb, cwZi¶v Kg wefvM Ges A¨vUbx-†Rbv‡ij BZ¨vw` c` mwó Kwiqv‡Q Ges Zvnv‡`i mK‡ji mvaviY `vwqZ I KZe¨ wb‡`k Kwiqv‡Q|

cÂg fvM tGB fvM iv‡ói Av‡iKwU ¯¤ AvBb mfv mwó Kwiqv‡Q| GB fv‡M RvZxq msm` cwZôv, RbM‡Yi cwZwbwa mvsm`-¯úxKvi, b¨vqcvj, AvBb cYqb I A_ msµvš c×wZ Ges Aa¨v‡`k cYqb BZ¨vw` eYbv c`vb Kiv nBqv‡Q|

lô fvM t GB fv‡M mswe avb iv‡ói ZZxq ¯¤ wePvi wefvM cwZôv Kwiqv‡Q| mcxg †KvU cwZôv, wePviK wb‡qvM, Aat¯b Av`vjZ Ges ckvmwbK UvBeb¨vj cwZôv m¤‡Ü eYbv iwnqv‡Q|

mßg fvM t GB fv‡M mswe avb wbevPb msÎ“vš welqvw`i eYbv Kwiqv‡Q| wbevPb Kwgkb cwZôv, wbevPb Abôv‡bi mgq BZ¨vw` wbw`ó nBqv‡Q|

Aóg fvM t GB fv‡M gnv-wnmve wbix¶K I wbqšK c‡`i cwZôv Ges G msG“vš welqvw` eYbv Kiv nBqv‡Q|

beg fvM t GB fv‡M evsjv‡`‡ki Kgv‡cfvM m¤‡Ü eYbv Kiv nBqv‡Q| msweavb GB fv‡M miKvix KgPvix‡`i wb‡qvM I K‡gi kZvejx, Kg wefvM cbMVb Ges miKvix Kg Kwgkb cwZôv Kwiqv‡Q|

beg K fvM t GB fv‡M msweavb Ri“ix Ae¯v †NvlYv I GZ`msµvš Kvhvejx wb‡`k Kwiqv‡Q|

`kg fvMt GB fv‡M msweavb ms‡kva‡bi ¶gZv eYbv Kiv nBqv‡Q|

GKv`k fvM t GB fv‡M wewea welqvw` m¤‡Ü eYbv Kiv nBqv‡Q|

msweav‡bi 150 Ab‡”Q` iv‡ói µwšKvjxb I A¯vqx weavbvejx m¤úwKZ| GB Ab‡”Q‡`i AvIZvq mó PZ_ Zdwm‡j µwšKvjxb I A¯vqx weavbvejx eYbv Kiv nBqv‡Q|

µwšKvjxb ewj‡Z 1971 mv‡ji 26‡k gvP ZvwiL nB‡Z msweavb ceZ‡bi ZvwiL A_vr 1972 mv‡ji 16B wW‡m¤i chš mgqKvj eSvB‡Z‡Q| GB mgqKv‡ji g‡a¨ ¯vaxbZv †NvlYvcÎ, mKj AvBb I mKj Kvhµg‡K PZ_ Zdwm‡ji 3 Ab‡”Q` msweav‡bi 150 Ab‡”Q‡`i AvIZvq mvsweavwbK ˆeaZv `vb Kwiqv‡Q| ZvnvQvov, D³ Zdwm‡j ewYZ 3 Ab‡”Q`mn 17wU Ab‡”Q` cvK-msweavb AvBb, iv‡ói wewfb wefvM I Bnvi Kvhµg¸wj‡K msweavb, msweav‡b ewYZ AvB‡bi AvIZvf³ KiZt †mZeÜ mwó Kwiqv‡Q| GLv‡bB msweav‡bi 150 Ab‡”Q‡`i AvIZvq cYxZ PZ_ Zdwm‡ji Kvhµ‡gi mgvwß| msweav‡bi cieZx ms‡kvab¸wj †h‡nZ msweav‡bi 150 Ab‡”Q` ewnfZ †mB‡nZ DË“ ms‡kvab¸wj PZ_ Zdwm‡j ¯vb cvq bvB , †hgb, msweavb c_g ms‡kvab, wØZxq ms‡kvab, ZZxq ms‡kvab I PZ_ ms‡kvab | A‰ea mvgwiK kvmbvgj I ZrcieZxKv‡ji msweavb ms‡kvabx¸wji g‡a¨ †h¸wj msweavbewnfZ †mB¸wj void ab initio Ges hw` PZ_ Zdwm‡j msh³ Kiv nBqv _v‡K †mB¸wj D³ Zdwmj nB‡Z evwZj ewjqv MY¨

nB‡e| †Kvb ^ea ms‡kvabx hw` D³ PZ_ Zdwm‡j ¯vb cvBqv _v‡K Z‡e D³ ms‡kvabx ‰ea _vwK‡e e‡U wKš PZ_ Zdwmj nB‡Z weh³ nB‡e KviY PZ_ Zdwmj 1972 mv‡ji 16B wW‡m¤i chš D³ Zdwm‡j ewYZ µvwšKvjxb I A¯vqx weavbvejx m¤úwKZ gvÎ|

32| msweav‡bi wewfb fv‡Mi g‡a¨ fvimvg¨ t

msweav‡bi gj I cavb ¯¤ wZbwU, †hgbt AvBb mfv, wbevnx wefvM I wePvi wefvM|

msweav‡bi ggevYx nB‡Z‡Q †h RwUj ivóh‡ši wewfb wefv‡Mi g‡a¨ Checks and balances Gi gva¨‡g Governance G mgZv ev Balance i¶v Kiv| G‡¶‡Î AvBb mfv msweavb Abmv‡i AvBb cYqb Kwi‡e, wbevnx wefvM AvB‡bi gg Abmv‡i Zvnv c‡qvM Kwi‡e Ges welqwU wePvi wefv‡Mi m¤§‡L Avbqb Kiv nB‡j Bnvi AvBbMZ ^eaZv cix¶v Kwi‡e| GKBfv‡e wbevPb Kwgkb, gnv-wnmve wbix¶K I wbqšK, miKvix Kg Kwgkb, Zvnviv mK‡jB ivóh‡ši wewfb As‡ki Askwe‡kl Ges wbR wbR †¶‡Î Governance †K ch‡e¶Y Kwiqv _v‡Kb, Z‡e we‡kl Kwiqv wePvi wefvM ivóxq ¶gZvi h‡_”Qv e¨envi mmsnZ Kwiqv _v‡K| GB Kvi‡Y GKRb wePvi‡Ki `vwqZ I KZe¨ AZ¨š¿i“ZcY| GB cm‡½ Professor W. Friedmann e‡jb t

> “In the modern democratic society the Judge must steer his way between the Scylla of subservience to Government and the charyvdis of remotensess from constantly changing social pressures and economic needs (Law in a Changing Society)” (Union of India Vs. Sankalchand AIR 1977 SC 2328 ‡gvKvÏgvq K Iyer, J Gi ivq nB‡Z D×Z)

ivóxq h‡ši wewfb wefv‡Mi g‡a¨ mgZv iwLevi c‡qvR‡b Ges †KvbwUi ¯v‡_ msNvZ †hb bv N‡U †mB Kvi‡YB msweav‡bi wewfb fvM wbR wbR `vwqZg‡a¨ `wó iwL‡Z‡Q|

33| evsjv‡`k msweav‡b RbMY t GLb †`Lv hvK RbM‡Yi mó msweav‡bi gva¨‡g RbMY wKfv‡e ivówbqšY K‡i|

c_‡gB GB cm‡½ Senator Daniel Webster Gi e³e¨ cwYavb‡hvM¨| h³ iv‡ói Federal fwg bxwZ jBqv GK weZ‡K (1830) Daniel Webster RbM‡Yi mswe avb I RbM‡Yi fwgKv m¤‡Ü e‡j bt

> "It is, sir, the People's Constitution, the People's Government; made for the People; made by the People; and answerable to the People ..... We are all agents of the same power, the People ... I hold it to be a popular Government, erected by the people; those who administer it responsible to the People; and itself capable of being amended and modified, just as the People may choose it should be. It is as popular, just as truly emanating from the People, as the State Governments."
> (Karamer: The People Themselves, cô v-177)

Bnvi 33 ermi ci h³ iv‡ói Gettysburg h×‡¶‡Îi GKwU Ask gZ ˆmwbK‡`i mgvwa‡¶Î wnmv‡e DrmM Kwievi Abôv‡b President Abraham Lincaln Zvnvi msw¶ß e³ Zv †kl K‡ib GB ewjqv t

> ".....that government of the people, by the people, for the people, shall not perish from the earth."

AvR nB‡Z †`okZ ermi c‡e GB fv‡e Abraham Lincaln ‡`‡ki RbM‡Yi †kôZ mgbZ K‡ib|

evsjv‡`k mswe av‡bi cÂg fvM AvBbmfv eYbv Kwiqv‡Q| 65 Ab‡"Q‡`i 1g `dv RvZxq msm` mwó Kwiqv‡Q| 3q `dv cZ¨¶ wbevP‡bi gva¨‡g evsjv‡`‡ki wZbkZwU AvÂwjK wbevPbx GjvKv nB‡Z wZbkZ msm`-m`m¨ wbevP‡bi weavb Kiv nBqv‡Q| GB wZbkZ msm`-m`m¨ evsjv‡`‡ki RbM‡Yi cwZwbwaZ K‡ib| Z‡e Zvnviv ÔRbMYÕ b‡nb RbM‡Yi wbevwPZ cwZwbwa gvÎ|

RbM‡Yi cwZwbwa GB msm`-m`m¨MY wbevP‡bi gva¨‡g evsjv‡`‡ki ivócwZ‡K wbevPb K‡ib| mKj wbevPbB mswe av‡bi 119 I 123 Ab‡"Q` Abmv‡i evsjv‡`‡ki wbevPb Kwgkb cwiPvjbv K‡ib|

mswe av‡bi 48 I 49 Ab‡"Q` Gi ¶gZv e‡j ivócwZ Zvnvi `wqZ cvjb K‡ib| 55(4) Ab‡"Q` Abmv‡i miKv‡ii mKj wbevnx

c`‡¶c ivócwZi bv‡g MnxZ nBqv‡Q ewjqv cKvk Kiv nq| 55(5) Ab‡”Q` Abmv‡i ivócwZi bv‡g cYxZ Av‡`k mgn I Ab¨vb¨ Pw³ cÎ wKi‡c mZ¨vwqZ ev cgvYxKZ nB‡e, ivócwZ Zvnv wewa Øviv wbaviY K‡ib| ZvnvQvov, ivócwZ miKvix Kvhvejx e›Ub I cwiPvjbvi Rb¨ wewamgn cYqb K‡ib| †h msm`-m`m¨ msm‡`i msL¨vMwiô m`‡m¨i Av¯vfvRb ewjqv ivócwZi wbKU cZxqgvb nB‡eb, ivócwZ Zvnv‡K 56(3) Ab‡”Q` e‡j cavbgšx wb‡qvM K‡ib|

ivócwZ mswea v‡bi 94(2), 95(1), 97 I 98 Ab‡”Q` Abmv‡i cavb wePvicwZ, A¯vqx cavb wePvicwZ, mcxg †Kv‡Ui wePvicwZ I AwZwi³ wePvicwZ wb‡qvM c`vb K‡ib|

Z‡e cavbgšx I cavb wePvicwZ wb‡qv‡Mi †¶Î e¨ZxZ ivócwZ Zvnvi Ab¨ mKj `vwqZ cvj‡b cavbgšxi civgk Abhvqx Kvh K‡ib|

Dc‡ii eYbv nB‡Z cZxqgvb nq †h ivócwZ RbM‡Yi cwZwbwaMY Øviv wbewPZ A_vr ivócwZ msm`-m`m¨MY gva¨‡g RbMY KZK c‡iv¶fv‡e wbewPZ| Avevi ivócwZi mKj Kvh gšxmfv KZK wbqwšZ Ges gšxmfv msm‡`i wbKU `vqe×, msm`-m`m¨MY evsjv‡`‡ki RbM‡Yi wbKU `vqe×| ZvnvQvov, cavbgšx I Zvnvi gwšmfvi AwaKvsk gšxeM wbewPZ weavq ZvnvivI RbM‡Yi wbKU mivmwi `vqe×|

Kv‡RB AvBb cYq‡bi †¶‡Î msm`-m`m¨M‡Yi gva¨‡g RbMY msm‡` Dcw¯Z| RbM‡Yi wbKU `vqe×ZvB ¶gZvi cKZ Drm| wbevnx Kvh‡¶‡Î cavbgšx I gwšmfv `B fv‡e RbM‡Yi wbKU `vqe×| c_gZ, RvZxq msm` gvidr, wØZxqZ, wbewPZ msm`-m`m¨ wnmv‡e| GB `Bfv‡eB RbM‡Yi Qvqv cavbgšx I Zvnvi gwšmfvi Dci wbwðZfv‡e we`¨gvb| †h‡nZ, cavbgšx I Zvnvi gwšmfvi AwaKvsk m`m¨ wbewPZ †m Kvi‡Y Zvnviv mve‡fšg RbM‡Yi GB Qvqv A¯xKvi Kwi‡Z cv‡ib bv, Zvnv‡`i cwZwU

c`‡¶‡ci Rb¨ Zvnviv RbM‡Yi wbKU `vqe×| (accountable to the sovereign people)|

cRvZ‡š¿i K‡g KgPvix‡`i wb‡qvM I K‡gi kZvejx msm` AvBb`viv wbqšY K‡i, Kv‡RB †m‡¶‡Î RbMY msm` gvidr evsjv‡`‡ki KgwefvM‡K wbqšY K‡ib| GgbwK cwZi¶v Kgwefv‡Mi †¶‡Î I RbM‡Yi wbqšY iwnqv‡Q KviY D³ KgwefvMI msm` KZK cYxZ AvBb Øviv wbqwšZ I cwiPwjZ| Z‡e GB wbqšY ïa ZwZKfv‡e msweav‡bi côvq _wK‡j Pwj‡e bv| ivócwZ nB‡Z iv‡ói meKwbô mKj KgPvix‡K Aš‡i GB bxwZ aviY Kwi‡Z nB‡e ‡h Zvnviv mK‡jB RbM‡Yi †meK gvÎ, RbM‡Yi cwZ mK‡ji wbR wbR †¶‡Î †mev c`v‡bi gva¨‡gB Zvnv‡`i c‡Z¨‡Ki ¸i“Z I Zvrch wbwnZ iwnqv‡Q| BnvB evsjv‡`‡ki msweav‡b gjgš I mK‡ji cwZ evZv|

mcxg ‡KvU e¨wZ‡i‡K †Rjv wfwËK wePvi wefv‡Mi †¶‡Î AvBb gšYvjq I mcxg †Kv‡Ui ˆØZ wbqšY iwnqv‡Q| G‡¶‡Î AšZt AvBb gšYvjq Bnvi wewfb c`‡¶‡ci Rb¨ msm‡`i wbKU `vqe× Ges msm` gvidr RbM‡Yi wbKU `vqe×|

Z‡e mcxg †KvU ev wbæ Av`vjZ †Kvb Av`vjZB Bnvi wePwiK Kvhµ‡gi Rb¨ mivmwi Kvnvi I wbKU `vqx b‡n| hw` ‡Kvb wePvicv_x †Kvb iv‡q ¶ä nb, wZwb Aek¨B cieZx D”P Av`vj‡Z Avcxj Kwi‡Z cv‡ib| kZ kZ ermi awiqv we‡ki mKj mf¨ ‡`‡k GB c×wZB we``¨gvb, Ab¨_vq, b¨vq wePvi e¨vnZ nBevi m¤ebv _v‡K| Z‡e †h †Kvb Av`vj‡Zi ivq jBqv cKZ cwÛZ¨cY Aeva Av‡jvPbv nB‡ZB cv‡i, Zvnv‡Z mK‡jiB jvfevb nBevi m¤ebv _v‡K, Ggwb wK wePvi‡Ki I, Z‡e wePviK‡K jBqv mg‡jvPbv we‡aq b†n| KviY wePviK‡K e¨w³MZ fv‡e mgv‡jvPbv Kwi‡j cieZx‡Z ivq c`v‡b wZwb wØavM¯ nBqv cwo‡Z cv‡ib, Zvnv‡Z b¨vqwePvi e¨vnZ nBevi m¤ebv _v‡K, Bnv‡Z wePvi cv_xMYB ¶wZM¯ nB‡Z cv‡ib| D‡jL¨, GKRb wePviK‡K fqfxwZ I mecKvi cfveg³

nBqv ivq c`vb Kwi‡Z nq| ZvnvQvov, GKRb wePvi‡Ki m¤§‡L †h mKj hw³ I NUbvejx cKvwkZ nq Zvnv fwelr Av‡jvPK‡`i m¤§‡L bvI _vwK‡Z cv‡i| Z‡e RbMY b¨vqwePvi Aek¨B `vex Kwi‡Z cv‡ib, KviY, mcxg †KvUmn mgM wePvi wefvM RbM‡Yi msweavb nB‡Z mó I RbM‡YiB m¤úwË Ges ‡mB w`K w`qv wePvi wefvM Povš wePv‡i RbM‡Yi wbKU Aek¨B `vqe×|

GB cm‡½ Senator Daniel Webster Gi e³e¨ (1830) cwYavb‡hvM¨t

> "The People, then, sir, created this Government. They gave it a Constitution, and in that Constitution they have enumerated the powers which they bestow upon it. They made it a limited Government. They have defined its authority.... But, sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear, as to avoid possibility of doubt; no limitation so precise, as to exclude all uncertainty. Who, then, shall construe this grant of the People? .... This, sir, the Constitution itself decides, also by declaring, *"that the Judicial power shall extend to all cases arising under the Constitution and Laws of the United States."* [That clause together with the Supremacy Clause], sir, cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a Constitution; without them, it is a Confederacy."
>
> (Kramer : The People Themselves, cô v-177)

iv‡ói Ab¨vb¨ wefv‡Mi Kvhµg †hgb RbMY mivmwi cwiPvjbv K‡ib bv, Zvnv‡`i wbevwPZ cwZwbwa gvidr cwiPvjbv K‡ib, †Zgwb RbM‡Yi cwZwbwa gvidr wb‡qvM cvß wePviKMY RbM‡Yi c‡¶ RbM‡Yi wePvwiK ¶gZv c‡qvM K‡ib|

†mB Kvi‡Y RbM‡Yi cwZwbwaZ Kvix msm` wePvi wefv‡Mi wei"‡× DÌvwcZ Awf‡hvM I GB wefv‡Mi mvweK KvhÎ"g (Performance) m¤‡Ü ïack DÌvcb Kwi‡Z AwaKvix b‡n, Bnv‡K AwaKZi Kg¶g Kwievi j‡¶¨ cwZweavb Kwi‡Z c‡qvRbxq c`‡¶c I jB‡Z cv‡ib| D‡jL¨ †h RbM‡Yi A‡_B wePvi wefvM cwiPvwjZ nq| AZGe, wePvi wefvMI RbM‡Yi ¶gZv-ej‡qi AšMZ|

34| msweavb (Î‡qv`k ms‡kvab) AvBb Gi cUfwgKv t gv¸iv wbevPbx GjvKvi msm` m`m¨ Rbve ‡gvt

Avmv`¾vgv‡bi gZ¨ nB‡j Z_vq Dc-wbevPb Abôvb Kwievi c‡qvRb nq| wbevPb Kwgkb 1994 mv‡ji 20‡k gvP Zvwi‡L gv¸iv wbevPbx GjvKvq Dc-wbevPb Abôvb Kwievi Rb¨ Zdwmj †NvlYv K‡i| we‡ivax`j¸wj Avmb Dc-wbevP‡b †fvU-KviPwci AvksKv cej fv‡e cKvk Kwi‡Z _v‡K|

wbevP‡bvËi Kv‡j we‡ivax`j¸wj gv¸iv Dc-wbevP‡b KviPwci Awf‡hvM DÌvcb KiZt mgM †`‡k cej cwZev` Kwi‡Z _v‡K Ges we‡ivax `jxq mvsm`MY msm` eRb Ae¨vnZ iv‡Lb|

1995 mv‡ji 4Vv RjvB ivócwZ mswea v‡bi 106 Ab‡”Q` Abmv‡i wbæwjwLZ wel‡q mcxg †Kv‡Ui Avcxj wefv‡Mi gZvgZ Rvwb‡Z Pv‡nb (Special Reference No. 1 of 1995) 47 DLR (AD) (1995) 117 t

Para U: And Whereas, pursuant to the powers conferred on me by Article 106 of the Constitution, I, Abdur Rahman Biswas, President of the People's Republic of Bangladesh hereby refer the said questions to the Appellate Division of the Supreme Court of Bangladesh to report its opinion thereon namely -

(1) Can the walkout and the consequent period of non-return by all the opposition parties taking exception to a remark of a ruling party Minister be construed as 'absent' from Parliament without leave of Parliament occurring in Article 67(1)(b) of the Constitution resulting in vacation of their seats in Parliament?

(2) Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67(1)(b) of the Constitution resulting in vacation of their seats in Parliament?

(3) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67(1)(b), read with the definition of 'sessions' and 'sittings' defined under Article 152(1) of the Constitution ?

(4) Whether the Speaker or Parliament will compute and determine the period of absence ?

Sd/ Abdur Rahman Biswas

4.7.95

President

People's Republic of Bangladesh.

ïbvbx A‡š 24/7/1995 Zvwi‡Li iv‡q Avcxj we fv‡Mi c‡¶ weÁ cavb wePvicwZ wbæwjwLZ gZvgZ c`vb K‡ibt

80. Having regard to the discussion as above, we are of the opinion that the answers to question Nos. 1 and 2 are in the affirmative subject to computation of ninety consecutive sitting days. As to question No. 3 our opinion is that the period between two sessions intervened by prorogation of the Parliament should be excluded in computing ninety consecutive sitting days. As to question No. 4, our opinion is that it is the Speaker who will compute and determine the period of absence. Let this report be communicated to the President immediately.

24/11/1995 Zvwi‡L msm` fvw½qv †`Iqv nq| K‡qKevi ¯wMZ nBevi ci 1996 mv‡ji 15B †de“qvix Zvwi‡L ló msm‡`i wbevPb Abwô Z nBevi ZvwiL wbaviY Kiv nq|

‡`‡k cPÛ MYwe‡¶vf Pwj‡Z _v‡K| GKwU ivR‰bwZK `j wbevP‡b Ask MnY bv Kwievi wm×vš MnY K‡i| mgM †`‡k e¨vcK gvÎvq mwnsm NUbvejxi ga¨ w`qv 15/2/1996 Zvwi‡L wbevPb Abwô Z nq| wbevP‡b e¨vcK gvÎvq †fvU KviPwci Awf‡hvM DÌvcb Kiv nq|

ló msm‡`i c_g Awa‡ek‡bB ZËveavqK miKvi wej Avbqb Kiv nq| wKš ivR‰bwZK `j¸wji c¶ nB‡Z †de“qvix‡Z Abwô Z wbevPb evwZj Ges cavbgšxmn K¨vwe‡bU Z_v miKv‡ii c`Z¨vM `vex Kiv nB‡Z _v‡K | ivócwZ welq¸wj jBqv Dfq c‡¶i mwnZ Av‡jvPbv Avi¤ K‡ib|

35| mswe avb (Î‡qv`k ms‡kvab) AvBb, 1996 t 26/3/1996 Zvwi‡L msm` mvaviY wbevPb Abôv‡bi Rb¨ wb`jxq ZËveavqK miKvi MV‡bi D‡Ï‡k¨ mswe avb (Î‡qv`k ms‡kvab) AvBb Gi wejwU msm‡` MnxZ nq| 28/3/1996 Zvwi‡L ivócwZ D³ we‡j ¯v¶i c`vb Kwi‡j Zvnv AvB‡b cwiYZ nq|

30/3/1996 Zvwi‡L 12 w`‡bi lô msm` fvw½qv †`lqv nq lmiKvi c`Z¨vM K‡i Ges me‡kl Aemicvß cavb wePvicwZ Rbve gnv¤§` nvweei ingvb cavb Dc‡`óv wbhË“ nb Ges Zvnvi †bZ‡Z Dc‡ivË“ AvB‡bi AvIZvq c_g ZËveavqK miKvi MwVZ nq|

mswevab (Î‡qv`k ms‡kvab) AvBb, 1996, AvBbwU wbæi¡c t

1996 m‡bi 1 bs AvBb

28‡k gvP,1996

MYcRvZšx evsjv‡`‡ki mswevav‡bi KwZcq weav‡bi AwaKZi ms‡kvabK‡í cYxZ AvBb

‡h‡nZ wbæewYZ D‡Ïk¨mgn ciYK‡í MYcRvZšx evsjv‡`‡ki mswevav‡bi KwZcq weav‡bi AwaKZi ms‡kvab mgxPxb I c‡qvRbq;

‡m‡nZ GZØviv wbæi¡c AvBb Kiv nBjt-

1| msw¶ß wk‡ivbvg|- GB AvBb mswevab (Î‡qv`k ms‡kvab) AvBb, 1996 bv‡g Awf‡wnZ nB‡e|

2| mswevav‡b bZb 58K Ab‡”Q‡`i mwb‡ek|- MYcRvZšx evsjv‡`‡ki mswevab (AZtci mswevab ewjqv D‡jwLZ) Gi 58 Ab‡”Q‡`i ci wbæi¡c bZb Ab‡PQ` mwb‡ewkZ nB‡e, h_vt-

ÔÔ58K| cwi‡”Q‡`i c‡qvM |- GB cwi‡”Q‡`i †Kvb wKQ 55(4), (5) I (6) Ab‡”Q‡`i weavbvejx e¨ZxZ, †h †gqv‡` msm` fvswMqv †`lqv nq ev fsM Ae¯vq _v‡K †mB †mB †gqv‡` chË“ nB‡e bv t

Z‡e kZ _v‡K ‡h, 2K cwi‡”Q‡` hvnv wKQ _vKK bv †Kb, †h‡¶‡Î 72(4) Ab‡”Q‡`i Aaxb †Kvb fsM nBqv hvIqv msm`‡K cbivnŸvb Kiv nq †m‡¶‡Î GB cwi‡”Q` c‡hvR¨ nB‡eÕÕ|

3| mswevav‡b bZb 2K cwi‡”Q‡`i mwb‡ek|- mswevav‡bi PZ_ fv‡Mi 2q cwi‡”Q‡`i ci wbæic bZb cwi‡”Q` mwb‡ewkZ nB‡e, h_vt-

ÔÔ2K cwi‡”Q` - wb`jxq ZËveavqK miKvi

58L| wb`jxq ZËveavqK miKvi|- (1) msm` fvswMqv †`lqvi ci ev †gqv` Aemv‡bi Kvi‡Y fsM nBevi ci †h Zvwi‡L wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óv Kvhfvi MnY K‡ib †mB ZvwiL nB‡Z msm` MwVZ nIqvi ci bZb

cavbgšx Zvnvi c‡`i Kvhfvi MnY Kivi ZvwiL chš †gqv‡` GKwU wb`jxq ZËveavqK miKvi _vwK‡e|

(2) wb`jxq ZËveavqK miKvi †hŠ_fv‡e ivócwZi wbKU `vqx _vwK‡eb|

(3) (1) `dvq D‡jwLZ †gqv‡` cavb Dc‡`óv KZK ev Zvnvi KZ‡Z GB mswevab Abhvqx cRvZ‡ši wbevnx ¶gZv, 58N(1) Ab‡"Q‡`i weavbvejx mv‡c‡¶, chË" nB‡e Ges wb`jxq ZËveavqK miKv‡ii civgk Abhvqx Zr-KZK Dnv ch³ nB‡e|

(4) 55(4),(5)I (6) Ab‡"Q‡`i weavbejx (c‡qvRbxq Awf‡evRb mnKv‡i) (1) `dvq D‡jwLZ †gqv‡` GKBic welqvejxi †¶‡Î ch³ nB‡e|

58M| wb`jxq ZËveavqK miKv‡ii MVb, Dc‡`óvM‡Yi wb‡qvM BZ¨vw`|- (1) cavb Dc‡`óvi †bZ‡Z cavb Dc‡`óv Ges Aci AbwaK `kRb Dc‡`óvi mgb‡q wb`jxq ZËveavqK miKvi MwVZ nB‡e, hvnviv ivócwZ KZK wbh³ nB‡eb|

(2) msm` fvswMqv †`Iqv ev fsM nBevi cieZx c‡bi w`‡bi g‡a¨ cavb Dc‡`óv Ges Ab¨vb¨ Dc‡`óvMY wbhË" nB‡eb Ges †h Zvwi‡L msm` fvswMqv †`Iqv nq ev fsM nq ‡mB ZvwiL nB‡Z †h Zvwi‡L cavb Dc‡`óv wbhË" nb †mB ZvwiL chš †gqv‡` msm` fvswMqv †`Iqvi ev fsM nBevi Ae¨ewnZ c‡e `vwqZ cvjbiZ cavbgšx I Zvnvi gwšmfv Zvnv‡`i `vwqZ cvjb Kwi‡Z _vwK‡eb|

(3) ivócwZ evsjv‡`‡ki Aemicvß cavb wePvicwZM‡Yi g‡a¨ whwb me‡k‡l Aemicvß nBqv‡Qb Ges whwb GB Ab‡"Q‡`i Aaxb Dc‡`óv wbhË" nBevi †hvM¨ Zvnv‡K cavb Dc‡`óv wb‡qvM Kwi‡ebt

Z‡e kZ _v‡K †h, hw` D³ iƒc Aemicvß cavb wePvicwZ‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` Mn‡Y Am¤§Z nb, Zvnv nB‡j ivócwZ evsjv‡`‡ki me‡kl Aemicvß cavb wePvicwZi Ae¨ewnZ c‡e Aemicvß cavb wePvicwZ‡K cavb Dc‡`óv wb‡qvM Kwi‡eb|

(4) hw` †Kvb Aemicvß cavb wePvicwZ‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` Mn‡Y Am¤§Z nb, Zvnv nB‡j ivócwZ Avcxj wefv‡Mi Aemicvß wePviKM‡Yi g‡a¨ whwb me‡k‡l Aemicvß nBqv‡Qb Ges whwb GB Ab‡"Q‡`i Aaxb Dc‡`óv wbhË" nBevi †hvM¨ Zvnv‡K cavb Dc‡`óv wb‡qvM Kwi‡ebt

Z‡e kZ _v‡K †h, hw` D³ iƒc Aemicvß wePviK‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` Mn‡Y Am¤§Z nb, Zvnv nB‡j ivócwZ Avcxj wefv‡Mi Aemicvß wePviKM‡Yi g‡a¨ me‡kl Aemicvß wePvi‡Ki Ae¨ewnZ c‡e Aemicvß Abic wePviK‡K cavb Dc‡`óv wb‡qvM Kwi‡eb|

(5) hw` Avcxj wefv‡Mi †Kvb Aemicvß wePviK‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` Mn‡Y Am¤§Z nb, Zvnv nB‡j ivócwZ, hZ`i m¤e, cavb ivR‰bwZK `jmg‡ni mwnZ Av‡jvPbvK‡g, evsjv‡`‡ki †h mKj bvMwiK GB Ab‡”Q‡`i Aax‡b Dc‡`óv wbhË“ nBevi †hvM¨ Zvnv‡`i ga¨ nB‡Z cavb Dc‡`óv wb‡qvM Kwi‡eb|

(6) GB cwi‡”Q‡` hvnv wKQ _vKK bv †Kb, hw` (3),(4) I (5) `dvmg‡ni weavbvejx‡K Kvh¨Ki Kiv bv hvq, Zvnv nB‡j ivócwZ GB mswkøv‡bi Aaxb Zvnvi ¯xq `vwq‡Zi AwZwiË“ wnmv‡e wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óvi `vwqZ MnY Kwi‡eb|

(7) ivócwZ-

(K) msm`-m`m¨ wnmv‡e wbevwPZ nBevi †hvM¨;

(L) ‡Kvb ivR‰bwZK `j A_ev †Kvb ivR‰bwZK `‡ji mwnZ h³ ev AsMxfZ †Kvb msV‡bi m`m¨ b‡nb;

(M) msm`-m`m¨‡`i Avmb wbevP‡b cv_x b‡nb, Ges cv_x nB‡eb bv g‡g wjwLZ fv‡e m¤§Z nBqv‡Qb;

(N) evnvËi erm‡ii AwaK eq¯‹ b‡nb|

GBiƒc e¨wË“M‡Yi ga¨ nB‡Z Dc‡`óv wb‡qvM Kwi‡eb|

(8)ivócwZ cavb Dc‡`óvi civgk Abhvqx Dc‡`óvM‡Yi wb‡qvM`vb Kwi‡eb|

(9) ivócwZi D‡Ï‡k¨ ¯n‡¯ wjwLZ I ¯v¶ih³ cÎ‡hv‡M cavb Dc‡`óv ev †Kvb Dc‡`óv ¯xq c` Z¨vM Kwi‡Z cwi‡eb |

(10) cavb Dc‡`óv ev †Kvb Dc‡`óv GB Ab‡”Q‡`i Aaxb DË“ic wb‡qv‡Mi †hvM¨Zv nvivB‡j wZwb D³ c‡` envj _vwK‡eb bv|

(11) cavb Dc‡`óv cavbgšxi c`ghv`v Ges cwikwgK I m‡hvM-mweav jvf Kwi‡eb Ges Dc‡`óv gšxi c`ghv`v Ges cwikwgK I m‡hvM-mweav jvf Kwi‡eb|

(12) bZb msm` MwVZ nBevi ci cavbgšx †h Zvwi‡L Zvnvi c‡`i Kvh¨fvi MnY K‡ib †mB Zvwi‡L wb`jxq ZËveavqK miKvi wejß nB‡e|

58N| wb`jxq ZËveavqK miKv‡ii Kvhvejx|- (1) wb`jxq ZËveavqK miKvi GKwU AšeZxKvjxb miKvi wnmv‡e Bnvi `wqZ cvjb Kwi‡eb Ges cRvZ‡ši K‡g wb‡qvwRZ e¨w³M‡Yi mvnvh¨ I mnvqZvq D³ic miKv‡ii ^``bw›`b Kvhvejx m¤úv`b Kwi‡eb; Ges GBic Kvhvejx m¤úv`‡bi c‡qvRb e¨ZxZ †Kvb bxwZ wbaviYx wm×vš MnY Kwi‡eb bv|

(2) wb`jxq ZËveavqK miKvi kvwšcY, mô I wbi‡c¶fv‡e msm`-m`m¨M‡Yi mvaviY wbevPb Abôv‡bi Rb¨ †hifc mvnvh¨ I mnvqZvi c‡qvRb nB‡e, wbevPb Kwgkb‡K ‡mBic mKj m¤ve¨ mvnvh¨ I mnvqZv c`vb Kwi‡eb|

58O| mswea v‡bi KwZcq wea v‡bi AKvhKiZv|- GB mswea v‡bi 48(3), 141K(1) Ges 141M(1) Ab‡”Q‡` hvnvB _vKK bv †Kb , 58K Ab‡”Q‡`i (1) `dvq †gqv‡` wb`jxq ZËveavqK miKv‡ii KvhKv‡j ivócwZ KZK cavbgšxi civgk Abhvqx ev Zvnvi cwZ¯v¶i MnYv‡š Kvh Kivi weavbmgn AKvh¨Ki nB‡e|ÕÕ

4| mswea v‡bi 61 Ab‡”Q‡`i ms‡kvab|- mswea v‡bi 61 Ab‡”Q‡`i ÔÔ wbqwšZ nB‡eÕÕ kã¸wji cwie‡Z ÔÔ wbqwšZ nB‡e Ges †h †gqv‡` 58 Ab‡”Q‡`i Aaxb wb`jxq ZËveavqK miKvi _vwK‡e †mB †gqv‡` DË“ AvBb ivócwZ KZK cwiPvwjZ nB‡eÕÕ kã¸wj cwZ¯vwcZ nB‡e|

(5) mswea v‡bi 99 Ab‡”Q‡`i ms‡kvab|- mswea v‡bi 99 Ab‡”Q‡`i (1) `dvq ÔÔ Avav-wePvi wefvMxq c`ÕÕ kã¸wji cwie‡Z ÔÔAvav-wePvi wefvMxq c` A_ev cavb Dc‡`óv ev Dc‡`óvi c`ÕÕ kã¸wj cwZ¯vwcZ nB‡e|

6| mswea v‡bi 123 Ab‡”Q‡`i ms‡kvab|- mswea v‡bi 123 Ab‡”Q‡`i (3) `dvi cwie‡Z wbæifc `dv cwZ¯vwcZ nB‡e, h_vt-

ÔÔ(3) †gqv` Aemv‡bi Kvi‡Y A_ev ‡gqv` Aemvb e¨ZxZ Ab¨ †Kvb Kvi‡Y msm` fvswMqv hvBevi cieZx beŸB w`‡bi g‡a¨ msm`-m`m¨M‡Yi mvaviY wbevPb Abwô Z nB‡eÕÕ|

7| mswea v‡bi 147 Ab‡”Q‡`i ms‡kvab|- mswea v‡bi 147Ab‡”Q‡`i (4) `dvq,-

(K) (L) Dc-`dvi cwie‡Z wbæi“ Dc-`dv cwZ¯vwcZ nB‡e, h_v t-

(L) cavbgšx ev cavb Dc‡`óv; Ges

(N) (N) Dc-`dvi cwie‡Z wbæi“c `dv cwZ¯wcZ nB‡e, h_v t-

ÔÔ(N) gšx, Dc‡`óv, cwZgšx ev Dc-gšxÕÕ|

8| mswea v‡bi 152 Ab‡”Q‡`i ms‡kvab|- mswea v‡bi 147 Ab‡”Q‡`i (1) `dvq,-

(K) ÔÔAb‡”Q`ÕÕ Awfe¨w³i msÁvi ci wbæi“c msÁv mwb‡ewkZ nB‡e, h_v-

ÔÔDc‡`óvÕÕ A_ 58M Ab‡”Q‡`i Aaxb D³ c‡` wbh³ †Kvb e¨w³;

(L) ÔÔcRvZ‡ši KgÕÕ Awfe¨w³i msÁvi ci wbæi“c msÁv mwb‡ewkZ nB‡e, h_vt-

ÔÔcavb Dc‡`óvÕÕ A_ 58N Ab‡”Q‡`i Aaxb D³ c‡` wbh³ †Kvb e¨w³|

36| mswea vb (Î‡qv`k ms‡kvab) AvBb Gi ¸i“ZcY ˆewkó¨t

GB AvB‡bi ¸i“ZcY ‰ewkó¨¸wj wbæi¡ct

(1) msm` f½ Ae¯vq _vwK‡j †mB †gqv‡` mswea v‡bi 55 Ab‡”Q‡`i (4), (5) I (6) `dv¸wj chË“ _vwK‡e, wKš mswea v‡bi PZ_ fv‡Mi 2q cwi‡”Q‡`i Ab¨ †Kvb Ask chË“ _vwK‡e bv;

(2) h×ve¯vi Kvi‡Y hw` f½ msm` mswea v‡bi 72(4) Ab‡”Q‡`i AvIZvq AvnŸvb Kwi‡Z nq Z‡e 2q cwi‡”Q` chË“ nB‡e;

(3) msm‡`i †gqv` Aemv‡bi Kvi‡Y ev AcY †gqv` g‡a¨ mvaviY wbevP‡bi Kvi‡Y msm` f½ nB‡j GKwU wb`jxq ZËveavqK miKvi MwVZ nB‡e;

(4) ZËveavqK miKv‡ii †gqv` wbevPb cieZx msm` MVb Ges bZb cavbgšxi `vwqZfvi MnY chš ejer _vwK‡e;

(5) ZËveavqK miKvi †hŠ_ fv‡e ivócwZi wbKU `vqx _vwK‡e;

(6) ZËveavqK miKvi †gqv` g‡a¨ 58(N) (1) Ab‡”Q‡`i weavbvejx mv‡c‡¶ cRvZ‡ši wbevnx ¶gZv cavb Dc‡`óv KZK chË“ nB‡e;

(7) ZËveavqK miKvi †gqv` g‡a¨I ivó AšZ ZvwZK fv‡e nB‡j I GKwU cRvZš¿ _vwK‡e ;

(8) ZËveavqK miKvi †gqv` g‡a¨ 55 Ab‡”Q‡`i (4),(5) I (6) `dv¸wj‡Z ewYZ ivócwZi Kvhµg eRvq _vwK‡e;

(9) ZËveavqK miKv‡i ivócwZ cavb Dc‡`óv I AbwaK `kRb Dc‡`óv‡K wbhË“ Kwi‡eb ;

(10) msm` f½ nBevi 15 w`‡bi g‡a¨ Dc‡`óvMY wbhË“ nB‡eb ;

(11) cv_wgK fv‡e wbevP‡bi c‡e evsjv‡`‡ki me‡kl Aemicvß cavb wePvicwZ cavb Dc‡`óv wbhË“ nB‡eb ;

(12) hw` me‡kl Aemicvß cavb wePvicwZ‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` MnY Kwi‡Z Am¤§wZ Rvbvb Z‡e Zvnvi Ae¨ewnZ c‡e Aemicvß cavb wePvicwZ‡K cavb Dc‡`óv wb‡qvM †`Iqv nB‡e ;

(13) hw` †Kvb Aemicvß cavb wePvicwZ‡K cavb Dc‡`óv c‡` wb‡qvM †`Iqv bv hvq Z‡e †m‡¶‡Î Avcxj wefv‡Mi me‡kl Aemicvß wePviK‡K cavb Dc‡`óv c‡` wb‡qvM †`Iqv nB‡e;

(14) hw` Avcxj wefv‡Mi me‡kl Aemicvß wePviK‡K cvIqv bv hvq A_ev wZwb cavb Dc‡`óvi c` MnY Kwi‡Z Am¤§wZ Rvbvb Z‡e Avcxj wefv‡M Zvnvi Ae¨ewnZ c‡e Aemicvß wePviK‡K cavb Dc‡`óv wb‡qvM †`Iqv hvB‡e;

(15) hw` Avcxj wefv‡Mi †Kvb Aemicvß wePviK‡K cavb Dc‡`óv c‡` wb‡qvM c`vb m¤e bv nq Z‡e ivócwZ evsjv‡`‡ki GKRb m‡hvM¨ bvMwiK‡K cavb Dc‡`óv c‡` wb‡qvM Kwi‡Z cvwi‡eb;

(16) hw` Avcxj wefv‡Mi †Kvb Aemicvß wePviK A_ev †Kvb bvMwiK‡K cavb Dc‡`óv c‡` wb‡qvM c`vb Kiv m¤e bv nq Z‡e ivócwZ me‡kl c`‡¶c wnmv‡e ¯qs cavb Dc‡`óvi `vwqZfvi MnY Kwi‡Z cvwi‡eb ;

(17) ivócwZ cavb Dc‡`óvi civgk Abhvqx Dc‡`óvM‡Yi wb‡qvM `vb Kwi‡eb ;

(18) cavb Dc‡`óv cavbgšxi b¨vq Ges GKRb Dc‡`óv gšxi b¨vq c`ghv`v Ges cvwikwgK I m‡hvM-mweav jvf Kwi‡eb ;

(19) bZb msm` MwVZ nBevi ci cavbgšx †h Zvwi‡L Zvnvi c‡`i Kvhfvi MnY Kwi‡eb †mB Zvwi‡L wb`jxq ZËveavqK miKvi wejß nB‡e ;

(20) ZËveavqK miKvi cRvZ‡ši K‡g wb‡qvwRZ e¨wË“M‡Yi mvnvh¨ I mnvqZvq miKv‡ii ^`bw›`b Kvhvejx m¤úv`b Kwi‡e Ges DË“ ^`bw›`b Kvhejx m¤úv`‡bi c‡qvRb e¨wZZ †Kvb bxwZ wbaviYx wm×vš MnY Kwi‡e bv ;

(21) kvwšcY , mô I wbi‡c ¶ fv‡e RvZxq msm`-m`m¨M‡Yi mvaviY wbevPb Abôv‡bi Rb¨ ZËveavqK miKvi wbevPb Kwgkb‡K mKj cKvi m¤ve¨ mvnvh¨ I mnvqZv c`vb Kwi‡e;

(22) ZËveavqK miKv‡ii †gqv`-g‡a¨ mswkøó 48(3) Ab‡”Q‡` ewYZ cavbgšxi civgk, 141 (K) (1) Ab‡”Q‡` ewYZ Ri“ix Ae¯v †NvlYv I 141 (M) (1) Ab‡”Q‡` ewYZ Ri“ix Ae¯vi mgq †gŠwjK AwaKvimgn ¯wMZKiY msÎ“vš cavbgšxi civgk BZ¨vw` MnY Kwievi weavbmgn AKvhKi _vwK‡e;

(23) ZËveavqK miKvi †gqv` g‡a¨ evsjv‡`‡ki cwZi¶v Kgwe fvM msµvš ckvmb ivócwZ KZK mswkó AvBbØviv cwiPvwjZ nB‡e;

(24) mswkøó 123 Ab‡”Q‡`i (3) `dv cwieZb Kwiqv msm` f½ nBevi cieZx beŸB w`‡bi g‡a¨ RvZxq msm` m`m¨‡`i mvaviY wbevPb Abôvb Kwievi weavb Kiv nBqv‡Q|

cZxqgvb nq †h †gqv` mgvcv‡š msm` fvw½qv †M‡j A_ev msm` Ab¨ †Kvb Kvi‡Y †gqv‡`i c‡eB f½ nB‡j, msm` f‡½i ZvwiL nB‡Z 15 w`‡bi g‡a¨ cavbgšx I Zvnvi gwšmfv c`Z¨vM Kwi‡eb Ges ivócwZ Dc‡`óvMY‡K cavb Dc‡`óvi mcvwik Abmv‡i wb‡qvM c`vb Kwi‡eb Ges GKwU wb`jxq ZËveavqK miKvi MwVZ nB‡e|

wbevPb Kwgkb msm` f‡½i ZvwiL nB‡Z 90 w`‡bi g‡a¨ msm` m`m¨‡`i mvaviY wbevPb Abôvb Kwi‡eb| GB mgqKv‡ji g‡a¨ ZËveavqK miKvi GKwU mô mvaviY wbevPb Abôv‡bi Rb¨ wbevPb Kwgkb‡K mKj cKvi mvnvh¨ mn‡hvwMZv Kwi‡e|

37| RbMY I mswkøó (Î‡qv`k ms‡kvab) AvBb t wKš mswkøó (Î‡qv`k ms‡kvab) AvBb, 1996, evsjv‡`‡ki

RbMY‡K m¤úY A`k¨ Kwiqv w`qv‡Q| msm` bvB, gšxmfv bvB, RbM‡Yi †Kvb cwZwbwa bvB| A_P GB RbMYB h× Kwiqv‡Q, e‡Ki i³ w`qv evsjv‡`k‡K g³ Kwiqv‡Q| GB RbMY‡K eRb KwiqvB RbM‡Yi MYZš cwZôvi Rb¨ GB ZwKZ ms‡kvabx GKRb cavb Dc‡`óvmn AwbevwPZ 11Rb Dc‡`óv mgwfe¨vnv‡i GKwU wb`jxq ZËveavqK miKvi MV‡bi e¨e¯v Kwiqv‡Q| Bnv †hb Prince of Denmark †K eRb Kwiqv Hamlet Gi Awfbq | †h RbMY evsjv‡`k ivó I Bnvi mswea v‡bi †K›`we›` I Pvwj Kv kwË“ †mB RbMY†K eRb Kwiqv Z_v cRvnxb †Mvôx Z‡ši Rb¨ cYxZ GB AvB‡bi ˆeaZv GB †gvKvÏgvq wePv‡ii welqe¯|

D‡jL¨, †h wbevPb Abôvb me mg‡qB cavbZ wbevPb Kwgk‡bi `vq I `vwqZ Ges KZe¨ | ZËveavqK miKv‡ii we‡kl I cavb `vwqZ nBj 58N(2) Ab‡”Q‡` ewYZ kwšcY, mô I wbi‡c¶ fv‡e wbevPb Abôv‡bi Rb¨ wbevPb Kwgkb‡K m¤ve¨ mKj cKvi mvnvh¨ I mnvqZv c`vb Kiv|

cavbgšx I Zvnvi gwšmfv Zvnv‡`i mKj Kvhµ‡gi Rb¨ †hš_ fv‡e RvZxq msm‡`i wbKU `vqe× _v‡Kb Ges msm‡`i gva¨‡g I e¨w³MZ fv‡e RbM‡Yi wbKU `vqe× _v‡Kb| wKš ZËveavqK miKvi †h‡nZ AwbevwPZ †m‡nZ Zvnv‡`i msm‡`i wbKU ev RbM‡Yi wbKU `vqe× _wKevi ck bvB| Zvnviv Zvnv‡`i wb‡qvMKZv ivócwZi wbKU `vqe× _v‡Kb|

ivócwZ I mswea vb (Î‡qv`k ms‡kvab) AvBb t ivócwZ evsjv‡`‡ki ivócavb| wZwb cavbgšx, cavb wePvicwZ, wePvicwZmn mvswea vwbK c‡` Awawô Z mKj e¨w³e‡Mi wb‡qvMKZv| ZvnvQvov, mvgwiK, †emvgwiK mKj Kgwefv‡Mi wZwbB wb‡qvMKZv| Zvnvi bv‡gB Aa¨v‡`k I wewagvjv Rvix Ges mKj Av‡`k, wb‡`k c`vb, mKj wbevnx KgKvÛ cwiPvwjZ I Pw³ wbevn Kiv nBqv _v‡K| hw` I wZwb iv‡ói m‡ev”P e¨w³ wKš ivóxq mKj KgKvÛ Zvnvi c‡¶ I bv‡g cavbgšx ev Aci †Kvb `vwqZcvß gšx

cwiPvjbv Kwiqv _v‡Kb| wZwb mvswe avwbK ivócavb, Zvnvi cKZ †Kvb wbevnx `vwqZ bvB|

wKš msweavb (Î‡qv`k ms‡kvab) AvBb Dc‡iv³ ivóxq i∫c‡iLvi †gŠwjK cwieZb Avbqb Kwiqv‡Q|

msm‡`i †gqv` Aemv‡bi Kvi‡Y ev Ab¨ †Kvb Kvi‡b mvaviY wbevPb Abôv‡bi Rb¨ msm` f½ nB‡j Dc‡iv³ msweavb ms‡kvab AvBb Abmv‡i Ab¨vb¨ `vwq‡Zi mwnZ wbæwjwLZ AwZwi³ `vwqZ ivócwZi Dci eZvB‡et

1) msm` f½ nBevi c‡bi w`‡bi g‡a¨ cavb Dc‡`óv I Ab¨vb¨ Dc‡`óv wb‡qvM;
2) cwZi ¶v gšYvj‡qi wbevnx `vwqZ;
3) Aa¨v‡`k I wewagvjv Rvix;
4) wbR `vwq‡Z Ri“ix Ae¯v †NvlYv;
5) Ri“ix Ae¯vKvjxb mg‡q wbR `vwq‡Z †gŠwjK AwaKvi mgn ¯wMZKiY;

cZxqgvb nq †h ZwKZ AvBb Abmv‡i ¯í mg‡qi Rb¨ nB‡j I ivócwZ mvswe avwbK ev wbqgvZvwšK ivócavb nB‡Z wbevnx ivócav‡b cwiYZ nb hw` I wZwb RbMY KZK wbevwPZ b‡nb ev wZwb RbM‡Yi cwZwbwaZ I K‡ib bv| wZwb †h msm` KZK wbevwPZ nBqvwQ‡jb, †mB msm` I Avi we`¨gvb _v‡K bv| ZËveavqK miKvi ivócwZi wbKU `vqe× wKš wZwb Kvnvi I wbKU `vqe× bb, GgbwK mve‡fŠg RbM‡Yi wbKUI b‡n| GLv‡bB mvswe avwbK fv‡e Zvnvi ¶gZvi Amvi Zv ev ^`b¨Zv KviY ivówU ZLbI cRvZš Ges RbM‡Yi wbKU `vqe× ZvB ¶gZvi Drm| `vqe× Zvi Abcw¯wZ‡Z ¶gZvI Abcw¯Z|

RbM‡Yi mve‡fŠgZ t D‡jL¨ †h wewUk Avg‡j evsjvi RbMY civaxb wQj| civaxbZvi k•Lj nB‡Z i¶v cvBevi Rb¨ evsjvi RbMY cvwK¯vb mwó KwiqvwQj| wKš cvwK¯vb Avg‡j I evsjvi RbMY cKZ ¯vaxbZvi Av¯v` †Kvbw`bB cvq bvB | Gici j¶ Rxe‡bi wewbg‡q evsjv‡`k ¯vaxb nq| evsjvi RbMY GB c_g

mve‡fŠgZ ARb K‡i| wKš K‡qK erm‡ii g‡a¨B GB †`‡k `B `B evi mvgwiK kvmb Av‡ivc Kiv nq, evsjvi RbMY cKZc‡¶ Avevi I wb‡R‡`i mvgwiK evwnbxi wbKU mve‡fŠgZ nvivq|

`xN MYAv‡›`vjb †k‡l 1991 mv‡j msm`xq MYZš cbi“×vi Kiv nq| Bnv wQj RbM‡Yi weRq| RbMY Zvnv‡`i mve‡fŠgZ wdwiqv cvq| wKš ZwKZ AvBb 3 (wZb) gv‡mi Rb¨ ivRZš bv nB‡j I †MvôxZš ¯vcb K‡i| GB AvBb ivócwZ‡K †MvôxZ‡ši cavb K‡i Ges ¯í mg‡qi Rb¨ nB‡j I RbMY Avevi I mve‡fŠgZ nvivq| evsjv‡`‡ki RbMY fviZ ev cvwK¯v‡bi gZ wewUk iv‡Ri AbM‡n mve‡fŠgZ cvq bvB, h³ iv‡ói RbM‡Yi b¨vq h× Kwiqv B eû Z¨v‡Mi wewbg‡q GB mve‡fŠgZ ARb Kwiqv‡Q| mswean v‡bi c¯vebv I 7 Ab‡”Q‡` Zvnv AwZ cwi¯‹vi fv‡e †NvlYv Kiv nBqv‡Q A_P GB ms‡kvabx AvB‡bi Kvi‡Y RbMY Zvnv‡`i †kôZ I wbi¼k KZZ wZb gv‡mi Rb¨ nB‡j I nvivq| D‡jL¨, RbM‡Yi GB mve‡fŠgZ Kvnvi I `v‡bi mvgMx bq †h hLb Lwk w`jvg ev hLb Lwk wdivBqv jBjvg ev Bnv LÛKvjxbI b‡n, RbMY gw³h× Kwiqv GK mvMi i‡³i wewbg‡q GB wPišb mve‡fŠgZ ARb Kwiqv‡Q|

‡Kvb AvBb cYq‡b hZ KviY I IRiB _vKK bv †Kb, †Kvb Kvi‡Y ev †Kvb ARnv‡Z, Zvnv hZ ¸i“ZcYB nDK bv ‡Kb KLbB RbM‡Yi mve‡fŠgZ Kwoqv j Iqv hvq bv| RbM‡Yi mve‡fŠgZ mKj KviY, c‡qvRb I IR‡ii Dc‡i Aew¯Z| RbM‡Yi Kvi‡Y I c‡qvR‡b mswean vbI ms‡kvab Kiv hvq, †hgb, h³ iv‡ói mswean v‡b MZ †mvqv `BkZ erm‡i 27wU ms‡kvabx Avbvqb Kiv nBqv‡Q, fvi‡Zi mswean vbI kZvwaKevi ms‡kvab nBqv‡Q, wKš †Kvb ms‡kvabxB RbM‡Yi mve‡fŠgZ KLbB †Kvb fv‡eB ¶b K‡i bvB|

h³ ivó 1861 mv‡j Mnh‡× RovBqv c‡o| Pvi ermie¨vcx cej Mnh‡× Union Gi Aw¯Z wecb nBqv c‡o| j¶ j¶ gvbl Mnnviv nq, cvY nvivq wKš GBiƒc Zxe msKUgq Ae¯v‡ZI

h³ iv‡ói RbM‡Yi mve‡fŠgZ we›`gvÎ ¶b nq GBi∫c †Kvb AvBb cYqb Kiv nq bvB ev c`‡¶c MnY Kiv nq bvB| wØZxq gnvh‡×i mgq Rvcvb nvIqvB ØxccÄ Avµgb Kwi‡j h³ivó m`xN mg‡qi Rb¨ mivmwi h‡× RovBqv c‡o| wKš RbM‡Yi mve‡fŠg‡Zi cwicšx †Kvb c`‡¶c GBi∫c Ri“ix Ae¯v‡ZI KLbI MnY Kiv nq bvB, GgbwK wbevPbI mwVK mg‡q Abwô Z nBqv‡Q|

Z`∫c fviZI 1949 mvj nB‡Z eûevi h× ev h×ve¯vi m¤§Lxb nBqvwQj, Ri“ix Ae¯vI K‡qKevi Rvix Kwi‡Z nBqvwQj wKš RbM‡Yi mve‡fŠgZ cwicšx †Kvb c`‡¶c KLbI MnY K‡i bvB |

cKZc‡¶ Sovereignty ev mve‡fŠg‡Z KLbI µgf½ nB‡Z cv‡i bv, Bnv Perpetual Succession Gi b¨vq wPišb Awew”Qb fv‡e Pjgvb|

1649 mv‡j Bsj¨v‡Ûi ivRv Charles I Gi wki‡”Q` Kiv nq Ges Oliver Cromwell Bsj¨vÛ‡K Commonwealth †NvlYv K‡ib| Zrci, wZwb wb‡R Lord Protector Dcwa MnY Kwiqv Bsj¨vÛ kvmb Kwi‡Z _v‡Kb| Zvnvi gZ¨i wKQKvj ci ivRZš cbi“×vi nq Ges Charles I Gi cÎ Charles II 1660 mv‡j Bsj¨v‡Ûi wmsnvm‡b Av‡ivnY K‡ib| GB 11 ermi mgqKv‡ji NUbvejx BwZnv‡mi c‡qvR‡b wjwce× nBqv‡Q e‡U wKš mvswevwbK AvBb Abmv‡i Charles I Gi gZ¨i m‡½ m‡½B ¯qswµq fv‡e Charles II 1649 mv‡jB Bsj¨v‡Ûi ivRv nBqvwQ‡jb ewjqv mvswevwbK fv‡e MY¨ Kiv nq| GB Kvi‡YB The King is dead †NvlYvi m‡½ m‡½ GK wbtkv‡mB cieZx ivRvi D‡Ï‡k¨ Long live the King ejv nq|

1971 mv‡ji 26‡k gvP Zvwi‡Li c_g cn‡i evsjv‡`‡ki ¯vaxbZv †NvlYvi mgq nB‡ZB we‡ki gvbwP‡Î evsjv‡`k bv‡g GKwU bZb ivó AvZ¥cKvk K‡i| 10B Gwcj Zvwi‡L Avbôvwb K fv‡e Proclamation of Independence Rvix Kiv nq Ges Zvnv 26‡k gvP ZvwiL

nB‡Z KvhKi Kiv nq| D³ Proclamation G Ab¨vb¨ welqvejxi mwnZ wbæwjwLZ †NvlYvI Kiv nq t

> "declare and constitute Bangladesh to be a sovereign People's Republic....."

25‡k gvP w`evMZ ivÎ nB‡ZB evsjv‡`‡ki RbMY MYh× Avi¤ K‡i| h‡×i cvi¤ nB‡ZB evsjvi RbMY AvšRvwZK mg_b jvf Kwi‡Z _v‡K Ges h‡×i †klfv‡M wewfb †`k evsjv‡`k‡K ivó wnmv‡e ¯xKwZ (recognition) c`vb Kwi‡Z Avi¤ K‡i hvnv wQj evsjvi RbM‡Yi mve‡fŠg‡Zi cwZ AvšRvwZK ¯xKwZ| 16B wW‡m¤i Zvwi‡L cwK¯vb †mbvevwnbxi AvZ¥mgc‡bi ga¨ w`qv evsjvi RbMY ¯vaxbZv h‡× Rq jvf K‡i|

1972 mv‡ji 11B Rvbqvix Zvwi‡L RvixKZ Provisional Constitution of Bangladesh Order, 1972, 10B Gwcj Gi Proclamation †K Ab‡gv`b K‡i|

mswewav‡bi 153(1) Ab‡"Q` Abmv‡i mswewavb 1972 mv‡ji 16B wW‡m¤i ZvwiL nB‡Z ejer nq| mswewav‡bi 150 Ab‡"Q` I PZ_ Zdwm‡ji 3(1) Ab‡"Q` Abmv‡i 1971 m‡bi 26‡k gvP nB‡Z mswewavb ceZ‡bi ZvwiL chš cYxZ mKj AvBb I ¯vaxbZvi †NvlYvcÎ Ab‡gvw`Z nq|

AZGe, 1971 mv‡ji 26‡k gvP ZvwiL ¯vaxbZv †NvlYvi mv‡_ mv‡_ evsjvi RbMY GKwU mve‡fŠg evsjv‡`‡ki Awaevmx wnmv‡e mve‡fŠgZ jvf K‡i| mswewavb D³ mve‡fŠgZ‡K ïagvÎ Ab‡gv`bB c`vb K‡i bvB, AwaKZi mgbZI Kwiqv‡Q| cKZc‡¶ evsjvi RbM‡Yi mve‡fŠgZ‡K AbmiY Kwiqv mswewavb iwPZ nBqv‡Q|

¯vaxbZv †NvlYvi gva¨‡g evsjvi RbMY †h mve‡fŠgZ ARb K‡i, gw³ h‡× j¶ knx‡`i i‡³ Zvnv gwngvwbZ nq, RbM‡Yi †mB mve‡fŠgZ wPišb| evsjv‡`k wPiKvj ¯vaxb _vwK‡e Ges wPiKvj

evsjvi RbM‡Yi mve‡fŠgZ we`¨gvb _vwK‡e| gv‡S g‡a¨ ‰`e`NUbvi b¨vq mvgwiK kvmb BZ¨vw`i gZ mvsweavwbK weP¨wZ NwU‡j I NwU‡Z cv‡i wKš evsjvi RbM‡Yi mve‡fŠgZ wPišb-Pjgvb| Bnvi mwnZ hvnvB mvsNwlK nB‡e ZvnvB LwÛZ nB‡e, A‰ea †Nvwl Z nB‡e|

GB chš evsjvi RbM‡Yi mvg‡fŠgZ‡K AvšRvwZK I ivR‰bwZK `wó‡KvY nB‡Z wePvi Kiv nBj| GBevi Bnvi AvBbMZ ˆeaZv we‡ePbv Kiv hvK|

c‡eB D‡jL Kiv nBqv‡Q †h evsjvi RbMY msweavb iPbvi c‡eB mve‡fŠgZ ARb Kwiqv‡Q| 1971 mv‡ji 10B Gwcj Zvwi‡L Proclamation of Independence Rvix nq| BnvB evsjv‡`‡ki c_g mvsweavwbK `wjj| GB `wjjB ¯vaxbZv †NvlYvi ZvwiL 26‡k gvP nB‡ZB mve‡fŠg MYcRvZš i‡c evsjv‡`‡ki cwZôv ‡NvlYv K‡i|

GLv‡b DjL¨ †h ivRZ‡š ivRv wb‡RB mve‡fŠg (Sovereign) | cRvZ‡š MYgvbl B mve‡fŠg| GB Kvi‡YB Proclamation of IndependenceG Sovereign People's Republic A_ev mve‡fŠg MY-cRvZš ejv nBqv‡Q| Z‡e cRvZš A_ nB‡Z‡Q cRv A_vr RbM‡Yi Zš ev ivRZ|

Black's Law Dictionary Abmv‡i Republic A_ 'A system of government in which the people hold sovereign power and elect representatives who exercise that power'.

Robert A Dahl Gi gZ Abmv‡i 'A republic is a government which (a) derives all of its powers directly or indirectly from the great body of the people.....'

msweavb iwPZ nBevi c‡e evsjv‡`‡ki RbM‡Yi GB AvBbMZ Ae¯vb msweav‡bi 150 Ab‡"Q` I PZ_ Zdwm‡ji 3(1) Ab‡"Q` I mg_b I Ab‡gv`b K‡i|

msweav‡bi c¯vebv GKB fv‡e †NvlYv K‡i †h evsjv‡`‡ki RbMYB ¯vaxbZvh‡×i gj Pvwj Kvkw³, ZvnvivB gw³h‡×i gva¨‡g mve‡fŠg MYcRvZšx evsjv‡`k ¯vaxb Kwiqv‡Q Ges evsjv‡`‡ki msweavb iPbv I wewae× Kwiqv mg‡eZ fv‡e MnY Kwiqv‡Q|

msweav‡bi c_g fv‡Mi wk‡ivbvg ÔcRvZšÕ, Bs‡iRx‡Z 'The Republic'| msweav‡bi c_g Ab‡"Q` I GKB fv‡e †NvlYv K‡i †ht

ÔÔevsjv‡`k GKwU GKK, ¯vaxb I mve‡fŠg cRvZš, hvnv ÔÔMYcRvZšx evsjv‡`kÕÕ bv‡g cwiwPZ nB‡eÕÕ|

c_g Ab‡"Q‡`i Bs‡iRx fvl¨ wbæi¡c t

Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh.

GB fv‡e RbM‡Yi mve‡fŠgZ †NvlYvi gva¨‡gB msweav‡bi mPbv|

msweav‡bi c_g fv‡Mi me‡kl mßg Ab‡"Q` msweav‡bi cvavb¨ †NvlYv Kwi‡Z wMqv RbM‡Yi †kôZ I mve‡fŠgZ wbæwjwLZ fv‡e mwbwðZ K‡i t

7| (1) cRvZ‡ši mKj ¶gZvi gvwjK RbMY; Ges RbM‡Yi c‡¶ †mB ¶gZvi c‡qvM †Kej GB msweav‡bi Aaxb I KZ‡Z KvhKi nB‡e|

(2) RbM‡Yi Awfcv‡qi cig Awfe¨wl"i"‡c GB msweavb cRvZ‡ši m‡ev"P AvBb Ges Ab¨ †Kvb AvBb hw` GB msweav‡bi mwnZ AmgÄm¨ nq, Zvnv nB‡j †mB AvB‡bi hZLvwb AmvgÄm¨cY, ZZLvwb evwZj nB‡e|

Bs‡iRx fvl¨ wbæi¡c t

7.(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency,be void.

GB fv‡e evsjv‡`‡ki c_g mvswevwbK `wjj The Proclamation of Independence, msweav‡bi c¯vebv Ges c_g I mßg Ab‡"Q` evsjv‡`‡ki RbM‡Yi mve‡fŠgZ‡K mvswevwbK fv‡e †NvlYv Kwiqv‡Q, mg_b Kwiqv‡Q I mwbwðZ Kwiqv‡Q weavq AvBbMZ fv‡e Bnv msweav‡bi GKwU Aj•Nbxq weavb ev Basic Structure | Bnv‡K

†Kvb fv‡eB, †Kvb Kvi‡YB j•Nb Kiv hvB‡e bv| A_P ZwKZ AvBb wKfv‡e RbM‡Yi mve‡fŠgZ‡K j•Nb Kwievi cqvm cvBqv‡Q Zvnv Dc‡ii Av‡jvPbvq weeZ nBqv‡Q|

ZËveavqK miKvi-†MvôxZš t ZËveavqK miKv‡ii cavb Dc‡`óv g‡bvbxZ nB‡eb cv³b cavb wePvicwZ A_ev Avcxj wefv‡Mi Aemicvß wePviK A_ev evsjv‡`‡ki GKRb m‡hvM¨ bvMwiK A_ev Zvnv‡`i Kvnv‡KI cvIqv bv †M‡j ivócwZ ¯qs cavb Dc‡`óv nB‡eb| Bnv e¨wZZ Aci `kRb Dc‡`óvI cavb Dc‡`óvi civgk mv‡c‡¶ ivócwZ KZK wb‡qvMcvß nB‡eb| Zvnviv m‡ev”P beŸB w`‡bi Rb¨ †`k cwiPvjbv Kwi‡eb Ges wbevPb Kwgkb‡K mô fv‡e wbevPb cwiPvjbvi Rb¨ c‡qvRbxq mn‡hvwMZv c`vb Kwi‡eb|

m‡›`n bvB †h cavb Dc‡`óv I Ab¨ `kRb Dc‡`óv mK‡jB AZ¨š m¾b e¨wË“ Ges Áv‡b, ¸‡Y I wk¶vq Zvnviv †`‡ki †kô mšvb‡`i Ab¨Zg| wKš Zvnviv AwbevwPZ | Zvnviv †Kvb fv‡eB †`‡ki RbMY‡K cwZwbwaZ K‡ib bv| ¯í mg‡qi Rb¨ nB‡jI Zvnviv GKwU ¯vaxb mve‡fŠg ivó cwiPvjbvi `wq‡Z _vwK‡eb| Zvnviv mr, b¨vqcivqY I me¸YwbZ nIqv m‡ZI ivóweÁv‡bi fvlvq GBiƒc ivóe¨e¯v‡K †MvôxZš (Oligarchy) e‡j| AwZ ¯í mg‡qi Rb¨ nB‡jI ZËveavqK miKvi e¨e¯v GKwU †MvôxZš eB Avi wKQ b‡n|

‡MvôxZ‡ši BwZnvm mf¨Zvi b¨vqB civZb | wKš GB ivóe¨e¯v‡K AvovB nvRvi ermi c‡ei Mx‡mi bMi †K›`xK mf¨ZvI MnY K‡i bvB | ga¨h‡Mi cvi‡¤ BD‡iv‡ci †Kvb †Kvb †`‡k GB ivóe¨e¯v cPj‡bi †Póv e¨_ nq| 18k kZvãx nB‡ZB cwZwbwaZkxj MYZ‡ši D‡b¥I| A_P 21 kZ‡Ki `vicv‡š DcbxZ nBqv evOvjx RwZ‡K GLb GB †MvôxZš‡K MjatKiY Kwi‡Z nB‡Z‡Q| Dcj¶ nB‡Z‡Q GKwU mô wbevPb Abôvb Kwi‡Z wbevPb Kwgkb I miKv‡ii e¨_Zv|

38| **Basic Structure** ZZ- mvaviY Av‡jvPbv t

Kesavananda ‡gvKvÏgvq AwfgZ cKvk Kiv nq †h mswe avb ms‡kva‡b Parliament Gi ¶gZv Amxg bq eis 368 Ab‡”Q‡` c`Ë ¶gZvq AcZ¨¶ (implied) mxgve×Zv iwnqv‡Q| D³ Ab‡”Q` mswe av‡bi basic structure A_ev framework ms‡kva‡bi ¶gZv c`vb K‡i bv|

mvswe avwbKZv eZgv‡b GKwU AvBbMZ bxwZ| Bnv mi Kv‡ii wbevnx ¶gZv‡K wbqš‡Yi g‡a¨ iv‡L hvnv‡Z iv‡ó MYZš¿ AvB‡bi kvmb eRvq _v‡K| GB MYZvwšK ixwZ bxwZi Ab¨Zg nB‡Z‡Q †gŠwjK AwaKvi msi¶Y| GB mvswe avwbKZv separation of powers ev ¶gZvi c_KKiY‡K checks and balances Gi g‡a¨ iv‡L| Bnv ¶gZv‡K †K›`xfZ bv Kwiqv cwie¨vß Kwiqv †`q| Parliament KLbB †gŠwjK AwaKvi Le K‡i bv, mcxg †KvU GB bxwZ ev aviYv MnY KiZt AvBb we‡klY Kwiqv _v‡K| Parliament c‡qvRb gZ †gŠwjK AwaKvi mxwgZ Kwi‡Z cv‡i wKš‿ KLbB AvBb Kwiqv evwZj Kwi‡Z cv‡i bv| GKwU ¯vaxb wePvie¨e¯vB †gŠwjK AwaKvi i¶v Kwi‡Z cv‡i KviY Bnv ïagvÎ AvB‡bi mvaviY e¨vL¨vB K‡i bv, Av`kMZ gj¨vqbI K‡i|

Bsj¨v‡Ûi Parliamentary mve‡fŠgZ I Avgv‡`i mvswe avwbK mve‡fŠg‡Zi g‡a¨ Zdvr iwnqv‡Q| Avgv‡`i mswe avb MYcwil` iPbv Kwiqv‡Q, RvZxq msm` bq| Avgv‡`i GKwU `t¯úwieZbxq mswe avb iwnqv‡Q| mswe av‡bi ZZxq fv‡M ewYZ †gŠwjK AwaKvimgn AvB‡bi kvm‡bi wfwË| AvB‡bi kvmb (rule of law) I ¶gZvi c_KKiY I †gŠwjK AwaKvimgn mvswe avwbKZvi bxwZ hvnv judicial review Gi wfwËI e‡U | GBifc †c¶vc‡UB basic structure Z‡Zi D™e nq|

‡gŠwjK AwaKvimgn mf¨ mgv‡R GKwU we‡klI ¯vb AwaKvi Kwiqv iwnqv‡Q| GB AwaKvimgn †gŠwjK I `‡Áq hvnv‡K h³ iv‡ói mswe av‡bi Av‡jv‡K inalienable AwaKvi ejv nq| h³ iv‡ói gj mswe av‡b †gŠwjK AwaKvi mgn c_‡g ms‡hvwRZ wQj bv| cieZx‡Z

†gŠwjK AwaKvim¤wjZ 10(`k) wU ms‡kvabx Avbv nq| ms‡kvab AvBb¸wj 1791 mv‡ji 15B wW‡m¤i Zvwi‡L GK‡Î A½ivó¸wji Ab‡gv`b (ratification) jvf K‡i| GB¸wj‡K GK‡Î Bill of Rights ejv nq| ZvnvQvov, Mnh‡×i ci XIII, XIV I XV ms‡kvab¸wj Ab‡gv`b cvq| GB¸wj msweav‡bi †mŠa ¯ifc| evsjv‡`k msweav‡bi wØZxq I ZZxq fvM‡K GK‡Î msweav‡bi we‡eK ejv hvq|

msweavb iPbv K‡i iv‡ói RbM‡Yi cwZwbwa wnmv‡e MYcwil`| D³ gj msweav‡bi ˆeaZv DÌvc‡bi †Kvb m‡hvM bvB wKš msweavb ms‡kvab Kiv nq msweav‡b c`Ë ¶gZvi AvIZvq, †mLv‡bB ˆeaZvi ck I‡V|

msweav‡bi †Kvb AskwU basic feature Zvnv wbYq Kwi‡Z ZwKZ ms‡kva‡bi D‡Ïk¨ I KviY mvgwMK fv‡e msweav‡bi mwnZ we‡ePbv KiZt D³ ms‡kva‡bi Kvi‡Y hw` Bnvi †Kvb gj Ask Ggb fv‡e ¶wZM¯ nq ‡h msweav‡bi PwiÎB Avgj cwieZb nBqv hvq, †m‡¶‡Î D³ gj Ask‡K basic sturcture ejv nq| 142 Ab‡”Q‡`i AvIZvq Ggb †Kvb ms‡kvab Kiv hvq bv hvnvi Øviv msweavb weKjv½ nBqv hvq| Bnv wbYq Kwi‡Z cwZwU ZwKZ ms‡kvab AvBb gj msweav‡bi mwnZ c_K c_K fv‡e Zjbv KiZt wePvi we‡ePbv Kwievi c‡qvRb iwnqv‡Q|

D‡jL¨ ‡h c‡Z¨KwU gvbl R‡b¥i mgq nB‡Z KZK¸wj mvaviY AwaKvi jBqv Rb¥ jvf K‡i| msweav‡bi ZZxq fvM evsjv‡`‡ki gvbl‡K bZb †Kvb AwaKvi †`q bvB| Rb¥ nB‡Z gvb‡li we`¨gvb AwaKvi‡K mvsweavwbK ¯xKwZ c`vb Kwiqv‡Q gvÎ| msL¨vMwiôZvi kw³‡Z GB AwaKvi ewZj Kiv hvq bv| GKwU mvaviY AwaKv‡ii hw` †gŠwjKZv _v‡K, wPwýZ I wbwðZ Av`k _v‡K, Z‡e Zvnv †gŠwjK AwaKv‡i cwiYZ nq| mcxg †KvU‡K Ggb fv‡e msweavb we‡klY Kwi‡Z nq hvnv‡Z gvbl Zvnvi mvsweavwbK AwaKvi Dc‡fvM Kwi‡Z

cv‡i| †gŠwjK AwaKvi mgn msweav‡bi GKwU we‡kl ghv`vcY Ae¯v‡b iwnqv‡Q|

‡gŠwjK AwaKvi mgn mvaviY fv‡e basic structure I AcwieZbxq| Bnv we‡kl ‡Kvb Kvi‡Y msw¶ß Kiv hvB‡Z cv‡i wKš KLbB iwnZ Kiv hvq bv| Bnv iv‡ói Acwiwg Z ¶gZv‡K mshZ I wbqš‡Yi g‡a¨ iv‡L| Basic structure ZZ †gŠwjK AwaKvi¸wj i¶vi Rb¨ cvPxi wnmv‡e KvR K‡i|

mcxg †Kv‡Ui judicial review Gi ¶gZv basic structure Z‡Zi AvIZvf³| mg¯ AvB‡bi mvsweavwbKZv wePvi Kwievi `vwqZ wePvi wefv‡Mi Dci b¨¯| wePvi wefv‡Mi wbqšY e¨wZ‡i‡K msweavb ms‡kvab msm`xq ^¯iZ‡š cwiYZ nB‡Z cv‡i Ges cwiYwZ‡Z msweav‡bi †kôZ nvivBevi m¤ebv †`Lv w`‡Z cv‡i|

mvaviY fv‡e RvZxq msm` msweav‡bi †h†Kvb Ab‡”Q‡`i ms‡kvab Kwi‡Z cv‡i e‡U wKš D³ ms‡kvab hw` basic structure Gi mwnZ mvsNwlK nq Zvnv nB‡j Dnv A‰ea ev ultra vires nB‡e|

Indira Gandhi ‡gvKÏgvq AvB‡bi `wó‡Z mgZv Ges Minerva †gvKvÏgvq fviZxq msweav‡bi 14, 19 I 21 Ab‡”Q`‡K msweav‡bi basic structure Ges Zvnv ewZj †hvM¨ b‡n ewjqv †NvlYv Kiv nq|

‡gŠwjK AwaKv‡ii cðv‡Z †h Av`k I bxwZ we`¨gvb iwnqv‡Q ZvnvB basic structure Gi wfwË|

msweavb ms‡kva‡bi gva¨‡g Bill of Rights h³ iv‡ói msweav‡b msh³ Kiv nB‡e GB k‡Z A½ivó¸wj msweavb Ab‡gv`b Kwiqv wQj| wØZxq gnvh‡×i ci we‡k A‡bK bZb MYZvwšK ivó Rb¥ jvf Kwiqv‡Q| cvq mKj MYZvwšK iv‡ó Rbgvb‡li †gŠwjK AwaKvi i¶vi c`‡¶c MnY Kiv nBqv‡Q|

Rvgvbxi msweav‡b KZK¸wj gj AwaKvi basic structure wnmv‡e ms‡hvwRZ iwnqv‡Q| KvbvWv Bnvi 1982 mv‡j ji msweav‡b KZK¸wj

†gŠwjK AwaKvi msi¶Y Kwiqv‡Q| 1998 mv‡j h³iv‡R¨ Human Rights Act cYqb Kiv nBqv‡Q|

cZxqgvb nq we‡ki cvq mKj iv‡ói mswe avb KZ¸wj we‡kl AwaKvi msi¶Y K‡i hvnv KLbB cwieZb†hvM¨ b‡n|

Indira Gandhi ‡gvKvÏgvq ¶gZvi AcZ¨¶ (implied) mxgve×Zv I controlled mswe avb‡K uncontrolled mswe av‡b icvši Kwievi cqv‡mi Kvi‡Y mcxg ‡KvU mswe av‡b ms‡hvwRZ 329-G(4) Ab‡”Q` evwZj †NvlYv K‡i|

RvZxq msm` mswe avb ms‡kvab Kwi‡Z ¶gZvcvß wKš D³ ¶gZv mxgvnxb ev Awbqšx Z bq| hw` ms‡kvabwU mswe av‡bi cKwZ cwieZb K‡i Zvnv nB‡j D³ ms‡kvabxwU evwZj ev ultra vires nB‡e|

ck DwV‡Z cv‡i †h RvZxq msm` 142 Ab‡”Q` ms‡kvab Kwiqv Bnvi ms‡kva‡bi ¶gZv ew× KiZt mswe av‡bi †gŠwjK Pwi Î niY Kwi‡Z cv‡i wKbv| 142 Ab‡”Q` Ggb ‡Kvb ¶gZv RvZxq msm`‡K c`vb K‡i bv| RvZxq msm` †h †Kvb ms‡kvabx Kwi‡Z cvwi‡j I D³ Ab‡”Q‡` ewYZ ms‡kvabxi kZ f½ ev basic structure Gi mwnZ mvsNwlK †Kvb ms‡kvab AvBb RvZxq msm` Kwi‡Z cv‡i bv|

cRvZš, MYZš, AvB‡bi `wó‡Z mgZv, AvB‡bi kvmb, wePvi wefv‡Mi ¯vaxbZv, judicial review I ¶gZvi c_KKiY BZ¨vw` mswe av‡bi basic structure| GB AwaKvi¸wj Avevi GKwU Avi GKwUi Dci ci¯úi wbfikxj | AvB‡bi `wó‡Z mgZv GB †gŠwjK AwaKv‡ii Abcw¯wZ‡Z AvB‡bi kvmb Avkv Kiv A_nxb| †Kvb ms‡kvabx‡Z mswe avb j•Nb nB‡Z‡Q wKbv Zvnv wePvi Kwievi `vwqZ me mg‡qB mcxg †Kv‡Ui Dci b¨v¯| GB Kvi‡YB mcxg †Kv‡Ui judicial review Gi ¶gZv mswe av‡bi GKwU AwZ c‡qvRbxq ˆewkó¨ | ZZxq fvM ev Ab¨vb¨ fv‡M mswe av‡bi gj mi ev D‡Ïk¨ wK Zvnv judicial review Gi gva¨‡gB Bnvi cKZ Ae¯vb wbYq Kiv m¤e|

AvB‡bi `wó‡Z mgZv mvaviYfv‡e GB †gŠwjK AwaKvi wbtm‡›`‡n mswea v‡bi GKwU basic structure, wKš mvweK mgZvi D‡Ï‡k¨ AvB‡bi gva¨‡g GB AwaKvi †¶Î we‡k‡l mxwgZ Kiv ev GgbwK mvweK ¯v‡_ Le KivI m¤e| mswea v‡bi †Kvb basic structure Gi PwiÎ niY bv KwiqvI mxwgZ Kwievi GB mxgvbv wbaviY judicial review Gi gva¨‡gB m¤e|

GB fv‡e †Kvb AwZ c‡qvRbxq AvBb‡K mvswevwbK fv‡e i¶v Kwievi j‡¶¨ AvB‡bi kvmb ev ¶gZvi c_KKiY e¨wZ µg wnmv‡e wKQUv Qvo w`‡Z nq wKš Zvnv‡Z basic structure wnmv‡e Bnv‡`i gj PwiÎ niY nq bv | wKš GBiƒc †¶‡Î l mswea v‡bi Ab¨vb¨ As‡ki mwnZ ZwKZ ms‡kvabxwU mmsMwZcY wKbv Zvnv wePvi we‡klY Kwievi `vwqZI mcxg †Kv‡Ui, RvZxq msm` ev wbevnx KZc‡¶i b‡n|

¶gZvi c_KKiY, AvB‡bi kvmb, mvswevwbKZv c‡Z¨KwU ZZ judicial review Gi mwnZ msMwZcY| AvaywbK MYZš msL¨vMwi‡ôi kvm‡bi mwnZ †gŠwjK AwaKvi msi¶Y Df‡qi Dci wbfikxj| †`‡ki miKvi ‡hb Bnvi msL¨v MwiôZvi kw³‡Z RbM‡Yi †gŠwjK AwaKvi Le bv K‡i Zvnv wbqšY I ZZveavqb Kwievi `vwqZ mcxg †Kv‡Ui|

mvswevwbK ms‡kvabxi †¶‡Î mxgve×Zv iwnqv‡Q wKš RvZxq msm` mswea v‡b ms‡kvab KiZt cbivq Bnvi AvBbMZ wbivcËv weavb Kiv, Bnvi GLwZqvi ewnfZ I h_v_ bq| GKB cwZôvb KZK AvBb cYqb Avevi †mB cwZôv‡bi Dc‡iB Dnvi ˆeaZv wbiƒcY Kwievi `vwqZ c`vb mvswevwbK fv‡e we‡aq bq| Zvnv‡Z mswea v‡bi AšwbwnZ checks and balances webó nq| RvZxq msm` AvBb cYqb Kwi‡e Ges mcxg ‡KvU mswea v‡bi Av‡jv‡K m¤úY ¯vaxb I Av‡eMg³ fv‡e D³ AvB‡bi ˆeaZv wbi“cY Kwi‡e BnvB mswea v‡b

AcZ¨¶ fv‡e wbwnZ iwnqv‡Q| GB Kvi‡YB msweav‡bi 101 I 102 Ab‡”Q` AZ¨š¿i“ZcY basic structure|

msweavb mvaviY †Kvb `wjj bq| GB gnvb `wjj iv‡ói RbM‡Yi c‡¶ RbM‡Yi cwZwbwaMY gwlh‡×i Av`‡k iPbv Kwiqv‡Q‡jb| Bnv GKwU Rxeš `wjj| Bnvi wbR¯ GKwU ¯vfvweK Aš—wbwnZ kw³ iwnqv‡Q| Bnv RbM‡Yi Avkv, AvKv•Lv I wb‡`kbv‡K cwZdwjZ K‡i| GLv‡bB GB `wj‡ji ‡kôZ wbwnZ iwnqv‡Q| GB `wjj iv‡ói AZxZ msi¶Y K‡i Ges eZgvb I fwel¨r w`K wb‡`kbv c`vb K‡i| Basic structure GKwU ¯Ztwm× ZZ| GB ZZ mvswevwbK cwiPq (identity) I cKwZi Dci wbfikxj| Bnv msweavb‡K `pZv c`vb K‡i Ges mKj weavb m½wZcY K‡i| GKwU iv‡ói Rxe‡b hZ wKQ mgm¨v Zvnv GB gnvb `wj‡ji gva¨‡gB mgvavb Kiv m¤e I †kq| GB Kvi‡YB msweav‡bi e¨vL¨v I we‡klY mgq I mgvR cwieZb I weeZ‡bi mwnZ m½wZcY nBqv _v‡K | GB KvhwU iv‡ói c‡¶ wePvi wefvM Kwiqv _v‡K|

mg‡qi ZvwM‡` A‡bK mgq msweavb ms‡kvab c‡qvRb nB‡Z cv‡i wKš— D³ ms‡kvab KLbB gj msweav‡bi PwiÎMZ cwieZb Avbqb Kwi‡e bv| cKZc‡¶ msweavb‡K aŸsk Kwievi Rb¨ msweavb e¨envi Kiv hvq bv|

MYZš—, mgvRZš—, RvZxqZvev`, agwbi‡c¶Zv BZ¨vw` bxwZ I Av`kmgn msweav‡bi mwnZ mvskwqK I web¨vwmZ| GB Av`k¨wjB msweavb‡K cvÄj fv‡e Rbgvb‡li wbR¯ m¤ú` wnmv‡e cKvwkZ K‡i| Bnv mvswevwbK AvB‡bi AskI e‡U | GB¨wj msm‡`i ms‡kvabx ¶gZv ewnfZ|

msm‡`i Dci eva¨Ki nBevi c‡iB ïa mvswevwbK †Kvb bxwZ msweav‡bi ¿i“ZcY ˆewkó¨ wnmv‡e cwiMwYZ nB‡Z cv‡i| hw` H weavb GZUvB †gŠwjK nq †h Zvnv msm‡`i ms‡kvabx ¶gZvi Dc‡iI eva¨Ki nq Z‡eB Dnv‡K basic structure wnmv‡e MY¨ Kiv hvq

wKbv Zvnv we‡ePbv Kiv hvq| GB basic structure ZZ msm‡`i ms‡kvabx ¶gZv‡KI mxgve× iv‡L|

mvaviY fv‡e msweavb ms‡kvaxZ nB‡j I msweavb Bnvi gj PwiÎ A¶b iv‡L| ms‡kva‡b hw` msweav‡bi gj cKwZ Le nq Z‡e msweav‡bi basic structure i`iwnZ nB‡Z cv‡i| BnvB mvsweavwbK mve‡fŠg‡Zi cwiPq| Basic structure GKgvÎ ZZ hvnvi Øviv msweavb ms‡kva‡bi ‰eaZv wbYq Kiv hvq|

msweav‡bi †Kvb we‡kl weavb basic structure wnmv‡e MY¨ Kiv hvq wKbv Zvnv c‡Z¨KwU †¶‡ÎB Avgv‡`i msweav‡bi i‚c-†iLvq Bnvi cKZ Ae¯vb Ges Bnvi j¶¨ I D‡Ïk¨ wbYq KiZt msweav‡bi b¨vq iv‡ói kvmb cwiPvjbvi GKwU †gŠwjK `wj‡j Bnvi A¯xKwZ ev Abcw¯wZi cwiYvg wK `vovq cwZwU †¶‡Î Avewk¨K fv‡e Zvnv cix¶vi c‡qvRb nq| hw` ZwKZ ms‡kvabxi Kvi‡Y msweav‡bi †gŠwjK cwiwPwZ (identity) ev cKwZi cwieZb N‡U Zvnv nB‡j Bnv Basic structure e‡U|

39| msweavb (Î‡qv`k ms‡kvab) AvBb Gi we‡klYt

GB chš Avgiv MYZš, cRvZš I wePvi wefvM Ges msweavb ms‡kvab m¤‡Ü mvaviY Av‡jvPbv KwiqvwQ|

GBevi msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, KvhKix nBevi c‡e iv‡ói ivR‰bwZK Ae¯v‡bi cwieZb I D³ AvBb KvhKix nB‡j iv‡ói ivR‰bwZK Ae¯vb m¤‡Ü Av‡jvPbv Kiv nBj|

c‡eB D‡jL Kiv nBqv‡Q †h evsjv‡`k msweavb iwPZ I wewae× nBqv evsjv‡`k RbM‡Yi c‡¶ Bnvi MYcwil` KZK 1972 mv‡ji 4Vv b‡f¤i Zvwi‡L MwnZ nq| GB gnvb msweavb 1972 mv‡ji 16B wW‡m¤i ZvwiL nB‡Z cewZZ I KvhKi nq|

mswevb Abmv‡i evsjv‡`k iv‡ó c_‡g msm`xq MYZš (Parliamentary Form) cPwjZ nq| AZcit, mswevb (PZ_ ms‡kvab) AvBb, 1975, Abmv‡i 1975 mvj nB‡Z ivócwZ kvmbe¨e¯v (Presidential System of Government) Pvj nq| GB e¨e¯v 1991 mvj chš Pvj _v‡K| 1991 mv‡j mKj ivR‰bwZK `j GKgZ nB‡j msm`xq ivóe¨e¯v cbivq cPjb Kwievi wm×vš MnY Kiv nq| †mB wm×vš Abmv‡i mswevb (Øv`k ms‡kvab) AvBb, 1991, c_‡g wej AvKv‡i MnxZ nq Zrci D³ ms‡kvabx MY‡fv‡U MnxZ nBqv AvB‡b cwiYZ nq|

mswev‡bi PZ_ fv‡M iv‡ói wbevnx wefvM m¤úwKZ Gi weavbmgn mwb‡ewkZ Kiv nBqv‡Q| Bnvi 1g cwi‡”Q‡` ivócwZ msµvš, 2q cwi‡”Q‡` cavbgšx I gwšmfv, 3q cwi‡”Q‡` ¯vbxq kvmb, 4_ cwi‡”Q‡` cwZi¶v Kgwefv‡M I 5g cwi‡”Q‡` A¨vUwb-†Rbv‡ij msµvš weavbvejxwjwce× Kiv nBqv‡Q|

mswev‡bi 48(1) Ab‡”Q` Abmv‡i evsjv‡`k iv‡ói GKRb ivócwZ _vwK‡eb| wZwb AvBb Abhvqx msm`-m`m¨MY KZK wbevwPZ nB‡eb| Z`vbhvqx ivócwZ wbevPb msµvš AvBb, 1991 (1991 mv‡ji 27bs AvBb) Abmv‡i msm`-m`m¨MY cKv‡k¨ †fvU`vb K‡ib| 50(1) Ab‡”Q` Abmv‡i ivócwZ cvP ermi †gqv‡` Zvnvi c‡` Awawôv _vwK‡eb| wKš‡Kvb e¨w³ `B ‡gqv‡`i AwaK ivócwZ c‡` Awawôv _vwK‡eb bv|

48(2) Ab‡”Q` Abmv‡i ivócwZ evsjv‡`‡ki wbqgvZvwšK ivócavb| Zvnvi ¯vb iv‡ói mKj e¨w³i D‡a|

48 (3) Ab‡”Q` Abmv‡i ‡Kej cavbgšx I cavb wePvicwZ wb‡qv‡Mi †¶Îe¨ZxZ ivócwZ Zvnvi Ab¨ mKj `vwqZ cvj‡b cavbgšxi civgk Abhvqx Kvh K‡ib|

mswewavb wbevnx ¶gZv ivócwZi Dci b¨¯ K‡i bvB Z‡e 55 Ab‡”Q‡`i (4) `dv Abmv‡i miKv‡ii mKj wbevnx e¨e¯v ivócwZi bv‡g MnxZ nBqv‡Q ewjqv cKvk Kiv nq|

55 Ab‡”Q‡`i (5) `dv Abmv‡i ivócwZi bv‡g cYxZ Av‡`kmgn I Ab¨vb¨ Pw³ cÎ wKi‡c mZ¨wqZ ev cgvYxKZ nB‡e, ivócwZ Zvnv wewamgn-Øviv wbaviY K‡ib|

55 Ab‡”Q‡`i (6) `dv Abmv‡i ivócwZ miKvix Kvhvejx e›Ub I cwiPvjbvi Rb¨ wewamgn cYqb K‡ib| GB ¶gZve‡j ivócwZ miKv‡ii Kvhvejx e›Ub I cwiPvjbvi Rb¨ Rules of Business, 1996, cYqb K‡ib|

Rules of Business Gi rule 6 (i) Gi AvIZvq Zdwmj 3G D‡jwLZ welqv`x, h_vt cavbgšx I cavb wePvicwZi wb‡qvM I c`Z¨vM m¤úwKZ welqvejx ivócwZi wbKU mivmwi Dc¯vcb Kiv nq|

56 Ab‡”Q‡`i (3) `dv Abhvqx †h msm` m`m¨ msm‡`i msL¨vMwiô m`‡m¨i Av¯vfvRb ewjqv ivócwZi wbKU cZxqgvb nB‡eb ivócwZ Zvnv‡K cavbgšx wb‡qvM K‡ib|

cavbgšxi civgk Abmv‡i 56 Ab‡”Q‡`i (2) `dv Abmv‡i ivócwZ Ab¨vb¨ gšx, cwZgšx I Dc-gšxw`M‡K wb‡qvM `vb K‡ib|

cavbgšxi civgk Abmv‡i ivócwZ evsjv‡`‡ki A¨vUwb-†Rbv‡ij (64Ab‡”Q`), mcxg †Kv‡Ui Dfq wefv‡Mi wePviKMY (95 Ab‡”Q`), cavb wbevPb Kwgkbvi I Ab¨vb¨ Kwgkbvi (118Ab‡”Q`), gnv-wnmve wbix¶K I wbqšK (127 Ab‡”Q`), miKvix KgKwgk‡bi mfvcwZ I m`m¨MY‡`i (138 Ab‡”Q`) wb‡qvM `vb K‡ib|

61 Ab‡”Q` Abmv‡i evsjv‡`‡ki cwZi¶v Kg wefvMmg‡ni mewabvqKZv ivócwZi Dci b¨¯ Ges AvBb Øviv Zvnvi c‡qvM wbqwšZ nq|

93 Ab‡”Q‡`i (1) `dv Abhvqx msm` fw½qv hvIqv Ae¯vq A_ev Dnvi Awa‡ekbKvj e¨ZxZ †Kvb mg‡q ivócwZi wbKU Avï e¨e¯v Mn‡Yi Rb¨ c‡qvRbxq cwiw¯wZ we`¨gvb iwnqv‡Q ewjqv m‡švlRbK fv‡e cZxqgvb nB‡j wZwb D³ cwiw¯wZ‡Z †hi“c c‡qvRbxq ewjqv g‡b Kwi‡eb, ‡mBiƒc Aa¨v‡`k cYqb I Rvix Kwi‡Z cv‡ib|

49 Ab‡”Q‡`i AvIZvq †Kvb Av`vjZ, UvBebvj ev Ab¨ †Kvb KZc¶ KZK c`Ë †h‡Kvb `‡Ûi gvRbv, wej¤b I weivg gÄi Kwievi Ges †h‡Kvb `Û gIKd, ¯wMZ ev nvm Kwievi ¶gZv ivócwZi _vwK‡e|

48 Ab‡”Q‡`i (3) `dv Abmv‡i †Kej cavbgšx I cavb wePvicwZ wb‡qv‡Mi †¶Î e¨wZZ ivócwZ Zvnvi Ab¨ mKj `vwqZ cvj‡b cavbgšxi civgk Abhvqx Kvh K‡ib|

Dc‡ii eYbv nB‡Z Bnv ¯úóZB cZxqgvb nq †h Dc‡ii `B †¶Î e¨wZ‡i‡K Ab¨ mKj Kvh ivócwZ cavbgšxi civgk Abmv‡i K‡ib|

GBevi cavbgšxi mvswevwbK Ae¯vb cix¶v Kiv hvDK|

GKRb cavbgšx Aek¨B GKRb wbevwPZ msm`-m`m¨, A_vr wZwb RbM‡Yi GKRb wbevwPZ cwZwbwa| ZvnvQvov, wZwb msL¨vMwiô msm`-m`m¨, hvnviv wbevwPZ RbcwZwbwa, Zvnv‡`i Av¯vfvRb|

ivócwZ Dc‡i ewYZ c`‡¶c¸wj mswevwb Abmv‡i ïagvÎ cavbgšxi civgk µ‡gB MnY Kwiqv _v‡Kb Ab¨ Kvnvi I civg‡k bq| wZwb Ab¨‡Kvb msm`-m`m¨ ev gšxi civgk Abmv‡i I Dc‡iv³ †Kvb c`‡¶c MnY Kwi‡Z cv‡ib bv, Kwi‡j Zvnv Aek¨B Amvswevwb K nB‡e|

56 Ab‡”Q‡`i (1) `dv Abmv‡i evsjv‡`k iv‡ói GKRb cavbgšx _vwK‡eb| 57 Ab‡”Q‡`i (1) `dv Abmv‡i cavbgšxi c`

kb¨ nB‡e hw` wZwb †Kvb mg‡q ivócwZi wbKU c`Z¨vMcÎ c`vb K‡ib, A_ev, wZwb msm`-m`m¨ bv _v‡Kb| ZvnvQvov, (2) `dv Abhvqx msL¨vMwiô m`‡m¨i mg_b nvivB‡j cavbgšx c`Z¨vM Kwi‡eb wKsev msm` fvswMqv w`evi Rb¨ wjwLZ fv‡e ivócwZ‡K civgk`vb Kwi‡eb| Z‡e, (3) `dv Abhvqx cavbgšxi DËivwaKvix Kvhfvi MnY bv Kiv chš cavbgšx ¯xq c‡` envj _vwK‡eb|

55 Ab‡”Q‡`i (2) `dv Abmv‡i cavbgšx KZK ev Zvnvi KZ‡Z mswevab-Abhvqx cRvZ‡ši wbevnx ¶gZv ch³ nB‡e| (3) `dv Abhvqx gwšmfv †hš_fv‡e RvZxq msm‡`i wbKU `vqx _vwK‡eb|

GB wZbwU `dv we‡klY Kwi‡j cZxqgvb nB‡e †h wKfv‡e mswevab iv‡ói kvmbe¨e¯vq c‡iv¶fv‡e nB‡j I RbM‡Yi wbKU Revew`wnZv wbwðZ Kwiqv‡Q|

ZvnvQvov, cavbgšx I Zvnvi gwšmfvi Abb¨ bq-`kgvsk gšxB wbevwPZ msm`-m`m¨ A_vr Zvnviv mK‡jB RbcwZwbwa Ges †mB wnmv‡e RbM‡Yi wbKU `vqe×|

D‡jL¨, 1972 mv‡ji gj msweav‡bi 56 Ab‡”Q` Abmv‡i mvaviYZ gšx c‡` wb‡qvM cvB‡Z nB‡j Zvnv‡K GKRb msm`-m`m¨ nB‡Z nBZ| Aek¨ 56 Ab‡”Q‡`i (4) `dv Abmv‡i gšx c‡` wbh³ nBevi mg‡q †Kvb e¨w³ msm`-m`m¨ bv _vwK‡j cieZx Qqgv‡mi g‡a¨ Zvnv‡K msm`-m`m¨ wbevwPZ nB‡Z nBZ, Ab¨_vq wZwb gšx _vwK‡Zb bv|

1991 mv‡j mswevab (Øv`k ms‡kvab) AvBb, 1991 (1991 m‡bi 28 bs AvBb) Abmv‡i ivó cbivq msm`xq MYZ‡š cZ¨veZb K‡i| wKš gj 56 Ab‡”Q‡`i (2) `dvi ci kZ (Proviso) cwieZb Kiv nq| (2) `dv wbæi“c t

ÔÔ(2) cavbgšx I Ab¨vb¨ gšx, cwZgšx I Dcgšx‡K ivócwZ wb‡qvM `vb Kwi‡eb t ÕÕ

Zrci cwiewZZ kZ (Proviso) wbæi“c t

ÔÔZ‡e kZ _v‡K †h, Zvnv‡`i msL¨vi Ab¨b bq-`kgvsk msm`-m`m¨M‡Yi ga¨ nB‡Z wbh³ nB‡e Ges AbwaK GK-`kgvsk msm`-m`m¨ wbevwPZ nBevi †hvM¨ e¨w³M‡Yi ga¨ nB‡Z g‡bvbxZ nB‡Z cvwi‡eb|ÕÔ

cZxqgvb nB‡Z‡Q, Dc‡iv³ kZ (Proviso) Abmv‡i gwšmfvi GK-`kgvsk m`m¨ msm`-m`m¨ wnmv‡e wbevwPZ bv nBqvI gšx wnmv‡e g‡bvbqb cvB‡Z cv‡ib, hw` I Zvnviv MYcwZwbwa b‡nb|

1972 mv‡j mswea vb c‡YZvMY evsjv‡`k iv‡ói mswea v‡b †h ai‡Yi RbcwZwbwaZkxj MYZš I RbM‡Yi ¶gZvq‡bi mPbv Kwiqvwe Qjb Dc‡iv³ kZ Zvnvi ¯úó ei‡Ljvc|

D‡jL¨, †h mswea vb `Bfv‡e RbM‡Yi wbKU gšx‡`i Revew`wnZv wbwðZ Kwiqv‡Q, c_gZt gšx wnmv‡e RvZxq-msm` gvidr RbM‡Yi wbKU, wØZxqZt wbevwPZ msm`-m`m¨ wnmv‡e RbM‡Yi wbKU|

Av‡iv D‡jL¨ ‡h 1972 mv‡ji gj mswea v‡bi cwZwU ¯‡i MYZvwšK Abkxjb I RbM‡Yi ¶gZvqb †hfv‡e cùwUZ nBqv DwVqvwQj 1991 mv‡ji Dc‡iv³ AMYZvwšK wea vb mswea v‡bi gj Av`‡ki mwnZ m¤úY mvsNwlK ewjqv cZxqgvb nB‡Z‡Q, Z‡e †h‡nZ welqwU eZgvb †gvKvÏgvq wePvh welq b‡n, †m‡nZ G m¤ú‡K †Kvb ¯úó †NvlYv †`Iqv nBj bv|

h³iv‡R¨i mvswea vwbK ixwZ (Convention) Abmv‡i gšxMY gwšmfvi m`m¨ wnmv‡e †hŠ_ I wbR wbR gšYvj‡qi Rb¨ GKK fv‡e House of Commons Gi wbKU `vqe× _v‡Kb| fvi‡Zi mswea v‡b gšxM‡Yi wbR wbR gšYvj‡qi Rb¨ e¨w³MZ `vqe×Zvi K_v ejv bv nB‡jI Zvnviv mvaviYZ h³iv‡R¨i mvswea vwbK ixwZ AbmiY Kwiqv e¨w³MZ `vqe×Zv MnY K‡ib|

evsjv‡`‡k gwšmfvi gšxMY RvZxq msm‡` wbR wbR gšYvjq msµvš DÌvcZ c‡ki DËi c`vb K‡ib Ges c‡qvR‡b weewZI c`vb K‡ib e‡U wKš wb‡Ri ev gšYvj‡qi e¨_Zvi `vqfvi MnY

Ges c‡qvR‡b c`Z¨v‡Mi †Kvb NUbv Avgv‡`i †`‡k ‡Zgb GKUv †`Lv hvq bv| evsjv‡`‡k Ministerial responsibility ev gšxi `wqZkxjZvi ms¯‹wZ GLbI ‡Zgb fv‡e Mwoqv I‡V bvB|

mswe av‡bi 141 K Ab‡”Q` Abmv‡i ivócwZ Ri“ix-Ae¯v †NvlYv Kwi‡Z cv‡ib, Z‡e ‡NvlYvi c‡eB cavbgšxi cwZ-¯v¶i c‡qvRb nB‡e|

Rules of Business Gi rule-4 (ii) Abmv‡i gwšmfvi Ab‡gv`b e¨wZ‡i‡K †Kvb ¸i“ZcY bxwZMZ wm×vš MnY Kiv nq bv|

Rule-7 Abmv‡i Rules of Business Gi Zdwmj-4 G DwjwLZ cKwZi mKj welqvejx m¤úwKZ Av‡`k Rvixi c‡e cavbgšx I ivócwZi wbKU Dc¯vcb Kwi‡Z nq|

Rule-8 Abmv‡i Rules of Business Gi Zdwmj-5 G DwjwLZ welqvejx cavbgšxi wbKU Dc¯vcb Kwi‡Z nq|

cZxqgvb nq, cavbgšx wbevnx cavb nB‡j I mvaviYZ gwšmfvq Av‡jvPbv e¨wZ‡i‡K †Kvb wm×vš MnY m¤e bq, KviY, cavbgšxmn mgM gwšmfv †hŠ_fv‡e RvZxq msm‡`i wbKU `vqx _v‡Kb| cavbgšx hw` †Kvb Kvi‡Y gwšmfvi mwnZ Av‡jvPbv e¨wZ‡i‡K †Kvb wm×vš MnY K‡ib Zvnv nB‡e Zvnvi GKK wm×vš| GB GKK wm×v‡ši Rb¨ gwšmfv RvZxq msm‡`i wbKU `vqe× _vwK‡e bv Ges cavbgšxi †bZ‡Z mgm¨v †`Lv w`‡Z cv‡i| mswe avb cavbgšx I Zvnvi gwšmfvi mKj c`‡¶‡ci Rb¨ RvZxq msm‡`i wbewPZ msm`-m`m¨M‡Yi gva¨‡g †`‡ki RbM‡Yi wbKU Zvnv‡`i Revew`wnZv wbwðZ Kwiqv‡Q| GLv‡bB msm`xq MYZ‡ši †hŠw³KZv I †kôZ|

GLv‡b Av‡iv D‡jL¨, †h whwb msm‡`i msL¨vMwiô m`‡m¨i Av¯vfvRb nB‡eb wZwb evsjv‡`‡ki mKj RbM‡Yi, GgbwK hvnviv Zvnv‡K Ges Zvnvi ivR%bwZK `j‡K †fvU †`q bvB Zvnv‡`i I cavbgšx nB‡eb|

GBevi mswevavb (Î‡qv`k ms‡kvab) AvBb, 1996, wKfv‡e ivócwZi Kvhµ‡g cwieZb Avbqb K‡i Zvnv Av‡jvPbv Kiv c‡qvRb| Z‡e Zvnvi c‡e Dc‡iv³ AvBbwU mswevavb ms‡kvab Kwiqv‡Q wKbv Ges ms‡kvab Kiv nB‡j wKfv‡e Kiv nBqv‡Q Zvnvl Av‡jvPbv c‡qvRb, KviY, nvB‡KvU wefv‡Mi wePvicwZMY Dc‡iv³ AvBb Øviv Av‡`Š †Kvb ms‡kvab nq bvB ewjqv gZ cKvk Kwiqv‡Qb|

Dc‡iv³ AvBb cix¶v‡š cZxqgvb nq †h mswev‡bi 58 Ab‡”Q‡`i ci 58K Ab‡”Q` mwb‡ewkZ Kiv nq| PZ_ fv‡M 2q cwi‡”Q‡`i ci GKwU bZb cwi‡”Q` 2K cwi‡”Q`, ms‡hvwRZ Kiv nBqv‡Q| D³ bZb cwi‡”Q‡` 58L, 58M, 58N I 58O Ab‡”Q`¸wj mwb‡ewkZ Kiv nBqv‡Q| ZvnvQvov, mswev‡bi 61, 99 I 123 Ab‡”Q` ms‡kvab Kiv nq|

c‡eB mswev‡bi 142 Ab‡”Q‡`i AvIZvq mswevavb ms‡kvab m¤‡Ü Av‡jvPbv Kiv nBqv‡Q| cbe¨³ Kwiqv ejv hvq †h mswev‡bi †Kvb weavb ms‡hvRb, cwieZb, cwZ¯vcb ev iwnZKi‡Yi Øviv ms‡kvwaZ nB‡Z cvwi‡e|

wbw`avq ejv hvq †h 58L, 58M, 58N I 58O Ab‡”Q`¸wj mwb‡e‡k mswev‡bi PZ_ fv‡M 2K cwi‡”Q`wU mswev‡b ms‡hvR‡bi gva¨‡g mswevavb ms‡kvab Kiv nBqv‡Q| ZvnvQvov, 58K Ab‡”Q`wUI ms‡hvRb Kiv nBqv‡Q|

mswev‡bi 61 Ab‡”Q‡`i ÔÔwbqwšZ nB‡eÕÕ k㸇ji cwie‡Z ÔÔwbqwšZ nB‡e Ges †h †gqv‡` 58L Ab‡”Q‡`i Aaxb wb`jxq ZËveavqK miKvi _vwK‡e †mB †gqv‡` D³ AvBb ivócwZ KZK cwiPvwjZ nB‡eÕÕ k㸇j Ges 99 Ab‡”Q‡`i (1) `dvq ÔÔAvav-wePvi wefvMxq c`ÕÕ k㸇ji cwie‡Z ÔÔAvav-wePvi wefvMxq c` A_ev cavb Dc‡`óv ev Dc‡`óvi c`ÕÕ k㸇j Dfq ¯v‡b h_vµ‡g cwZ¯vwcZ nBqv‡Q|

ZvnvQvov, mswea v‡bi 123 Ab‡”Q‡`i ceZb (3) `dvi cwie‡Z bZb (3) `dv cwZ¯vwcZ nBqv‡Q|

123 Ab‡”Q‡`i ceZb (3) `dv wbæi¡c t

123| (1) .....
.....

(3) msm`-m`m¨‡`i mvaviY wbevPb AbwôZ nB‡e|

(K) †gqv`-Aemv‡bi Kvi‡Y msm` fvw½qv hvBevi †¶‡Î fvw½qv hvBevi ceeZx beŸB w`‡bi g‡a¨ ; Ges

(L) †gqv`-Aemvb e¨ZxZ Ab¨ †Kvb Kvi‡Y msm` fvw½qv hvBevi †¶‡Î fvw½qv hvBevi cieZx beŸB w`‡bi g‡a¨ ;

Z‡e kZ _v‡K †h, GB `dvi (K) Dc-`dv Abhvqx AbwôZ mvaviY wbevP‡b wbevwPZ e¨w³MY D³ Dc-`dvq D‡jwLZ ‡gqv` mgvß bv nIqv chš msm`-m`m¨i¡c Kvhfvi Mnb Kwi‡eb bv|

Î‡qv`k ms‡kva‡bi ci cwZ¯vwcZ (3) `dv wbæi¡c t

123| (1) .....
.....

(3) ‡gqv` Aemv‡bi Kvi‡Y A_ev †gqv` Aemvb e¨ZxZ Ab¨ †Kvb Kvi‡Y msm` fvw½qv hvBevi cieZx beŸB w`‡bi g‡a¨ msm`-m`m¨‡`i mvaviY wbevPb AbwôZ nB‡e|

(Aa‡iLv c`Ë)

GB `BwU wea v‡bi g‡a¨ cv_K¨ nvB‡KvU wefv‡Mi weÁ wePviKMY Abaveb Kwi‡Z e¨_ nBqv‡Qb|

Dc‡iv³ Ab‡”Q`¸wj‡Z cwZ¯vc‡bi gva¨‡g msweavb ms‡kvab Kiv nBqv‡Q|

ZvnvQvov, msweav‡bi PZ_ fv‡M 58K Ab‡”Q` Ges 2K cwi‡”Q‡`i wewfb Ab‡”Q` 2q cwi‡”Q‡`i Ab‡”Q`¸wj, 141K(1) I 141M(1) ¸wj‡KI wewfb fv‡e ms‡kvab Kwiqv‡Q|

Dc‡i ewYZ ms‡kvab¸wji AvBbMZ Ae¯vb Ges GB¸wj msweav‡bi wK wK cwieZb Avbqb Kwiqv‡Q Ges Zvnv msweav‡bi

basic sturcture Gi mwnZ mvsNwlK wKbv Zvnv G¶‡b Av‡jvPbv Kiv nB‡e|

c_‡gB ivócwZi Kgcwim‡i GB ms‡kvab wK cfve Avbqb Kwiqv‡Q Zvnv Av‡jvPbv Kiv hvDK|

c‡eB D‡jL Kiv nBqv‡Q, ivócwZ evsjv‡`‡ki wbqgvZvwšK ivócavb| wZwb iv‡ói wbevnx cavb b‡nb| cavbgšx I cavb wePvicwZi wb‡qvM I c`Z¨vM cÎ MnY e¨wZ‡i‡K Ab¨ mKj `vwqZ cvj‡b wZwb cavbgšxi civgk Abmv‡i Kvh K‡ib| BnvB mvsweavwbK cwiKíbv|

wKš Î‡qv`k ms‡kvabx KvhKix nB‡j Zvnvi fwgKvi Avgj cwieZb nq|

mvaviY fv‡e ivócwZ evsjv‡`‡ki cwZi¶v Kg wefvMmg‡ni mevwabvqK nB‡j I AvBb Øviv Zvnvi c‡qvM wbqwšZ nq| A_vr wbqgvZvwšK fv‡e ivócwZ cwZi¶v Kgwefvmg‡ni mevwabvqK nB‡j I Bnvi cKZ wbevnx ¶gZv ivR‰bwZK miKv‡ii Dc‡iB b¨¯_v‡K Ges miKv‡ii mswkó cwZi¶v gšYvj‡qi mivmwi AvBbMZ wbqš‡Y cwiPvwjZ nq|

wKš Î‡qv`k ms‡kvabx KvhKix nB‡j †h †gqv‡` 58L Ab‡”Q‡`i Aaxb wb`jxq ZËveavqK miKvi _vwK‡e †mB †gqv‡` cwZi¶v Kgwefvmgn ivócwZ KZK AvBb Øviv mivmwi cwiPvwjZ nB‡e A_vr H mg‡qi Rb¨ wZwb ivR‰bwZK miKv‡ii wbevnx ¶gZv MnY Kwi‡eb Ges cKZ c‡¶ ivócwZi `vwq‡Zi mwnZ wZwb GKB mv‡_ cwZi¶v gšYvj‡qi gšxi `vwqZI cvjb Kwi‡eb|

mvaviY mg‡q `vwqZ cvjbiZ cwZi¶v gšx GKRb wbevwPZ RbcwZwbwa| Zvnvi gva¨‡g evsjv‡`‡ki RbMY MYZvwšK fv‡e evsjv‡`‡ki cRvZ‡ši cwZi¶v Kgwefvmg‡ni wbqšY K‡i| ivócwZ mvsweavwbK fv‡e iv‡ói m‡ev”P c`vwaKvix e¨w³ e‡U wKš wZwb MYZvwšK fv‡e cRvZ‡ši wbevwPZ cwZwbwa b‡nb| gj msweavb cwZi¶v Kgwefvmg‡ni wbevnx `vwqZ ivócwZi Dci b¨¯ K‡i bvB,

wbevwPZ ivR‰bwZK miKv‡ii Dci Kwiqv‡Q| GgZ Ae¯vq ivócwZ KZK cwZi¶v gšYvj‡qi GB wbevnx `vwqZ cvjb gj mvsweavwbK cwiKíbvi mwnZ m¤úY mvsNwlK|

msweav‡bi 48(3), 141K(1) Ges 141M(1) Ab‡”Q‡` hvnvB _vKK bv †Kb, 58L Ab‡”Q‡`i (1) `dvi †gqv‡` 58O Ab‡”Q` wb`jxq ZËveavqK miKv‡ii KvhKv‡j ivócwZ KZK cavbgšxi civgk Abhvqx A_ev Zvnvi cwZ¯v¶i MnYv‡š Kvh Kivi weavbmgn AKvhKi Kwiqv‡Q|

D‡jL¨, msweav‡bi Ri“ix weavbvejx m¤wjZ beg-K fvM gj msweav‡b wQj bv| msweavb (wØZxq ms‡kvab) AvBb, 1973 (1973 m‡bi 12bs AvBb) e‡j D³ beg-K fvM msweav‡b ms‡hvRb Kiv nq|

141K(1) Ab‡”Q‡` c`Ë ¶gZve‡j ivócwZ †`‡k Ri“ix-Ae¯v †NvlYv Kwi‡Z cv‡ib| †`‡k Ri“ix-Ae¯v †NvwlZ nB‡j 141L I 141M Ab‡”Q‡` ewYZ weavbvejx Abmv‡i †gŠwjK AwaKvimgnmn msweav‡bi KwZcq Ab‡”Q‡`i weavb ¯wMZ nBqv hvq| GB Kvi‡Y ivócwZ KZK Ri“ix-Ae¯v †NvlYvi ¶gZvi Ace¨envi †ivaK‡í 48(3) Ab‡”Q‡` c`Ë mvaviY kZ e¨wZ‡i‡K Ab¨ GKwU we‡kl kZ, 141K(1) Ab‡”Q‡`i †k‡l wbæwjwLZ fv‡e ewYZ nBqv‡Q t

> ÔÔ Z‡e kZ _v‡K †h, Abi¡c †NvlYvi ^eaZvi Rb¨ †NvlYvi c‡eB cavbgšxi cwZ-¯v¶i c‡qvRb nB‡e|ÕÕ

wK Kvi‡Y cavbgšxi cwZ-¯v¶i c‡qvRb nB‡Z cv‡i, Zvnv we‡ePbv Kiv c‡qvRb| ‡gŠwjK AwaKvi gvb‡li Agj¨ m¤ú` I mf¨Zvi cKó D`vniY| Bnv gvb‡li me‡kô AwaKvi| Z‡e †`‡ki enËi ¯v‡_ †mB †gŠwjK AwaKvi I A‡bK mgq ¯wMZ iwL‡Z nq| wKš †mB ¶gZv †hb †Kvb fv‡eB Ace¨envi bv nq †m Kvi‡YB Ri“ix-Ae¯v Rvixi c‡e GB AwZwi³ kZ Av‡ivc Kiv nBqv‡Q, KviY cavbgšx wb‡R GKRb wbevwPZ RbcwZwbwa| ZvnvQvov, cavbgšx wnmv‡e msL¨vMwiô RbcwZwbwaM‡Yi wZwb Av¯vfvRbI

e‡U| wbtm‡›`‡n Ri“ix Ae¯v †NvlYv GKwU ¸i“ZcY bxwZMZ wm×vš| Avewk¨Kfv‡eB gwšmfvq GB †NvlYv m¤‡Ü c•Lbvc•L fv‡e Av‡jvPbvi c‡iB G m¤‡Ü wm×vš jIqv nq| gwšmfvi AwaKvsk m`m¨MY wbevwPZ RbcwZwbwa| mK‡ji mw¤§wjZ Av‡jvPbv I we‡ePbvi ci hw` cZxqgvb nq †h Ggb Ri“ix-Ae¯v we`¨gvb iwnqv‡Q, hvnv‡Z h× ev ewnivµgY ev Af¨šixY †Mvj‡hv‡Mi Øviv evsjv‡`‡k ev Dnvi †h †Kvb As‡ki wbivcËv ev A_‰bwZK Rxeb wec‡`i m¤§Lxb, Zvnv nB‡j cavbgšx c_gZ mswea v‡bi 48(3) Ab‡”Q` Abmv‡i ivócwZ‡K Ri“ix-Ae¯v †NvlYv cm‡½ civgk c`vb Kwi‡eb Ges wØZxqZt 141K Ab‡”Q‡`i kZ †gvZv‡eK ivócwZ KZK Ri“ix-Ae¯v †NvlYvi c‡eB Dnv‡Z cwZ-¯v¶i c`vb Kwi‡eb| Zrci Ri“ix-Ae¯v †NvlYv Kiv nB‡e| BnvB Ri“ix-Ae¯v †NvlYvi mvswea vwbK cekZvejx I Ae¯vb|

wKš 58O Ab‡”Q` ivócwZ‡K ¯xq we‡ePbv Abmv‡i Zvnvi GKK wm×v‡š †`‡k Ri“ix-Ae¯v †NvlYvi wbevnx ¶gZv c`vb K‡i| GB GKK ¶gZv c_gZt ivócwZi mvswea vwbK wbqgvZvwšK Ae¯v‡bi cwicšx Ges wØZxqZt mswea v‡bi 48(3) I 141K(1) Ab‡”Q‡`i k‡Z c`Ë mvswea vwbK i¶vKe‡Pi mwnZ mvsNwlK| GgZ Ae¯vq ivócwZi c‡¶ ‰¯ivPvixi fwgKvq hvBevi GKwU m¤vebv _vwKqv hvq| nq‡Zv ivócwZ †Kvb w`bB ^¯ivPvixi fwgKv MnY Kwi‡eb bv, wKš †Zgb m¤vebv _vwK‡jB ‡mB e¨e¯v mswea v‡b e¨³ MYZvwšK Av`‡ki mwnZ mvsNwlK nB‡e weavq Zvnv Amvswea vwbK nB‡e|

58L Ab‡”Q‡`i (2) `dv Abmv‡i wb`jxq ZËveavqK miKvi †hŠ_fv‡e ivócwZi wbKU `vqx _vwK‡eb| wKš mvaviY Ae¯vq cavbgšx ev Zvnvi gwšmfvi gšxMY Zvnv‡`i Kv‡Ri Rb¨ ivócwZi wbKU `vqe× _v‡Kb bv| eiÂ 55 Ab‡”Q‡`i (3) `dv Abhvqx cavbgšxmn gwšmfv †hŠ_fv‡e msm‡`i wbKU `vqx _v‡Kb Ges e¨w³MZ fv‡e I msm`-m`m¨M‡Yi gva¨‡g mve‡fŠg RbM‡Yi wbKU

`vqe× _v‡Kb| BnvB MYZvwšK bxwZ I ixwZ| GgZ Ae¯vq wb`jxq ZËveavqK miKvi Avg‡j gj mswea v‡bi me‡kô kZ ev basic structure evsjv‡`‡ki RbM‡Yi mve‡fŠgZ Zvnv Le nq Ges RbM‡Yi mve‡fŠg‡Zi cwie‡Z ivRvi b¨vq ivócwZ mve‡fŠg nb| Bnv mswea v‡bi ‡gŠwjK bxwZi cwicšx I mvsNwlK|

58L Ab‡”Q‡`i (4) `dv Abmv‡i 55(4), (5) I (6) Ab‡”Q‡`i weavbvejx (c‡qvRbxq Awf‡hvRb mnKv‡i) (1) `dvq D‡jwLZ †gqv‡` GKBifc welqvejxi †¶‡Î ch³ nq| Z‡e cv_K¨ nB‡Z‡Q GB †h 55 Ab‡”Q‡`i †¶‡Î mKj c`‡¶c 48(3) Abmv‡i wbewPZ cavbgšxi civgk mv‡c‡¶ ch³ nq, wKš 58L(4) Ab‡”Q‡`i AvIZvq wbewPZ cavbgšxi Z_v RbM‡Yi fwgKv Abcw¯Z _v‡K| djk“wZ‡Z MYZš I Abcw¯Z _v‡K| Bnv gj mswea v‡bi ‡gŠwjK Av`k I bxwZi mwnZ m¤úY mvsNwlK| MYZš‡K Abcw¯Z ivwLqv Zvnv hZ ¯í mg‡qi Rb¨B nDK bv †Kb, †Kvb e¨e¯vB mvswea vwbK nB‡e bv|

58M Ab‡”Q` Abmv‡i msm` fvswMqv †`Iqvi ev fsM nBevi cieZx c‡bi w`‡bi g‡a¨ ivócwZ cavb Dc‡`óv I Aci AbwaK `kRb Dc‡`óvi mgb‡q wb`jxq ZËveavqK miKvi MVb Kwi‡eb|

msm` fw½qv hvIqv Ae¯vq A_ev Bnvi Awa‡ekbKvj e¨ZxZ †Kvb mg‡q ivócwZi wbKU Avï e¨e¯v Mn‡Yi Rb¨ c‡qvRbxq cwiw¯wZ we`¨gvb iwnqv‡Q ewjqv m‡švlRbK fv‡e cZxqgvb nB‡j mswea v‡bi 93 Ab‡”Q‡`i (1) `dv Abmv‡i wZwb D³ cwiw¯wZ‡Z Aa¨v‡`k cYqb I Rvix Kwi‡Z cv‡ib|

GKB fv‡e ivócwZ 93 Ab‡”Q‡`i (3) `dvi AvIZvq Ggb Aa¨v‡`k I cYqb I Rvix Kwi‡Z cv‡ib hvnv‡Z mswea vb-Øviv msh³ Znwe‡ji (Consdidated Fund) Dci †Kvb e¨q `vqg³ nDK ev bv nDK, D³ Znwej nB‡Z †mBifc e¨q wbev‡ni KZZ c`vb Kiv hvB‡e|

mvaviYZ AvBb cYqb RvZxq msm‡`i Abb¨ ¶gZv| c¯vweZ AvB‡bi Lmov, c¯ve ev wej AvKv‡i mswkøvaxb 80 Ab‡”Q` Abmv‡i msm‡` †ck Kwi‡Z nq| c¯vweZ Public Bill c_‡g gwšmfvq Av‡jvPbv nq| gwšmfv KZK Ab‡gvw`Z nB‡j mvaviYZ mswkó gšx Zvnv msm‡` ‡ck K‡ib| msm` c‡qvRb g‡b Kwi‡j wejwU msm`xq KwgwU‡Z Zvnv cix¶v wbix¶vi Rb¨ †ciY Kwi‡Z cv‡i| Zrci msm`xq KwgwUi mcvwik mnKv‡i Zvnv msm‡`i we‡ePbvi Rb¨ cbivq †ck Kiv nq| Zrci, wejwU msm` Ab‡gv`b Kwi‡j Zvnv ¯v¶‡ii Rb¨ ivócwZ mgx‡c †ck Kiv nq| ivócwZi ¯v¶‡ii ci wejwU AvB‡b cwiYZ nq|

msm‡`i Awa‡ekbKvj ewnfZ †Kvb mg‡q hw` ‡Kvb Aa¨v‡`k cYqb I Rvixi we‡kl c‡qvRb AbfZ nq Zvnv nB‡j 93 Ab‡”Q‡`i we‡kl ¶gZve‡j ivócwZ Aa¨v‡`k cYqb I Rvix Kwi‡Z cv‡ib| wKš †m¶‡Î I gwšmfv‡K c¯vweZ Lmov Aa¨v‡`kwU cix¶v KiZt Ab‡gv`b Kwi‡Z nq| GLv‡b cbivq D‡jL¨, cavbgšxmn gwšmfvi AwaKvsk m`m¨ wbevwPZ RbcwZwbwa| c¯vweZ Aa¨v‡`kwUi Lmov gwšmfv‡KB Ab‡gv`b Kwi‡Z nq, Ab¨ Kvnvi I Ab‡gv`‡b Pwj‡e bv| gwšmfv LmovwU Ab‡gv`b Kwievi ci ivócwZi Av‡`kµ‡g Aa¨v‡`kwU Rvix nq| GBi‡c ivócwZi Aa¨v‡`k RvixI c‡iv¶fv‡e RbM‡Yi KZ‡Zi AvIZvi g‡a¨ _vwKqvB Kwi‡Z nq|

wb`jxq ZËveavqK miKvi †gqv‡` Lmov Aa¨v‡`kwU Dc‡`óv cwil` Ab‡gv`b K‡i, wKš Dc‡`óvMY †KnB wbevwPZ RbcwZwbwa b‡nb| Kv‡RB wb`jxq ZËveavqK miKvi Avg‡ji Aa¨v‡`k¸wji Lmov AwbevwPZ e¨w³eM KZK Ab‡gvw`Z hvnv RbM‡Yi KZZ Z_v GKwU MYZvwšK ivóe¨e¯vi mwnZ mvsNwlK| memg‡q Bnv nv‡`‡q †Lvw`Z _vwK‡Z nB‡e †h evsjv‡`k ivó GKwU wPišb MYZvwšK ivó, GgbwK ZvwIKfv‡e ZIveavqK miKvi Avg‡jI, hw`I ZIveavqK miKvi e¨e¯v MYZ‡ši mwnZ mivmwi mvsNwlK|

A_msµvš Aa¨v‡`‡ki †¶‡Î welqwU mvswevwbK fv‡e Avi I m½xb nBqv `vovq|

1215 mv‡ji Magna Carta Gi mgq nB‡Z Bnv a“e mZ¨ †h RbcwZwbwa‡`i m¤§wZ e¨wZ‡i‡K KLbB A_msµvš †Kvb AvBb Kiv hvq bv| 1648 mv‡j Purging of the Parliament Kwiqv Oliver Cromwell c‡qvRbxq A_ Qvo KivB‡Z cv‡ib bvB|

h³ iv‡R¨i mwnZ Bnvi Av‡gwiKv¯ K‡jvbx ivó¸wji we‡iv‡ai gj KviY wQj †h h³ iv‡R¨i Parliament G Av‡gwiKv¯ K‡jvbx ivó¸wji †Kvb cwZwbwa wQj bv wKš Parliament K‡jvbx ivó¸wji Dci Ki Av‡ivc Kwiqv | K‡jvbx ivó¸wji e³e¨ wQj †h †h‡nZ Zvnv‡`i †Kvb cwZwbwa h³ iv‡R¨i Parliament G bvB, ‡mB †nZ D³ Parliament Zvnv‡`i Dci Ki Av‡ivc Kwi‡Z cv‡i bv| BnvB we‡iv‡ai gj KviY|

h³ iv‡ói ivócwZ mvswevwbK fv‡e iv‡ói wbevnx cavb| h³ iv‡ói mswev‡bi Article II wbæi∫ct

“Section 1. The executive power shall be vested in a President of the United States.....”

wbevnx cavb wnmv‡e Zvnvi `vqe×Zv h³ iv‡ói RbM‡Yi wbKU hvnviv Zvnv‡K wbevwPZ Kwiqv‡Q, Avi Kvnvi wbKU bq|

fvi‡Z wbevnx ¶gZv ivócwZi Dci wbæwjwLZ fv‡e AwcZt

“Article 53. Executive power of the Union ; (1) The executive power of the Union shall be vested in the President.....”

wKš wZwb gwš¿cwil` (Council of Ministers) Gi ‘aid and advise’ Øviv cwiPvwjZ nB‡eb| Article 74 wbæi∫ct

Article 74. Conucil of Ministers to aid and advise President : There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Shamsher Singh V. State of Punjab AIR 1974 SC 2192 ‡gvK Ï gvq fvi Zxq mcxg †KvU ivócwZi fwgKv m¤ú‡K gše¨ K‡i t

> "There is no doubt that the imprint of his personality may chasten and correct the Polititical government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, i.e., the Prime Minister and his colleagues."

Kv‡RB fvi Zxq ivócwZi wm×vš cKZc‡¶ gwš cwil‡`iB wm×vš hvnviv RbM‡Yi wbevwPZ cwZwbwa|

evsjv‡`k iv‡ó ivócwZi Ae¯vb wbæi¡c t

ÔÔ48| (1) .....

(2) ivócavbi¡‡c ivócwZ iv‡ói Ab¨ mKj e¨w³i D‡aŸ¯vb jvf Kwi‡eb Ges mswe avb I Ab¨‡Kvb AvB‡bi Øviv Zvnv‡K c`Ë I Zvnvi Dci Awc Z mKj ¶gZv c‡qvM I KZe¨ cvjb Kwi‡eb|ÕÕ Ges

ÔÔ55| (4) miKv‡ii mKj wbevnx e¨e¯v ivócwZi bv‡g MnxZ nBqv‡Q ewjqv cKvk Kiv nB‡e|ÕÕ wKš

55| (2) (3) Ab‡"Q` wbæi¡c t

ÔÔ55| (1).....

(2) cavbgšx KZK ev Zvnvi KZ‡Z GB mswe avb-Abhvqx cRvZ‡ši wbevnx ¶gZv ch³ nB‡e|

(3) gwšmfv †hŠ_fv‡e msm‡`i wbKU `vqx _vwK‡eb|ÕÕ

cZxqgvb nq †h ivócwZ evsj‡`k iv‡ó m‡ev"P c`vwaKvix e¨w³ nB‡j I iv‡ói cKZ wbevnx ¶gZv gwšmfvi Dci b¨¯|

evsjv‡`‡ki mswe av‡b h³ivó ev fvi‡Zi mswe av‡bi b¨vq h_vµ‡g ' The Executive power shall be vested in a President' ev 'in the President' ejv nq bvB|

evsjv‡`k mswe av‡bi 55 (2) I (3) Ab‡"Q` GK‡Î Dcjwä Kwi‡Z nB‡e ‡h cavbgšx GKK fv‡e msm‡`i wbKU `vqe× b‡nb, wZwb I Zvnvi gwšmfv †hŠ_fv‡e `vqx| gj K_v nBj t

ÔÔ(3) gwšmfv †hŠ_fv‡e msm‡`i wbKU `vqx _vwK‡eb|ÕÕ

msm‡`i wbKU GB `vqe×ZvB RbM‡Yi ¶gZvi Awfe¨wI"|

mswe av‡bi GB fv‡l¨i †c¶vcU nBj, cvwK¯vb Avg‡j ¶gZv memg‡qB GK-e¨w³‡Kw›`K wQj| evsjv‡`‡ki mswe avb c‡YZvMY GB GK-e¨w³‡Kw›`KZv nB‡Z evwni nBqv RbMY‡K ¶gZvqb Kwi‡Z Pvwnqvwe‡jb| GB Kvi‡YB Povš `vqe×Zv RbM‡Yi wbevwPZ cwZwbwaM‡Yi wbKU ivLv nBqv‡Q|

Dcjwä Kiv c‡qvRb, h³ivó I fvi‡Zi ivócwZi b¨vq wbevnx ¶gZv evsjv‡`‡ki cavbgšxi Dci 'vested' ev Awc Z nq bvB| GLv‡b wbevnx ¶gZv Ôcavbgšx KZK ev Zvnvi KZ‡ZÕ ch³ nB‡e ejv nBqv‡Q wKš Zvnvi GKK wm×v‡š ch³ (exercised) nB‡e Zvnv ejv nq bvB| ¯úóZB cZxqgvb nq †h cKZ wm×vš MnY Kwi‡e gwšmfv Ges Zrci cavbgšx KZK ev Zvnvi KZ‡Z D³ wm×vš ch³ nB‡e| GB Kvi‡YB gwšmfv †hŠ_fv‡e msm‡`i wbKU `vqe×| hw` cavbgšx Zvnvi GKK wm×v‡š wbevnx ¶gZv ch³ Kwi‡Zb Z‡e wZwb wb‡R GKK fv‡e msm‡`i wbKU `vqe× _vwK‡Zb| †m‡¶‡Î gwšmfv cavbgšxi GKK wm×v‡ši Rb¨ †hŠ_fv‡e msm‡`i wbKU `vqx nB‡Zb bv|

h³iv‡R¨i Prime Minister Gi ZvwZK Ae¯vb nBj †h wZwb 'First among the equals', hw` I wZwbB gwšmfv MVb K‡ib Ges Zvnvi cQ›` Abmv‡iB wewfb MP †K gšx c‡` wb‡qvM †`Iqv nq| bxwZ wbavi‡Yi †¶‡Î I Zvnvi fwgKvB me cavb|

evsjv‡`‡ki mswe avb c‡YZvMY I evsjv‡`‡ki ivócwZ‡K h³iv‡R¨i Queen Gi Abifc Ges gwšmfv‡K m¤eZ Dc‡iv³ Av`k Ae¯v‡b Awaôvb Kwi‡Z Pvwnqvwe‡jb|

Aa¨v‡`‡ki †¶‡Î ivócwZi †h mšwói K_v ejv nBqv‡Q Zvnv cKZ c‡¶ gwšmfvi mšwó| GB mšwó GKwU mvaviY evûj¨ kã b‡n| Bnvi ¸i"Z Acwimxg| D‡jL¨, gwšmfvi AwaKvsk m`m¨ wbevwPZ MYcwZwbwa| mswe avb c‡YZvMY GB fv‡e GgbwK Aa¨v‡`k

cYq‡bi †¶‡Î I gwšmfvi wbewPZ m`m¨M‡Yi gva¨‡g RbM‡Yi m¤ú³ Zv wbwðZ Kwiqv‡Qb|

wKš wb`jxq ZËveavqK miKvi Avg‡ji Aa¨v‡`‡ki †¶‡Î Dc‡`óv cwil` KLbB gwšmfvi ¯jvwfwl³ nB‡Z cv‡ib bv, Zvnvi cavb KviY Dc‡`óvMY AwbewPZ| Zvnviv Áv‡b ¸‡Y bgm¨ nB‡Z cv‡ib wKš Zvnviv RbcwZwbwa b‡nb| BnvB Zvnv‡`i mev‡c¶v A‡hvM¨Zv| wbewPZ I AwbewP‡Zi g‡a¨ GB cv_K¨ AvKvkmg|

The Rules of Business, 1996 Gi Rule-34 Abmv‡i cavbgšx I gšxi ¯‡j h_vµ‡g cavb Dc‡`óv I Dc‡`óv c‡hvR¨ nB‡e| Rule-34 wbæi∫c t

> Rule-34 : During the period in which the Non-Party Care-Taker Government is in office, all references to the ‘Prime Minister’ and ‘Minister’ shall be construed as reference to ‘Chief Adviser’ and ‘Adviser’ respectively and these rules shall, mutatis mutandis, apply.

wKš cavbgšx ev gšxM‡Yi †h RbcwZwbwamjf Pvwiwî K ˆewkó¨ iwnqv‡Q Zvnv cavb Dc‡`óv ev Dc‡`óvM‡Yi g‡a¨ G‡Kev‡iB Abcw¯Z| BnvB Zvnv‡`i g‡a¨ AvKvkmg cv_K¨ mwó K‡i|

Kv‡RB wb`jxq ZËveavqK miKvi Avg‡j Aa¨v‡`k cYqb Kwievi Rb¨ Dc‡`óv cwil‡`i mšwó mvswevwbK fv‡e G‡Kev‡iB AMnYxq|

†Kvb †Kvb weÁ amicus curiae GB g‡g hw³ DÌvcb Kwiqv‡Qb †h ivócwZ †h‡nZ RvZxq msm` KZK wbewPZ Kv‡RB Zvnv‡K I wbewPZ ivócwZ ejv hvq Ges Zvnvi mšwóI 93 Ab‡”Q‡`i AvIZvq Aa¨v‡`k cYqb I Rvixi Rb¨ h‡_ó|

Dc‡iv³ hw³ mwVK b‡n| c_gZt wbevPb ewj‡Z mveRbxb †fvUvwaKvi gvidr wbevPb ev adult franchise †evSvb nq| msm` KZK ivócwZi wbevPb GB ai‡bi wbevPb b‡n Ges wZwb RbcwZwbwaI b‡nb| GgZ Ae¯vq Zvnvi e¨w³MZ mšwói Dci wbfi Kwiqv 93 Ab‡”Q‡`i AvIZvq Aa¨v‡`k cYqb I Rvix mvswevwbK b‡n| m¥iY

iwL‡Z nB‡e †h cv_wgK fv‡e GKgvÎ msm`B AvBb cYqb Kwi‡Z ¶gZvevb, †Kvb AwbewPZ e¨w³ AvBb cYqb Kwi‡Z cv‡ib bv, ïagvÎ e¨wZ µg wnmv‡e, Ri“ix c‡qvR‡b Aa¨v‡`k Rvix Kiv nq, Kv‡RB G‡¶‡Î I gwšmfvi wm×vš GKvš c‡qvRb nq, KviY, gwšmfvi AwaKvsk m`m¨B wbewPZ RbcwZwbwa|

58M Ab‡”Q‡`i ¶gZve‡j ivócwZ me‡kl Aemicvß cavb wePvicwZ‡K wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óvi c` Mn‡Yi Rb¨ AvnŸvb RvbvB‡eb| Zvnvi Acwß‡Z Zvnvi Ae¨ewnZ c‡e Aemicvß cavb wePvicwZ‡K cavb Dc‡`óvi c` Mn‡Yi Rb¨ AvnŸvb RvbvB‡eb| Zvnvi Acwß‡Z ivócwZ Avcxj wefv‡Mi me‡kl Aemicvß wePvicwZ‡K cavb Dc‡`óvi c` Mn‡Yi Rb¨ AvnŸvb RvbvB‡eb| Zvnvi Acwß‡Z Zvnvi Ae¨ewnZ c‡e Aemicvß wePvicwZ‡K cavb Dc‡`óvi c` Mn‡Yi Rb¨ AvnŸvb RvbvB‡eb|

Avcxj wefv‡Mi †Kvb Aemicvß wePvi‡Ki Acwß‡Z ivócwZ, hZ`i m¤e, cavb ivR‰bwZK `jmg‡ni mwnZ Av‡jvPbvµ‡g, evsjv‡`‡ki †h mKj bvMwiK GB Ab‡”Q‡`i Aax‡b Dc‡`óv wbh³ nBevi †hvM¨ 58M Ab‡”Q‡`i (5) `dv Abhvqx Zvnv‡`i ga¨ nB‡Z cavb Dc‡`óv wb‡qvM Kwi‡eb|

hw` Dc‡i ewYZ †Kvb e¨w³‡K cavb Dc‡`óv c‡` wb‡qv‡Mi Rb¨ cvIqv bv hvq, Zvnv nB‡j ivócwZ GB mswea v‡bi Aaxb Zvnvi ¯xq `vwq‡Zi AwZwi³ wnmv‡e wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óvi `vwqZ MnY Kwi‡eb|

cZxqgvb nq †h Î‡qv`k ms‡kva‡bi d‡j Dc‡iv³ fv‡e cavb Dc‡`óv cavbgšxi ¯jvwfwl³ nB‡eb| Rules of Business Gi Rule-34 G BnvB cbe¨³ Kiv nBqv‡Q|

GLv‡b cbi‡jL Kiv c‡qvRb †h iv‡óvi wZbwU cavb ¯‡¤i g‡a¨ wbevnx wefvM GKwU| wbevnx wefv‡Mi Ges iv‡óvi m‡ev”P c‡` ivócwZ Awaôvb _vwK‡jI cKZ wbevnx ¶gZv cavbgšx I Zvnvi

gwšmfvi Dci b¨¯| Bnv ïagvÎ mweavi Rb¨ Kiv nq bvB, Bnvi GKwU mvswevwbK e¨vL¨v iwnqv‡Q|

evsjv‡`k iv‡ói PvwiwÎK ˆewkó¨ nBj Bnv GKwU cRvZš (Ab‡”Q`-1)| msweav‡bi c_g fv‡Mi wk‡ivbvg nBj ÔcRvZšÕ| GB fv‡Mi cwZwU Ab‡”Q‡` ÔcRvZšÕ kãwU evisevi D”PviY Kiv nBqv‡Q| 7(1) Ab‡”Q‡` RbMY †h cRvZ‡ši gvwjK Zvnv AwZ ¯úó Kwiqv ejv nBqv‡Q| GB cRvZš ‡h GKwU MYZš nB‡e Zvnv 11 Ab‡”Q‡` ejv nBqv‡Q| ZvnvQvov, GB msweav‡bi Ab¨Zg gjbxwZ nB‡e MYZš Zvnv msweav‡bi c¯vebvq ejv nBqv‡Q| GKB gjbxwZi K_v 8 Ab‡”Q‡` I ejv nBqv‡Q|

GB ‡c¶vc‡U Bnv AwZkq ¯vfvweK †h ivó e¨e¯vcbvi cwZwU ¯‡i cRvZvwšKZv I MYZvwšKZv Av`k wnmv‡e c ùwUZ| wbtm‡›`‡n BnvB evsjv‡`‡ki msweav‡bi gj wfwË ev basic structure | c¯vebv I msweav‡bi m¤úY webvm nB‡Z Dc‡iv³ wfwË I basic structure wbwðZ fv‡e wbYq Kiv hvq| msweavb Ggb fv‡e KLbB ms‡kvab Kiv hvq bv hvnv‡Z Dc‡iv³ `B basic structure Gi †Kvb cKvi cwieZb nq hvnv‡Z msweav‡bi cwiPq ev PwiÎ cwiewZZ nBqv hvq|

‡h cwieZb RbM‡Yi mve‡fŠg‡Zi wec‡¶ hvq, Zvnv hZ ¯í mg‡qi Rb¨B nDK bv, RbM‡Yi ¯v‡_ ev c‡¶ e¨envi Kiv nB‡Z‡Q Zvnv ejv hvq bv| 142 Ab‡”Q‡`i Aax‡b RvZxq msm` †h‡Kvb ms‡kvab Kwi‡Z cv‡i mZ¨ wKš RbM‡Yi mve‡fŠgZ, ivóxq bxwZi cRvZvwšKZv I MYZvwšKZv KLbB cwieZb Kwi‡Z cv‡i bv, GgbwK ¶bI Kwi‡Z cv‡i bv| memg‡q g‡b iwL‡Z nB‡e †h jv‡Lv knx‡`i i‡³i AvL‡i GB msweavb iwPZ nBqv‡Q, Bnv †Ljvajvi e¯ b‡n| RvZxq msm` †h AvBbB Ki“K bv †Kb Zvnv msweav‡bi 7 Ab‡”Q` Øviv Aek¨B cixw¶Z nB‡Z nB‡e| KviY ms‡kva‡bi ¶gZvI msweavbB RvZxq msm`‡K c`vb Kwiqv‡Q|

RvZxq msm‡`i mswevb ms‡kva‡bi wekvj ¶gZv iwnqv‡Q, Bnv mZ¨, wKš Bnv mswev‡bi †Kvb gjwfwË ¶b Kwi‡Z cv‡i bv, Ggb wK n¯‡¶c I Kwi‡Z cv‡i bv| AwZ ¯í mg‡qi Rb¨I †Kvb ARnv‡Z cRvZš ev MYZš ¶b Kwiqv †MvôxZš Avbqb Kwi‡Z cv‡i bv| ‡h †Kvbiƒc ms‡kvab we`¨gvb mswev‡bi mxgvi g‡a¨B _vwK‡Z nB‡e| we`¨gvb Ae¯vb nB‡Z Ab¨‡Kvb c×wZ‡Z cwieZb nIqv, †hgb, mvswevwbK MYZš nB‡Z GKbvqKZ ivóe¨e¯v ev †MvôxZ‡š cwieZb Kiv hvB‡e bv|

Aeva mô I wbi‡c¶ wbevPb wbtm‡›`‡n mswev‡bi GKwU basic structure, wKš Hi“c wbevPb Abôv‡bi Rb¨ wbevPb Kwgkb‡K cKZ A‡_ kw³kvjx Kwi‡Z nB‡e, we`¨gvb miKvi‡K mswevb I AvBb gvb¨ Kwi‡Z eva¨ Kwi‡Z nB‡e| wKš †mB ARnv‡Z †Kvb ms‡kvab Øviv RbM‡Yi mve‡fŠgZ‡K †Kvb fv‡eB ¶b Kiv hvq bv, A_ev cRvZš I MYZ‡ši cwie‡Z GKbvqKZ ev †MvwôZš Avbqb Kiv hvB‡e bv| Ab¨_vq Bnv nB‡e mvswevwbK hara-kiri|

memgq m¥iY ivwL‡Z nB‡e †h gj mswevb RbMY Bnvi MYcwil‡`i gva¨‡g mwó Kwiqv‡Q wKš ms‡kvab RvZxq msm` Avbqb Kwiqv‡Q|

Av‡iv m¥iY ivwL‡Z nB‡e †h †Kvb ms‡kvabx Øviv mswev‡bi gj wfwËi wecixZ †Kvb wKQ Kiv hvq bv| GKvi‡Y ZwKZ ms‡kvabx mvswevwbK fv‡e ˆea wKbv Zvnv wbi“c‡Yi Rb¨ gj mswev‡bi mwnZ Zjbv c‡qvRb nq| gj mswevb hLb MnY Kiv nBqvwQj ZLb ¯Ztwm× bxwZ wnmv‡e MnxZ bxwZ¸wji mwnZ ZwKZ ms‡kvabxwU wK mvsNwlK ev D³ gj bxwZ cwicšx Zvnv we‡ePbv Kwi‡Z nB‡e| ZvnvQvov, ZwKZ ms‡kvabxwU gj mswev‡bi mwnZ m½wZcY wKbv Zvnvl we‡ePbv Kwi‡Z nB‡e| hw` m½wZcY nq Z‡e ZwKZ ms‡kvabxwU ‰ea nB‡e| wKš hw` Dnv gj mswev‡bi mwnZ GZUvB AmvgÄm¨cY nq †h ZwKZ ms‡kvabxwU gj mswev‡bi mwnZ mmsMZ

nB‡e bv, †m‡¶‡Î ms‡kvabxwU Amvsweavwb K Z_v A‰ea nB‡e| BnvQvov, Avi I Abaveb Kwi‡Z nB‡e †h ZwKZ ms‡kvabxwU wK MYZvwšK Pwi Î we‡ivax, Bnv wK gj msweav‡b e¨³ iv‡ói cRvZvwšK Pwi Î‡K †Kvb fv‡e ¶wZM¯ K‡i, hw` K‡i †m‡¶‡Î I ZwKZ ms‡kvabxwU A‰ea nB‡e|

GBevi ZwKZ msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, gj msweav‡bi wK ai‡bi cwieZb Avbqb Kwiqv‡Q Ges Zvnv msweav‡bi gj wfwË I basic structure †K ¶b K‡i wKbv Zvnv cix¶v Kiv nB‡e|

¯xKwZg‡ZB ivócwZ iv‡ói m‡ev”P c`vwaKvix e¨w³ nB‡j I wZwb wbqgZvwšK ivócavb| gj msweav‡b Zvnvi †Kvb wbevnx ¶gZv bvB| A_P ZwKZ ms‡kvabx ivócav‡bi nv‡Z wbevnx ¶gZv c`vb Kwiqv msweav‡bi gj PwiÎB cwieZb Kwiqv †dwjqv‡Q| gj msweav‡b RbM‡Yi ¶gZvqbB cavb DcRxe¨| GB Kvi‡YB wbevwPZ cavbgšx I Zvnvi gwšmfvi DciB iv‡ói mKj wbevnx ¶gZv Acb Kiv nBqv‡Q| Zvnv‡`i gva¨‡gB RbM‡Yi ¶gZvqb| A_P GKw`‡K AwbevwPZ cavb Dc‡`óv I Ab¨vb¨ Dc‡`óvMY gwšmfvi wbevnx ¶gZv c‡qvM Kwi‡Z‡Qb| Ab¨w`‡K ivócwZ wb‡R cwZi¶v gšYvj‡qi wbevnx `wqZ cvjb K‡ib| 48 Ab‡”Q‡`i (3) `dvi gva¨‡g RbM‡Yi cwZwbwa I gwšmfvi gLcvÎ Ges RvZxq msm‡` RbM‡Yi cwZwbwaM‡Yi Av¯vfvRb cavbgšxi civgk Abmv‡i ivócwZ Zvnvi mKj `wqZ cvjb Kwievi K_v Ges GBfv‡e ivócwZi mKj Kv‡Ri g‡a¨I RbMY Dcw¯Z _v‡K| Ggb wK Ri“ix-Ae¯v †NvlYv Kwievi c‡eI cavbgšxi civgk I cwZ-¯v¶‡ii gva¨‡g RbM‡Yi m¤ú³Zv I Dcw¯wZ wbwðZ Kiv nBqv‡Q| cavbgšxI Zvnvi cwZwU civgk I cwZ¯v¶‡ii c‡e gwšmfvi wm×vš MnY K‡ib| D‡jL¨, Zvnviv †hŠ_fv‡e RvZxq msm‡`i wbKU `vqe×| GBfv‡e gj msweav‡b iv‡ói cRvZvwšK I MYZvwšK PwiÎ eRvq ivLv wbwðZ Kiv nBqv‡Q| wKš ZwKZ ms‡kvabx gvidr 48 Ab‡”Q‡`i (3) `dvi eva¨evaKZv Ges Ri“ix-Ae¯v †NvlYvq

cavbgšxi cwZ-¯v¶‡ii kZ wejß Kwiqv ivócwZi `wqZ cvj‡b RbMY‡K Abcw¯Z KiZt wZbgv‡mi Rb¨ nB‡j I, ZwKZ ms‡kvabxi †gqv` g‡a¨ RbM‡Yi mve‡fŠgZ, iv‡ói cRvZvwšK I MYZvwšK Pwi Î, mswea v‡bi GB wZbwU basic sturcture Le Kiv nBqv‡Q|

ZvnvQvov, gwšmfvi wm×vš I cavbgšxi civgk e¨wZ‡i‡K AwbevwPZ Dc‡`óv-mfvi wm×vš Abmv‡i ivócwZ KZK Aa¨v‡`k cYqb I Rvix GKwU AMYZvwšK c`‡¶c hvnv iv‡ói MYZvwšK Pwi Î GB basic sturcture Gi mwnZ mvsNwlK|

cKZc‡¶, ZwKZ ms‡kvabxi Aax‡b iv‡ói cRvZvwšK I MYZvwšK Pwi Î †hfv‡e jß nq Zvnvi mwnZ gj mswea v‡bi Aax‡b evsjv‡`k iv‡ói Av`wkK Pwi‡Îi mwnZ †Kvb fv‡eB mvgÄm¨ Avbqb m¤e bq|

ZwKZ ms‡kvabx gj mswea v‡bi wfwË `B cavb basic sturcture, cRvZš I MYZ‡ši cwie‡Z †MvôxZš Avbqb Kwiqv‡Q hvnvi cavb ivócwZ wb‡R| GBiƒc †MvôxZ‡ši mwnZ gj mswea v‡bi ¯Ztwm× bxwZ¸wj G‡Kev‡iB AmsMwZcY I mvsNwlK Ges mswea v‡bi 'Pole-star' 7 Ab‡"Q‡`i m¤úY cwicšx|

ZvnvQvov, ivócwZ hw` 58M Ab‡"Q‡`i (6) `dv Abhvqx ¯xq `wq‡Zi AwZwi³ wnmv‡e wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óvi `wqZ MnY K‡ib Zvnv nB‡j evsjv‡`k GKbvqKZvwšK iv‡ó cwiYZ nB‡e| BnvI gj mswea v‡bi ¯Ztwm× Av`wkK bxwZ¸wji m¤úY cwicšx I mvsNwlK|

Avi GKwU hw³ DÌvcb Kiv Kiv nBqv‡Q †h ZwKZ mswea vb (Î‡qv`k ms‡kvab) AvBb Gi Aax‡b ¯wcZ wb`jxq ZËveavqK miKvi ckwU gjZ GKwU ivR‰bwZK ck weavq AÎ Av`vj‡Zi KZZ ewnfZ|

DÌwcZ hw³wU Av‡`Š mwVK b‡n| Bnv wVK †h ïagvÎ †Kvb ivR‰bwZK we‡iva wb¯úwË‡Z Av`vjZ KLbB Ask MnY Kwi‡e bv|

Z‡e hw` †Kvb AvBbMZ ev mvsweavwbK ˆeaZv I AwaKv‡ii ck DÌvwcZ nq Zvnv nB‡j GB mcxg †KvU DÌvwcZ welqwU we‡ePbv Kwi‡e KviY, mcxg †KvU msweav‡bi AwefveK wnmv‡e msweavb I AvB‡bi i¶Y, mg_b I wbivcËv weavb Kwi‡Z mvsweavwbK fv‡e eva¨| ZvnvQvov, mvsweavwbK †Kvb we‡iva wb¯úwËi mwnZ ivR‰bwZK ck RwoZ _vwK‡j I _vwK‡Z cv‡i| ‡m‡¶‡Î I GB Av`vjZ Bnvi mvsweavwbK `vwqZ I KZe¨ msweavb I AvBb Abmv‡i cvjb Kwi‡Z KLbB GovBqv hvB‡Z cv‡i bv ev Abxnv cKvk Kwi‡Z cv‡i bv| KviY msweavb e¨vL¨v I we‡klY Kwievi `vwqZ mcxg †Kv‡Ui Dci b¨¯| RbM‡Yi wbKU mcxg †Kv‡Ui BnvB mvsweavwbK `vqe×Zv|

40| ZËveavqK miKvi Gi Aax‡b mvaviY wbevPb t

†ewki fvM weÁ Amicus Curiae wb`jxq ZËveavqK miKvi e¨e¯vi c‡¶gZ cKvk Kwiqv‡Qb| Zvnviv evsjv‡`‡k GKwU wbi‡c¶ I mô wbevPb Abôv‡bi Rb¨ GB e¨e¯v GKvšB Acwinvh ewjqv gZ cKvk Kwiqv‡Qb| Bnv ¯vqx e¨e¯v wnmv‡e ceZb Kiv nBqv‡Q wKbv ck Kwi‡j Rbve wU GBP Lvb e‡jb †h Bnv ¯vqx e¨e¯v bv nB‡j I wbi‡c¶ I mô wbevPb Abôv‡bi ¯v‡_ GB e¨e¯v eûw`b Ae¨vnZ iwL‡Z nB‡e| KZw`b wRÁvmv Kwi‡j wZwb Zvr¶wYK fv‡e e‡jb, AšZ cÂvk erm‡ii Rb¨ c‡qvRb nB‡e|

Zvnv‡`i cvq mK‡jiB aviYv †h wbevPb msµvš mKj mgm¨vi mgvavb ZËveavqK miKvi e¨e¯vi g‡a¨B wbwnZ iwnqv‡Q| BnvB mKj wb`v‡bi Dcmg| AZGe, ZËveavqK miKvi e¨e¯v 1996, 2001 I 2006 mv‡j wKfv‡e mgm¨v mgvav‡b c`‡¶c MnY KwiqvwQj Zvnv Rvwbevi †Póv Kiv c‡qvRb|

GB iv‡qi c_g w`‡KB 1994 mv‡j AbwôZ gv¸ivi Dc-wbevP‡bi K_v ejv nBqv‡Q| H wbevP‡b mec_g bvbv cKvi Awbq‡gi Awf‡hvM I‡V| `B ermie¨cx µgvMZ Av‡›`j‡bi g‡L msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, cYxZ nq|

Dc‡iv³ AvB‡bi Aax‡b mec_g mßg RvZxq msm‡`i wbevPb Abwôz nq| D³ wbevPb NUbv eûj wQj bv Zvnv ejv hvq bv| 1996 mv‡ji 20‡k †g Zvwi‡L XvKvi ivRc‡_ XvKvevmx †KŠZnj I wem¤‡qi mwnZ mvgwiK evwnbxi U¨v¼ PjvPj cZ¨¶ K‡i| †Kvb †Kvb mijgbv e¨w³ GB¸wj‡K †Kvb cv_xi wbevPbx cZxK g‡b KwiqvwQ‡jb| hvnv nDK, †`‡ki †mŠfvM¨ †h †kl chš mswkó mK‡ji ïfew× i D‡`K nq Ges †`k Avevi I GKwU wech‡qi nvZ nB‡Z i¶v cvq|

Aóg RvZxq msm‡`i wbevP‡b cavb Dc‡`óv kc_ jBevi ciciB Zvnvi Dc‡`óv cwil` kc_ jBevi c‡eB †ek K‡qKRb mwPe‡K e`wji Av‡`k c`vb K‡ib| Zvici µgvb‡q eû KgKZv‡K e`wj Kiv nq| d‡j GK ivR‰bwZK `‡ji c¶ nB‡Z cej AvcwË DÌvcb Kwiqv ZËveavqK miKv‡ii Dci Abv¯v Ávcb Kwi‡Z _v‡K| Ab¨w`‡K Avi GKwU ivR‰bwZK `j h‡_ó e`wj Kiv nB‡Z‡Q bv ewjqv ZËveavqK miKv‡ii Dci Abv¯v Ávcb K‡i|

2004 mv‡ji ga¨fv‡M msweavb (PZ`k ms‡kvab) AvBb, 2004, wewae× Kiv nq| D³ AvB‡b Ab¨vb¨ wel‡qi mwnZ mcxg †Kv‡Ui wePviKM‡Yi Aemi Mg‡bi eqm 65 ermi nB‡Z ew× Kwiqv 67 ermi Kiv nq| miKvi c‡¶ Bnvi KviY wnmv‡e ejv nq †h AwfÁ wePviKMY‡K Avi I `B ermi PvKix‡Z ivwLevi gnr D‡Ï‡k GBiƒc AvBb Kiv nq| Aci w`‡K Z`vbxšb we‡ivax`‡ji c‡¶ cej AvcwË DÌvcb Kwiqv ejv nq †h Aemicvß Î‡qv`k cavb wePvicwZ‡K beg RvZxq msm‡`i wbevP‡b cavb Dc‡`óv wb‡qvM c`vb Kwievi D‡Ï‡k¨B Dc‡iv³ fv‡e msweavb ms‡kvab KiZt mcxg †Kv‡Ui wePviKM‡Yi eqm ew× Kiv nq|

2006 mv‡ji †kl fv‡M wb`jxq ZËveavqK miKvi wb‡qv‡Mi cv°v‡j Z`vbxšb ivócwZ msweav‡bi 58M Ab‡”Q‡`i (6) `dvi Aax‡b wb‡RB cavb Dc‡`óvi c` MnY K‡ib| Bnv‡Z mgM †`‡k cej D‡ËRbv I Av‡›`vjb Avi¤ nq| mgM †`‡k GKiKg

APjve¯vi mwó nq| GgbwK †mbvevwnbxI †gvZvqb Kwi‡Z nq| Z‡e Gmg‡qI A‡bK cwÛZ e¨w³ ivócwZi ZrKvjxb fwgKvi fqmx cksmv Kwiqv‡Qb|

‡`‡ki GBiƒc Aw¯i cwiw¯wZ‡Z 11-1-2007 Zvwi‡L ivócwZ cavb Dc‡`óvi c` nB‡Z c`Z¨vM K‡ib Ges mgM †`‡k Ri“ix Ae¯v †NvlYv K‡ib| Zvnvi †NvlYv wbæiƒc t

“wemwgjvwni ivngvwbi ivnxg|

wcq ‡`kevmx, Avmmvjvg AvjvBKg|

‡`k I RwZi µvwšj‡M wKQ¸i“ZcY K_v Ges wm×vš Avcbv‡`i Kv‡Q Dc¯vcb Kivi Rb¨ Awg Avcbv‡`i mvg‡b nvwRi n‡qwQ| weMZ 29 A‡±vei 2006 Zvwi‡L Awg msweavb Gi 58M aviv †gvZv‡eK Dc‡`óvi `vwqZfvi MnY Kwi Ges Dc‡`óvgÛjx mnKv‡i Aeva, wbi‡c¶ Ges mô wbevPb Abôv‡bi j‡¶¨ wewfb c`‡¶c MnY Kwi| Avgv‡`i cvq meKÔwU wm×vš I c`‡¶c mKj ivR‰bwZK `j mgn KZK mgv`Z nqwb| cvq cwZwU wm×vš GK †RvU c‡¶ gZvgZ w`‡jI Ab¨ †RvU wec‡¶ Ae¯vb wb‡q‡Q| c¶vš‡i †`‡ki ivR‰bwZK A½‡Y †`Lv w`‡q‡Q kvwš, ksLjv I mwnòZvi Afve| Dc‡`óv cwil‡`i HKvwšK c‡Pôv m‡ZI weMZ AvovB gv‡m †`‡k nvbvnvwb, mšvm, I i³v³ msNl n‡q‡Q| wewfb ivR‰bwZK `‡ji Amwnò I wnsmvZ¥K AvPi‡Yi d‡j S‡i †M‡Q A‡bK gj¨evb wb¯úvc cvY, †`‡k A_bxwZ Mfxifv‡e wech¯|mgM †`‡k Qwo‡q c‡o‡Q mwnsmZv, hv Av‡iv cKU AvKvi aviY Ki‡e e‡j Avgvi wekvm| mgM RwZ AvR D‡ØM, DrKÚv, Aw¯iZv I Awbðqvh wbcwZZ| †`‡ki kvwš ksLjv `vi“Yfv‡e wewNZ| Kg-†ekx mevB Rvb-gv‡ji wbivcËvnxbZvq Avµvš| MYgvb‡li ^``bw›`b Rxeb-hvcb n‡q‡Q mxgvnxb Kó I `‡fv‡Mi wkKvi|

“ZËveavqK miKv‡ii Ab¨Zg KvR kvwšcY, mô I wbi‡c¶ fv‡e msm` wbevPb Abôv‡b wbevPb Kwgkb‡K mevZ¥K mvnvh¨ I mnvqZv Kiv| Aeva, mô I wbi‡c¶ wbevP‡bi cekZ n‡”Q, wbevPbx cwµqv ïi“i cv°v‡j GKwU wbfj †fvUvi Zvwjkv c¯Z Kiv| mvsweavwbK fv‡e msm` wbevP‡bi Rb¨ †fvUvi Zvwjkv c¯‡Zi `vwqZ wbevPb Kwgk‡bi| Avmb wbevPb Dcj‡¶ †fvUvi Zvwjkv ms‡kvab ïi“ n‡j †`Lv hvq, GwU

wewfb ai‡Yi Î“wU-wePÌwZ‡Z cwicY Ges Gi MnY‡hvM¨Zv ckmv‡c¶| mswkøvi 123(3) bs Ab‡”Q‡` msm` ‡f‡½ hvevi cieZx 90 w`‡bi g‡a¨ msm` m`m¨‡`i mvaviY wbevPb Abôv‡bi wel‡q wb‡`kbv †`qv Av‡Q| wKš‘ iƒp ev¯eZv n‡jv, G 90 w`b mgqmxgvi g‡a¨ GKwU wbfj †fvUvi Zvwjkv cYqb K‡i Aeva, mô, wbi‡c¶ I mK‡ji wbKU MnY‡hvM¨ wbevPb Abôvb m¤e bq| BwZg‡a¨ gnv HK¨‡RvU †_‡K †fvU MnY Abôv‡b ¯”Q e¨vjU ev· e¨envi Kiv I †fvUvi‡`i cwiPqc Î c`vb Kivi wel‡q `vwe DÌvcb K‡i‡Qb| RvZxq msm‡`i mvaviY wbevPb GKwU e¨q eûj cwµqv wbw`ó †gqv‡`i g‡a¨ GKvwaK mvaviY wbevPb KLbI †`‡ki Rb¨ g½j RbK n‡e bv| mKj `‡ji AskMnY e¨wZZ †h‡Kvb mvaviY wbevPb †`‡k I we‡`‡k MnY‡hvM¨ n‡e bv|

“wcq †`kevmx, †`‡ki eo `ÔwU ivR‰bwZK `‡ji †bZ‡Z Ab¨vb¨ ivR‰bwZK `jmgn `ÔwU †Rv‡Ui Aš—f³ n‡q `ÔwU wecixZ †gi“‡Z Ae¯vb K‡i‡Q| `ÔwU ivR‰bwZK ‡Rv‡Ui KgKvÛ Gfv‡e Pj‡Z _vK‡j †`‡ki DbœZ I AMMwZ e¨nZ n‡e Ges †`k mvg‡bi w`‡K G¸‡bvi cwie‡Z wcQ‡bi w`‡K †h‡Z _vK‡e| GKwU †`k‡K m¤ve¨ DbœZi j‡¶¨ †cŠ‡Q w`‡Z n‡j RvZxq †bZ‡Z PviwU ¸bvejxi mgbq c‡qvRb| h_v, mZZv, AvšwiKZv, Z¨vM I †`k‡cg| Avgv‡`i RvZxq †bZ‡Z PviwU ¸bvejxi mgbq n‡”Q wKbv Zv gj¨vq‡bi `vwqZ †`kevmxi| mwVK †bZ‡Z †h GKwU †`k‡K Clvwb Z chv‡q wb‡q hvq Zvi D`vniY Avgv‡`i G gnv‡`‡kB i‡q‡Q|

“‡`‡ki Avcvgi RbM‡Yi cZ¨vkv GKwU Aeva, mô I wbi‡c¶ wbevP‡bi gvav‡g hviv Rqx n‡e Zv‡`i Øviv †`k cwiPvwjZ †nvK| wKš‘ we`¨gvb cwiw¯wZ‡Z Zv wKQ‡ZB m¤e bq| Gw`‡K Dfq †Rv‡Ui wecixZgLx Ae¯v‡bi Kvi‡Y Zviv ¯ ¯ KgmPx wb‡q GwM‡q †h‡Z _vK‡j †`k m¤ve¨ wech‡qi g‡L cwZZ n‡e| †`‡ki A_bxwZ, e¨emv-evwYR¨ ¶wZM¯ n‡e, idZvbx‡Z am bvg‡e Ges m‡evcwi †`‡k AivRKZv I ^bivR¨ weivR Ki‡e|

“wcq †`kevmx, 1971 mv‡ji i³¶qx h‡×i gva¨‡g AwRZ Avgv‡`i wcq gvZfwg‡Z GB ai‡Yi cwiw¯wZ Kv‡iviB Kvg¨ wQj bv| ¯vaxb evsjv‡`k mwói wZbhM c‡i AvR‡KI †`kevmx gwiqv n‡q L‡R †eov‡”Q kvwš—, ksLjv,wbivcËv I ¯w¯Z| AbvPvi Ae¨e¯vcbv, Amwnò Zv I mxgvnxb `bxwZi Kvi‡Y RbM‡Yi Avkv, AvKv•Lv, mL I kvwš— wbevwmZ| ejv

hvq, MYZš PPvi bv‡g Pj‡Q AMYZvwšK AvPiY, cnmb I cZviYv| GB Ae¯v Ae¨vnZ fv‡e PjK RbMY Zv Pvq bv| ZvB GB Ae¯vi Aemvb NwU‡q cwieZb Avb‡Z n‡e| cwiw¯wZi DbœZ NUv‡Z n‡e| RbMY‡K m‡L I kvwš‡Z emevm Kivi m‡hvM K‡i w`‡Z n‡e| ¯vaxb fv‡e Zv‡`i cQ›` †gvZv‡eK wbi‡c¶, Aeva I mô wbevP‡bi gva¨‡g GKwU mr I Dch³ miKvi MV‡bi AwaKvi I m‡hvM w`‡Z n‡e| GB gnr c‡qvR‡b e¨e¯v Mn‡Yi wbwg‡Ë Avgv‡`i mg‡qi c‡qvRb|

“wcq †`kevmx, †`‡ki kvwš wcq gvbl hviv AMMwZ I cMwZ‡Z wekvm K‡i Zviv †KDB Pvqbv †`‡ki Acvi m¤vebvi c_ ivR‰bwZK Aw¯wZkxjZvi Kvi‡Y i“× n‡q hvK| G K_v A¯xKvi Kivi KviY †bB †h, BwZg‡a¨ ckvmb, cwjk I wePvi wefv‡Mi D”Pv`vj‡Zi fvegwZ `vi“Yfv‡e ¶b n‡q‡Q| †`k‡K me‡¶‡Î ¯vej¤x Ki‡Z n‡j, †`‡ki A_bxwZ‡K mPj ivL‡Z n‡j, †`‡ki idZvbx evwY‡R¨i cmvi NUv‡Z n‡j, †`‡k AvBb ksLjv wbqš‡Y ivL‡Z n‡j Ges †`‡ki Dbq‡bi aviv‡K Ae¨vnZ ivL‡Z n‡j eZgvb cwiw¯wZ‡Z Ri“ix Ae¯v †NvlYv AZ¨vek¨K n‡q c‡o‡Q| Dc‡iv³ Kvi‡Y Ges †`k I RbM‡Yi mev½xY g½‡ji K_v we‡ePbvq wb‡q Ri“ix Ae¯v †NvlYv KiwQ hv mgM evsjv‡`‡k ejer _vK‡e|

“e¨w³ MZfv‡e Avgvi miKvi I cmvk‡bi j¶¨ GKwU Aeva, mô I MnY‡hvM¨ wbevPb Abôvb, mrfv‡e MYZš PPv Ges cZ¨vwkZ RvZxq msm‡`i wbevP‡bi gva¨‡g RbM‡Yi Kvw•LZ miKvi cwZôvi m‡hvM mwó Kiv| GB Kv‡R I kvwš-k•Ljv cbt D×v‡i Ges miKvi‡K c‡qvRbxq mvnvh¨ Kivi Rb¨ BwZg‡a¨ †`k‡cwgK I cixw¶Z †mbvevwnbx‡K Zje Kiv n‡q‡Q| Awg Avkv Kwi c‡ei g‡ZvB Zviv †`‡ki mbvg A¶b ‡i‡L Zv‡`i Dci b¨¯ `vwqZ mPvi“i‡c cvjb Ki‡e|

Awg ivócwZ c‡`i AwZwi³ ZËveavqK miKvi cav‡bi `vwqZ †bqvq †h weZ‡Ki mwó n‡q‡Q Zv AvR †`k I RvwZ‡K `wU wecixZgLx avivq wef³ K‡i‡Q| †`‡ki cMwZ I AMMwZi ¯v‡_I weZ‡Ki Aemvb nIqv evÃbxq| mKj ivR‰bwZK `‡ji Ask Mn‡Yi gva¨‡g GKwU MnY‡hvM¨ wbevP‡bi c_‡K mMg Kivi j‡¶¨ Awg ZËveavqK miKvi cav‡bi c` †_‡K B¯dv c`v‡bi wm×vš MnY K‡iwQ Ges Awg AvMvgx 2/1 w`‡bi g‡a¨ GKwU Dc‡`óv cwil` MVb Ki‡ev| bZb Dc‡`óv cwil` MV‡bi ce chš eZgvb cwil‡`i †R¨ôZg Dc‡`óv fvicvß wnmv‡e `vwqZ cvjb Ki‡eb|

beMwVZ AšeZx miKvi mswkó mK‡ji mv‡_ Av‡jvPbv K‡i ¯í mg‡qi g‡a¨ GKwU Aeva, mô, wbi‡c¶ I MnY‡hvM¨ wbevPb Av‡qvR‡bi gva¨‡g Zv‡`i Dci AwcZ `wqZ cvjb K‡i RbcwZwbwa‡`i Øviv †`k kvm‡bi e¨e¯v Ki‡eb|

Avjvn Avcbv‡`i mnvq †nvb| Avjvn nv‡dR| evsjv‡`k wR›`vev`|ÕÕ

(^`wbK B‡Ëdv K cwÎKvi 12-1-2007 Zvwi‡Li cwÎKv nB‡Z D×Z)

BnvB nBj eûj cPwiZ I AwZ ckswmZ ZIveavqK miKv‡ii Z_vKw_Z mvd‡j¨i miKvix fvl¨ | gše¨ wb¯ú‡qvRb|

`B GKw`‡bi g‡a¨ ivócwZ bZb cavb Dc‡`óv I Dc‡`óv cwil` wb‡qvM c`vb KiZt ZËveavqK miKvi cbMwVZ K‡ib| cbMwVZ GB ZËveavqK miKvi `B ermiKvj hveZ miKvi cwiPvjbv K‡ib| A_P ZwKZ msweavb ms‡kvab AvB‡bi AvIZvq ZËveavqK miKv‡ii †gqv` †Kvb µ†gB beŸB w`‡bi AwZwi³ nBevi K_v bq|

Bnv mZ¨ †h msweav‡bi PZ_ fv‡Mi 2K cwi‡”Q` G 58L Ab‡”Q‡` wb`jxq ZËveavqK miKvi MV‡bi weavb _vwK‡j I Bnvi †gqv` m¤‡Ü †Kvb ¯úó weavb bvB wKš ms‡kvwaZ 123(3) Ab‡”Q‡` wbæi∫c weavb iwnqv‡Q t

123(1) .....

.....

(3) †gqv` Aemv‡bi Kvi‡Y A_ev †gqv` Aemvb e¨ZxZ Ab¨ †Kvb Kvi‡Y msm` fvswMqv hvBevi cieZx beŸB w`‡bi g‡a¨ msm`-m`m¨‡`i mvaviY wbevPb AbwôZ nB‡e|

Bs‡iRx fvl¨ t

123.(1) .....

.....

(3) A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration.

Dc‡iv³ weav‡b wbevPb Abôvb beŸB w`‡bi g‡a¨ Abwô Z Kwievi K_v ejv nBqv‡Q| Kv‡RB mvaviY wbevPb msm` fvswMqv hvBevi 90 w`‡bi g‡a¨ Abwô Z Kwi‡Z nB‡e| Avi, wb`jxq ZËveavqK miKvi MVb Kwievi GKgvÎ D‡Ïk¨ nB‡Z‡Q mvaviY wbevPb Abôvb| msweavb we‡klY Kwievi wbqg nB‡Z‡Q †h msweav‡bi GKwU Ab‡”Q` c_K fv‡e we‡ePbv Kwi‡j nB‡e bv, mgM msweavb GK‡Î we‡ePbv Kwiqv Bnvi gg Abaveb Kwi‡Z nB‡e| eZgvb †¶‡Î ïagvÎ PZ_ fv‡Mi 2K cwi‡”Q` wew”Qb fv‡e we‡ePbv Kwi‡j nB‡e bv, Bnvi mwnZ 123(3) Ab‡”Q`I we‡ePbv Kwi‡Z nB‡e| 58L I 123(3) Ab‡”Q` GK‡Î we‡klY Kwi‡j wbwðZ fv‡e cZxqgvb nB‡e †h ZËveavqK miKv‡ii †gqv` 90 w`b, Bnvi AwZwi³ bq|

AZGe, wb`jxq ZËveavqK miKv‡ii †gqv` m‡ev”P 90w`b|

wKš gj msweavb Ges GgbwK msweavb (Î‡qv`k ms‡kvab) AvB‡bi AvIZvi evwn‡i 90 w`‡bi AwaK cvq `B ermiKvj m¤úY A‰ea fv‡e D‡jwLZ wb`jxq ZËveavqK miKvi †`k kvmb Kwiqv‡Q| 90 w`‡bi AwZwi³ mgqKvj m¤úY Amvsweavwb K fv‡e DI“ miKvi †`k kvmb Kwiqv‡Q|

GB mgqKv‡ji g‡a¨ Z`vbxšb miKvi eûwea ckvmwbK I Ab¨ bvbvwea Kvhµg cwiPvjbv Kwiqv‡Q| ivó I RbM‡Yi ¯v‡_ H mgqKv‡ji mKj A‰eaZv gvRbv Kiv (condone) Kiv c‡qvRb nB‡e|

D‡jL¨ †h msweav‡bi 121 Ab‡”Q` Abmv‡i msm` wbevP‡bi Rb¨ GKwU †fvUvi Zvwj Kv eva¨Zvgj K fv‡e c¯Z iwLevi weavb iwnqv‡Q| ZvnvQvov, msweav‡bi 123 Ab‡”Q` Abmv‡i I Aax‡b mgqgZ mvaviY wbevPb Abôvb Kwievi mKj `vq I `vwqZ wbevPb Kwgk‡bi Dci b¨¯| wbw`ó mgq mxgvi g‡a¨ wbevPb Abôvb Kwi‡Z bv cvwi‡j msweavb f½ Kwievi `vq-`vwqZ wbevPb Kwgk‡bi DciB eZv‡eB, Z‡e wej‡¤ Abwô Z wbevP‡bi ˆeaZv ¶b nq bv, wbevPb ˆeaB _v‡K|

Avi GKwU welq Avgv‡`i bR‡i Avwmqv‡Q| cZxqgvb nq 2007 mv‡ji 11B Rvbqvix Zvwi‡Li GK Av‡`k e‡j ivócwZ †`‡k Ri“ix-Ae¯v Rvix Kwiqvw Q‡jb Ges D³ Ri“ix-Ae¯v cvq `B ermi Kvj †`‡k ejer wQj| ¯xKZg‡ZB H mg‡q RvZxq msm‡`i Awa‡ekb we`¨gvb Ae¯vq wQj bv|

Ri“ix-Ae¯v Rvix Kwi‡Z nB‡j Zvnv Aek¨B mswea v‡bi 141K Ab‡”Q‡` e¨³ kZvw` cvjb mv‡c‡¶ Rvix Kwi‡Z nB‡e Ges Dnvi †gqv` D³ weav‡b ewYZ †gqv` Abmv‡iB nB‡Z nB‡e| Ri“ix Ae¯v Rvixi ˆeaZv m¤ú‡K †Kvb gše¨ e¨wZ‡i‡K Bnv wØavnxb fv‡e ejv hvq †h RvZxq msm‡`i Ab‡gv`b e¨wZ‡i‡K cvq `B ermi Kvj Ri“ix-Ae¯v eRvq ivLv AvcvZ `wó‡ZB (on the face of it) A‰ea ewjqv cZxqgvb nq| msm‡`i Ab‡gv`b e¨wZ‡i‡K †h Kqw`b Ri“ix-Ae¯v eRvq ivLv m¤e, ‡mB Kqw`bB Ri“ix Ae¯v eRvq _vwK‡e, Zrci ¯qswµq fv‡e Zvnv AKvhKi nBqv hvB‡e| 141K Ab‡”Q` ewnf Z fv‡e KLbB Ri“ix-Ae¯v Rvix ev Pjgvb ivLv hvB‡e bv| Ab¨_vq msweavb f½ nB‡e|

Dc‡iv³ Av‡jvPbv nB‡Z cZxqgvb nB‡e ‡h AwZ Ôcksw mZÕ 1996 mv‡ji ZËveavqK miKvi, 2001 mv‡ji wØZxq ZËveavqK miKvi ev 2006/2007 mv‡ji ZËveavqK miKviØq †KvbwUB Kvw•LZ Av¯v †gv‡Ul RvMZ K‡i bv|

1996 mv‡ji c_g ZËveavqK miKvi Avg‡j †`k mebv‡ki Øvicv‡š (precipice) Pvwjqv wMqvwQj| Zvnv Avi hvnvB †nvK eûj cPwiZ I cksw mZ wb`jxq ZËveavqK miKv‡ii wekvm†hvM¨Zv I KwZ‡Zi mv¶¨ enb K‡i bv| wbevP‡bi c‡i GKwU ivR‰bwZK `j wbevP‡bi djvdj MnY Kwi‡Z A¯xKvi K‡i|

2001 mv‡ji wØZxq ZËveavqK miKvi Avg‡j wewfb ivR‰bwZK `j G‡K Ac‡ii cwZ Awf‡hvM Avbqb Ges m‡evcwi

ZËveavqK miKvi‡K µgvMZ ckwe× Kwiqv‡Q| wbevP‡bi ci GKwU ivR‰bwZK `j wbevP‡bi djvdj MnY Kwi‡Z A¯xKvi K‡i|

Zvnv nB‡j cv_K¨Uv wK nBj| mswevab ms‡kvabØviv ZIveavqK miKvi e¨e¯v Avbqb Kwiqv cwiw¯wZi DbwZB ev wK nBj| ZIveavqK miKviØviv Abwôz wbevPb ‡Zv mKj ivR‰bwZK `‡ji wbKU Mnb‡hvM¨ nq bv| Zvnv nB‡j GB e¨e¯vi mvdj¨ †Kv_vq ?

2006 mv‡j Î‡qv`k cavb wePvicwZ cavb Dc‡`óvi c` MnY Kwi‡Z A¯xKwZ Ávcb Kivq ‡kl chš ivócwZ wb‡RB cavb Dc‡`óvi c` MnY K‡ib| Bnv cKZ c‡¶ GKbvqKZ cwZôv K‡i Ges evsjv‡`k iv‡ói gj wfwË cRvZš I MYZš m¤úY wbevm‡b hvq| cPÛ MYAv‡›`vj‡bi g‡L wZwb 2007 mv‡ji 11B Rvbqvix Zwi‡L c`Z¨vM K‡ib|

GB mKj NUbvejx Avi hvnvB †nvK ZËveavqK miKv‡ii mvdj¨ ev MnY‡hvM¨Zv I wekvm‡hvM¨Zv Avbqb K‡i bv|

Bnvi ci Rbve dLiDwÏb Avn‡g` cavb Dc‡`óv wnmv‡e wb‡qvM cvb| m¤eZt mswevab ms‡kvabx Abmv‡i 58L Ab‡”Q‡`i (5) `dvi Aax‡b Zvnvi wb‡qvM nq|

ck I‡V †h ivócwZ wK 58L(5) Ab‡”Q‡`i Aax‡b cavb Dc‡`óv wb‡qvM c`v‡bi c‡Póv e¨wZ‡i‡KB wK 58L(6) Ab‡”Q‡`i AvIZvq wb‡R cavb Dc‡`óvi c`MnY KwiqvwQ‡jb? A_ev 58L(6) Ab‡”Q‡`i AvIZvq wZwb cavb Dc‡`óvi c` GKevi MnY Kwievi ci cbivq 58L(5) Ab‡”Q‡`i AvIZvq cavb Dc‡`óvi c‡` wb‡qvM c`vb Kwi‡Z cv‡ib wKbv? †h‡nZ ZwKZ Î‡qv`k ms‡kvab AvBbwUiB ‰eaZv we‡ePbv Kiv nB‡Z‡Q, ‡m‡nZ Dc‡iv³ ck¦wj we‡klY Kwievi ‡Kvb c‡qvRb bvB|

c‡eB ejv nBqv‡Q †h GgbwK ZwKZ mswevab (Î‡qv`k ms‡kvab) AvB‡bi Aax‡bI wb`jxq ZËveavqK miKvi m‡ev”P 90

w`b ¶gZvq _vwK‡Z cv‡i, Zvnvi AwaK b‡n| GgZ Ae¯vq AwZwi³ cvq GK ermi bq gvm Kvj D³ wb`jxq ZËveavqK miKvi mswkøvab, GgbwK ZwKZ mswkøvab (Î‡qv`k ms‡kvab) AvB‡bi I AvIZv ewnfZ fv‡e evsjv‡`k kvmb Kwiqv‡Q| Bnvi †Kvb mvswkøvwbK ev Ab¨ †Kvb AvBbMZ ˆeaZv wQj bv| 2006 mv‡j A‡±vei gv‡mi †h Zvwi‡L Z`vbxšb cavbgšx 58L(6) Ab‡”Q‡`i AvIZvq Z`vbxšb ivócwZi wbKU `vwqZfvi n¯vši Kwiqvwe‡jb ‡mB ZvwiL nB‡Z 90 w`b ci GgbwK ZwKZ (ms‡kvab) AvB‡bi I AvIZvi ewn‡i Z_vKw_Z ZËveavqK miKvi ¶gZvq AwaôZ wQj|

GB mvswkøvwbK hara-kiri m¤‡Ü weÁ A¨vUbx-†Rbv‡ij ev Amicus curiae MY †Kvb e³e¨ †ck K‡ib bvB|

41| wePvi wefv‡Mi ¯vaxbZv I mswkøvab (Î‡qv`k ms‡kvab) AvBbt-

ixU `iLv¯Kvix c‡¶ Rbve Gg AvB dvi“Kx, G¨vW†fv‡KU, wb‡e`b K‡ib †h ZwKZ mswkøvab ms‡kvabxi AvBb gvidr Aemicvß cavb wePvicwZ ev Avcxj wefv‡Mi Aemicvß wePvicwZMY‡K cavb Dc‡`óv wb‡qvM c`vb Kwievi weavb Kwiqv wePvi wefv‡Mi ¯vaxbZv Le Kiv nBqv‡Q| wZwb Avk¼v cKvk K‡ib †h Bnvi d‡j ivR‰bwZK `j¸wj mswkó wePviKMY‡K wb‡R‡`i c‡¶ Awbevi Rb¨ cfve we¯vi Kwi‡Z _vwK‡eb| ZvnvQvov, †h ivR‰bwZK `j miKv‡i iwnqv‡Q Zvnvivl wb‡R‡`i fveavivi e¨w³‡K cavb wePvicwZ Kwievi cqvm cvB‡eb| djk“wZ‡Z nq‡Zv A‡hvM¨ e¨w³ cavb wePvicwZ nB‡eb Ges †hvM¨ e¨w³i Ae`vb nB‡Z †`k I RvwZ ewÂZ nB‡e|

wZwb Avk¼v cKvk K‡ib †h nq‡Zv †Kvb †Kvb wePvicwZ AmZK gû‡Z cavb Dc‡`óv nBevi AvKv•Lv †cvlY Kwiqv †Kvb we‡kl ivR‰bwZK `‡ji cwZ mnvbfwZkxj nBqv cwo‡Z cv‡ib| d‡j b¨vq wePvi ¶b nB‡Z cv‡i| b¨vq wePvi ¶b nB‡j wePvi wefv‡Mi Aw¯Z msKU mwó nB‡Z cv‡i|

Rbve iwdK Dj nK, W. Gg. Rwni I Rbve AvRgvj j †nv‡mb G¨vW†fv‡KU g‡nv`qMY g‡b K‡ib †h cavb wePvicwZ Aemicvß nB‡j I cavb Dc‡`óv wnmv‡e Zvnvi wb‡qvM wePvi wefv‡Mi ¯vaxbZv ¶b Kwi‡Z cv‡i| Rbve iwdK Dj nK cavb Dc‡`óv wb‡qv‡M weKí c¯ve †ck K‡ib|

Rbve gvng`j Bmjvg, G¨vW†fv‡KU g‡nv`q †Rvivj fv‡e wb‡e`b K‡ib †h †h‡nZ cavb wePvicwZ ev Avcxj wefv‡Mi Ab¨ wePviKMY ïagvÎ Zvnv‡`i Aemicvß nBevi c‡iB cavb Dc‡`óv wb‡qvMcvß nBevi m¤vebv ‡`Lv w`‡e ‡m‡nZ wePvi wefv‡Mi m¤§vbnvbxKi cwiw¯nwZ D™‡ei †Kvb m¤vebv bvB|

Rbve gvng`j Bmjvg, G¨vW†fv‡KU g‡nv`†qi GB cm‡½ DÌvwcZ e³e¨ ZwKZ welqwUi AwZ mijxKiY, wKš welqwU †gv‡UB mij bq| eiÂ h‡_ó RwUj| KviY mgm¨vwU gL¨Z gvbwmK Ges †ekxifvM †¶‡ÎB Bnv Ae¨I“ _v‡K, †`Lv hvq bv| Dcjwä Kiv hvq gvÎ| e¨vL¨vI Kiv hvq bv|

G cm‡½ GKwU NUbv D‡jL Kiv hvq| 11-1-2001 Zvwi‡L nvB‡KvU wefv‡Mi R‰bK wePvicwZi Avcxj wefv‡M wb‡qvM Dcj‡¶ kc_ MnY Abôvb ‡k‡l Judges Lounge G nvjKv Avc¨vqb Pwj‡ZwQj| GK mg‡q g‡b nBj †h A‡bKUv mgq AwZevwnZ nBqv‡Q wKš Avgiv wePviKMY †KnB wbR wbR †P¤v‡i wdwiqv hvB‡ZwQ bv Ges Av`vj‡Zi KvRI eÜ nBqv iwnqv‡Q| ZLb Rvbv †Mj †h Judges Lounge Gi m¤§‡L KwiW‡i GKwU ivR‰bwZK `‡ji mg_K AvBbRxwe g‡nv`qM‡bi GKvsk kqbiZ _vwKqv mswkó wePvicwZi Avcxj wefv‡M wb‡qv‡M we‡¶vf cKvk Kwi‡Z‡Qb| †ek wKQUv mgq AwZevwnZ nBevi ci Z`vbxšb cavb wePvicwZ‡K Ab‡iva Kiv nBj †h wZwb wb‡R kqbiZ AvBbRxwe g‡nv`qMY‡K Ab‡iva Kwi‡j m¤eZ Zvnviv c_ Qvwoqv w`‡Z cv‡ib, wKš Z`vbxšb cavb wePvicwZ †Zgb Ab‡iva Kwi‡Z Abxnv cKvk K‡ib| Zrci K‡qKRb cexY AvBbRxwe g‡nv`qM‡Yi n¯‡¶‡c mcxg †Kv‡Ui cvq

50 Rb wePviK `B N›Uvi DaKvj AvUK Ae¯v nB‡Z gw³ cvq| cw_exi mcxg †KvU mg‡ni BwZvnv‡m GBi¡c bwRi Avi bvB| Z`vbxšb cavb wePvicwZ cieZxKv‡j wb`jxq ZËveavqK miKv‡ii cavb Dc‡`óv c‡` wb‡qvM cvb| ZLb `B N›Uvi AwaK mgq mcxg †Kv‡Ui Dfq wefv‡Mi mKj Av`vj‡Zi Kvhµg eÜ _v‡K, wKš cavb wePvicwZ mg‡hvc‡hvMx `p c`‡¶c jB‡Z ZLb †Kb e¨_ nB‡jb| Zvnvi Ae‡PZb g‡b cavb Dc‡`óv nBevi AvKv•LvB wK Zvnv‡K c‡qvRbxq `p c`‡¶c jB‡Z evav mwó Kwiqv wQj ? Zvnvi gvbwmK Ae¯vb Rvbv m¤e bq, wKš Bnv GKwU m¤vebv e‡U| wbwðZ nBevi c‡qvRb bvB, GBi¡c m¤vebvB wePvi wefv‡Mi Rb¨ m¤§vbnvbxKi Ges ¯vaxbZvi cwicšx|

mswe avb (Î‡qv`k ms‡kvab) AvBb, 1996, Gi Aax‡b wePvicwZ Gg GBP ingvb c_g cavb Dc‡`óvi c` MnY K‡ib| Z‡e wZwb hLb cavb wePvicwZ c‡` `vwqZiZ wQ‡jb ZLb ZwKZ ms‡kvabxwU wewae× nq bvB weavq cfvevwbZ nBevi †Kvb m‡hvM Zvnvi wQj bv| Kv‡RB Zvnvi wb‡Ri gvbwmK Pvc ev PvÂj¨ ev mcxg †KvU evi G¨v‡mvwm‡qk‡bi weÁ m`m¨M‡Yi g‡a¨ hvnviv wewfb ivR‰bwZK `‡ji mg_K Zvnv‡`i Zid nB‡Z I †Kvb ¯úkKvZiZvi ck ZLb †`Lv †`q bvB|

cZxqgvb nq, evsjv‡`‡ki cÂ`k, †lvok I Aóv`k cavb wePvicwZMY Zvnv‡`i ‰R¨ô wePviKMY‡K AwZµvš Kwiqv (Supersession) nvB‡KvU wefvM nB‡Z Avcxj wefv‡M wb‡qvMcvß nb| Avevi Î‡qv`k I PZ`k cavb wePvicwZMY Avcxj wefv‡M Zvnv‡`i ‡R¨ô wePviKMY‡K AwZµvš K‡ib| GKB fv‡e †lvok, mß`k I Dbweskzg cavb wePvicwZMY Avcxj wefv‡M Zvnv‡`i ˆR¨ô wePviK‡K AwZµvš Kwiqv cavb wePvicwZ nb| Î‡qv`k cavb wePvicwZ Zvnvi ‰R¨ô wePviK‡K AwZG“vš Kwiqv wb‡qvMcvß nB‡j †Zgb †Kvb ¸Äb nq bvB| wZwb 26-1-2004 Zvwi‡L Aemi Mgb K‡ib|

cieZx‡Z mswevb (PZ`k mswevb) AvBb gvidr mcxg †Kv‡Ui wePviKM‡Yi Aemicvwßi eqm cqlwÆ nB‡Z mvZlwÆ erm‡i DwbZ Kiv nq| d‡j ZwKZ ms‡kvabx Abmv‡i Î‡qv`k cavb wePvicwZi cavb Dc‡`óv nBevi m¤vebv †`Lv †`q| ZLb Z`vbxšb we‡ivax`j Bnv‡Z cej AvcwË DÌvcb Kwi‡Z _v‡K|

Zvnviv hw³ DÌvcb Kwiqv e‡jb †h ZLb †h ivR‰bwZK `j miKvi MVb KwiqvwQj wZwb wePvicwZ wnmv‡e wb‡qvM cvBevi c‡e †mB ivR‰bwZK `‡ji m`m¨ wQ‡jb weavq wZwb KLbB wbi‡c¶ nB‡Z cvwi‡eb bv| 2006 mv‡ji †klfv‡M miKv‡ii †gqv` mgvcvbv‡š D³ Î‡qv`k cavb wePvicwZi cavb Dc‡`óv wb‡qvM hLb cvq Povš ZLb mgM †`‡k GZ cPÛ we‡¶vf I Av‡›`vjb Avi¤ nq †h D³ Î‡qv`k cavb wePvicwZ cavb Dc‡`óvi c` MnY Kwi‡Z A¯xKwZ Rvbvb|

cZxqgvb nB‡e †h cavb wePvicwZ c‡` bq eiÂ cavb Dc‡`óvi c‡` wb‡qv‡Mi m¤vebv‡ZB †`ke¨vcx Av‡›`vjb Avi¤ nBqvwQj| Avil cZxqgvb nB‡e †h cavb wePvicwZ c‡` Zvnvi wb‡qv†M †Zgb †Kvb AvcwË †Kvb Zid nB‡ZB DÌvcb Kiv nq bvB| Zvnvi Aemi Mg‡bi ci mswevb ms‡kvab KiZt Aemicvwßi eq‡mi †gqv` ew×i c‡iB ïa Zvnvi cavb Dc‡`óv c‡` wb‡qv‡Mi wei“‡× Am‡švl ‡`Lv †`q| Z‡e †mB †¶‡Îl hLb Î‡qv`k cavb wePvicwZ Zvnvi c‡` AwawôZ wQ‡jb ZLb Zvnvi cavb Dc‡`óvi c` Mn‡Yi ckwU I‡V bvB weavq Zvnvi wei“‡× Am‡švl wQj bv Ges wePvi wefvMl ckwe× nq bvB| Z‡e Aemi Mg‡bi eqm ew×i d‡j kagvÎ Zvnvi cavb Dc‡`óv c‡` wb‡qv‡Mi m¤ebv †`Lv †`lqvq GKwU ivR‰bwZK `j Zvnvi D³ wb‡qv‡Mi wei“‡× cPÛ Av‡›`vjb Avi¤ K‡i| d‡j evsjv‡`‡ki GKRb cv³b cavb wePvicwZi fvegwZ wbwðZ fv‡e ¶b nq Ges wePvi wefv‡Mi fvegwZ c‡iv¶ fv‡e nB‡jl ¶b nq|

GB fv‡e †Kvb wePvi‡Ki cavb wePvicwZ wnmv‡e wb‡qvM cvBevi mgq wnmve Kwiqv hw` Bnv †`Lv hvq †h cieZx wbevP‡bi c‡e wZwbB mekl Aemicvß cavb wePvicwZ, †m‡¶‡Î GBiƒc eûgLx mgm¨vi D™e nq|

Av`k Ae¯vb bv nB‡j I Bnv A¯xKvi Kwievi Dcvq bvB †h mcxg †KvU evi G¨v‡mvwm‡qk‡bi AwaKvsk weÁ m`m¨MY `BwU cavb ivR‰bwZK `‡ji mg_K| cavb wePvicwZ c‡` wb‡qvM cvBevi c‡e D³ wePviK Avewk¨Kfv‡e nvB‡KvU I Avcxj wefv‡M eû msL¨K †gvKvÏgv wb¯úwË Kwiqv _v‡Kb| BnvB ¯vfvweK †h mKj ivq mKj‡K Lkx Kwi‡e bv| GKRb wePviK AvB‡bi ck hZ cwi¯‹vi fv‡eB wb¯úwË Ki“b bv †Kb, ivq †h c‡¶i wei“‡× hvB‡e Zvnviv mvaviYZt Dnv MnY Kwi‡Z Pvwn‡eb bv Ges A‡bK hw³ (ev K-hw³) DÌvcb Kwi‡eb| we‡ivaxq wel‡qi mwnZ hw` ivR‰bwZK ck RwoZ _v‡K Zvnv nB‡j I wePviK‡K msweavb, AvBb I b¨vqbxwZ Abmv‡i we‡ivawU wb¯úwË Kwi‡Z nq| Zvnv Avewk¨Kfv‡e GK c‡¶i cQ›` nB‡e, Ab¨ c‡¶i G‡Kev‡iB cQ›` nB‡e bv| mswkó wePviK gvbwmKfv‡e hZB wbi‡c¶fv‡e wePvi Kwi‡Z‡Qb ewjqv g‡b Ki“b bv †Kb Zvnv‡K †Kvb GK ivR‰bwZK `‡ji c‡¶i ewjqv Kj¼ Av‡ivc Kiv nB‡Z _vwK‡e| A_P mKj wePviKB Rv‡bb †h c¶cvZ`óZv GKRb wePvi‡Ki Rb¨ me‡c¶v nxbZg KUw³| †h wePviK c¶cvZ`óZvq †fv‡Mb wZwb cKZc‡¶ †Kvb wePviKB bb| GKRb wePviK wbi‡c¶Zg nBevi c‡iI Zvnvi ivq Dfq c¶‡K Lwk bvI Kwi‡Z cv‡i| `tLRbK nB‡j I mZ¨ †h wKQ msL¨K AvBbRxwe msweavb I AvB‡bi we‡klY eRb Kwiqv iv‡qi g‡a¨ KjwlZ ivRbxwZ Awe¯‹vi Kwi‡Z _v‡Kb| GB fv‡e wKQ msL¨K wePvi‡Ki mwnZ ivR‰bwZK g‡bvfvem¤úb wKQ msL¨K AvBbRxwei `iZ mwó nB‡Z _v‡K hvnv ax‡i ax‡i Ab¨ AvBbRxwe‡`i g‡a¨I msµgb nq|

D‡jL¨, GB Dc-gnv‡`‡ki †kô ivRbxwZwe`MY AvBbRxwe wQ‡jb, wKš Zvnviv Av`vj‡Z KLbI ivRbxwZ Avbqb K‡ib bvB|

Zvnviv Zvnv‡`i ivR‰bwZK Rxeb I AvBb‡ckvi g‡a¨ GKwU cv_K¨ memgq eRvq ivwL‡Zb| Zvnviv Av`vjZ‡K m¤§vb Kwi‡Zb Ges Av`vj‡Zi wbKU nB‡Z m¤§vb Av`vq Kwi‡Z Rvwb‡Zb| wKš KLbI †Kvb wePviK‡K Am¤§vb Kwi‡Zb bv| Zvnviv Rvwb‡Zb †h wePviK‡K Am¤§vb Zvnv‡`i wb‡R‡`i Am¤§vb| KviY wePvi‡Ki Am¤§v‡b Av`vj‡Zi Am¤§vb, Avi Am¤§vwbZ Av`vj‡Z m¤§vwbZ †KnB _v‡Kb bv| Am¤§vwbZ wePviK I Av`vj‡Zi AvBbRxweMY‡K †`‡ki RbMYI m¤§vb K‡i bv|

cw_exi cvPxb ivRbxwZi BwZnvmcv‡b ZvKvB‡j Avgiv †`wLe, †h †Kvb †`‡ki m‡ev”P wkw¶Z Ávbx ¸Yx e¨w³eMB ivRbxwZ Kwi‡Zb| cvPxb fvi‡Z PvbK¨ ev †KŠwUj¨i gZ e¨w³ ivRbxwZ Kwi‡Zb| cvPxb Mx‡m m‡µwUm, †W‡gvm‡_wbm, †cwiwKm, AvwKwgwWm, †c‡Uv, G¨vwi‡óvUj Gi b¨vq wkw¶Z I Ávbx e¨w³ wQ‡jb| †ivgK wm‡bUiMY D”P wkw¶Z wQ‡jb| Aóxqv, cvwmqv, dvÝ †`k Áv‡b-weÁv‡b cw_ex weL¨vZ| †gwKqv‡fwji gZ ivRbxwZwe`MY ZLb ivó cwiPvjbvq AMYx fwgKv ivwL‡Zb| Bsj¨v‡Û n¨v‡iv, BUb, A·‡dvW, †KgexR, AvBb wk¶vi wewfb Inns of Court fwel¨r ivRbxwZwe`M‡Yi mwZKvMvi wQj| h³iv‡ói ¯vaxbZvi AMMvgx wQ‡jb Benjamin Franklin, John Adams, John Jay, Madison, Alexander Hamilton, James Iredell, Thomas Jefferson cgL e‡iY¨ ivRbxwZwe`MY| GB Dcgnv‡`‡k ivRbxwZi c‡ivfv‡M wQ‡jb gnvZ¥v MvÜx, ‡gvnv¤§` Avjx wRbvn, gwZjvj ‡b†ni“, RInvijvj †b‡ni“, Ave`j Mvddvi Lvb, gvIjvbv Avej Kvjvg AvRv`, G.†K. dRjj nK, ‡nv‡mb knx` †mvn‡ivIqv`x, †kL gwRei ingvb cgL| Zvnv‡`i e¨w³MZ mZZv, wbôv I †`‡ki RbM‡Yi cwZ wbLv` fvjevmv wQj ckvZxZ| GKR‡bi Avi GKR‡bi cwZ wQj AvšwiK k×v‡eva I mnvbfwZ| GRb¨B Zvnviv webv i³cv‡Z wewUk-iv‡Ri wbKU nB‡Z `BwU ivó ¯vaxb Kwi‡Z cwiqvwQ‡jb|

eZgvb evsjv‡`‡k g‡b nq GKRb Avi GKRb‡K †nq Kiv, Am¤§vb KivB †hb GLb G‡`‡ki ms¯‹wZ‡Z cwiYZ nBqv‡Q| BnvB †hb fwel¨r DbœZi †mvcvb Ges mvdj¨i evnb| Bnvi †XD Av`vjZ PZi‡K I cejfv‡e Av‡›`vwjZ Kwi‡Z‡Q| ZwKZ ms‡kvabxi gva¨‡g me‡kl Aemicvß cavb wePvicwZ‡K cavb Dc‡`óv Kwievi weavb GB Acms¯‹wZi Rjš `óvš|

mvaviY wbq‡g GKRb cavb wePvicwZ Aem‡i Mgb Kwi‡j ivócwZ bZb GKRb wePviK‡K cavb wePvicwZ c‡` wb‡qvM c`vb K‡ib| ivócwZ Avewk¨K fv‡eB RvZxq msm`, †hLv‡b miKvi c¶ ivR‰bwZK `j msL¨vMwiô, Zvnv‡`i Øviv wbevwPZ| hw` wnmv‡e †`Lv hvq †h ZwKZ ms‡kvabx Abmv‡i bZb cavb wePvicwZ cieZx wbevP‡bi c‡e me‡kl Aemicvß cavb wePvicwZ nB‡eb A_vr wZwb cieZx wbevP‡bi mgq ZËveavqK miKvi cavb _vwK‡eb †m‡¶‡Î mswkó mK‡jB Zvnvi Dci ïa mZK `wó iv‡Lb ZvnvB b‡n mK‡jB Zvnvi cwZ AwZwi³ ¯úkKvZi nBqv c‡ob|

‡Kvb ivqB cavb wePvicwZ GKK wm×v‡š c`vb K‡ib bv, wKš ‡mB ivq hw` ‡Kvb ivR‰bwZK `‡ji ¯v‡_i wec‡¶ hvq Zvnv nB‡j Av`vjZ I Av`vjZ cv½‡b D³ ivR‰bwZK `‡ji mg_K AvBbRxweMY cPÛ Av‡jvob mwó K‡ib|

‡Kvb †Kvb AvBbRxwe Zvnv‡`i cv_bv gvwdK Av‡`k hvPTbv Kwiqv e¨_ nB‡j Amšó nb I bvbvfv‡e Zvnvi ewntcKvk N‡U Ges ‡h‡Kvb ARnv‡Z cavb wePvicwZi wei“×vPviY Avi¤ K‡ib| Avevi we‡ivax `jxq A‡bK AvBbRxwe g‡b K‡ib †h †h‡nZ miKvic¶xq ivócwZi wm×v‡š we`¨gvb cavb wePvicwZ D³ c‡` wb‡qvM cvBqv‡Qb †m‡nZ AvMvgx wbevP‡b cavb Dc‡`óv wnmv‡e wZwb Aek¨B cwiZ¨vR¨| †mB j‡¶¨ †h †Kvb ARnv‡Z Zvnviv cavb wePvicwZi wei“‡× A‡nZK Ggb D‡ËRbv I Av‡›`vjb mwó Kwi‡Z _v‡Kb hvnv cvqkB mvaviY wkóvPvi ewnfZ nBqv hvq| ZvnvQvov, Zvnviv bvbv fv‡e Zvnv‡K weZwKZ Kwi‡Z _v‡Kb| cavb wePvicwZ wnmv‡e A‡bK

mg‡qB Zvnv‡K Awcq wm×vš I jB‡Z nq, wKš KviY ev AKvi‡YB Zvnvi wei“×vPib I cweÎ Av`vjZ A½‡b Pig Dk•Lj AvPiY Pwj‡Z _v‡K|

`p ckvmwbK c`‡¶c MnY we‡kl Kwiqv wePviKMY‡K k•Ljvi g‡a¨ Avwbevi c‡Póvq wem¥qKi nB‡j I mZ¨ †h A‡bK AvBbRxwe Hifc c`‡¶‡c Amšó nb|

ZvnvQvov, cavb wePvicwZ whwb nq‡Zv fwelr cavb Dc‡`óv c‡` Awawô Z nB‡eb, m¤eZt †mB Kvi‡YB Zvnvi cvq cwZwU c`‡¶‡ci Ac-e¨vL¨v KiZt Zvnv‡K weZwKZ Kwievi µgvMZ c‡Póv Ae¨vnZ fv‡e Pwj‡Z _v‡K| †Kvb AvBbRxwe, †Kvb wePviK GgbwK †Kvb cavb wePvicwZi (whwb mvaviY wbevP‡bi c‡ei me‡kl cavb wePvicwZ bb) c‡¶ I GBi“c bvRK cwiw¯nwZ Dcjwä Kiv m¤e bq| mswevavb (Î‡qv`k ms‡kvab) AvBb, Abmv‡i †h cavb wePvicwZ cieZx cavb Dc‡`óv nB‡eb GKgvÎ wZwbB Zvnvi wÎk¼ Ae¯nv Dcjwä Kwi‡Z cvwi‡eb| Avewk¨K fv‡eB Bnv nB‡e Zvnvi e¨wl“MZ `tmn Awf ÁZv|

Hifc cwiw¯wZ‡Z GKRb cavb wePvicwZ wK Kwi‡Z cv‡ib|

c_‡gB wePviKM‡Yi kc_ cm½ Av‡jvPbv Kiv c‡qvRb| mswevav‡bi 148 Ab‡”Q` Abmv‡i ZZxq Zdwm‡j DwjwLZ †h †Kvb c‡` wbewPZ ev wbhl“ e¨w³ Kvhfvi Mn‡Yi c‡e D³ Zdwmj-Abhvqx kc_Mnb Kwi‡eb Ges Abifc kc_c‡Î ev ‡NvlYvc‡Î ¯v¶i`vb Kwi‡eb|

mswevav‡bi ZZxq Zdwm‡j ewYZ e¨w³M‡Yi g‡a¨ mcxg †Kv‡Ui wePviKMYI iwnqv‡Qb| mcxg †Kv‡Ui †h †Kvb wefv‡M wb‡qv‡Mi ci mswkó wePviK‡K wbæifc fv‡e kc_ ev †NvlYv cvV Kwi‡Z nq t

ÔÔAvwg..... mcxg †Kv‡Ui Avcxj/nvB‡KvU wefv‡Mi wePviK wbh³ nBqv mk×wP‡Ë kc_ (ev `pfv‡e †NvlYv) Kwi‡ZwQ †h, Avwg AvBb-Abhvqx I wek¯vi mwnZ Avgvi c‡`i KZe¨ cvjb Kwie;

Awg evsjv‡`‡ki cwZ AKwÎg wekvm I AvbMZ¨ †cvlY Kwie;

Awg evsjv‡`‡ki msweavb I AvB‡bi i¶Y, mg_b I wbivcËweavb Kwie ;

Ges Awg fxwZ ev AbMn, AbivM ev weiv‡Mi ekZZx bv nBqv mK‡ji cwZ AvBb-Abhvqx h_vwenxZ AvPiY Kwie|ÕÕ

Dc‡ii kc_ evK¨¸wj GKRb wePvi‡Ki Rb¨ wbQK Avbôvwb KZv b‡n| Bnvi cwZwU kã we‡kl Zvrch enb K‡i|

GB kc_ GKRb wePvi‡Ki wePvwiK KZe¨, †`‡ki cwZ ckvwZZ AvbMZ¨, wbwðZ wbi‡c¶Zv Ges mecwi msweavb I AvBb mgbZ Kwievi `vwqZ Acb K‡i|

GKRb wePviK mgM Rxeb, GgbwK Aem‡i Mgb Kwievi c‡iI, Zvnvi kc_Øviv eva¨|

BwZnv‡mi w`‡K ZvKvB‡j Avgiv †`wL‡Z cvB †h Lord Chancellor Sir Thomas More Zvnvi kc_‡K AZ¨š¿i“‡Zi mwnZ we‡ePbv Kwi‡Zb| ivRv Henry VIII Zvnv‡K Head of the Church of England wnmv‡e ¯xKwZ c`vb KiZt kc_ jBevi Rb¨ Sir Thomas More ‡K wb‡`k †`b wKš wZwb Zvnv gvb¨ Kwi‡Z A¯xKwZ Ávcb KiZt 1532 mv‡j Lord Chancellor c` nB‡Z c`Z¨vM K‡ib| ivRvi Av‡`k Agvb¨ Kivq ivR‡`v‡ni Awf‡hv‡M Zvnv‡K 16 ermi Tower G AšixY _vwK‡Z nq ZeI mK‡ji Ab‡iva m‡ZI Hi“c kc_ MnY Kwi‡Z A¯xKvi K‡ib| AZci, Zvnvi wki‡”Q` nq|

1591 mv‡j wePviKM‡Yi gZvg‡Z (Opinion of Judges) †`Lv hvqt

> “We are almost daily called upon to minister Justice according to law, whereunto we are bound by our office and our oath” (Philip Hamburger: Law and Judicial Duty).

PwikZ ermi c‡e Exchequer Chamber Av`vj‡Z 12 Rb wePvi‡Ki m¤§‡L Commendams (1616) †gvKÏgvUi ïbvbx Pwj‡ZwQj| DI“ †gvKÏgvq ivRvi GKwU Prerogative Abmv‡i gÄix c`v‡bi welqwUI †gvKÏgvi welq e¯ wQj| H mgq ivRv James I jÛb Gi evwn‡i

Ae¯nvb Kwi‡ZwQ‡jb| wZwb Attorney General Sir Francis Bacon gvidr ivRvi mwnZ Av‡jvPbv bv Kiv chš †gvKÏgvwUi ïbvbx ¯nwMZ Kwi‡Z e‡jb| wKš wePviKMY Rvbvb t

"Obedience to His Majesty's Command to stay proceedings would have been a delay of justice, contrary to the law, and contrary to oaths of the Judges. (Av‡av †iLv c`Ë)

ivRv James I jÛb kn‡i wdwiqvB 12Rb wePviK‡K WvwKqv cvVvb Ges wR Ávmv K‡ibt

"When the king believes his interest is concerned and requires the judges to attend him for their advice, ought they not to stay proceedings till His Majesty has consulted them?"

King's Bench Gi cavb wePvicwZ Sir Edward Coke e¨wZ‡i‡K Ab¨ mKj wePvicwZ ivRvi Awfjvl Abmv‡i c`‡¶c jBevi A½xKvi K‡ib| ïagvÎ Coke e‡jbt

"When that happens, I will do that which it shall be fit for a judge to do."

Aek¨ Coke ‡K Zvnvi GB ¯KxqZvi Rb¨ A‡bK gj¨ w`‡Z nq| K‡qK w`‡bi g‡a¨B ivRv Zvnv‡K eiLv¯Z K‡ib Ges 7 gvm Zvnv‡K Tower G Aš ixb _vwK‡Z nq|

(Dc‡ii D×wZ¸wj Lord Denning wjwLZ 'What Next In The Law' c¯ZK nB‡Z eYbv Kiv nBj)|

`BkZ ermi c‡e h I iv‡ói cavb wePvicwZ John Marshall Marbury V. Madison (1803) †gvKÏgvq wePvi‡Ki kc_ m¤‡Ü Av‡jvKcvZ K‡ibt

"Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support !

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as-,according to the best of

my abilities and understanding agreeably to the constitution and laws of the United States."

Why does a judge swedr to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government ? If it is closed upon him, and cannot be inspected by him ?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." (Quoted from Professor Noel T. Dowling on the Cases on the Constitutional Law, Fifth Edition, 1954, at page-96. (Av‡av‡iLv c`Ë)

Federation of Pakistan V. Moulvi Tamizuddin Khan PLD 1955 FC 240 ‡gvKÏgvq wePvicwZ A.R.Cornelius (as his Lordship then was) Zvnvi wfbgZmPK iv‡q wePviK‡`i kc_ m¤‡Ü e‡jb (cô v 319)t

"The resolution of a question affecting the interpretation of important provisions of the interim constitution of Pakistan in relation to the very high matters which are involved, entails a responsibility going directly to the oath of office which the constitution requires of a Judge, namely, to bear true faith and allegiance to the Constitution of Pakistan as by law established and faithfully to perform the duties of the office to the best of the incumbent's ability, knowledge and judgment." (Av‡av‡iLv c`Ë)

Fazlul Quader Chowdhury V. Muhammad Abdul Haque, PLD 1963 SC 486, †gvKÏgvq cavb wePvicwZ A.R. Cornelius kc_ m¤‡Ü e‡jb (cô v 502-03)t

"The Judges of the Supreme Court and the High Courts when they enter upon their office, are required to swear an oath that they will "preserve, protect and defend the Constitution."

..... The reasons why the Judges of the Supreme Court and the High Courts have to take a similar oath can in my opinion be found within the simple provisions of Article 58. It is there provided for all persons in Pakistan that in any case where it becomes necessary for them to assert in their interest, any provision of the Constitution, they shall have access to the High Courts and through the High Courts to the Supreme Court as of right, and these two Courts are bound by their oath and duty to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its provisions against attack of any kind. The duty of interpreting the Constitution is, in fact a duty of enforcing

the provisions of the Constitution in any particular case brought before the Courts in the form of litigation." (Av‡av‡i Lv c`Ë)

Asma Jilani V. Government of Punjab PLD 1972 SC 139 ‡gvKv Ï gvq cavb wePvi cwZ Hamoodur Rahman kc_ m¤‡Ü e‡j b (cô v-203-04)t

"Incidentally it may also be mentioned here that a great deal that has been said about the oath of Judges is also not germane to the question now before us, for, in the view I take of the duty of a Judge to decide a controversy that is brought before him it cannot be said that any Judge of this Court has violated his oath which he took under the Constitution of 1962.

.....So far as this Court is concerned it has always acted in accordance with its oath and will continue to do so whenever a controversy is brought before it, no matter what the consequences" (Av‡av‡i Lv c`Ë)

Anwar Hossain Chowdhury V. Government of Bangladesh 1989 BLD (Special) ‡gvK Ï gvq wePvi cwZ B.H. Chowdhury (as his Lordship then was) kc_ m¤‡Ü e‡j b (cô v-106)t

" 246. While it is the duty of the people at large " to safeguard, protect and defend the Constitution, the oath of the President, Judges is to preserve, protect and defend the Constitution. To preserve it is an onerous duty. While for the people the duty is to "safeguard". Nature of the two duties are different and run in parallel. To deny the power to judiciary to "preserve" the constitution is to destroy the independence of the judiciary thereby dismantling the Constitution itself".

GKB †gvK Ï gvq wePvi cwZ Shahabuddin Ahmed, (as his Lordship then was) kc_ m¤‡Ü wbæwjwLZ Awf gZ cKvk K‡i b (cô v-157)t

"379. Judges are by their oath of office bound to preserve, defend and protect the Constitution and in exercise of this power and function they shall act without any fear or favour and be guided by the dictate of conscience and the principle of self restraint. It is these principles which restrain them from exceeding the limits of their power. In this connection the following observation of the sitting in the Court of Appeal, State of Virginia, is quite appropriate:

> "I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature and consequently the whole community against the usurpations of the other and whenever the proper occasion occurs, I shall feel the duty ; and fearlessly perform it..... if the whole legislature, an

> event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the court, will meet the united powers at my seat in this tribunal, and pointing to the constitution, will say to them, there is the limit of your authority; and hither shall you go, but no further." (Av‡av‡iLv c`Ë)

wePvicwZ M.H. Rahman (as his Lordship then was) wePviKM‡Yi kc_ m¤‡Ü wbæwjwLZ gše¨ K‡ib (côv-180)t

> "488. The Court's attention has repeatedly been drawn to the oath the Chief Justice or a Judge of the Supreme Court takes under art. 148 of the Constitution on his appointment. Mr. Asrarul Hossain has pointed out the difference between the language of the oath the Judges of the Indian Supreme Court take "to uphold the Constitution." The import of the single word 'uphold' is no less significant or onerous than that of the three words 'preserve, protect and defend'. In either case the burden is the same. And the Court carries the burden without holding the swords of the community held by the executive or the purse of the nation commanded by the legislature."

Bangladesh Italian Marble Works Limited V. Government of Bangladesh 2006 (Special Issue) BLT (HCD) ‡gvKvÏgvq wePviK‡`i kc_ I `wqZ m¤‡Ü wb‡ævl" gše¨ Kiv nq (cóv-203) t

> "It should be noted that the oath of office, an individual Judge takes at the time of his elevation to the Bench, is a personal one and each individual Judge declares it taking upon himself, the obligation to 'preserve, protect and defend the Constitution.' It is an obligation cast upon each individual Judge. Each individual Judge himself remains oath-bound to fulfill his own obligations under the Constitution. This obligation under the oath is personal and remains so upon him, every day, every week, every month, every year, during his tenure as a such Judge. His all other obligations are subject to his Oath and the Constitution.
>
> .....We the Judges have got the obligation to uphold the Constitution and we are oath-bound to do it, no matter who is hurt. It is better to hurt a few than the country. In any case everybody must face the truth however awkard it may seem at first. But truth and only the truth must prevail. We Judges are obliged to enhance the cause of justice and truth and not to disgrace it, however political over-tone it may seem to have but the Constitution, the supreme law with the ever vigilant people of this country, shall over-ride all political implications."

GgZ Ae¯vq cavb wePvicwZ hw` we‡eK ew×m¤úb mZ¨Kvi wePvicwZ nb Ges fwel¨r cavb Dc‡`óvi c` hw` Zvnv‡K cfvweZ bv K‡i Zvnv nB‡j wZwb Zvnvi kc_ Abmv‡i `pn‡¯ cwiw¯wZ †gvKvwejv Kwi‡eb Ges AvBb I b¨vqbxwZ Abmv‡i b¨vq wePvi wbwðZ Kwi‡eb hw` I †mBi‚c `pZvi Rb¨ Zvnv‡K cwZ c‡` c‡` Acgvb mn¨ Kwi‡Z nB‡Z cv‡i| Ab¨w`‡K wZwb hw` cavb Dc‡`óv c‡`i wPšvq GgbwK Ae‡Zb g‡bI cfvevwbZ nb, Zvnv nB‡j mKj mgq mK‡ji mwnZ Av‡cvl Kwiqv Pvwnevgv Qvo w`‡eb| Bnv‡Z mK‡jB Lkx nB‡eb Ges wZwb mev‡c ¶v Rbwcq cavb wePvicwZ nB‡eb wKš wePv‡ii evYx wbf‡Z Kw`‡e|

ck DwV‡Z cv‡i †h cavb Dc‡`óvi c`wU nB‡Z cavb wePvicwZ ev Ab¨ wePvicwZ‡K m¤ú³ bv Kwi‡j wK mweav nB‡Z cv‡i|

c‡e Av‡jvPbv Kiv nBqv‡Q †h GKRb wePvi‡Ki gvbwmK kw³B nB‡Z‡Q wePvi wefv‡Mi cavb kw³| cavb Dc‡`óvi c` Mn‡Yi welqwU bv _vwK‡j GKRb cavb wePvicwZ gvbwmK Pvc nB‡Z g³ _vwKqv m¤úY ¯vaxb _vwK‡Z cvwi‡eb| wØZxqZt we‡ivax `jxq ivR‰bwZK `‡ji mg_K AvBbRxweM‡Yi ivR‰bwZK Kvi‡Y mó Pvc nB‡Z cavb wePvicwZ g³ _vwK‡Z cvwi‡eb|

GB `BwU welqB ¯vaxb wePvi e¨e¯vi Rb¨ AwZ c‡qvRbxq| †`‡ki ¯vaxb wePvi e¨e¯vi mv‡_ Aek¨B cavb wePvicwZ I Avcxj wefv‡Mi wePviKMY‡K †`‡ki ivRbxwZwe`M‡Yi e¨_Zvi `vqfvi nB‡Z i¶v Kwi‡Z nB‡e| wePviKM‡Yi mvswevwbK `vq I `vwqZ wePvi wefv‡Mi cwZ I mKj wePvi cv_xM‡Yi cwZ| ivRbxwZwe`M‡Yi e¨_Zvi `vqfvi Mn‡Y wePviKM‡Yi †KvbB mvswevwbK ev ˆbwZK `vwqZ bvB| D‡jL¨ †h ZwKZ ms‡kvabxwU ivRbxwZwe`M‡Yi e¨_Zvi Kvi‡YB Avbqb Kwi‡Z nBqv‡Q| ivRbxwZwe`M‡Yi wb‡R‡`i `vq I `vwqZ Zvnv‡`i wb‡R‡`i‡KB enb Kwi‡Z nB‡e| wePvi wefvM Zvnv enb Kwi‡e bv| Ab¨_vq wePvi wefvM wb‡RB Av¯nv msK‡U cwo‡e|

Avi Rbgvb‡li Av¯nvB nB‡Z‡Q wePviKM‡Yi cKZ kw³| Samson Gi kw³ j°vBZ wQj Zvi P‡ji g‡a¨, wePviKM‡Yi kw³ Zvnvi ckvZxZ mZZv, wbi‡c¶Zv I `p cwikxwjZ gbbkxjZvq| GB kw³i Dci wbfi KwiqvB GKRb wePviK wbfxK I `pfv‡e iv‡ói mev‡c¶v kw³gvb e¨w³i wei“‡× I Aejxjvµ‡g ivq c`vb Kwi‡Z GZUK wØav †eva K‡ib bv|

wePvi wefvM †Kvb wKQi wewbg‡qB GB kw³ cwiZ¨vM Kwi‡Z cv‡i bv| Ggb wK cavb Dc‡`óv c‡`i Rb¨ I b‡n|

GKRb wePviK mZZ _vwK‡eb t

> Be just, and fear not :
> Let all the ends thou aim'st at be thy country's,
> Thy God's, and truth's;

42| RbM‡Yi miKvi t

evsjv‡`k iv‡ói gj wfwË nBj mechv‡q RbM‡Yi ¶gZvqb| mswea v‡bi c¯vebv, mswea v‡bi c_g fvM, wØZxq fvM I meÎ RbM‡Yi ¶gZvqb cùwUZ nBqv DwVqv‡Q| mswea v‡bi gj wZbwU ¯‡¤i g‡a¨I RbMY Dcw¯Z| RbM‡Yi ¶gZvqb Avgv‡`i mswea v‡bi me‡kô Basic Structure|

Rbve iwdK-Dj nK weÁ G¨vW†fv‡KU g‡nv`q hw³ DÌvcb Kwiqv‡Qb †h cwK¯v‡bi mswea v‡bI GK ai‡bi ZËeavqK miKvi iwnqv‡Q| wKš evsjv‡`k mswea v‡bi cwZ¯‡i e¨³ RbM‡Yi wPišb cevngvb¶gZvq‡bi ce kZwU Zvnvi `wói A‡MvP‡i iwnqv wMqv‡Q|

nvB‡KvU wefv‡MI hw³ Dc¯vcb Kiv nBqv‡Q †h fvi‡Zi mswea v‡bI GK ai‡bi ZËeavqK miKvi iwnqv‡Q †hLv‡b wbevPb Dcj‡¶ Parliament fvwOqv †M‡j cavbgšx I Zvnvi gwšmfv ZËeavqK miKv‡ii `vwqZ cvjb K‡ib|

Rbve iwdK-Dj nK weÁ G¨vW†fv‡KU g‡nv`q hw³ DÌvcb K‡ib †h fvi‡Zi b¨vq evsjv‡`‡ki mswea v‡bI H ai‡bi ZËeavqK miKvi iwnqv‡Q| Î‡qv`k ms‡kvabx ïagvÎ cavbgšx I gwšmfvi

cwie‡Z m¤úY AivR‰bwZK e¨w³ eMØviv Dc‡`óv cwil` MVb KiZt wbi‡c¶ I mô wbevPb wbwðZ Kwiqv iv‡ói MYZvwšK e¨e¯v‡K Avil `p Kiv nBqv‡Q wKš RbM‡Yi ¶gZvq‡bi ce kZwU wZwb cbivq we¯gZ nBqv‡Qb|

cavbgšx I Zvnvi gwšmfvi cwie‡Z Dc‡`óv cwil` wb‡qv‡Mi c‡¶ hw³ welqwUi AwZ mijxKiY| cavbgšx I Zvnvi gwšmfvi AwaKvsk m`m¨ RbM‡Yi wbevwPZ Ges Zvnviv RbMY‡K cwZwbwaZ K‡ib| Zvnv‡`i gva¨‡gB RbMY gwšmfvq Dcw¯Z _v‡Kb Ges gwšmfvi cwZwU wm×vš RbM‡Yi wm×vš ewjqv cwiMwYZ nq| GLv‡bB RbM‡Yi ¶gZvqb| ZvnvQvov, gwšmfv RbM‡Yi cwZwbwa RvZxq msm‡`i wbKU `vqe×| GB `Bfv‡e RbM‡Yi ¶gZvqb|

ck DwV‡Z cv‡i, RvZxq msm‡`i `B Awa‡ek‡bi ga¨eZx mgq Ges wbevPb Dcj‡¶ RvZxq msm` fvswMqv †M‡j RbM‡Yi ¶gZvqb D³ mg‡qi Rb¨ †Q` c‡o wKbv ev Bnvi Awew”QbZv webó nq wKbv| bv KLbI nq bv, KviY, Awew”QbZv †Kvb we‡kle¨w³ ev e¨w³e‡Mi Rb¨ b‡n, e¨w³ ev e¨w³eM h_vµ‡g cavbgšx nB‡eb ev gwšmfvi m`m¨ nB‡eb Ges GKmgq c¯vb Kwi‡eb, Ab¨ †Kn ev A‡b¨iv Awwm‡eb Ges GK mgq ZvnvivI c¯vb Kwi‡eb, wKš cavbgšx I gwšmfv Awew”Qbfv‡e Pwj‡Z _vwK‡e, †mB m‡½ RbM‡Yi Dcw¯wZ I ¶gZvqb we`¨gvb cavbgšx I gwšmfvi gva¨‡g Awe”Qb fv‡e Avengvb Kvj awiqv Pwj‡Z _vwK‡e| RbM‡Yi GB Awew”Qb fv‡e AvengvbKvj awiqv iv‡ói me‡¶‡Î ¶gZvqb iv‡ói gj wfwË| KLbB †Kvb Kvi‡YB GB avivevwnKZvq †Q` (Hiatus) Avbv hvB‡e bv|

gj msweavb Abmv‡i cavbgšx I gwšmfvi m`m¨mn mKj msm`-m`m¨MY 5 (cvP) erm‡ii Rb¨ wbevwPZ nb| msweav‡bi gj 123(3) Ab‡”Q` Abmv‡i †gqv` Aemv‡bi Kvi‡Y msm` fw½qv hvBevi †¶‡Î fw½qv hvBevi ceeZx beŸB w`‡bi g‡a¨ wbevPb AbwôZ nB‡Z nB‡e| wKš msweavb (Î‡qv`k ms‡kvab) AvB‡bi AvIZvq ms‡kvwaZ 123(3) Ab‡”Q` Abmv‡i mvavib wbevPb AbwôZ

nB‡e msm` fvw½qv hvBevi cieZx beŸB w`‡bi g‡a¨ | †m‡¶‡Î ck DwV‡Z cv‡i †h cvP ermi AwZ µg nBqv †M‡j cavbgšx I gwšmfvi m`m¨MY msm`-m`m¨ _v‡Kb wKbv|

Bnvi DËi mswea v‡bi 56(4), 57(3), 72(3), 72(4) I gj 123(3) Ab‡”Q‡` c`vb Kiv nBqv‡Q| wb‡æ Dc‡iv³ Ab‡”Q`¸wj eYbv Kiv nBj t

56|(4) msm` fvswMqv hvIqv Ges msm`-m`m¨‡`i Ae¨ewnZ cieZx mvaviY wbevPb Abôv‡bi ga¨eZxKv‡j GB Ab‡”Q‡`i (2) ev (3) `dvi Aaxb wb‡qvM `v‡bi c‡qvRb †`Lv w`‡j msm` fvswMqv hvBevi Ae¨ewnZ c‡e hvnviv msm`-m`m¨ wQ‡jb, GB `dvi D‡Ïk¨mvabK‡í Zvnviv m`m¨i¡‡c envj iwnqv‡Qb ewjqv MY¨ nB‡eb|

57| (3) cavbgšxi DËiwaKvix Kvhfvi MnY bv Kiv chš cavbgšx‡K ¯xq c‡` envj _vwK‡Z GB Ab‡”Q‡`i †Kvb wKQB A‡hvM¨ Kwi‡e bv|

72| (3) ivócwZ c‡e fvw½qv bv w`qv _vwK‡j c_g ˆeV‡Ki ZvwiL nB‡Z cvP ermi AwZewnZ nB‡j msm` fvw½qv hvB‡e;

Z‡e kZ _v‡K †h, cRvZš h‡× wjß _vwKevi Kv‡j msm‡`i AvBb-Øviv Abi¡c †gqv` GKKv‡j AbwaK GK ermi ewaZ Kiv hvB‡Z cvwi‡e, Z‡e h× mgvß nB‡j ewaZ †gqv` †Kvb µg Qq gv‡mi AwaK nB‡e bv|

72| (4) msm` f½ nBevi ci Ges msm‡`i cieZx mvaviY wbevPb Abôv‡bi c‡e ivócwZi wbKU hw` m‡švlRbK fv‡e cZxqgvb nq †h, cRvZš †h h‡× wjß iwnqv‡Qb, †mB h×ve¯vi we`¨gvbZvi Rb¨ msm` cbivnŸvb Kiv c‡qvRb, Zvnv nB‡j †h msm` fvw½qv †`Iqv nBqvwQj, ivócwZ Zvnv AvnŸvb Kwi‡eb|

Dc‡ivl“ weavb¸wj nB‡Z cZxqgvb nB‡e †h msweavb c‡YZvMb ivóxq Kv‡h RbM‡bi cwZwbwa Z_v RbMb‡K m¤ú³ iwL‡Z KZUv m‡Pó wQ‡jb| Ggb wK h× Ae¯nvq msm‡`i †gqv` ew×i e¨e¯nv ivLv nBqv‡Q hvnv‡Z RbM‡bi cwZwbwaMY c‡qvRbxq wm×vš c`vb Kwi‡Z cv‡ib|

GKBfv‡e msm` fw½qv hvBevi ci wKš msm‡`i cieZx mvaviY wbevPb Abôv‡bi c‡e hw` h× Avi¤f nq †m‡¶‡Î Ivócwi m‡švl Abmv‡i †h msm` fw½qv †`Iqv nBqvwQj Zvnv cbivq AvnŸvb Kiv hvB‡Z cv‡i|

ejvi A‡c¶v iv‡L bv †h ivócwZi mšwó cKZc‡¶ wbfi Kwi‡e we`¨gvb gwšmfvi mšwó I wm×vš Ges †mB Abhvqx cavbgšxi civg‡ki Dci| D‡jL¨ †h gwšmfv we`¨gvb _vKv m‡ZI h×ve¯nvi Rb¨ msm` cbivnŸvb Kwievi e¨e¯nv msweav‡b ivLv nBqv‡Q|

GBfv‡e ivóxq Kv‡hi cwZ ¯Z‡i evsjv‡`‡ki RbM‡bi ¶gZvqb I Ae¯nvb mswevb wbwðZ Kwiqv‡Q|

ZvnvQvov, cvK mswevb (Î‡qv`k ms‡kvab) AvBb, 1996 A_vr ms‡kva‡bi c‡ei msweav‡bi 123(3) Ab‡”Q` wbæi“c t

> 123|(3) msm`-m`m¨‡`i mvaviY wbevPb AbwôZ nB‡e
> (K) †gqv`-Aemv‡bi Kvi‡Y msm` fw½qv hvBevi †¶‡Î fw½qv hvBevi ceeZx beŸB w`‡bi g‡a¨;
> Ges
> (L) †gqv`-Aemvb e¨ZxZ Ab¨ †Kvb Kvi‡Y msm` fw½qv hvBevi †¶‡Î fw½qv hvBevi cieZx beŸB w`‡bi g‡a¨|
> (A‡av‡iLv c`Ë)

Z‡e kZ _v‡K †h, GB `dvi (K) Dc-`dv Abhvqx AbwôZ mvaviY wbevP‡b wbevwPZ e¨w³MY Dc-`dvq D‡jwLZ †gqv` mgvß bv nIqv chš msm`-m`m¨i¡‡c Kvhfvi MnY Kwi‡eb bv|

Dc‡i ewYZ msweav‡bi weavb¸wj we‡klY Kwi‡j cZxqgvb nB‡e †h msm`-m`m¨MY hw` I cvP ermi †gqv‡` wbevwPZ nb, wKš †Kvb h× ev Ri“ix Ae¯vi mwó nB‡j D³ Ri“ix Ae¯v mgvß bv nIqv chš msm`-m`m¨MY Zvnv‡`i Kvhµg PvjvBqv hvB‡eb|

Bnv‡ZB cZxqgvb nq ‡h bZb wbewPZ msm`-m`m¨MY kc_ MnY bv Kiv chš c‡ei msm`-m`m¨MY RbM‡Yi cwZwbwaZ K‡ib| RbM‡bi cwZwbwa wnmv‡e Zvnv‡`i PwiwÎK ˆewkó¨ †gv‡UB wejxb nB‡e bv|

cavbgšxi †¶‡Î 57(3) Ab‡”Q` Abmv‡i Zvnvi DËiwaKvix Kvhfvi MnY bv Kiv chš wZwb ïa ¯xq c‡` envj _v‡Kb bv, wZwb RbM‡Yi cwZwbwaZ I K‡ib|

mecwi cvK-Î‡qv`k ms‡kvabxi †¶‡Î gj 123(3) Ab‡”Q` Abmv‡i msm`-m`m¨‡`i mvaviY wbevPb AbwôZ nB‡e †gqv` A‡š msm` fvswMqv hvBevi ceeZx beŸB w`‡bi g‡a¨| GB weavb LeB ¸i“ZcY, KviY, †m‡¶‡Î I bZb msm`-m`m¨MY kc_ MnY bv Kiv chš ceZb msm`-m`m¨MY wb‡R‡`i AwaKvie‡j ¯vfweK wbq‡gB RbcwZwbwa _wK‡eb Ges Zvnv‡`i gva¨‡g RbM‡Yi ¶gZvqb weiwZnxb fv‡e Pjgvb _wK‡e|

mZivs gj msweavb Abmv‡i wbevPb Dcj‡¶ msm` fvswMqv hvBevi ci gwšmfv GKai‡bi Care taker miKvi ev ZËveavqK miKvi wnmv‡e `vwqZ cvjb Kwi‡j I ZLbI cavbgšx I gwšmfvi mf¨MY wb‡R‡`i mvsweavwbK AwaKvie‡j RbcwZwbwa _v‡Kb Ges Zvnv‡`i cwZwU c`‡¶‡ci g‡a¨ RbM‡Yi ¶gZv Dcw¯Z _v‡K weavq Zvnv‡`i AvBbMZ Ae¯v‡bi mwnZ Î‡qv`k ms‡kva‡bi Aax‡b mó cavb Dc‡`óv I Dc‡`óv cwil‡`i †KvbB Zjbv nq bv KviY Zvnviv AwbewPZ Ges iv‡ói ¯xKZ gvwjK RbM‡Yi mwnZ Zvnv‡`i †Kvb m¤ú³Zv bvB| †h‡nZ, RbM‡bi mwnZ Zvnv‡`i †Kvb cKvi m¤ú³Zv bvB, †m‡nZ msweavb Zvnvw`M‡K kvmb (Governance) Kwievi †Kvb AwaKvi †`q bv| Kvib, MYZ‡ši cekZB nBj governance by consent| Dc‡`óv‡`i c‡¶ RbM‡Yi †KvbB consent bvB|

AZGe, Dc‡`óvMY †Kvbfv‡eB ivóhš ¿ízg Kv‡ji Rb¨ I cwiPvjbv Kwi‡Z cv‡ib bv| Kvib, "Every man, and every body of men on earth, possess the right of self-government." (Thomas Jefferson, 1790)| Bnv gvb‡li Rb¥wa Kvi|

43| Dcmsnvi t

Dc‡ii `xN Av‡jvPbv nB‡Z cZxqgvb nB‡e †h RbM‡Yi mve‡fšgZ iv‡ói cRvZwšK I MYZwšK Pwi Î, wePvi wefv‡Mi ¯vaxbZv wbtm‡›`‡n mswe av‡bi Basic Structure I iv‡ói gj wfwË|

mswe av‡bi 142 Ab‡"Q` Abmv‡i †h †Kvb ms‡kvab AvBbB msm` cYqb Kwi‡Z ¶gZvevb e‡U wKš iv‡ói gj wfwË ev Basic Structure Le ev ¶b K‡i Ggb †Kvb ms‡kvabx msm` Bnvi ms‡kvabx ¶gZve‡j Kwi‡Z cv‡i bv| H ms‡kvab mcxg †Kv‡Ui m¤§‡L Avbqb Kiv nB‡j mcxg †KvU ewj‡e " It is emphatically the province and duty of the judicial department to say what the law is." (John Marshall)|

‡Kvb ARnv‡ZB Ges ZwKZ welqwU mcxg †Kv‡Ui Awa‡¶‡Îi AšMZ bq, kZ AvBbRxwei GBi¡c el"e¨ m‡Z I ZwKZ AvB‡b hw` mswe av‡bi e¨vL¨v I we‡klb Kwievi ck _v‡K Zvnv nB‡j mcxg †KvUB Bnvi `vwqZ w¯ni Kwi‡e "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." (John Marshall).

Dc‡i mswe avb (Î‡qv`k ms‡kvab) AvBb, 1996, m¤‡Ü we¯ZwiZ Av‡jvPbv nBqv‡Q| Dl" AvBbwU iv‡ói gj wfwË RbM‡bi mve‡fšgZ, iv‡ói cRvZwšK I MYZwšK cwiPq I wePvi wefv‡Mi ¯vaxbZv Le Kwiqv‡Q weavq Bnv AmvswevwbK Z_v A‰ea ewjqv †Nvlbv Kiv nBj| Bnv AvBb bq|

cieZx ck nB‡Z‡Q †h GB iv‡qi fZv‡c¶ c‡qvM KiZt ZwKZ AvBbwU‡K void ab initio †Nvlbv Kiv nB‡e wK bv| ckwU we‡kl ¸i"ZcY AvKvi avib Kwiqv‡Q Kvib 1996 mvj nB‡Z ZwKZ

mswevb ms‡kvab AvB‡bi Aax‡b mßg,Aóg I beg RvZxq msm` wbevPb Abôvb nBqv‡Q| `BwU wbewPZ miKvi 10(`k) ermi Kvj †`k cwiPvjbv Kwiqv‡Q Ges ZZxq wbewPZ miKvi eZgv‡b †`k cwiPvjbv Kwi‡Z‡Q| GB `xN mg‡qi g‡a¨ Avewk¨Kfv‡e †`‡k eû msL¨K AvBb wewae× nBqv‡Q| eûevi evrmwiK ev‡RU cvm nBqv‡Q| m¤eZt GB mg‡qi g‡a¨ eû msL¨K AvšRwZK, eûRwZK I wØcw¶K Pw³ ¯v¶wiZ nBqv‡Q| †gvU K_v, 1996 mvj nB‡Z GB 15 erm‡i ivóxq AmsL¨ KgKvÛ cwiPwjZ nBqv‡Q| hw` ZwKZ AvBbwU void ab initio ejv nq Z‡e GB 15 erm‡ii ivóxq mKj KgKvÛ A‰ea nBqv hvB‡e Ges ‡`‡k GKwU Pig wech‡qi mwó nB‡e|

GB cm‡½ D‡jL¨ †h 1996 mv‡ji 6ô RvZxq msm` Bnvi Awa‡¶‡Îi g‡a¨ _wKqvB (within jurisdiction) ZwKZ AvBbwU wewae× KwiqvwQj hw` I Dc‡i Av‡jvPZ Kvibvax‡b Bnv A‰ea|

GBiƒc AmvaviY cwiw¯nwZ †gvKv‡ejv Kwievi Rb¨ Avgv‡`i wePvicwZ Benjamin N. Cardozo †K m¥ib Kwi‡Z nq| wZwb hLb New York A½iv‡R¨i cavb wePvicwZ wQ‡jb ZLb GK e³ Zvq wZwb e‡jbt

> "The rule (the Blackstonian rule) that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice however that any one trusting to it hereafter will do at his peril."

AZci, Great Northern Rly V. Sunburst Oil and Ref. Co. (1932) 287 US 358, 366 †gvKvÏgq US mcxg †KvU c_gev‡ii gZ Prospective Overruling ZZ c‡qvM K‡i| D³ †gvKvÏgvq wePvicwZ Cardozo e‡jbt

> "Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.
>
> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare

decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal constitution. This is not a case where a Court in overruling an earlier decision has given to the new ruling of retroactive bearing and thereby has made invalid what was valid in the doing. Even that may often be done though litigants not infrequently have argued to the contrary.....This is a case where a Court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation back ward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions .....On the other hand, it may hold to the ancient dogma that the law declared by its courts had a platonic or ideal existence before the act of declaration, in which event, the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning ..... The choice for any state may be determined by the juristic philosophy of the Judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

cieZx‡Z Linkletter V. Walker 381 US 618 (1965) †gvKvÏgvq Prospective Overruling ZZ cbtcwZwôZ nq| wePvicwZ Clarke msL¨vMwiô wePvicwZ‡`i c‡¶ e‡jbt

"It is clear that based upon the factual considerations heretofore discussed the Wolf Court then concluded that it was not necessary to the enforcement of the Fourth Amendment for the exclusionary rule to be extended to the States as a requirement of due process. " Mapp had as its prima purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights.....

We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.....On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again this Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to

effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witness available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

Dc‡ivl" iv‡qi cwZ `wó AvKlb ceK L.C. Golak Nath V. State of Punjab †gvK Ï gvq cavb wePvi cwZ K. Subba Rao e‡j bt

"This case has reaffirmed the doctrine of prospective overruling and has taken a pragmatic approach in refusing to give it retroactivity. In short, in America the doctrine of prospective overruling is now accepted in all branches of law, including constitutional law. But the carving of the limits of retrospectivity of the new rule is left to courts to be done, having regard to the requirements of justice.

AZci, Prospective Overruling m¤‡Ü wZwb e‡j bt

Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Indeed, Arts.32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation thereon is reason, restraint and injustice. Under Art. 32, for the enforcement of the fundamental rights the Supreme Court has the power to issue suitable directions or orders or writs. Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and Art. 142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders. as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we de not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to

future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country.

AvBbMZ GB Ae¯v‡bi †c¶vc‡U Ges mswe av‡bi 104 Ab‡”Q‡`i Aax‡b m¤úY b¨vq wePv‡ii Rb¨ (for doing complete justice) mswe avb (Î‡qv`k ms‡kvab) AvBb, 1996, AvBbwU fvexmv‡c¶ fv‡e (Prospectively) 2011 mv‡ji 10B †g ZwiL nB‡Z A‰ea †NvlYv Kiv nBj|

c‡eB Av‡jvPbv Kiv nBqv‡Q †h weÁ AvUbx-†Rbv‡ij I msL¨vMwiô Amicus Curiae MY wb`jxq ZËveavqK miKvi e¨e¯v we`¨gvb iwLevi c‡¶ gZ cKvk Kwiqv‡Qb| Rbve wU.GBP.Lvb, weÁ G¨vW†fv‡KU g‡nv`q †Zv ewjqv‡Qb GB e¨e¯v 50 ermi _vKv c‡qvRb|

GB e¨vcv‡i `BwU welq we‡ePbv Kiv c‡qvRb| c_gZ, cKZc‡¶ wb`jxq ZËveavqK miKvi bq, hvnv c‡qvRb Zvnv nBj KviPwcnxb GKwU mô, Aeva I wbi‡c¶ wbevPb| †mB Rb¨ c‡qvRb GKwU kw³kvjx, ¯vqËkvwmZ I ¯vaxb (autonomous) wbevPb Kwgkb, †Kvb ZËveavqK miKvi b‡n| KviY, wØZxqZ, wb`jxq ZËveavqK miKv‡ii Aax‡b AbwôZ c‡Z¨KwU wbevP‡bi c‡e I cieZx‡Z bvbv ai‡Yi Pig m¼U †`Lv w`qv‡Q hvnv eûj cPwiZ I eûj ckswkZ wb`jxq ZËveavqK miKv‡ii wekvm†hvM¨Zv I KwZ‡Zi mv¶¨ enb K‡i bv| ZvnvQvov, cwZeviB †h ivR‰wZK `j msL¨vMwiô Avmb jvf Kwi‡Z e¨_ nBqv‡Q ZvnvivB wbevP‡bi djvdj MnY Kwi‡Z mivmwi A¯xKvi Kwiqv‡Q| ïa ZvnvB b‡n, wbevP‡bi c‡e I ivR‰bwZK `j¸wj wb`jxq ZËveavqK miKvi‡K bvbvwea Awf‡hv‡M Awfh³ Kwiqv‡Q| Bnv Avi hvnvB †nvK, ZIveavqK miKvi e¨e¯vi mvd‡j¨i cwiPq enb K‡i bv|

D‡jL¨ †h 30 j¶ knx‡`i i‡³i Dci evsjv‡`k ivó we‡ki GKwU ¯vaxb ivói‡c AvZ¥cKvk K‡i| we‡k ivóc‡Äi `iev‡i hw` cZxqgvb nq †h GKwU ivR‰bwZK `j mvaviY wbevP‡b Rq jvf Kwiqv miKvi MVb K‡i Ges cvP ermi Kvj ivó cwiPvjbv K‡i, wKš mvaviY wbevPb cwiPvjbv Kwi‡Z AcviM| Bnv RvwZi Rb¨ AcgvbRbK| miKvi‡K ïa †`k cwiPvjbv bq, AvšRwZK A½‡bI wewfbgLx wm×vš MnY Kwi‡Z nq| †`‡ki AvBb cYqb, ev‡RU cYqb I DbqbgLx wewfb KvRI Kwi‡Z cv‡i| ïa ZvnvB bq, †gqv` g‡a¨ A‡bK Dc-wbevPbI nq| me wKQB miKvi Bnvi †gqv` g‡a¨B Kwi‡Z cv‡i, ïagvÎ cieZx mvaviY wbevPb Abôvb Kwi‡Z AcviM Kiv nq| wbevPb Kwievi Rb¨ Avi GKwU AwbewPZ miKvi c‡qvRb nq| GKwU AvZ¥ghv`vkxj RvwZ wnmv‡e Bnv AZ¨š j¾vi K_v| Bnv MYZ‡ši j¾v, GB cRvZ‡ši j¾v| wek-ivó c‡Äi mgv‡R GB NUbv Avgv‡`i m¤§vb ew× K‡iB bv, eiÂ Bnv Pig AcgvbRbK| Avðh †h ‡mB Acgvb Dcjwä Kwievi ¶gZvI †hb Avgiv nvivBqv †dwjqvwQ|

Dciš GB e¨e¯nv cvPermi e¨vcx RbcwZwbwa‡`i ivó cwiPvjbvi `vwqZ‡K ˆbwZK fv‡e ckwe× Kwiqv †Zv‡j|

GB ZËveavqK miKvi e¨e¯vi a¨iYv Avgiv mwó KwiqvwQ ewjqv Me Kwiqv †evKvi ¯‡M evm Kwi, A_P cw_exi A‡bK †`‡kB wbevP‡b cej KviPwc nq,†m mKj †`‡ki msev` gva¨g I c‡qvR‡b mcxg †KvU K‡VviZg fvlvq mswkó wefvM Ggb wK miKvi‡KI mgv‡jvPbv K‡i e‡U, wKš cRvZwšKZv ev MYZš‡K wbevm‡b cvVvBevi K_v Zvnviv wPšvI K‡i bv| wePvi wefvM‡K Zvnviv mKj c‡ki D‡a iv‡L|

G‡¶‡Î I †c¶vc‡U Avgv‡`i wePviK‡`i `vwqZ wK?

> “I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels ; all that falsehood and malice

can invent, or the credulity of a deluded populace can swallow. (Lord Mansfield)

Ges

wePviKMY nB‡eb 'deaf as an adder to the clamours of the populace' (John Adams) | Zvnviv 'must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists and talk-shows. In this country, we do not administer justice by plebiscite. (Judge Hiller B. Zobel) |

wbevP‡b KviPwc m¤‡Ü we Á Amicus Curiae M‡Yi D‡ØM I `wðšvi cwZ mg¥vb c`kbceK ewj‡Z PvB ‡h wb`jxq ZËveavqK miKvi Bnvi mgvavb b‡n| KviPwcg³ mô, Aeva I wbi‡c¶ wbevPb Abôv‡bi Rb¨ c‡qvRb mZ¨Kvi ¯vaxb I kw³kvjx wbevPb Kwgkb| GB j¶¨ AR‡bi Rb¨ mKj Ávbx I ¸Yx e¨w³M‡Yi GKvš I wb‡fRvj c‡Póv c‡qvRb|

wbevPb Kwgkb‡K Avw_Kfv‡e ¯vaxb Kwi‡Z nB‡e| Bnv‡K m¤úb ckvmwbK ¶gZv c`vb Kwi‡Z nB‡e| †jvKej wb‡qv‡M †Kvb cKvi evav mwó Kiv hvB‡e bv| wbevPb Abôvb Kwi‡Z mecKvi c‡qvRb wbimbK‡í miKvi Zvr¶wbKfv‡e c`‡¶c jB‡eb| mswea v‡bi 126 Ab‡"Q‡` ewYZ mKj cKvi mnvqZv miKv‡ii wbevnx wefvM Zwor c`vb Kwi‡Z eva¨ _vwK‡eb, Ab¨_vq Zvnviv msweavb f½ Kwievi `v‡q `vqx nB‡eb| GB e¨vcv‡i †Kvb Zi‡d †Kvb Mvwdjw Z †`Lv w`‡j wbevPb Kwgkb cKv‡k¨ Awf‡hvM DÌvcb Kwi‡eb Ges c‡qvRbxq c`‡¶c Zwor MnY Kwi‡eb, Ab¨_vq Zvnvivl mswea vb f‡½i `v‡q `vqx nB‡eb| mvaviY wbevP‡bi Zcmxj †NvlYvi ZwiL nB‡Z wbevP‡bi djvdj †NvlYvi ZwiL chš wbevP‡bi mwnZ cZ¨¶ fv‡e RwoZ Ges wbevPb Kwgk‡bi we‡ePbv (discretion) Abmv‡i, hvnviv GgbwK c‡iv¶ fv‡e RwoZ, iv‡ói †mB mKj KgKZv I KgPvixe›`mn mswkó mKj e¨w³ wbevPb Kwgk‡bi wbqš‡Y _vwK‡e| wbevPb Kwgkbv iMY AšgLx (introvert) nB‡eb bv| hZ`i m¤e Zvnv‡`i `wqZ cvj‡b ¯"QZv (transparence) eRvq iwL‡eb| mZZ g‡b iwL‡eb †h RbM‡Yi wbK‡UB Zvnv‡`i

Revew`wnZv (accountability)| Zvnviv mK‡j RbM‡bi †meK gvÎ| Zvnviv wK KvR Kwi‡Z‡Qb ZvnvI RbM‡bi Rvwbevi AwaKvi iwnqv‡Q, Zvnviv wK KvR Kwi‡Z cwi‡Z‡Qb bv Ges †Kb cwi‡Z‡Qb bv ZvnvI Rvwbevi AwaKvi RbM‡bi iwnqv‡Q| wbevPbx AvBb ev wewa f½Kvix‡`i wei“‡× h‡_vchI“ AvBbMZ c`‡¶c Zwor jB‡Z nB‡e| G e¨vcv‡i †Kvbiƒc ‰kw_j¨ c`kb Pwj‡e bv| ˆkw_j¨ c`kb Kwi‡j wbevPb Kwgk‡bi mswkó KgKZv e¨w³MZ fv‡e AvBb Agvb¨Kvix nB‡eb|

ïa ZvnvB b‡n, msev` gva¨g I Avcvgi Rbmvavi Y Zvnv‡`i AwaKvi m¤‡Ü ïa IqvwKenvj bq, †mv”Pvi nB‡Z nB‡e| Zvnv nB‡j B ïa wbevPb Kwgkb I miKvi Gi Revew`wnZv wbwðZ nB‡e Ges Zvnviv mK‡j B wbR wbR `vwqZ cvj‡b m‡Pó _vwK‡eb|

D‡j L¨ †h, A‡bK †`‡kB wbevPb Abôv‡b h‡_”Qv KviPwc nq wKš †m Kvi‡b †Kvb †`‡k mswevab ms‡kvab KiZt MYZš¿nwMZ Kiv nq bv | wbevPb m¤ú‡K wePvicwZ V.R.Krisha Iyer e‡j bt

> Philosophically speaking, election is an expression of opinion, a means not an end; a process, not a product.

BnvB ÔwbevPbÕ Gi cKZ AvBbMZ Ae¯vb |

fvi‡Z Abwôz wbevPb m¤ú‡K wePvicwZ Iyer e‡j bt.

> The election process, now a lunatic, terrorist bedlam operation, manipulated by the political mafia, shall have to undergo a civilizing mission.”
>
> (Justice V.R. Krishna Iyer: Law & Life, cô v-135)

19k kZ‡K h³ iv‡ói `w¶Y AÂ‡j wb‡Mv Rb‡Mvwô‡K wK fv‡e Zvnv‡`i †fvUvwaKvi nB‡Z ewÂZ Kiv nBZ Zvnvi GKwU eYbv ‘The Will of the People’ M‡›n cvIqv hvq :

> “While explicit discrimination by law was forbidden, it took only a little artifice on the part of states to accomplish the same goals in effect. Even the rights to serve on juries and to vote were subsequently curtailed by state governments, with the Court unwilling or unable to intervene. The *Chicago Tribune* explained in 1890 that to avoid federal interference, “the Southern States all have constitutional provisions and election laws which apparently guarantee the Negroes the right to

vote," but nonetheless "under this cover election cheating has been reduced to a system and the blacks are practically disenfranchised in several Southern States." To cite but one example, plucked from Charleston's News and Courier, a leading Democrat in the 1876 gubernatorial election in South Carolina called on each Democrat to "control the vote of one negro by intimidation, purchase, keeping him away or as each individual may determine." **(Barry Friedman : The Will of the People page : 145).**

wKš h³ iv‡ó ev fvi‡Z †Kn G Rb¨ ZIveavqK miKvi e¨e¯vi K_v wPšvl K‡i bvB|

Bnv wbwðZ †h m`v Pjgvb ALÛ I wb‡fRvj MYZvwšK kvmb e¨e¯vi †Kvb weKí mgM we‡k GLbI D™veZ nq bvB| GB e¨e¯v `p fv‡e ¯vcb Kwi‡Z MYZvwšK KvVv‡gvi g‡a¨B c‡qvRbxq cwZKvigjK e¨e¯v (remedial measures) RvZxq msm‡`i we‡ePbv (Discretion) Abmv‡i jIqv hvB‡Z cv‡i, wKš Zvnvi Rb¨ MYZvwšK kvmb e¨e¯v‡K †Kvb ARnv‡ZB, GgbwK míZg mg‡qi Rb¨I cwinvi Kiv hvB‡e bv|

GgZ Ae¯vq t

(1) mvaviY wbevPb AbwôZ nBevi †¶‡Î, RvZxq msm‡`i we‡ePbv (Discretion) Abmv‡i, hw³ m½Z Kvj (reasonable period) c‡e, h_v, 42 (‡eqvwjk) w`b c‡e msm` fvM½qv †`Iqv evÃbxq nB‡e, Z‡e, wbevPb cieZx bZb gwšmfv Kvhfvi MnY bv Kiv chš ceeZx gwšmfv msw¶ß AvKvi MnY KiZt D³ mg‡qi Rb¨ iv‡ói mvfvweK I mvaviY Kvhµg cwiPvjbv Kwi‡eb;

(2) mvaviY wbevP‡bi Zcmxj †NvlYvi ZvwiL nB‡Z wbevP‡bi djvdj †NvlYvi ZvwiL chš wbevP‡bi mwnZ cZ¨¶ fv‡e RwoZ Ges wbevPb Kwgk‡bi we‡ePbv (Discretion) Abmv‡i hvnviv GgbwK c‡iv¶ fv‡e RwoZ, iv‡ói †mB mKj KgKZv I KgPvixe›`mn mswkó mKj e¨w³ wbevPb Kwgk‡bi wbqš‡Y _vwK‡e|

weÁ Amicus Curiae MY mK‡jB GB Av`vj‡Zi wmwbqi G¨vW‡fv‡KU| Zvnv‡`i mMfxi Ávb, cÁv, AwfÁZv Ges †`‡ki cwZ Zvnv‡`i `vwqZ‡eva ckvZxZ| msL¨vMwiô Amicus Curiae MY †Kvb bv †Kvb AvKv‡i ZËveavqK miKvi e¨e¯nv eRvq ivwLevi c‡¶ gZ cKvk Kwiqv‡Qb| Zvnv‡`i Avk¼v wbevPbKv‡j ZËveavqK miKvi e¨e¯nvi Abcw¯nwZ‡Z †`‡k AivRKZv I wek•Ljv mwó nB‡Z cv‡i| Zvnviv mK‡jB `vwqZkxj e¨w³| Zvnv‡`i Avk¼v Avgiv G‡Kev‡i Ae‡njv Kwi‡Z cvwi bv| hw` I ZwKZ msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, †K Amvswe avwbK I A‰ea †Nvlbv Kiv nBqv‡Q Ges Bnv Aek¨B A‰ea| ZeI GBi¡c Avk¼vi Kvi‡b mnm erm‡ii civZb Latin Maxim, †hgb, Id Quod Alias Non Est Licitum, Necessitas Licitum Facit (That which otherwise is not lawful, necessity makes lawful), Salus Populi Est Suprema Lex (Safety of the people is the supreme law) Ges Salus Republicae Est Suprema Lex (Safety of the State is the Supreme Law) Bnvi mnvqZv jB‡Z nBj|

Dc‡iv³ bxwZmg‡ni Av‡jv‡K ZIveavqK miKvi e¨e¯nv mvgwqK fv‡e ïagvÎ cieZx `BwU mvaviY wbevP‡bi †¶‡Î _vwK‡e wK bv †m m¤‡Ü Povš wm×vš ïagvÎ RbM‡Yi cwZwbwa RvZxq msm` jB‡Z cv‡i|

D³ mg‡qi g‡a¨ mswkó mK‡jB wbR wbR KZe¨ mwVKi¡‡c cvjb Kwi‡Z m¤úY mRvM I cwicY `vwqZkxj nB‡eb ewjqv Avkv Kiv hvq|

GBi¡c AmvaviY cwiw¯nwZi Kvi‡b Dc‡iv³ mnm erm‡ii civZb Latin Maxim c‡qvM KiZt ZwKZ msweavb (Î‡qv`k ms‡kvab) AvBb, 1996, A‰ea nIqv m‡Z I AvMvgx `kg I GKv`k m‡ev”P GB `BwU mvaviY wbevPb RvZxq msm‡`i we‡ePbv Abmv‡i ZËveavqK miKvi e¨e¯nvi Aax‡b nB‡Z cv‡i|

Z‡e,

(1) RvZxq msm` ZËveavqK miKvi e¨e¯nvq evsjv‡`‡ki Aemicvß cavb wePvicwZ ev Avcxj wefv‡Mi Aemicvß wePvicwZMY‡K ev` †`Iqvi Rb¨ AvBb cYqb Kwi‡Z cv‡i, KviY wePvi wefv‡Mi ¯vaxbZv i¶vi ¯v‡_ Zvnvw`M‡K m¤ú³ Kiv evÃbxq bq|

eiÂ,

(2) ZËveavqK miKvi ïagvÎ RbM‡Yi wbevwPZ RvZxq msm` m`m¨MY Øviv MwVZ nB‡Z cv‡i, Kvib, RbM‡Yi mve‡fŠgZ I ¶gZvqb, MYZš, cRvZvwšKZv, wePvi wefv‡Mi ¯vaxbZv msweav‡bi basic structure Ges GB iv‡q D³ welq¸wji Dci mevwaK ¸i“Z Av‡ivc Kiv nBqv‡Q;

(3) Dc‡i ewYZ wbevPb Kwgk‡bi ¶gZv ZIveavqK miKvi Avg‡j I envj _vwK‡e|

Z‡e ïagvÎ AvBbØviv †Kvb e¨e¯vB mKj mg‡qi Rb¨ ¯qsm¤úY I wbwñ` (Full proof) Kiv m¤e bq| RbM‡Yi m`v me`v m‡PZbZvB c‡qvRb|

GLv‡b D‡jL¨ †h, AÎ Avcx‡j msweavb (Î‡qv`k ms‡kvab) AvBb,1996, Gi AvBbMZ Ae¯vb wbi‡c‡Yi ckB ïagvÎ DÌvcb Kiv nBqv‡Q|

ivq †kl Kwievi c‡e GKwU NUbv eYbv Kiv c‡qvRb| NUbvwU Prefessor Ronald Dworkin Gi ‘Justice in Robes’ c¯‡K eYbv Kiv nBqv‡Q|

Oliver Wendell Holmes I Learned Hand `BRbB Le bvgKiv wePviK I Jurist wQ‡jb|

GKw`b Holmes mcxg †Kv‡U hvIqvi c‡_ Zi“Y Learned Hand †K Zvnvi Mvox‡Z Kwiqv Zvnvi Mše¨ ¯‡j †cŠQvBqv †`b| Mvox nB‡Z bvwgqv Hand ewjqv I‡Vb “Do justice, Justice” | BwZg‡a¨ MvoxwU wKQ`i Pwjqv wMqvwQj wKš Holmes Mvox wdivBqv Avwbqv Hand †K AevK Kwiqv ewj‡jb “That’s not my job,” Zvnvi ci wZwb Pwjqv †M‡jb|

Bnvi ci I Avgiv ewje

Fiat justitia, ruat caelum |

44| mviggt

(1) RbMY evsjv‡`k iv‡ói gvwjK, RbMbB mKj ¶gZvi Drm, RbMYB GKgvÎ mve‡fšg;

(2) evsjv‡`‡ki miKvi gvb‡li miKvi b‡n, AvB‡bi miKvi (Government of laws and not government of men);

(3) mswewavb evsjv‡`‡ki m‡ev”P AvBb, Bnv evsjv‡`‡ki mKj cwZôvb I c` mwó Kwiqv‡Q Ges c‡qvRbxq ¶gZv I `vwqZ Acb Kwiqv‡Q;

(4) RbM‡Yi mve‡fšgZ, cRvZš, MYZš I wePvi wefv‡Mi mvaxbZv iv‡ói gj wfwË Ges mswewav‡bi Basic structure;

(5) MYZwšK ivó e¨e¯vq †Kvb ai‡Yi †”Q` (interruption) evsjv‡`‡ki mswewavb Ab‡gv`b K‡i bv ;

(6) mcxg †KvU Bnvi Judicial Review Gi ¶gZve‡j †h †Kvb Amvswewavwb K AvBb‡K A‰ea †Nvlbv Kwi‡Z cv‡i ev ewZj (Strike off) Kwi‡Z cv‡i;

(7) ‡Kvb †gvKÏgvi ïbvbxKv‡j †Kvb AvB‡bi mvswewavwbKZvi ck DÌvwcZ nB‡j mcxg †KvU †m m¤ú‡K wbwjß _vwK‡Z cv‡i bv, AvB‡bi ckwU wbimb KivB mcxg †Kv‡Ui `vwqZ;

(8) mswewav‡bi 142 Ab‡”Q‡`i Aax‡b RvZxq msm` mswewav‡bi †h‡Kvb ms‡kvab Kwi‡Z ¶gZvcvß wKš iv‡ói gj wfwË I mswewav‡bi Basic structure ¶b ev Le ev ms‡kvab Kwi‡Z cv‡i bv;

(9) mswewavb (Î‡qv`k ms‡kvab) AvBb, 1996, evsjv‡`k mswewavb ms‡kvab (amendment) Kwiqv‡Q;

(10) mswewavb (Î‡qv`k ms‡kvab) AvBb, 1996, iv‡ói wfwË Ges mswewav‡bi Basic structure ‡K Le Kwiqv‡Q weavq D³ ZwKZ AvBb Amvswewavwb K I A‰ea, mZivs ewZj nB‡e;

(11) we‡kl c‡qvRbxq †¶‡Î I Kvibvax‡b †Kvb AvBb fvexmv‡c¶ fv‡e (Prospectively) A‰ea †Nvlbv ev ewZj Kiv hvB‡Z cv‡i,

(12) mvaviY wbevPb AbwôZ nBevi ‡¶‡Î, RvZxq msm‡`i we‡ePbv (Discretion) Abmv‡i, hw³ m½Z Kvj (reasonable period) c‡e, h_v,42 (‡eqvwjk) w`b c‡e, msm` fvw½qv †`Iqv evÃbxq nB‡e, Z‡e, wbevPb cieZx bZb gwšmfv Kvhfvi MnY bv Kiv chš ceeZx gwšmfv msw¶ß AvKvi MnY KiZt D³ mg‡qi Rb¨ iv‡ói mvfvweK I mvaviY Kvhµg cwiPvjbv Kwi‡eb;

(13) mswevavb (Î‡qv`k ms‡kvab) AvBb, 1996, AmvswevwbK I A‰ea nB‡j I RvZxq msm` Bnvi we‡ePbv (Discretion) I wm×vš Abmv‡i Dc‡i ewYZ wb‡`kvejx mv‡c‡¶ `kg I GKv`k mvaviY wbevPbKvjxb mg‡q c‡qvRbgZ bZbfv‡e I Aww½‡K ZËveavqK miKvi MV‡bi e¨e¯nv MnY Kwi‡Z cwi‡e;

(14) mvaviY wbevP‡bi Zcmxj †NvlYvi ZwiL nB‡Z wbevP‡bi djvdj †NvlYvi ZwiL chš wbevP‡bi mwnZ cZ¨¶ fv‡e RwoZ Ges wbevPb Kwgk‡bi we‡ePbv (Discretion) Abmv‡i GgbwK c‡iv¶ fv‡e RwoZ, iv‡ói mKj KgKZv I KgPvixe›`mn mswkó mKj e¨w³ wbevPb Kwgk‡bi wbqš‡Y _vwK‡e;

(15) we`¨gvb mswevav‡bi 56(2) Ab‡”Q‡`i kZ (Proviso) Gi cwie‡Z 1972 mv‡ji gj mswevav‡bi 56(4) Ab‡”Q` MYZ‡ši ¯v‡_ Avbvqb Kiv c‡qvRb;

(16) 2007 mv‡j wØZxq ZËveavqK miKv‡ii 90 w`b †gqv` cieZx AwZwi‡l“ cvq `B ermi mgqKvj ckwe× weavq H AwZwi³ mgqKv‡ji Kvhvejx gvRbv (condone) Kiv nBj|

45| Av‡`kt

AZGe, mswevavb (Î‡qv`k ms‡kvab) AvBb, 1996, 2011 mv‡ji 10B ‡g ZwiL nB‡Z fvexmv‡c¶ fv‡e (Prospectively) AmvswevwbK Z_v A‰ea †Nvlbv Kiv nBj Ges AvcxjwU LiPv e¨wZ‡i‡K gÄi (allow) Kiv nBj|

Dc‡ivl“ Avcxjw‡Z c`Ë Av‡`k Civil Petition For Leave to Appeal No.596 of 2005 †gvKvÏgvq AbmiY Kiv nBj|

BnvQvovI, Dc‡i 44 `dvq ewYZ wb‡`kvejx c`vb Kiv nBj|

46| gše¨t

GB ivqwU we‡kl Kwiqv Avgv‡`i gvZfvlv evsjvq c`vb Kiv nBj Kvib 'The judicial department comes home in its effects to every man's fire side' (John Marshall)|

GB cm‡½ Dfq c‡¶i weÁ G¨vW†fv‡KUe›` Ges we‡kl Kwiqv weÁ Amicus Curiae MY‡K Zvnv‡`i Mfxi cÁvm¤úb mnvqZvi Rb¨

GB mcxg †KvU Zvnvw`M‡K h‡_vch³ gj¨vqb (deep appeciaption) Kwi‡Z‡Q Ges Zvnv‡`i c‡Z¨‡Ki mn‡hvMx AvBbRxwe‡K Uvt 20,000/- Kwiqv cwi‡ZwlK (honorarium) c`vb Kwievi Rb¨ evsjv‡`k miKvi‡K wb‡`k c`vb Kiv nBj|

C.J.

Md. Muzammel Hossain, J.:- I have had the advantage of going through the judgments proposed to be delivered by A. B. M. Khairul Haque, the learned Chief Justice, Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J.. I concur with the judgment and order passed by the learned Chief Justice.

J.

S.K.Sinha,J: While agreeing with the opinion of the learned Chief Judge, I would add a few words of my own. This certificated appeal calls for determination on whether the Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996) changed the basic structures of the Constitution. By this amendment Article 58A has been inserted in Chapter II, Part IV and Articles 58B, 58C, 58D and 58E along with Chapter IIA under the heading of 'Non-Party Caretaker Government' have also been

inserted. Along with the above additions Article 61 has also been amended. It is provided in Article 58A that except clauses (4), (5) and (6) of Article 55, the other provisions of Chapter II shall not apply during the period of Non-Party Caretaker Government, (the Care-taker Government). Article 58B provides for the procedure and the powers to be exercised by the Care-taker Government; Article 58C relates to the composition of such Government and the procedure for appointment of Chief Adviser and other Advisers; Article 58D relates to the functions of the Care-taker Government; Article 58E provides that during the period of Care-taker Government except the provisions of Article 48(3), 141A(1) and 141C(1), other provisions of the Constitution requiring the President to act on the advice of the Prime Minister shall be ineffective.

This amendment was challenged mainly on the ground that it was passed by the Parliament introducing new concept of non-representative Care-taker Government system violating the basic

concept of democracy, the fundamental structure of the Constitution and violative of the mandatory provision of Article 142(1A) of the Constitution. It is stated that Bangladesh is a Republic in which effective participation of the people, by the people and for the people is ensured by the Constitution and the elected representatives in administration at all levels are also ensured to achieve fundamental human rights and freedom and respect for the dignity worth of the human person in Bangladesh. The exercise of governmental powers for the interregnum is destructive of the democratic values ensured by the Constitution. The democracy being a corner stone of the Constitution, the amendment made by the impugned Act by introduction of the non-representative Government even for interregnum is destructive of democratic values. Therefore, the Parliament can not introduce such destructive provisions allowing unrepresentative and non-elected government to rule the country.

The unanimous views expressed by the learned Judges of the High Court Division are:

"1) The Constitution (Thirteenth Amendment) Act, 1996 (Act No.1 of 1996) is valid and Constitutional.

2) The Constitution (Thirteenth Amendment) Act, 1996 has not amended the Preamble, Article 8, 48 and 56 of the Constitution and it was therefore not required to be referred to referendum.

3) The Constitution (Thirteenth Amendment) Act, 1996 has not affected or destroyed basic structure or feature of the Constitution, particularly the democracy and independence of the judiciary.

4) Clauses (1A), (1B) and (1C) to Article 142 of the Constitution are valid and consequently any amendment to the Preamble and Articles 8, 48 and 56 of

the Constitution must observe the formalities provided in Clauses (1A), (1B) and (1C) to Article 142 of the Constitution."

The learned Judges, however, expressed separate opinions. Md. Joynul Abedin, J. argued that fair, independent and impartial election was not possible for the reason that although the Prime Minister used to run the Government during the interregnum and held the general election to the Parliament but the election was not free and fair, inasmuch as, the Government’s men and machinery were used by such Government to influence the election result in favour of the political party to which the Prime Minister belonged; this was the major factor necessitating the passing of the said Act for engrafting the Care-taker Government system. The learned Judge further held that unless the Second Proclamation (Fifth Amendment) Order, 1978 by which clause (1A) was inserted to Article 142 is declared void by a

Court of law, the same should be held to be valid and consequently any amendment is found to have amended the Preamble and Articles 8, 48 and 56, the amending bill must be referred to for a referendum before it is assented to by the President; that the legislature in its wisdom preferred retired Judges and the retired Chief Justices for discharging powers and functions of Chief Advisor in the Care-taker Government and that the Parliament may bring any amendment to the Constitution to achieve for consolidating and institutionalizing the democracy in the country.

Md. Awlad Ali,J. while concurring with the above arguments added that the necessity for forming Care-taker Government was felt in the Parliament and by the votes of two third majority, the bill was passed, which was a temporary measure for a limited period. This amendment is the product of political stress and crisis; major political parties struggled for a system where all citizens will have the equal opportunity to

exercise their voting power to elect representatives of their own choice. It is further added that this was made on the general will of the people. Win in the election of any candidate or party by foul means is a defeat of democracy, destruction of democracy which is against the fundamental structure of the Constitution. If the people really believe in democracy and want to practice democracy there is no harm if certain provisions laid down in Articles 48(3), 56 and 57(3) of the Constitution are suspended or kept in abeyance for a period of three months. The impugned amendment has not added any new provision; it has merely kept certain provisions ineffective for a limited period and thus this amendment is an apparatus set in the body of the Constitution and that apparatus during the period of 90 days will regulate certain provisions of the Constitution which system is a peculiar and novel political contrivance and it is an unprecedented

legislation in our legislative history since the framing of the Constitution.

Mirza Hossain Haider,J. while endorsing the above views added that even if democracy is taken as a basic structure of the Constitution, the impugned amendment cannot be said to be ultravires the Constitution since improvement in the democratic system has been brought by such amendment; free and fair election is an essential postulate of democracy and if the people cannot trust or keep faith in the partisan Government or in the system in holding free and fair election then obviously an alternative is to be looked for and thus it can not be said that the amendment has affected the basic feature of the Constitution; that the crisis that created in the political arena in practicing democracy has been solved, because the concept of care-taker Government is inherent in our Constitution and in most of the countries, where democracy is in practice, particularly in the sub-continent when the

Parliament is dissolved and till next Parliament is formed the concept of Care-taker Government is provided for in the Constitution. It is also added that under the scheme of the Constitution the out going Prime Minister who lost his character as an elected representative immediately with the dissolution of the Parliament continues to hold office along with members of out going cabinet till the next elected Government enters upon its office; such continuation being for a temporary period is in the shape of interim Care-taker Government, notwithstanding the fact that the outgoing Prime Minister and the cabinet lose their character as people's representative but they continue to retain their affiliation with their party. According to the learned Judge, under such circumstances, holding of an election impartially, free from influence or power under a partisan Government becomes a remote proposition.

We have heard the learned Counsel for the appellant and the learned Amici Curiae. It is the

contention on behalf of the appellant that impugned amendment cannot be justified which has changed the meaning of, or modify the basic structure of the Constitution in its tenor and effectiveness or by keeping them in abeyance, temporarily or permanently; and that nevertheless the impugned Act in effect has amended the preamble and other articles including those requiring reference of the bill to referendum. On the other hand Mr. T.H. Khan, Dr. Kamal Hossain, Mr. Mahmudul Islam, Mr. M. Amirul Islam and Mr. Rokonuddin Mahmud have supported the judgment of the High Court Division, while Dr. Zahir, Mr. Ajmalur Hossain and Mr. Mohsen Rashid have argued that the impugned amendment has changed the basic structure of the Constitution. Mr. Rafiq-ul-huq while arguing in favour of the amendment has criticised the provision for keeping the former Chief Justice or the retired Judges of this Division as the Chief Adviser. Learned Chief Justice has extensively reproduced their

submissions in his draft copy of the judgment and in order to avoid repetition, I have refrained from reiterating their submissions.

On perusal of the writ petition, the impugned judgment and the submissions of the learned counsel, and the Amici Curiae, the substantial questions involved for our consideration are:

1) *whether the Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996) ultra vires the Constitution; and*

2) *whether the provisions contained in clauses (3) and (4) of Article 58C relating to appointment of "Chief Adviser" from amongst the retired Chief Justices or from amongst the retired Judges of the Appellate Division retired last infringed the independence of judiciary.*

At the outset, I would like to point out that it is always difficult and perhaps painful when, on account of purely political situations in the

country, the judiciary is made to intervene and render its opinion, which is found to be controversial, more in a country like ours where people are exceptionally individualistic and subjective. The submission that the people have faith in the judiciary and the judicial institution, and thus the judiciary is the saviour of the situation is not but partially correct. It should be remembered that the judiciary cannot solve all the problems of the people–such expectation is also undesirable. It will create a false impression and false illusion that the Judges are a panacea for all ills in society. Politicians and the citizens should realise that the problems confronting the country are so huge that it will be an illusions in their minds that the judiciary can solve all problems.

It should have to be remembered that the judiciary is not in a position to provide solutions to each and every problem of the state. The problem of the day which is a burning issue

has to be solved by the politicians by using their solemn responsibility and ethos, and not by egoism. The problem is so massive that it can be solved on taking into consideration the historical background of achieving liberation, democracy and the Constitution. They should not forget the past history that whenever crisis comes, their strength both moral and physical have been generated by the mass people. While discussing on the characteristics of the Indian Constitution, Jennings stated *"All Constitutions are the heirs of the past as well as the testators of the future"*. In this context, Rowland, J. of the Federal Court in Benoarilal Sharma, 1943 FCR96 observed, *"I do not see why historical facts should be excluded from the purview. Such topics as the history of legislation and the facts which give rise to the enactment may usefully be employed to interpret the meaning of the statute, though they do not afford conclusive argument"*. Accordingly, for understanding the constitutional

law of a country, one must have to refer to the laws and the principles that exist outside the Constitution, he must acquaint with the historical background and also require to make a brief review of the Constitutional set-up in the preceding periods. Such historical account would not only enable us to lay the lessons of the past before the future, but to see the remarkable achievement of the Constitution against its historical background. Thus it will be necessary to go to what is known as British period since our political institution originated and developed from the ‘British period’.

The optimistic views of English Constitution was written by Burke in 1791 and then Hallam in 1818, was in the quaint language of George the Third, ‘*the most perfect of human formations’;* it was to them not a mere polity to be compared with the Government of any other state but, so to speak a secret mystery of statesmanship; it ‘had not been made but grown’; it was the fruit not of

abstract theory but of that instinct which (it is supposed) has enabled Englishmen, to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtley wrought than any work of conscious art. (Stanhope, Life of Pitt,) The Constitution was marked by more than one transcendent quality which in the eyes English forefathers raised it far above the imitations, counterfeits, or parodies which have been set up during the last hundred years throughout the civilized world; no precise date could be named as the day of its birth; no definite body of persons could claim to be its creators, no one could point to the document which contained its clauses; it was in short a thing by itself, which Englishmen and foreigners alike should ‘venerate, where they are not able presently to comprehend’.

The sources of English constitutional law may be considered fourfold, namely-(i) Treaties or

quasi-treaties, i.e. the Acts of union; (ii) The common law; (iii) Solemn agreements, i.e. the Bill of Rights; (iv) Statutes. (Monsieur Boutmy, English translation, page 8). It's resource is to recur to writers of authority on the law, the history, or the practice of the Constitution. Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. (Holland, Jurisprudence (10th end, P 138-139). It includes all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of legislature and its mode of election.

The other set of rules consists of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion may be termed the ‘conventions of the constitution’ or ‘conventional morality’. Thus constitutional law consists of two elements. The one element is called the ‘law of constitution’ is a body of undoubted law; the other element is ‘conventions of the constitution’ consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the Constitution, are not in strictness laws at all.

To the law of the Constitution belong to the rule; ‘the king can do no wrong’. There is no power in the Crown to dispense with the obligation to obey the law, this negation or abolition of the dispensing power now depends upon the Bill of

Rights; it is a law of the Constitution and a written law. So again the right to personal liberty, the right to public meeting, and many other rights, are part of the law of the Constitution, though most of these rights are consequences of the more general law or principle that no man can be punished except for direct breaches of law proved in the way provided by law.

To the conventions; The king must assent to, or can not veto any bill passed by the two Houses of Parliament; the House of Lords does not originate any money bill; when House of Lords acts as a Court of Appeal, no peer who is not a law lord takes part in the decisions of the House; Ministers resign office when they have ceased to command the confidence of the House of commons; a bill must be read a certain number of times before passing through the House of Commons. It is said, these maxims never violated and are universally admitted to be inviolable. Of constitutional conventions or practices some are as important as

any laws, though some may be trivial, as may also be the case with a genuine law.

The Constitution of the United States, on the other hand, is recorded in a given document to which every one has access, namely, '*the Constitution of the United States established and ordained by the people of the United States*'. The articles of this constitution fall indeed far short of perfect logical arrangement, and lack absolute lucidity of expression; but they contain, is a clear and intelligibly form, the fundamental law of the union. This law is made and can only be amended or altered in a way different from the method by which other enactments are made or altered; it stands forth, therefore, as a separate subject for study; it deals with the legislature, the executive, and the judiciary, and, by its provisions for its own amendment, indirectly defines the body in which resides the legislative sovereignty of the United States.

One has to ascertain the meaning of the Articles of the American Constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammer, by his knowledge of the common law, by the light thrown on American legislation by American history, and by the conclusions to be deduced from a careful study of judicial decisions. The task, in short, which lay before the great American commentators was the explanation of a definite legal document in accordance with the received cannons of legal interpretations. In the United States the legal powers of the President, the Senate, the mode of electing the President and the like, are, as far as the law is concerned, regulated wholly by the law of the Constitution. But side by side with the law have grown up certain stringent conventional rules, which, though they would not be noticed by any Court, have in practice nearly the force of law. No President has ever been re-elected more

than once; the popular approval of this conventional limit of which the Constitution knows nothing on a President’s re-eligibility proved a fatal bar to General Grant’s third candidature. Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the Constitution intended to be what their name denotes, the persons who chose or selected the President; the Chief Officer, in short, of the Republic was, according to the law, to be appointed under a system of double election. The power of an elector to elect is as completely abolished by constitutional understandings in America as is the Royal right of dissent from bills passed by both Houses of by the same force in England.

Under a written, as under an unwritten Constitution, we find in full existence the distinction between the law and the conventions of the Constitution. This takes us to the very root of the matter. To understand the true

Constitutional law, its proper function is to show what are the legal rules, that is to say, rules recognised by the Courts which are to be found in several parts of the Constitution. This constitutional law or the constitutional convention or the conventional rules had not been allowed to grow in Pakistan. Our leaders committed to the people to present a modern democracy, a Constitution where the fundamental rights of the citizens will be enshrined, the democracy will be flourished and practiced and the rule of law will prevail but within a short period of time after partition the people found the leaders tried to concentrate power instead of presenting a Constitution and also acted against the spirit of democracy. The rullers whittled down the conventional morality. No constitutional set up either the Executive or Parliament or Election Commission or the judiciary was allowed to function and this will be evident from the historical background narrated in Yusuf Patel V.

The Crown, PLD 1955 FC 387, State V. Dosso's, PLD 1958 SC (Pak.) 533 and Asma Jilani V. Government of the Punjab, PLD 1972 SC 139. The Government of India Act, 1935 provided for a federal Parliamentary form of Government, though the Governor General was the real repository of power as the representative of the British Sovereign. By the Indian Independence Act, 1947, India was partitioned in two dominions and two Constituent Assemblies for the two dominions were constituted which functioned until the adoption of the Constitution.

The Constituent Assembly of Pakistan could not enact the Constitution because of tussle among persons in power, such as, the politicians, bureaucrats and military officers. In 1950 Prime Minister Liaquat Ali Khan, was murdered and the murderer was killed on the spot so that the real persons behind the murder could not be traced out. Khawaja Nazimuddin, who became the Governor General on the death of M.A. Jinnah, became the

Prime Minister and Ghulam Mohammad became the Governor General. In April, 1953 Ghulam Mohammad dismissed Khawaja Nizimuddin and his Cabinet, and he appointed Mohammad Ali as the Prime Minister. Ghulam Mohammad, a titular head had no Constitutional authority to dismiss the Prime Minister. A draft Constitution had been prepared on the basis of the Objectives Resolutions on 25th October, 1954. Ghulam Mohammad issued a Proclamation dissolving the Constituent Assembly and reconstituting the cabinet with Mohammad Ali as the Prime Minister and two army men were also included in the said cabinet. Section 19 of Act of 1935 conferred power on the Governor General to dissolve its legislature. Tamizuddin Khan, challenged the dissolution of the Constituent Assembly by filing a writ petition on the ground that the Governor General had no power of dissolution. The Sind Chief Court found that the assent of the Governor General for inserting section 223A in the Act of 1935 was not necessary

for the validity of the amendment and declared that the Governor General had no power to dissolve Constituent Assembly.

In an appeal from the said judgment, the Federal Court of Pakistan by majority allowed the appeal holding that the insertion of section 223A was invalid for want of assent of the Governor General and the Sind Chief Court had no jurisdiction to entertain the writ petition. (Pakistan Vs. Tamizuddin Khan, 7 DLR(FC)291). Pursuant to such views taken in Tamizuddin, a large number of Constitutional enactments of the Constituent Assembly were found to be invalid for want of the assent. The Governor General sought to validate those Acts by indicating his assent retrospectively by an Ordinance. The Federal Court declared this Ordinance ultra vires the power of the Governor. In Usif Patil V. Crown, 7 DLR(FC)385, in such situation, the Governor General resorted to the advisory jurisdiction of the Federal Court in reference by Governor General

to find a solution to the Constitutional deadlock created by the judgment of the Federal Court in Tamizuddin Khan.

The Federal Court invoked the doctrine of necessity and evolved a new political formula for setting up a Constituent Assembly. The Federal Court found the dissolution of the Constituent Assembly by the Governor General valid on the reasonings that when the Constituent Assembly failed to give a Constitution, the Governor General could dissolve the said Constituent Assembly. The Constituent Assembly, thereupon adopted a new Constitution based on the principle of parity prescribing a Federal Parliamentary Government with the President as its Constitutional head. The National Assembly would be composed of an equal number of members from the two units of East Pakistan and West Pakistan on the basis of direct election. The Prime Minister and the cabinet would be responsible to the Federal Legislature. The Supreme Court and the

High Courts were given the power of judicial review. By the Proclamation of Martial Law in 1958 no election could be held under the Constitution of 1956. The Proclamation of 7th October, 1958 abrogated the Constitution and the President issued the Laws Continuance in Force Order, 1958 which provided that notwithstanding the abrogation of the Constitution, the country would be governed as nearly as may be in accordance with the abrogated Constitution.

Under the provisions of Frontier Crimes Regulation several persons were found guilty of murder and Malik Toti Khan and Mehrban Khan along with others were found not guilty. The Deputy Commissioner remanded the case to the Council of Elders but the Council of Elders after keeping the case pending for some time expressed their inability to give an opinion on the ground that the parties had approached them and they did not open minds on the question. The case was then referred to another Council of Elders, which found

the respondents guilty, whereupon the Deputy Commissioner convicted them. The respondents then moved a writ of habeas corpus and certiorari in the Peshawar Bench of the High Court of West Pakistan on the ground that the provisions of Frontier Crimes Regulation enabling the executive authorities to refer criminal cases to a Council of Elders were void under Article 4 of the Constitution. Their contention was accepted. On appeal from the said judgment by the State, the Supreme Court in State Vs. Dosso, 11 DLR SC 1 held that the proceedings abated giving legal recognition to the Martial Law itself by describing it as a successful revolution.

The Constitution of Pakistan came into operation on 7th June, 1962 introducing a system which was euphemistically called a Presidential form of Government even though the normal checks and balances of such a form of Government to prevent one-man rule were not incorporated in it. It is, in fact, enacted an authoritarian rule by

one who occupied the office of the President Field Martial Md. Ayub Khan. Under the Constitution the National Assembly and the Provincial Assemblies were to be elected by the members of Electoral College who were to be elected by the people. The members of the National and Provincial Assemblies were not responsible to the people. People electing the members of the Electoral College had no way of ensuring that their wishes would be reflected in the election of the President and the members of the National and Provincial Assemblies. In 1965 Ayub Khan got himself reelected as the President of Pakistan. There was general impression of the people that the election was rigged. Sheikh Mujibur Rahman started a movement in the then East Pakistan with his 6-point programme in 1966 which reflected the genuine grievances of the people of East Pakistan.

Towards the end of 1968, agitation was started all over Pakistan by the main political parties against the despotic rule of Ayub Khan and as a

result of such agitation, Ayub Khan wrote a letter to the Commander-in-Chief of army Yahya Khan to take over the rein of Pakistan and he expressed his desire to step down. Yahya Khan by a Proclamation issued on 26th March, 1969 abrogated the Constitution, dissolved the National and Provincial Assemblies, and imposed Martial Law through out Pakistan and promulgated the Provisional Constitution Order,1969. Thereafter, he framed Legal Frame Work Order for holding election. Under the said Order, National and Provincial Assemblies elections were held in December, 1970. Awami League led by Sheikh Mujibur Rahman which won almost all the seats in East Pakistan and held a clear majority in the National Assembly. Z.A. Bhutto who held majority seats in West Pakistan refused to attend the session of National Assembly at Dhaka and Yahya Khan postponed the session sine-die.

Jan Mohammad Dawood, a lawyer of Pakistan on an analysis of the above cases expressed his

opinion lucidly in his book 'The Role of Superior Judiciary in Politics of Pakistan' thus *"This country was conceived as a liberal democratic country by our founders and under the Government of India Act, 1935, read with the Indian Independence Act of 1947 passed by the British Parliament, this country came into being as a modern democracy. Unfortunately, within a short period of time serious differences arose between our political leaders as regards the nature of our Constitution, the quantum of provincial autonomy, the National Language which the country should adopt and many other disputes of a Fundamental nature, with the result that the First Constituent Assembly which came into being on 11th of August, 1947, got bogged down on political mere. Throughout this period of 45 years, every leader of the country, whether Civil or Military, has sworn by democracy but has acted against the spirit of democracy and has tried his level best to concentrate all the powers of the state in his*

person. Unfortunately, we have not yet developed a democratic culture characterized by accommodation, tolerance, large-heartedness and mutual respect- a culture in which everybody's legitimate rights are secured and everyone not only feels obliged to do his duty and discharge his obligations according to Constitution and the law, but is also ready at all times to account for his actions and willingly submits himself for accountability.....All our leaders who came to power either through elections or by other dubious means started to believe that they were indispensable for the continued existence of the country and that their exit from power would sound the death-knell of Pakistan. They, therefore, always tried to perpetuate themselves in power by hook or by crook".

The framers of the Constitution and the history itself have made the Court the ultimate arbiter of the Constitution's meaning as well as the source of answers to a magnitute of questions

about how the then Pakistan, a complex country would be governed but it failed to address the core question. The Supreme Court of Pakistan in Dosso’s case expressed that the proceedings of habeas corpus abated and gave legal recognition to the Martial Law itself by describing it as a successful revolution and, therefore, a fresh law creating organ. Thereafter the democracy in Pakistan was trampled by the millitary rullers and ultimately this country became independent. Thus, it is important that the public understands how the Court carries out its role.

The political episode in Pakistan and the quotations of the author after analysing the events are self explanatory which exposed nakedly the proficiency of the politicians and their thrust for power. Though the politicians spoke for democracy, in reality they had no faith in it. They had also no love for the people and the country other than the power. The second episode of the history is that after the election of 1970

when Bhutto refused to attend the session of National Assembly at Dhaka and the Pakistani regime supported him, Sheikh Mujibur Rahman virtually took over the administration in East Pakistan and to meet the eventuality, Yahya Khan pretended to talks with the important political leaders in Dhaka, suddenly in the midst of such talks used military force in the mid night of 25th March, 1971. The military gunned down thousands of innocent unarmed persons all over East Pakistan, committed genocide and atrocities which could be compared with none other than orgies. In the back-drop of such brutality, Sheikh Mujibur Rahman declared independence of Bangladesh on 26th March, 1971 and urged the people of Bangladesh to defend the honour and integrity of Bangladesh. The people of Bangladesh took arms to fight against the Pakistani Jaunta to liberate the country and ultimately at the cost of three million martyrs, Bangladesh got its independence on 16th December, 1971.

The moot questions involved in this appeal are to be considered in the light of the above historical background, whether the impugned judgment conflicts the basic feature of the Constitution or in the alternative, such amendment was made against the spirit of the Constitution and the constitutional convention. If the answer is in positive it is our duty to express opinion as to how and why it is unconstitutional. The Court has a special responsibility to ensure that the Constitution works in practice.

The Proclamation of Independence reflected the true feelings and emotions of the people. The people took arms against the Pakistani rullers for liberation of the country against exploitation. This has been reflected in the beginning of the Proclamation that there was "free elections" to elect representatives for the purpose of framing the Constitution but the Pakistani authority declared an unjust and treacherous war, and Sheikh Mujibur Rahman, the undisputed leader in due

fulfillment of the legitimate right of self determination of the people declared independence and urged the people to defend the honour and integrity of Bangladesh. It was also pointed out in unequivocal terms that the will of the people is supreme and the independence was declared to ensure the people of Bangladesh to present a modern democratic country where equality, human dignity and social justice will be served.

The following day of Sheikh Mujibur Rahman's return from Pakistani incarceration the Provisional Constitutional Order, 1972 was issued on 11th January, 1972. The President of the Republic having realised the mischief committed by the Constituent Assembly of Pakistan after independence in 1947 that it failed to frame a Constitution because of conflicting interests, ideologies, and power struggle, did not waste a single moment and declared that the Parliamentary form of Government would be the basis for running the country. Though he was sworn in as the

President of the newly born country immediate after his return, again he was sworn in as Prime Minister although the Constitution was not framed and transacted the business of the Government in a Parliamentary form in all practical purposes during the interim period. He constituted the Constituent Assembly with the members of National and East Pakistan Provisional Assemblies who were elected by the people of East Pakistan in December, 1970 for drafting a Constitution. The Constituent Assembly thereupon within a short period adopted a Constitution on 16th December, 1972. The preamble of the Constitution reads:

> "*We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;*

Pleading that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pleading that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will

of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, the eighteenth day of Kartick, 1379 B.S., corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution."

The preamble starts with the expression ‘we’, the people of Bangladesh. The independence of Bangladesh was achieved not as a course but it was achieved by the people through a historic struggle for national liberation. The Constituent Assembly pledged that the fundamental aim of the state should be realized through ‘democratic process’ free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and

social, will be secured for all citizens. The supremacy of the Constitution was declared. The framers of the Constitution describe the qualitative aspects of the polity the Constitution is designed to achieve. In this situation, the preamble of the Constitution and in its role cannot be relegated to the position of the preamble of a statute.

This preamble is different from other Constitutions of the globe which reflected the philosophy, aims and objectives of the Constitution and describes the qualitative aspects of the Constitution as designed to achieve. The preamble declares in clear terms that all powers in the Republic belong to the people. It emphatically declares to constitute a sovereign Peoples Republic in which democracy with equality of status and of opportunity of all citizens in all spheres of life be ensured. Their exercise on behalf of the people shall be effected only under and by the authority of the Constitution. This

preamble speaks of representative democracy, rule of law and the supremacy of the Constitution. The beginning of the expressions ‘we the people’ means the machineries and the apparatus of the Republic, that is, the Executive, the Legislature, the Judiciary including the President and the Cabinet, the disciplinary forces including the army are subservient to the will of the people. They are answerable to the people for every action taken. If this preamble is read along with Articles 7 and 11, provisions of Parts III, IV, V and VI, there is no denying the fact that the sovereignty of the people, the four ideals, such as, nationalism, socialism, democracy and secularism which inspired the martyrs to sacrifice their lives, the will of the people, the rule of law, the fundamental rights of the citizens and the parliamentary form of Government are the main pillars of the Constitution. The will of the people is to be expressed through their elected

representatives in the administration at all levels.

Thus, our preamble contains the clue to the fundamentals of the Constitution and the basic constituent of our Constitution is the administration of the Republic through their elected representatives. These two integral parts of the Constitution form a basic element which must be preserved and can not be altered. The Parliament has power to amend the Constitution but such power is subject to certain limitation which is apparent from a reading of the preamble. The broad contours of the basic elements and fundamental features of the Constitution are delineated in the preamble.

Chandrachud,CJ. while expressing views on preamble of Indian Constitution in Minerva Mills Ltd. V. Union of India, AIR 1980 S.C. 1789 stated:

"The preamble assures to the people of India a polity where basic structure is described therein as a Sovereign Democratic Republic". S. Ahmed,J.

in Anwar Hossain Chowdhury Vs. Bangladesh, 1989 BLD (Special)1 argued that the preamble of our Constitution is something different from that of ordinary statute and it is the intention of the makers the Constitution that it is the guide to its interpretation. M.H. Rahman,J. in Anwar Hossain is of the opinion that the preamble is not only a part of the Constitution, it now stands as an entrenched provision that can not be changed and any amendment to the Constitution 'is to be examined in the light of the preamble'. In Kuldip Nayar V. Union of India, AIR 2006, 3127 it has been argued: *"the edifice of democracy in the country (India) rests on a system of free and fair elections. These principles are discernible not only from the preamble, which has always been considered as part of the Constitution, but also from its various provisions".*

The basic feature of the Constitution is that all powers belong to the people. The preamble outlines the objectives of the whole Constitution.

The peoples participation in the affairs of the state are through their elected representatives. This is an essential characteristic of a Parliamentary form of Government and it is the ‘main fabric’ of the system set up by the Constitution. An alteration of this ‘main fabric’ is to destroy it altogether and it can not altogether be changed even for a short period, similar to those conventions of the British Constitution that ‘The King must assent to, or ‘can not veto any bill passed by the two Houses of Parliament”, “the House of Lords does not originate any money bill” (A.V. Dicey-The Law of the Constitution) and those of the American conventional rules that ‘No president has ever been re-elected more than once”.

Our Constitution establishes political institutions designed to ensure a workable, democratic form of Government that protects basic personal liberties; divides and separates power so that no person or office holder can become too

powerful; ensures a degree of equality and guarantees the rule of law. The Constitution, by creating several governmental institutions and dividing power among them, stresses the importance of considering those institutions as part of one Government, working together. Under the Constitution there is a threefold distribution of powers, and those powers are co-extensive.

Article 7 says "*All powers in the Republic belong to the people ---- and their exercise on behalf of the people shall be effected only under, and by the authority of this Constitution*". Article 8 provides for the fundamental principles of state policy, Article 11 highlights the democracy and human rights of the citizens. Part III protects the fundamental rights of the citizens. This Division held in Anwar Hossain Chowdhury that Article 7 of the Constitution declares the supremacy of the Constitution, there must be some authority to maintain and preserve the supremacy of the Constitution and there can be

no doubt that judiciary must be that authority. One of the basic features of the preamble of our Constitution is to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. One of the fundamental principles contained in Article II is that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person be guaranteed. The expression ‘democracy’ used in the article has been explained to the effect that ‘effective participation by the people through their elected representatives in administration at all levels shall be ensured.”

The basic concept underlying the sovereignty of the people is that the entire body politic becomes a trustee for the discharge of sovereign functions. In a complex society every citizen can not personally participate in the performance of the affairs of the State, the body politic appoints state functionaries to discharge these

functions on its behalf and for its benefit, and has the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligation under a trust. The head of the state is chosen by the people and has to be assisted by a Council of Ministers which holds its meetings in public view. They remain accountable to public. It is, therefore, said the government becomes government of laws and not of men, for; no one is above the law. All powers lie with the people, not on any particular individual. This trust concept of government filtered into Europe through Spain and even as early as 1685 John Locke rejected Hobbes' leviathan and propounded the theory that sovereignty vested in the people and they have the right not only to decide as to who should govern them but also to lay down the manner of government, which they thought to be the best for the common good. Government was, therefore,

according to Locke essentially a moral trust which could be forfeited if the conditions of the trust were not fulfilled by the trustee or trustees, as the case may be.

Part IV of the Constitution vests the power of the President and the Cabinet providing for a Parliamentary form of Government with the President as the Constitutional head is elected by the members of Parliament. The members of Parliament are to be directly elected by the people on the basis of adult franchise. The President would appoint a member of Parliament who commanded the support of the majority of the members of Parliament as the Prime Minister and would appoint Ministers on the recommendation of the Prime Minister. The executive power of the Republic is vested with the Prime Minister and his Cabinet who shall be responsible to the Parliament. The Prime Minister and the Cabinet would continue as long as they command the support of the majority of the members of Parliament.

In a Parliamentary form of Government the Prime Minister occupies the central position. As per Article 55, there shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising such Ministers as the Prime Minister shall decide. The executive power of the Republic shall be exercised by or on the authority of Prime Minister. The Ministers comprising the Cabinet shall be determined by the Prime Minister and they shall hold office during the pleasure of the Prime Minister, who can ask any Minister to resign and if such Minister disobeys, he may advice the President to terminate him. The tenure of the Prime Minister, as per Article 57 of the Constitution, shall become vacant (a) if he resigns from office at any time or (b) if he ceases to be a Member of Parliament. Except otherwise than the above two conditions, the Prime Minister shall continue to hold office so long he retains the support of majority of the members of Parliament and he shall be disqualified only when

his successor has entered upon office i.e. the successor is elected. The Cabinet is the ultimate policy and decision making organ of the Parliamentary form of Government in which the Prime Minister is the head. The Cabinet is thus in full control over the direction of the public affairs of the country and is instrumental in formulating the policy of the administration, piloting legislation in Parliament and correlating and supervising all administrative actions. As the Cabinet is composed of the leading members of the majority party in Parliament, the Cabinet virtually controls Parliament and the Cabinet really runs the show in the executive and legislative branches. Therefore, this Parliamentary democracy is also a basic structure of the Constitution which cannot be whittled down or changed even for a shorter period by the Parliament.

Under the scheme of the Constitution the President has two powers under Article 48(3)

namely; the appointment of the Prime Minister in accordance with Article 56(3) and the appointment of the Chief Justice in accordance with Article 95(1). Though the President shall take precedence over all other persons in the state, in practice he is the titular head of the State. Apart from the above two powers, the President shall act in accordance with the advice of the Prime Minister.

In the light of these constitutional provisions, let us look at whether the impugned Act violates the basic feature as well as destroys the structure of the Constitution. The impugned amendment is to be tested in the context of the Constitutional scheme. Learned Judges without deciding the main issue in dispute diverted their attention towards the holding of free and fair parliamentary election. As regards the power of amendment of the Constitution, Md. Joinul Abedin, J. observes that the Parliament may bring any amendment to the Constitution to achieve for consolidating and institutionalising democracy.

Mr. Awlad Ali, J. was of the view that Parliament considering the necessity for the system in exercise of its prerogative powers passed the bill by two thirds majority, who are representatives of the people and if the people really believe in democracy there is no harm if certain provisions of the Constitution are suspended. Mirza Hossain Haider, J. is of the view that democracy being the basic structure of the Constitution, for improvement of the democratic system, there is no bar to making such amendment. I find fallacy in the arguments of the learned Judges.

The expressions “may be amended by way of addition, alteration, substitution or repeal used in Article 142(1)(a) do not cover the right to abrogate or annul or change the basic features or structure of the Constitution. This power of ‘amendment’ must be construed in such a manner so as to preserve the basic features or in the alternative, their power does not include in damaging or destroying the structure and the

identity of the Constitution. This is why this Division has declared the Constitution Eighth Amendment, and the High Court Division has also declared the Constitution Fifth Amendment ultravires the Constitution which was affirmed by this Division. Therefore, the arguments that the Parliament has the power to amend the Constitution by two-thirds of the total number of members of Parliament for the improvement in the Parliamentary democratic process are contrary to the statements of law settled by this Division. It is also not correct to come to the conclusion that as the Sixth Parliament which passed the impugned amendment having been validly constituted despite non-participation of all other opposition political parties has sanctity of law since it has not been set aside by a Court of law.

It will not be out of place to mention that the Parliamentary election by which the Sixth Parliament was constituted was generally perceived as one held without participation of the people

and that is why, the then Government could not continue even for a single day after passing of the said amendment. If the parameter for presuming an election to have the sanctity and if it was held following the provisions of the Representation of the People Order, 1972, there is no reason for not presuming the Magura bye-election as one not held properly and legally. These are not at all relevant for deciding the core question as to whether the impugned amendment was constitutional or not. Assuming that all the political parties participated in the election and supported the amendment which are not legal grounds and relevant for justifying the amendment. If it is so, there was no reason for declaring the Constitution Fifth and Eighth amendments ultravires the Constitution which amendments were also passed by two-thirds of the total number of members of Parliament. What’s more, in those Parliamentary elections all political parties had participated.

As per Constitution though the Parliament has power to amend the Constitution, it has no power to change its basic structure. If one puts question as to what are the basic frameworks of our Constitution, he has to draw on facts of history which may admit one answer. Therefore certain preliminary considerations must be borne in mind in order to evaluate the doctrine of the basic structure. First, what was the geographical area, and secondly, who were the people, for whom the Constitution was being framed? when the Constituent Assembly first begun its work, the objectives resolution moved by Sheikh Mujibur Rahman show the lengths to which the members were prepared to highlight the historical struggle for liberation achieved by the people of Bangladesh and secondly, the high ideals of nationalism, socialism, democracy and secularism which inspired the martyrs to dedicate their lives and thirdly, to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of

the will of the people. It is therefore, wrong to say that to achieve democracy, the Parliament may bring any amendment to the Constitution. Can the Parliament amend the Constitution changing a system to the Presidential form of Government for consolidating and institutionalizing democracy? It will be against the spirit of the Constitution. By amending the Constitution the Republic cannot be replaced by Monarchy, Democracy by Oligarchy or the judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution.

There is no doubt that democracy is one of the basic features of the Constitution but how the country will be run by a Government which is not democratically elected by the people? The Constitution abhors any system of governance other than a government which is elected by the people. In theory, the British Parliament possessed the power to repeal great charters of liberty like the Magna Carta (1215), the Bill of Rights (1688) and

the Act of Settlement (1700) as easily as it could repeal a Dog Act, but these great charters have remained unchanged. The amending power is provided for in a Constitution to secure orderly change by remedying defects disclosed in the working of the Constitution, or by judicial decisions (In the united States the 11th Amendment was enacted to nullify Chisholm V. Georgia (1793)2 Dallas 419), or by unforeseen circumstances, or by circumstances which were foreseen but not guarded against. Therefore, the above opinions are in direct contrast to the scheme of the Constitution.

Though Md. Joynul Abedin, J. concurred the views argued in Anwar Hossain Chowdhury and Sreemoti Indira Nehru Gandhi V. Raj Narain, AIR 1975(SC) 2299, that democracy is a basic feature of our Constitution and that free and fair election is an inextricable part of the democracy which is also a basic feature of our Constitution, on a wrong notion observed that the impugned amendment was passed in order to strengthen,

consolidate and institutionalize the democracy in Bangladesh which is also a basic feature of the Constitution. If that being so, I fail to understand how the democracy will be strengthened, consolidated and institutionalized by amending Part IV of the Constitution? This Chapter contains the powers and functions of the Executive.

Supremacy of the Constitution as the solemn expression of the people, while Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental rights are no doubt basic structures of our Constitution. There is no dispute about their identity. Principle of separation of powers means that the sovereign authority is equally distributed among the three organs and as such one organ cannot destroy the others. These are structural pillars of the Constitution and they stand beyond any change by a mandatory process. Sometimes it is argued that this doctrine of bar to change of basic structures is based on the fear

that unlimited power of amendment may be used in a tyrannical manner so as to damage the basic structures, in view of the fact that 'power corrupts and absolute power corrupts absolutely'.

In Anwar Hosain Chowdhury, the question was whether by substituting Article 100 by the Constitution (Eighth Amendment) Act, 1988 for the purpose of setting up Permanent Benches of the High Court Division *“the basic structures of the Constitution has been altered and it seeks to destroy the independence of judiciary and the character role and effectiveness of the High Court Division”*. The majority view of this Division is that Article 100(5) purports to mean that the President has been empowered to redetermine by executive fiat the territorial jurisdiction of the permanent Benches which in effect renders the Constitutional provisions in Articles 94, 95(3), 101, 102 nugatory and irreconciable. The High Court Division being an integral part of the Supreme Court has lost its original character as

well as most of its territorial jurisdiction. Amendment of the Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structures. The Court, therefore, has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution.

In Kudrat-E-Elahi Panir Vs. Bangladesh, 44 DLR(AD) 319, Kudrat-E-Elahi and three others had challenged the Constitutional validity of the Bangladesh Local Government (Upazila Parishad and Upazila Administration Re-Organisation) (Repeal) Ordinance, 1991, on the ground that the Ordinance is inconsistent with Articles 9, 11, 59 and 60 of the Constitution and as such it is void in terms of Article 7(2) of the Constitution. Mustafa Kamal, J. argued the point as under:

"*Thirdly, to the extent that Articles 59 and 60 prescribe manner*

and method of establishing local government, its composition, powers and functions including power of local taxation, the plenary legislative power of Parliament to enact laws on local government is restricted pro tanto. The learned Attorney-General submits that the plenary power still remains unaffected. I can not conceive of a local government existing in terms of Articles 59 and 60 and another outside of it. That will make a mockery of Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution, namely, "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution".

If Parliament has to pass a local government legislation, it has conform to Articles 59 and 60, read with Article 152(1). With Articles 59 and 60 the Constitution local government legislation became very much a subject matter of legislation within the terms of the Constitution. Parliament is not free to legislate on local government ignoring Articles 59 and 60."

In Kesavananda Bharati, AIR 1973 S.C. 1461, the Supreme Court of India by a majority held that though by Article 368 Parliament is given power to amend the Constitution that power cannot be exercised so as to damage its basic features or so as to destroy its basic structure. Sikri, C.J. held that fundamental rights conferred by Part III of the Constitution can not be abrogated, though a reasonable abridgement of those rights can be effected in public interest and that the

fundamental importance of the freedom of the individual has to be preserved for all times to come and it could not be amended out of existence. It is further argued that there is a limitation on the power of amendment by necessary implication which was apparent from the reading of the preamble; that the expression ‘amendment’ in Article 368 means any addition or change in any of the provisions of the constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the constitution. Therefore, every provisions of the Constitution was open to amendment provided the basic foundation or structure was not damaged or destroyed. Shelat and Grover, JJ. were of the opinion that the expression ‘amendment’ contains in Article 368 must be construed in such a manner as to preserve the power of Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus implied

limitation of amending power of the Parliament from changing the identity or any of the basic features of the Constitution.

Hegde and Mukherjee, JJ. in the said case observed that Indian Constitution is a social document, is founded on the social philosophy and thus it has two features: basic and circumstantial. The basic constituent remained constant, the later part is subject to change. The broad contours, according to the learned Judges, of the basic elements and the fundamental features are delineated in the preamble and the Parliament has no power to change or abrogate those basic elements of fundamental features. According to the learned Judges, the building of a welfare state is the ultimate goal of every Government but that does not mean that in order to build a welfare state, human freedoms have to suffer a total destruction.

In Minerva Mills Ltd. V. Union of India, AIR 1980 S.C.1789, the validity of sections 4 and 55

of the constitutional 42nd Amendment rests on the ratio of the majority judgment in Kesavananda Bharati. By section 4 of the amendment Article 31C of the Constitution was amended by substituting the words and figures 'all or any of the principles laid down in part IV' for the words and figures 'the principles specified in clause (b) or clause (c) of Article 30." Section 55 of the amendment inserted sub-section (4) and (5) in Article 368 which read thus:

> *"(4) No amendment of the constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question on any ground.*
>
> *(5) For removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent*

power of parliament to amend by way of addition, variation or repeal the provisions of this constitution under this article.”

The purpose of this amendment by inserting clause (5) is to remove all limitations on the amending power while clause (4) deprives the Courts the power to call in question any amendment of the Constitution. It is argued by Chandrachud, C.J. that the Indian Constitution is founded on a nice balance of power among the three wings of the state, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges to pronounce upon the validity of laws. If Courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are writ in water. A controlled Constitution will then become uncontrolled. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law

shall pronounce upon the validity of such destruction seems a transparent case of transgression of the limitations on the amending power. The Supreme Court approved of the majority views argued in Kesavananda observing: *"Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one"*. The Supreme Court declared sections 4 and 55 of the Constitution 42nd Amendment Act void.

This Division approved of the arguments in Kesavananda Bharati and Minerva Mills Ltd. in Anwar Hossain Chowdhury, and in a later case in Khandker Delwar Hossain and others Vs. Bangladesh Italian Marble works Ltd. and others, 18 BLT (AD) 329 also approved the arguments in Kesavananda. In Kesavananda's case the Supreme Court dealt with the amending power with reference to the 24th Amendment, and the Judges applied their views of the amending power to test the validity of the 25th Amendment and the 29th Amendment. The 24th Amendment amended Article 368 of the Constitution in the following manner:

> *"368(1) Notwithstanding anything in this constitution Parliament may, in exercise of its constituent power amend by way of addition, variation or repeal any provision of this constitution in accordance with the procedure laid down in this article"*.

These amendments displaced the reasoning on which Golak Nath’s case (1967) 2SCR 762) is based. The ‘Constituent power’ i.e. the ability to frame or alter a Constitution as, the Constituent Assembly, involved in amending a rigid Constitution cannot be equated to the constituent power involved in framing it. The sovereign constituent power of framing a Constitution consists of an undifferentiated amalgamation of Legislative, Executive and Judicial powers, which powers come into existence after a Constitution is framed, is based upon a confusion of ideas. Those who frame a Constitution possess law making power to make a particular kind of law – namely, the Constitution of the country under which it is to be governed. If this law making power is unrestricted, because not subject to limitations imposed by any external authority, the power is plenary. Such a law making power is not an undifferentiated mass of legislative, executive and judicial power; it is a law making power. Till

that power is exercised, it is not possible to say whether the Constitution will be the supreme law or not for, if the power is exercised to enact a flexible Constitution, the Constitution will not be the supreme law in the sense that any law contravening its provisions would be void.

But those who exercise the law making power for framing a Constitution, do not possess legislative power in the sense of making laws for the governance of the country, or exercise Executive power to administer those laws and carry on the day to day Government of the country, or exercise ‘judicial power’ in the correct sense of the words of (Griffith, C.J. in Huddart, Parker Pvt. Ltd. V. Moorehead (1908-09) 8CLR 330), approved by Privy Council, (1931) A.C. 275);

> *“the power which every sovereign authority must of necessity have to decide controversies between its subjects, whether the rights relate to life, liberty or property. The exercise*

of this power does not begin until some tribunal which has power to give a binding and authoritative division (whether subject to appeal or not) is called upon to take action".

Article V of the U.S. Constitution contains two express limitations on the amending power, namely,

"Provided that no amendment which may be made prior to 1808 shall, in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

The first limitation has long ceased to be operative but the second limitation is in operation till today. Section 128 of the Australian Constitution contains the following limitations:

"No alteration diminishing the proportionate representation of any state in either House of the Parliament, or the minimum number of representatives of a state in the House of Representatives, or increasing diminishing or otherwise altering the limits of the state, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that state approve the proposed law."

The Canadian Constitution (the B.N.A. Act of 1867) when enacted did not confer any power of amendment on the Federal Parliament and could be amended only by the British Parliament; but by convention, recognised by the Statute of Westminster, 1931, the power was not exercised without the request of the Dominion Parliament. (Wheare, Statute of Westminster & Dominion Status, 5th Edition, Page 178). In 1949 by the BNA Act of

1949, limited power of amendment was conferred on the federal Parliament by insertion of Sub-section (1) of Section 91. The United States, Canada and Australia are federations of originally separate states with Constitutions of their own. The U.S. Constitution was drafted by a convention and ratified by the requisite number of states. The Canadian and Australian Constitutions were enacted by the British Parliament. The limitation of Article V on the amending power in the US Constitution has remained unchanged for over 200 years without provoking any revolution; the express limitation in section 128 of the Australian Constitution has remained unchanged for 96 years. These two countries which were declared to have status equal to that of United Kingdom did not wish to have the power to amend their Constitutions independently of the existing law. The reason for bringing inferences from the above is that a member of the British Commonwealth, enjoying the status of a sovereign state

internationally, was content with a limited amending power, and was content to sacrifice its ‘sovereignty’ by leaving the amending power to be exercised, at its request, by the British Parliament because an unlimited power of amendment might have led to a disintegration of the federation.

The same conclusion would follow from considering whether even in the case of a Supreme and sovereign Parliament, like that of United Kingdom. In theory, the British Parliament can enact any law, but it has been said by Dicey that the combined influence both of the external and the internal limits on legislative sovereignty stated by Leslie Stephen in his Science of Ethics (1882), Page 143: *“Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as, a law means any rule which has been made by legislature. But*

from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislatures must go mad before they could pass such a law, and subjects be idiotic before they could submit to it”.

The above passage shows that it is not the inability of Parliament to pass a law providing for the murder of blue-eyed babies which would provoke a revolution. On the contrary, the exercise of the power to pass such a law would provoke revolution. A legislative power which would be exercised only if legislators go mad and

subjects become idiotic, does not, in any rational sense, exist at all.

On an analysis of the authorities we may conclude that there are ‘rigid’ or flexible Constitutions. A rigid Constitution is one in which the power to amend the Constitution can only be exercised by the special procedure prescribed for it, and not by the procedure prescribed for making laws under the Constitution. The differentia being found in the different procedure prescribed for the exercise of Constituent power as distinguished from the procedure prescribed for making ordinary laws (Kesavananda). A flexible Constitution is one in which the power to amend the Constitution is exercisable by the same procedure as it prescribed for making ordinary laws. In a flexible Constitution, the distinction between ‘legislative’ and ‘constituent’ power is analytic and formal, but in reality and in substance the distinction disappears since any law passed under the Constitution if inconsistent with

the provisions of the Constitution, those provisions so far to that extent to be declared ultravires. This distinction will not be applicable to the making of a Constitution by the Constituent Assembly which was not subject to restraint by any external authority for, the framing of the Constitution involves the exercise of ‘constituent power’ and is, not meant to distinguish ‘constituent power’ from legislative power as in a rigid Constitution. Therefore, we may conclude that the power to frame Constitution is a primary power, whereas, a power to amend a rigid Constitution is a derivative power and subject at least to the limitations imposed.

Secondly, laws made under a rigid Constitution as well as amendment of such Constitution can be ultra vires if they contravene the limitations put on the amending power by the Constitution for, the Constitution is the touchstone of the validity of the exercise of powers conferred by it. The majority views of the apex Courts of this sub-

continent are that the power of amendment to the Constitution can not be exercised so as to destroy or damage its essential elements or the basic structure. There is no doubt that the Parliamentary form of Government is a basic structure of our Constitution and thus, the impugned amendment not only destroyed but also damaged the Parliamentary form of Government- consequently the said amendment would be ultravires and void. Let us now examine how the Parliamentary form of Government has been damaged by the impugned amendment.

As observed above, the framers of the Constitution have adopted the system of Parliamentary executive. Article 58B has been added by the impugned amendment providing that the Care-taker Government shall enter upon office after the Parliament is dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office. There is total ambiguity in the provision in that

nothing has been mentioned either in Article 58B or anywhere in Chapter 11A as to who would run the Government if the Parliament is dissolved otherwise than "by reason of expiration of its term." If Parliament is dissolved on the resignation of the Prime Minister or for any other reason and if the President is unable to appoint another Prime Minister in accordance with Article 58(4), the Constitution, as it stands after amendment, is silent about the form of Government under which the election of the members of Parliament will be held. None of the learned amici curiae has been able to clarify the point on the query of the Court and frankly concedes that there is defect in the amendment.

It is to be noted that prior to the impugned amendment the position of clause (3) of Article 123 was as under:

'(3) A general election of members of Parliament shall be held –

(a) in the case of a dissolution by reason of the expiration of its term, within a period of ninety days proceeding such dissolution; and

(b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution;

Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein.'

After the Thirteenth Amendment this clause was substituted as under:

'(3) A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration'.

The difference between these two provision is that under the previous provision the general election was required to be held before the expiry of the term of five years or within ninety days in any other case of dissolution and the newly elected members of Parliament could not assume office before the expiration of the term of five years, whereas, under the amended provision, the general election will be held after the expiry of the term, that is to say, after cessation of the term of five years. Thus we find that even after the dissolution of the Parliament and cessation of the office of the members of Parliament, the members of Parliament will be able to attend Parliament in view of Proviso to Article 58 A. Therefore, there is no gainsaying the fact that the proviso to Article 58A and clause (3) of Article 123 are inconsistent with clause (4) of Article 72.

Article 72(4) of the Constitution provides that if after dissolution before holding the next

general election of the members of Parliament, the President is satisfied that owing to the existence of a state of war in which the Republic is engaged, it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved to meet. Suppose, after dissolution of Parliament a Care-taker Government has been appointed and immediate thereafter, the country is engaged in a war or there is existence of a state of war. The President will be left with no alternative but to summon the Parliament. Then what would be the fate of Care-taker Government? As soon as the President would summon the Parliament, the Prime Minister and his Cabinet would assume the Government. The Parliament thereupon would continue to function under the provisions to the proviso to clauses (3) and (4) of Article 72 for at least six months after the cessation of the war. The persons holding the office under the Care-taker Government system would also continue in office without any power

pointing fingers in unequivocal terms that this amendment ultravires the Constitution for, if the care-taker Government has no authority or power to take any decision in an emergent situation of the country then how its other acts, deeds, things and transactions relating to the affairs of the state particularly dealing with finance can be said to be justified.

There is also no dispute that the provisions contained in Chapter IIA are in direct conflict with Articles 55 and 57. The Legislature attempted to meet the consequence by inserting Article 58A in Part II which also has failed to address the problem. It provided that except the provisions of clauses (4) (5) and (6) of Article 55, the other provisions in Chapter-II, Part-IV, shall not apply during the period in which Parliament is dissolved. A proviso has been added authorizing the President to summon Parliament that has been dissolved to meet the eventuality provided in Article 72(4). What's more, if the Parliament is

dissolved how then the dissolved Parliament shall be summoned by the President is not clear in presence of the Care-taker Government? The expression 'dissolve' according to Chamber’s dictionary, New Edition, is to terminate or dismiss (the assembly such as Parliament). After the termination of the Parliament which ceased to exist if the President summons Parliament, the dissolved Cabinet would revive and in that eventuality, the cabinet would exercise all Executive powers of the Government.

Clause (2) to Article 58B provides that the Care-taker Government shall be collectively responsible to the President. This provision is against the spirit of the Parliamentary form of Government enshrined in Articles 55(2), 55(3) and 58(2) for, the Care-taker Government would be converted into one akin to the Presidential form of Government during the interregnum period. Article 58C provides for the composition of the Care-taker Government and appointment of Advisers

etc. Clause (3) of Article 58C provides that the President shall appoint as Chief Adviser who among the retired Chief Justices of Bangladesh retired last or from amongst the retired Chief Justices retired next before the last Chief Justice or from among the retired Judges of the Appellate Division retired last in case no retired Chief Justices are available or willing to hold the office of Chief Adviser. This provision is vague, indefinite and lacking particulars as to the mode of selecting the Chief Adviser. Whenever a dispute would arise in the process of selecting a particular retired Chief Justice, there is scope for exercising arbitrary power by the President.

Suppose a political party has opposed against the appointment of a particular retired Chief Justice, then the question will arise about the appointment as per proviso to clause (3) of Article 58C. If there is objection against the selection of another retired Chief Justice who retired next before the last Chief Justice by

another political party then the President has no option other than to exercise power to appoint the Chief Adviser from amongst the retired Judges of the Appellate Division. If similar objections are raised by the political parties in rotation against retired Judges of the Appellate Division then there would arise a deadlock, chaos and confusion in the process of selecting the Chief Adviser.

Clause (5) of Article 58C has authorized the President under such eventuality to appoint Chief Adviser from amongst the citizens of Bangladesh after consultation with major political parties. If no consensus is reached amongst the major political parties to select a citizen for the job, the President would assume the function of the Chief Adviser under clause (6) of Article 58C. The President is elected by the members of Parliament of a political party which commands the support of the majority and therefore, the President practically belongs to a particular political

party. Thus apart from ambiguity in the selection process, the purpose for which the system has been introduced will be bound to frustrate in such eventuality. This has happened in the process of selecting the Chief Adviser of the last Care-taker Government. The President without exhausting the procedures provided for in clauses (4) and (5) assumed the office of Chief Adviser under clause (6) but he failed to continue by reason of his partisan activities and other causes. Further more, if the President assumes himself as the Chief Adviser under the amended scheme of the Constitution, this will be turned into a Presidential form of Government. Such assumption of power will be in conflict with the basic structure of the Constitution, particularly the Preamble and Articles 48(3), 55, 56 and 58(2). There is, therefore, no gain saying the fact that the system introduced by the impugned amendment can be termed as hotch-potch system and the same violates the entire scheme of the Constitution.

Cooly in his 'Treatise on Constitutional Limitations' says *"A constitution is the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised"*. The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rules for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within the four corners of the

Constitution nor can anyone transgress the limits therein specified.

Though it is provided in Article 58D that '*the Non-party Care-taker Government shall discharge its functions as an interim Government and shall carry on routine functions ....*' in reality the last two care-taker Governments transacted business like elected Governments. Immediate after taking oath, Mr. Justice Latifur Rahman, the Chief Adviser had changed almost the entire administration which raised question as to the modality of such action. On query about justification of such prompt step taken by the Chief Adviser at a time before the composition of the Care-taker Government as per Article 58C, Dr. Kamal Hossain, learned Amicus Curiae has drawn our attention to a book written by him under the name 'তত্ত্বাবধায়ক সরকারের দিনগুলি ও আমার কথা' and submitted that the steps taken were justified as would be evident from his book. This submission proved that Justice Latifur Rahman transacted some affairs of the

Republic which were out side the scope of Article 58D and that he had tried to justify his action by writing a book, the relevant portions extracted therefrom are as under:

"Z‡e †m iv‡ÎB Awg Avgvi gšYvjqmn †h mg¯ gšYvjq Avgvi Aax‡b _vK‡e †mme gšYvj‡qi mwPe‡`i e`wji Av‡`k Rwi Kijvg|(Page-91)

c_gZt ZËveavqK miKv‡ii cavb wn‡m‡e Avgvi nv‡Z †h mí mgq i‡q‡Q Zvi cwZwU gûZ‡K ¸i"‡Zi mv‡_ Kv‡R jvMv‡bv Ges †m j‡¶¨ Awg wb‡R cPi †nvgÐlqvK K‡iB G‡mwQ|(ibid)

Kv‡RB kc_ Mn‡Yi c‡i 8wU ¸i"ZcY mwPe chv‡q i`e`j Kwi| Awg Av‡M t_‡KB w¯ni K‡iwQjvg †h, cavbgšxi †cm mwPe RvIqv`j Kwig‡KI Awg H iv‡ÎB i`e`j Kie, KviY ¸i"ZcY c‡` ZwiZ i`e`j Kivi GKUv BwZevPK djI ckvm‡bi Dci co‡e e‡j Avgvi Av‡M t_‡K aiYv wQj| (Page-92)

`c‡i weGbwci †Pqvicvmb †eMg Lv‡j`v wRqv I mfvcwZgÛjxi m`m¨e›` Avgvi mv‡_ mv¶vr K‡ib| wZwb c_‡gB 15 RjvB Avgvi kc_ MnY Abôv‡b Dcw¯nZ bv _vKvi KviY we‡klY K‡ib Ges cavb Dc‡`óv nIqvq Avgv‡K Awfb›`b Rvbvb| †eMg wRqv wKQ welq we‡klfv‡e Avgvi we‡ePbvi Rb¨ DÌvcb K‡ib | †hgb, AvIqvgx jx‡Mi 5 eQi kvmbvg‡j Zv‡`i †bZv

Kgx‡`i Ici †h Ab¨vq AZ¨vPvi I wg_¨v gvgjv n‡q‡Q Zvi weeiY †`b| ZvQvov wZwb Zvi e³‡e¨ e‡jb †h, mô wbevP‡bi Rb¨ AvBbÐk•Ljvi DbœZ, A‰ea A¯ D×vi, wPwýZ mšvmx‡`i †MdZvi, wbevPb Kwgkbvi mwdDi ingv‡bi Acmv‡iY I ckvm‡b e¨vcK i`e`j Ki‡Z n‡e| wZwb Avi I AwfgZ e¨³ K‡ib †h, Avlqvgx jxM miKvi we`v‡qi ce gû‡Z ckvmb‡K `jxqKiY K‡i e¨vcK i`e`j K‡i‡Q Ges Zv‡`i †bZvÐKgx‡`i‡K Xvjvlfv‡e Av‡Mqv‡¯i jvB‡mÝ c`vb K‡i‡Q| GQvovI †`‡k cPi A‰ea A¯ Av‡Q †m¸‡jv D×vi Kiv c‡qvRb| Gme wel‡q ZËveavqK miKvi `p c`‡¶c bv wb‡j Ges Bm¨KZ A‡Mqv‡¯i jvB‡mÝ ewZj bv Ki‡j mô wbevPb e¨vnZ n‡e| Awg Zv‡`i e³e¨ ïbjvg Ges G wel‡q †`Le e‡j gše¨ Kijvg| †eMg wRqv we‡klfv‡e Zvi g‡Z ivR‰bwZK D‡Ïk¨Ðc‡Yw`Z n‡q Avlqvgx jxM miKvi †hme nqiwbgjK gvgjv Zvi `‡ji †bZvÐKgx‡`i wei“‡× `v‡qi K‡i‡Q †m¸‡jv cZ¨vnvi bv n‡j Zv‡`i c‡¶ wbevPb Kiv m¤e n‡e bv e‡j D‡jL K‡ib| Avgvi mvg‡b Avi I D‡jL K‡ib †h, weGbwc I †RvU msMV‡bi †bZv Kgx‡`i GKÐGKR‡bi wei“‡× 50/60wUi †ekx gvgjv †gvKÏgv i‡q‡Q| Zviv wbevP‡b AskMnY Ki‡e bwK cwZw`b †Kv‡U wM‡q gvgjvÐ†gvÏgvq nwRiv w`‡e? kvBLj nww`m, dRjj nK Awgbx, QvÎ`j †bZv bwmi“wÏb wc›Umn Av‡iv A‡bK †bZvKgxi wei“‡× GiKg eû gvgjv Av‡Q e†j D‡jL K‡ib| G mg¯ gvgjv chv‡jvPbv Kivi Rb¨ Ab‡iva Rvbvb| (Pages-106-7)

স্বরাষ্ট্র মন্ত্রনালয়ের ২৩/৭/২০০১ তারিখের তদন্ত কমিশন ১/২০০১ (আইন-১) ৪৯৬ নম্বর প্রজ্ঞাপনে বিচারপতি আমিরুল কবীর চৌধুরী, বাংলাদেশ সুপ্রীম কোর্ট হাইকোর্ট বিভাগ-এর বিচারপতিকে চোয়ারম্যান করে একটি কমিশন গঠন করা হয়। এ কমিশন ১ জানুয়ারি, ২০০১ তারিখ হতে ১৫ জুলাই, ২০০১ তারিখের মধ্যে আটককৃত এবং বিচারাধীন বন্দিদের বিরুদ্ধে অভিযোগ ও বিচারাধীন মামলাসমূহ পর্যালোচনা পূর্বক মুক্তি প্রদান অথবা ফৌজদারী কার্যবিধির ৪৯৪ ধারা অনুযায়ী মামলা প্রত্যাহারের বিষয়ে সুপারিশ প্রদান করবে।

ঐ কমিশনের অপর দুইজন সদস্য ছিলেন স্বরাষ্ট্র মন্ত্রনালয়ের একজন যুগ্ন-সচিব ও একজন উপ-সচিব। বিচার বিভাগীয় তদন্ত কমিশন আমার কার্যালয়ে তাঁদের রির্পোট পেশ করেন। আমি আইন উপদেষ্টা সৈয়দ ইশতিয়াক আহমদ ও স্বরাষ্ট্র সচিবকে পেশকৃত উক্ত রিপোর্টের ভিত্তিতে সত্বর প্রয়োজনীয় ব্যবস্থা গ্রহণ করার জন্য আদেশ দেই। বিচারপতি আমিরুল কবীর চৌধুরী ও তার কমিশনের সদস্যরা অত্যন্ত পরিশ্রম করে অল্প সময়ের মধ্যে রিপোর্ট পেশ করেন। পুরো রিপোর্টটির উপর চোখ বুলিয়ে মনে হলো যেভাবে বিচারকরা কোর্টে রায় লেখেন সেভাবে তিনি প্রত্যেকটি মামলার বিষয় আলোচনা করেছেন। রিপোর্টের কিছু অংশ আমার পড়ার ইচ্ছা ছিল, কিন্তু সময়ের স্বল্পতার জন্য সেটা সম্ভব হয়নি।

কমিশন ৪৯৫টি মামলার রেকর্ডপত্র পর্যালোচনা করেন।

(ক) কমিশন ১২৮টি মামলায় ফৌজদারী কার্যবিধির ৪৯৪ ধারা অনুসারে মামলা প্রত্যাহার করে আসামীদের মুক্তি দেওয়ার জন্য সুপারিশ করে;

(খ) ৯টি মামলার প্রসিকিউশনের আংশিক প্রত্যাহারের সুপারিশ করে;

(গ) যে সমস্ত মামলার ফৌজাদারী কার্যবিধির ১৭৩ ধারা অনুসারে চার্জশীট বা ফাইনাল রিপোর্ট দেয়া হয়নি, কিন্তু উক্ত মামলাসমুহে আটককৃত বন্দি রয়েছে এরূপ ৩৬টি মামলার আটক বন্দিদের মুক্তির সুপারিশ করে।

সরকার উক্ত সুপারিশ সম্বলিত কমিশনের প্রতিবেদন অনুমোদন করে প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য সরকারি কৌশুলীদের মাধ্যমে জেলা ম্যাজিস্ট্রেটদের অনুরোধ জানায়।

উল্লেখ্য যে, উক্ত সুপারিশ বাস্তবায়িত হলে, ১২৮টি মামলায় প্রায় ৬৬৫ জন, ৯টি মামলায় (আংশিক হিসেবে) ৫৬ জন এবং ৩৬টি তদন্তাধীন মামলায় ৪৬৮ ব্যক্তি মুক্তি পাবে। তবে সকল আসামী হাজতে কি না তা এ স্বল্প সময়ে নির্ণয় করা যায়নি। ধারণা ছিল যে, প্রায় ৫০০ জন আসামী হাজতে এবং বাকি আসামী জামিনে/পলাতক আছে।” (Pages-207-8)

The above quotations are self explanatory. When there are loopholes and ambiguities in the Constitution, there will always be scope for abusing the power by the executive taking such loopholes as the basis for exercising abusive power. This has been nakedly exposed during the last Care-taker Government. This violation will continue so long this system introduced by the impugned amendment will remain in the Constitution. According to Article 58D, the Care-

taker Government shall carry on the routine functions ‘*with the aid and assistance of persons in the services of the republic’*. The question would necessarily arise before the composition of the Government how the Chief Adviser took such decision without the assistance of the persons in the services of the Republic? After the Constitution of the said Government, it constituted a commission headed by a Judge of the High Court Division for holding inquiry and submitting report in respect of cases instituted against persons on political consideration. The said commission submitted report and pursuant to such report huge number of cases were withdrawn from the prosecution and many under trial prisoners were released from the custody prior to the Parliamentary election. This decision of the Government was apparently violative to Article 58D, inasmuch as, there is specific prohibition in the functioning of the Government that ‘it shall not make any policy decision’. As regards the last

Care-taker Government, there is no doubt that it had performed like an authoritarian ruler for more than two years. These were possible only because the system was introduced in such a vague, indefinite and unconstitutional manner that there is every possibility of transacting the business of the Government in a Presidential form of Government as existed prior to the amendment of the Constitution by the Constitution (Twelfth Amendment) Act, 1991.

We noticed that the last President assumed the office of the Chief Adviser without exhausting the alternative provisions provided in the proviso to clause (3), clauses (4) and (5) of Article 58C. What’s more, Article 83 provides that no tax shall be levied or collected except by or under the authority of an Act of Parliament and clause (1) of Article 89 provides that ‘So much of the annual financial statements as relates to expenditure charged upon the Consolidated Fund may be discussed in, but shall not be submitted to the

vote of Parliament’. We noticed that the last Care-taker Government passed budgets, spent money out the Consolidated Fund and passed Money Bills which relate to imposition of tax, borrowing of money, receipt of moneys on account of the Consolidated Fund or the Public Account of the Republic etc. without placing, discussing and passing in the Parliament. These were transacted without sanction of the provisions of the Constitution. It was possible only because the Care-taker Government is not answerable to the Parliament and the people. The question of abuse of the provisions of the Constitution or the provisions of the impugned Act come only when the provisions are contrary to the existing provisions of the Constitution. Under the Parliamentary system is it possible on the part of the Government to pass a Money Bill without placing it before the Parliament or is it possible to levy tax or collect money except by or under the authority of the Act of Parliament? The simple

answer is in negative. If these acts, things, deeds and transactions are not taken due to the fault of the impugned amendment, there will be nothing on earth which can be called as illegal or unconstitutional?

According to Dicey, under the British Constitution, ‘revenue once raised by taxation was in truth and in reality a grant or gift by the Houses of Parliament to the Crown. Such grants as were made to Charles the First of James the first were monies truly given to the king. He was, as a matter of moral duty, bound, out of the grants made to him, as out of hereditary revenue, to defray the expenses of the Government.....not a penny of revenue can be legally expended except under the authority of some Act of Parliamnt”. (Page 202-203 The Law of the Constitution). Secondly, this has nakedly focused that though the Parliament and the cabinet are dissolved by reason of expiration of its term, its representative character subsist till the date on which a new

Prime Minister enters upon office after the constitution of the Parliament. Thirdly, the scheme of our Constitution does not afford to run the Government without the peoples participation- it has not recognised any system other than the Parliamentary form of Government.

There is no doubt that there are inconsistencies between Articles 56(4) and 58A which tend to cloud the order, length and the manner of governance by the Care-taker Government introduced by the impugned amendment. This amendment providing for Care-taker Government is not only ultra vires the democratic character but also the scheme of the Constitution. In democratic polity after dissolution of Parliament the incumbent cabinet is entrusted with the role of interim Government. Mirza Hossain Haider, J. was confused with the concept of ‘interim Government’ after the dissolution of Parliament under the unamended scheme of the Constitution and the ‘Non-party care-taker’ Government introduced by the

impugned amendment. The Prime Minister does not lose her representative character even after the dissolution of the Parliament as is evident from clause (4) of Article 56, clause (3) of Article 57, and clauses (3), (4) and (5) of Article 72. But under the latter provision, the country is being run by a Government which is not Parliamentary; rather it is almost akin to the Presidential form or a diarchy system not answerable to the people.

What’s more, as argued and conceded by all sides, ‘democracy’ is one of the basic features of the Constitution. This ‘democracy’ means the Parliamentary form of democracy as will be evident from Chapter II, part IV, of the Constitution and this system has been replaced even for a shorter period to govern the country by persons other than the elected representatives by the impugned Act. If we read the expression ‘democracy’ used in the preamble and Articles 8 and 11, with clauses (2) and (3) of Article 48, clauses (2) and (3) of

Article 55, clauses (2) and (3) of Article 57 and clause (4) of Article 58 it will appear that the executive power of the Government will be run by a Cabinet with the Prime Minister at its head. The provisions of Article 56(4) and 57(3) clearly indicate that the representative character of the Government will continue as per scheme of the Constitution even after the dissolution of the Parliament and the Prime Minister shall continue until his successor enters upon office. Thus, Articles 58B and 58C violate Articles 56(4) and 57(3) of the Constitution. Similarly clause (2) of Article 58B is inconsistent with clause (3) of Article 48 and Article 55. The addition of the words ‘and such law shall, during the period in which there is a Non-Party Caretaker Government under article 58B, be administered by the President in Article 61 by the amendment contravenes Article 55 of the Constitution.

As per unamended Article 61 of the Constitution, the Supreme command of defence

services shall vest in the President and such exercise of power shall be regulated by law. After amendment, during the period of Care-taker Government, the defence services be administered by the President, who shall retain the portfolio of the Ministry of Defence. Therefore, the President shall exercise the executive power of the Republic which is being exercised by the Prime Minister under Article 55(2), although it is said in clause (3) of Article 58B that the Chief-Adviser shall exercise the executive power ‘in accordance with the advice of the Non-Party Care-Taker Government’ which is not in pari-materia with Article 55(2) in view of clause (2) of Article 58B, which provides that ‘the Care-taker Government shall be collectively responsible to the President’. Under the present structure of the Constitution the President is not in true sense is the representative of the people in the sense the Presidents of United States of America and France are being elected by the people. He is elected by

the members of the Parliament and therefore he is not answerable to the people and the Parliament for his acts. Before the substitution of Chapter-I, Part-IV by the Constitution (Twelfth Amendment) Act, 1991 the President was the representative of the people. Therefore he can not perform ‘exercise power’ that is being performed by the Prime Minister as per clause (2) of Article 55 as per scheme of the Constitution. What’s more, under the Parliamentary system ‘the cabinet shall be collectively responsible to the Parliament’ which is replaced by the President under the amendment, that is to say, the ‘Care-taker Government shall be collectively responsible to the President’. The Executive exercises its power on democratic principles but the amendment brings to a system of authoritarian rule. This system has also reverted to a system which functioned prior to the Constitution (Twelfth Amendment) Act, 1991, against which system all political parties except one struggled and unanimously brought into the

change in the Parliamentary system by a constitutional amendment.

The British Constitution is an unwritten Constitution, and it is based on the doctrine of the supremacy of the British Parliament. Its main feature was a cabinet form of representative Government with a Monarch as its constitutional head. That form had been adapted by the British Parliament in enacting the federal constitutions of Canada and Australia, and had been adopted in a modified form for the federal Government of India envisaged in the Government of India Act, 1935. This Division has held that our Constitution is based on the Westminister model of Cabinet Government, incorporating most of its characteristic features. So is the opinion of the Supreme Court of India in respect of its features. The gradual introduction of representative Government had finalized in British India with the working of the Cabinet form of representative Government. And the study of, and admiration for,

the constitutional history of England made the British form of Government, adapted to a representative character Constitution, appear to be the most appropriate form of Government under our Constitution. This form of Government has demanded high standards of character and conduct from the members of Parliament, the judiciary and the civil service. Our founding fathers believed that those high standards of character and conduct would be maintained under our Constitution. This was the result of the course which political and economic struggle had taken before the independence of the country.

It will not be out of place to mention here that though the Constituent Assembly had the legal power to enact the Constitution, the preamble of our constitution, following the American example. There is no gainsaying the fact that our Constitution embodies Parliamentary cabinet system of Government on the British model and that the President corresponds to that of the sovereign in

the United Kingdom who is the formal head of the Government and must act on the advice of the cabinet. The legislative procedure in respect of finance, the provision for a Consolidated Fund, the security and the supervision of the state and state public accounts by an independent Comptroller and Auditor General, all follow the British model. The court must gather the spirit of the Constitution from the language used, and what one may believe to be spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed according to the well-established rules of interpretation uninfluenced by an assumed spirit of the Constitution. (Keshavan Madhava Menon V. Bone (1951)SCR 228)

This new system introduced by the amendment is not the solution for holding and conducting free and fair Parliamentary elections which will be apparent from the process of selecting the Chief Adviser for the last Parliamentary election. The

system is vague, indefinite and faulty for which the nation has swallowed an authoritarian regime which ruled the country for more than two years on the plea of combating corruption and political reforms which was not the object for bringing the system. In fact a despotic Government ruled the country. There is no guarantee to recur the similar nature of Government in each and every occasion after the Parliament would be dissolved so long this system subsists. No nation enshrines a system which is self conflicting, undemocratic and diarchy in a social document like the Constitution. The system was taken initially as a test case as argued by the learned Judges but as a matter of fact, there is nothing in the amendment to suggest that the system would run for a limited period. The system failed to satisfy the much desired goal and this is the right time to burry it up finally for the sake of democracy.

It is argued by Mr. Farooqui that the impugned amendment not only damaged the ‘Republican’ and

‘Democratic’ character of the Constitution but also changed the democratic spirit of the Government. Mr. Mahmudul Islam, on the other hand, contended that when the head of the state is a hereditary monarch, it is called monarchy, though the monarch may not be sovereign, but titular, when the head of the state is elected by the people, the state is called Republic and the Constitution is said to have provided a Republican Government. It is further contended that Article 48(1) having provided that the President will be the head of the state to be elected by the peoples representatives, the ‘Thirteenth Amendment’ has not introduced any provision which can be said to have altered Article 48(1) in any manner. Democracy being a vague term and its connotation varies from person to persons, though the impugned amendment suspends representative Government for a short interregnum, it ensures operation of democracy in the country and democracy has to be

suspended for a little while for ultimate survival of democracy, it is finally argued.

It seems to me inconsistency in the arguments of the learned amici curiae. The Republican and Democratic form of Government is discernible from the historical background, the preamble and Articles 11, 142 and Part IV of the Constitution. It may be remembered that the source of power and the power granted by the Constitution for a specific purpose is the Constitution, the highest law of the country. Mr. Mahmudul Islam has confused the point in issue by submitting that the impugned amendment has not introduced any provision which can be said to have altered the manner of election of the President. If we read the Constitution as a whole, there is no room for doubt that it professes to be Democratic and Republican in character which has been dismantled by the ‘Thirteenth Amendment’ by making detailed provision for running the Government similar to the Presidential form during the short interregnum

after the Parliament is dissolved. The Care-taker Government as per Article 58B(2) shall be collectively responsible to the President. Mr. Mahmudul Islam himself conceded that the democracy has been suspended for a short period by the impugned amendment. Mr. T.H. Khan argued that the point in dispute is a political issue which can only be resolved in the Parliament. On the question of political issue I have discussed earlier and I fully agree with the learned Amicus Curiae that Courts should not adjudicate upon or to interfere with political issues. But by the same time it must be remembered that this Court being the guardian of the Constitution, it has the responsibility to see that the Constitution is not violated from any corner. If the Court finds that the Constitution is violated it shall struck down to the extent of the inconsistency. This has been done previously also.

It is emphatically argued by Dr. Kamal Hossain that in the interest of democracy, this amendment

has been made, and the democracy has a core value and it should not be interpreted in a simplistic manner. In this connection Dr. Hossain has drawn our attention to the Magura by-election episode held in 1996. Dr. Hossain contended that after this by-election people lost confidence in democracy. I find no force in the contention of Dr. Hossain for, even after introduction of the system all parliamentary bye-elections will be held under the political party in power. Then all these elections will be rigged but in reality all bye-elections under the political parties in power are being held and accepted by the people at large fairly and peacefully with the exception of one or two as pointed out.

While endorsing the views of Dr. Hossain, Mr. Mahmudul Islam added that the expression 'democracy' is a very vague and elastic term and its connotation varies from persons to persons. Mr. Islam goes on saying that even Russia claims itself to be the true democracy but in reality

authoritarian rule is being practised. In elaborating his argument, Mr. Islam has explained the democratic character of a state. It is said, with the present size of even the smallest state does not permit direct participation of the people in the governance of the state and it has been replaced by the participation of the people through their elected representatives. It is contended, Articles 7 and 11 clearly indicate that the Constitution contemplates representative Government, that is, rule of the people through their elective representatives. Democracy has its own deficiencies-it carries within it the seed of its own destruction. In this connection Mr. Islam argues, emergence of Hitler operating within the regime of the third Republic of Germany offers the best example.

It is further contended, Pareto, Mitchel and Mosca, the three notable political philosophers of Itali brutally exposed the deficiency of democracy which led to the emergence of fascism in Itali.

According to the learned counsel, destruction of democracy was going to take place in our country. Democracy through the representatives of the people is possible when there is free and fair election. *“Magura by-election which offered the example of worst form of rigging. All parties other than party in power protested and took to the street. There was serious erosion in the law and order situation. Public works came to a stand still. 'Parliament's tenure came to an end and an election without participation of the major political parties except BNP took place”* learned counsel argued. I fail to understand why he has cited those examples which can not be the basis for changing one of the basic feature of the Constitution? Except the Magura episode, which was a deliberate act of a political party in power as submitted, the other examples exposed the charactor of authoritarians who ruled different countries of the globe in the name of democracy.

It is emphatically argued by Mr. Mahmudul Islam that if the impugned amendment is declared unconstitutional, one major political party will not participate in the next parliamentary election. Mr. Islam in his written argument also expressed his anxiety and submitted with circumlocution that for the interest of democracy the system introduced by the amendment should be retained. Mr. Rafique-ul-Haque echoed the above view. These candour submissions nakedly exposed the motive behind the defending the amendment even at the cost of disgracing a social document like the Constitution. The learned Amici were supporting the amendment for accommodating a particular political party to participate in the next Parliamentary election. These submissions suggest that though this amendment conflicts with the basic features of the Constitution it should be retained for that purpose. This is completely a political issue. Mr. T.H. Khan also argued that this is totally a political issue which should be

resolved by the Parliament alone and not by the Court. Mr. T.H. Khan in course of his argument also submitted that the issue involved in the appeal is completely a political issue which should not be decided by this Division and it can only be decided by the Parliament.

Judges will ordinarily find that the law is fine as it is. But when they find that it is not, the law intends for them to do something about it. The Judges must apply their reason and experience in the attempt to achieve justice. That is their role and their responsibility to the law, to the judicial institution, to the public and to the litigants. If law is violated, the Courts are set things right and this is always the case. During the second world war when England was involved in war, Lord Atkin while disposing of a habeas corpus petition argued ‘that law speaks the same language during the time of war as in peace’. Judicial review is intended to keep the public body within limits of its authority. This power is exercised

to rein in any unbridled executive action. This is the basic feature of the Constitution.

In the connection I would like to reproduce the observations of Sir John Latham, C.J., (1951) 83 CLR page 148 as under:

> *'I am aware that it is sometimes said that legal questions before the High Court should be determined upon sociological grounds – political, economic or social. I can understand Courts being directed (as in Russia and in Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the Court is provided with at least a political standard. But such a proposition as, for example, that the recent Banking case (1948) 76 C.L.R.I.) should have been determined upon political grounds and that of Court was wrong in adopting an attitude of*

detachment from all political considerations appears to me merely to ask the Court to vote again upon an issue upon which parliament had already voted or could be asked to vote, and to determine whether the nationalisation of banks would be a good thing or bad thing for the community. In my opinion the Court has no concern whatever with any such question. In the present case the decision of the Court should be the same whether the members of the Court believe in communism or do not believe in communism?'

A.T.M. Afzal, J. in Anwar Hossain Chowdhury observed *"In answering the ultimate question involved in these cases i.e. scope of the Parliament's power of amendment of the Constitution, the Court's only function is to examine dispassionately the terms of the Constitution and the law without involving itself*

in any way with all that I have indicated above. Neither politics, nor policy of the government nor personalities have any relevance for examining the power of the Parliament under the Constitution which has to be done purely upon an interpretation of the provisions of the Constitution with the help of legal tools". I fully agree with the above observation. The Court exercises its power of restraint in relation to interference of political issues. The role of the Courts in a democracy, carries high risks for the Judges and for the public. Courts may interfere in advisedly in public administration. A distinction should be drawn between areas where the subject-matter lies within the expertise of the Courts and those which were more appropriate for decision by democratically elected and accountable bodies. Courts should not step outside the area of their institutional competence. The exercise of political power is not within the province of the judicial department.

Mirza Hossain Haider, J. also pointing fingers at Magura by-election observed that after the rigged by-election, its aftermath followed by mass resignation of all opposition party members of the Fifth Parliament and the boycott of the Sixth Parliamentary election that proved that free and fair election cannot be held under the supervision of the ruling party. Accordingly, all political parties came forward with the solution for overcoming the same through the Constitutional process of ‘Non-party care-taker Government’.

Learned Judges of the High Court Division did not dispute that the Election Commission is not independent rather observed that the Commission is sufficiently strong and independent in matters of its operation and decision making. That being the admitted position, why then the by-election of Magura perceived generally as rigged, and why the result of Sixth general Parliamentary election without participation by the people of the country was declared by the Election Commission? The High

Court Division did not at all advert its attention in that regard. The answer to these questions is that the persons constituting the Election Commission were not independent – they were partisan. They failed to perform their Constitutional obligations. It is because of lack of transparency in the selection process of the members of Commission. The independence of Election Commission in the ultimate analysis depends upon the quality of persons who man the Commission. There are allegations against the Executive in selecting the Commission Members. If the selection process is transparent and neutral persons are appointed, the election will be held free and fair even under a political Government.

There is no dispute that democracy stands for the actual, active and effective exercise of power by the people. According to Schumpeter, democracy is 'the ability of a people to choose and dismiss a Government'. Giovanni Sartori echoed the idea stating that democracy is a multi-party system in

which the majority governs and respects the right of minority. Our democracy is similar to the above theories. If we look towards the globe, we find similar to ours, particularly in Canada, Australia and India. There are, however, dissimilarity in many respects. Arundhati Ray, a writer and columnist in an article ‘Democracy debased’ wrote, *“Democracy the modern world’s holy cow, is in crisis. And this crisis is a profound one. Every kind of outrage is being committed in the name of democracy. It has become little more than a hollow word, a pretty shell, emptied of all content or meaning. It can be whatever you count it to be. Democracy is the Free world’s whore willing to dress up dress down, willing to satisfy a whole range of taste, available to be used and abused at will. In countries of the first world, too, the machinery of democracy has been effectively subverted. Politicians, media barons, Judges, powerful corporate lobbies, and government officials are imbricated in an elaborate underhand*

configuration that completely undermines the lateral arrangement of checks and balances between the constitution, courts of law, parliament, the administration and perhaps most important all, the independent media that forms the structural basis of a parliamentary democracy. Increasingly, the implication is neither subtle nor elaborate." Therefore, the battle to reclaim democracy is going to be difficult one.

In R.C. Poudyal V. Union of India, AIR 1993 S.C. 1804, while discussing on democracy in the context of Indian Constitution, it has been argued, the unalterable fundamental commitments incorporated in a written Constitution are like the soul of a person not amenable to a substitution by transplant or otherwise. And for identifying what they are with reference to a particular Constitution, it is necessary to consider, besides other factors, the historical background in which the Constitution has been framed, the firm basic commitments of the people

articulated in the course of and by the contents of their struggle and sacrifice preceding it, the thought process and traditional beliefs as also the social ills intended to be taken care of. These differ from country to country. The fundamental philosophy, therefore, varies from Constitution to Constitution.

It is further stated, a Constitution has its own personality and as in the case of a human being, its basic features can not be defined in the terms of another Constitution. The expression 'Democracy' and 'Republic' have conveyed not exactly the same ideas through out the world, and little help can be obtained by referring to another Constitution for determining the meaning and scope of the said expressions with reference to the Constitution. When we undertake the task of self-appraisal, we can not afford to forget our motto of the entire world being one big family and consequent commitment to the cause of unity which made the people suffer death, destruction and

devastation on an unprecedented scale for replacing the foreign rule by a democratic Government on the basis of equal status for all. The fact that they lost in their effort for a united independent country is not relevant in the present context, because that did not shake their faith in democracy where every person is to be treated equal, and with this firm resolve, they proceeded to make the Constitution. *“An examination of the provisions of the Constitution does not leave room for any doubt that this idea has been kept as the guiding factor while framing the Constitution. 'Democracy' and 'republic' have to be understood accordingly*" it has been finally concluded.

In my opinion, the above arguments are more applicable in the context of the historical background for achieving our independence. We fought twenty four years for democracy and against economic exploitation by Pakistani despotic rulers, and ultimately we got independence at such

cost which no nation could sacrifice in the manner we had sacrificed. On the night of 25th March, 1971 the most violent and brutal act of political repression in South Asian history took place. Tanks and armored personnel carrying the Pakistan Army rumbled through Dhaka. It was remembered as 'Kal Ratri' and on the first night alone thousands were killed in the indiscriminate firing and shelling. It was a barbaric attack on the unarmed civilians.

The quality of democracy has been explained in the preamble which does not only secure the equality of opportunity but the status of all the citizens-this equality principle is clearly envisaged in parts II and III of the Constitution. Parliamentary democracy envisages (a) the representation of the people, (b) the responsibility of the Government and (c) the accountability of the Cabinet to the Parliament under Article 55(3). This is the direct line of authority from the people through the Parliament

to the Executive Government. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and Executive, the two facets of people’s will, have all the powers including that of finance. It is apt to observe here that it is a shame for the nation that a political party which can run the Government for five years will not allow a Constitutional organ of the state to conduct the Parliamentary election in accordance with law. It is also a disgraceful for such a political party which stand in the way in holding a free and fair election in the country. No self-respect nation can even imagine that such political party in power which will run the Government for five years will not be able to present a free and fair Parliamentary election. If it does not allow to hold a fair election it has no moral right to run a political Government in the country.

It is stated by Dr. A.S. Anand, CJ. in S.R. Chandhuri V. State of Punjab, AIR 2001 S.C. 2707

"*The character and content of Parliamentary democracy in the ultimate analysis depends upon the quality of persons who man the Legislature as representative of the people. It is said “elections are the barometer of democracy and the contestants the lifeline of the Parliamentary system and its set up*". The very concept of responsible Government and representative democracy signifies the Government by the people, for the people, and of the people. The sovereign power which enjoins the people is exercised on their behalf by the representatives. In a Parliamentary form of Government, the sovereignty remains with the people, who delegate this authority through their representatives, the members of Parliament, who retain representative character until the Parliament is dissolved. The source of power has been clearly indicated by expressing the words in the opening of the preamble 'we the people of Bangladesh'. Thus, the will of the people cannot be subjugated, affronted

or subordinated to a person who is not people’s representative.

The entire scheme of our Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by Parliamentary form of Government. In P.V. Narasimha Rao V. State (1998) 4 SCC 626, it has been observed “*Parliamentary democracy is part of basic structure of the Constitution. It is settled law that in interpreting the Constitutional provision the Court should adopt a construction which strengthens the foundational feature of the Constitution*". In Kuldip Nayar V. Union of India, AIR 2006 3127, the views expressed in P.V. Narasimha Rao's case were reproduced as under:

> "*As mentioned earlier, the object of immunity conferred under Article 105(2) is to ensure the independence of individual legislators. Such independence is necessary for healthy functioning of*

the system of Parliamentary functioning of the system of Parliamentary democracy adopted in Constitution. Parliamentary democracy is a part of the basic structure of the Constitution".

In democracy all persons heading public bodies can continue provided they enjoy the confidence of the persons who comprise such bodies. This is the essence of democratic republicanism. In Bhanumati V. State of Uttar Pradesh (2010) 12 SCC 1, it has been argued:

"*Any head of a democratic institution must be prepared to face the test of confidence. Neither the democratically elected Prime Minister of the country nor the Chief Minister of a State is immune from such test of confidence under the Rules of procedure framed under Articles 118 and 208 of the Constitution (corresponding to Article 75 of our Constitution). Both the Prime Minister of*

India and Chief Ministers of several States heading the council of Ministers at the centre and several states respectively have to adhere to the principles of collective responsibilities to the respective houses in accordance with Articles 75(3) and 164(2) of the Constitution".

In Kesavananda Bharati (AIR 1973 SC 1467), Sikri,CJ. expressed the view that 'Republican and democratic' form of Government is one of the features constituting the basic structure of the Government. Jagamohan Reddy,J. in the same case expressed that the edifice of Indian Constitution is built upon and stands on several pops which, if removed would result in the Constitution collapsing and which include the principle of 'Sovereign Democratic Republic' and 'Parliamentary democracy' a polity which is based on a 'representative system'.

In Union of India V. Association for Democratic Reforms (2002) 5 SCC 244, the Supreme Court of India reiterated the earlier views observing:

> "*(a) One of the basic structures of our Constitution is 'republican and democratic form of Government; (b) the election to the House of the people and the Legislative Assembly is on the basis of adult suffrage, that is to say, every person who is citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution ....".*

If we truly want to present a free and fair election to the nation, we have to see first the person or institution which is reposed with such task, and secondly the person holding the

Executive power of the Republic is accountable to the people otherwise one day we will find that the Republic is in the hands of an authoritarian against whom we fought many a times for the people’s freedom, equality, justice and democracy. If we look towards the globe, we find that different democratic countries have made provisions prescribing the laws and forums for holding free and fare election. In United Kingdom where a Parliamentary election petition is tried by two Judges on the rota in accordance with the Representation of the People Act, 1949. Section 5 of Article 1 of the U.S. Constitution provides that each House (Senate and the House of Representatives) shall be the Judge of the elections, returns and qualifications of its own members.

Section 47 of the Australian Constitution provides that until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the

House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the house in which the question arises. Article 55 of the Japanese Constitution states that each House shall Judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present. Article 46 of the Iceland Constitution provides that the Althing itself decides whether its members are legally elected and also whether a member is disqualified. Article 64 of the Norwegian Constitution states that the representatives elected shall be furnished with certificates, the validity of which shall be submitted to the judgment of the Storthing.

Article 59 of the French Constitution provides that the Constitutional Council shall rule, in the case of disagreement, on the regularity of the

election of deputies and senators. Article 41 of the German Federal Republic Constitution states that the scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a deputy has lost his seat in the Bundestag. Against the decision of the Bundestag an appeal shall lie to the Federal Constitutional Court. Details shall be regulated by a federal law. According to Article 66 of the Italian Constitution, each Chamber decides as to the validity of the admission of its own members and as to cases subsequently arising concerning ineligibility and incompatibility. In Turkey, Article 75 provides inter alia that it shall be the function of Supreme Election Board to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and after elections. The functions and powers of the Supreme Election Board shall be regulated by law. Article 53 of the Malaysian Constitution Provides that if any question arises

whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final.

In Indira Nehru Gandhi V. Raj Narayan, AIR 1975 SC 2299, the majority views in Kesavananda Bharati have been approved observing: "*democratic set-up was part of basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not*

mere rituals calculated to generate illusion of defence of mass opinion".

In Mohinder Singh Gill V. Chief Election Commissioner, AIR 1978 SC 851, while speaking on the philosophy of election in a democracy it was argued:

> "*....(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.*
>
> *(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in*

conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the commission shall be responsible to the rule of law, act bona-fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the Constitutional order viz. elections."

In Kuldip Nayar (Supra) the arguments in S. Raghbie Singh Gill V. S. Gurcharan Singh Tahra (1980) Supp SCC 53 have been approved: "*An act to give effect to the basic feature of the Constitution adumbrated and boldly proclaimed in the preamble to the Constitution viz. the people*

of India constituting into sovereign, socialist, secular, democratic republic, has to be interpreted in a way that helps achieve the Constitutional goal. The goal on Constitutional horizon being of democratic republic, a free and fair election, a fountain spring and cornerstone of democracy, based on universal adult suffrage is the basic. The regulatory procedure for achieving free and fair election for setting up democratic institution in the country is provided in the Act .....". The above views have been supplemented in Kihoto Hollohau V. Zachillhu, 1992 Supp(2) SCC 651 observing that democracy is a part of basic structure of the Constitution, and rule of law, and free and fair elections are basic features of democracy.

In order to achieve free and fair election, the institutionalization of democratic institution is a precondition. Unless democratic institution is made strong no election can be said to have held freely and fairly. The primary function for

holding an election in a congenial atmosphere depends upon such institution which is vested with the responsibilities for such task. This institution has been given the responsibilities of superintendence, direction and control of the conduct of elections, and not on the Executive Government in Part IV of the Constitution. In Kesavananda Bharati (Supra) it is argued that lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law will affect the free and fair election. The objective of setting up of an Election Commission is to achieve a free and fair election being conducted by an independent body. The secondary function is the quality of persons who man the Election Commission.

Part VII of the Constitution provided for the elections and the Election Commission is vested with the task. Article 118 provides for the establishment of Election Commission which shall be independent in the exercise of its functions.

The tenure and the removal of an Election Commissioner has been safeguarded under this provision. The powers and functions of the Election Commission is provided in Article 119. It is provided in clause(3) of Article 123 that a general election of members of Parliament shall be held (a) in the case of dissolution by reason of the expiration of its term, within a period of ninety days preceding such dissolution; and (b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution. Article 124 authorises the Parliament to promulgate law making provision with respect to all matters relating to or in connection with general elections to Parliament. The opening words used in Article 119 to the effect that the superintendence, direction and control of the preparation of the electoral rolls for all elections manifestly suggest that the Election Commission is vested with all powers for holding ‘free and fair’ elections of members of

Parliament. If the Executive or the Parliament really wanted to hold a free and fair Parliamentary election, Part VII of the Constitution should have to be amended empowering such power to the Election Commission which is conducive for holding a free and fair Parliamentary election.

It is thus obvious that the Election Commission is composed of the Chief Election Commissioner and other Election Commissioners if appointed for holding free and fair elections. Article 118 is couched in similar language of clause(2) of Article 324 of the Constitution of India. Ahmadi, CJ. in T.S. Seshan V. Union of India, (1995) 4 SCC 611 on construction of Article 324(2) observed: *"It is crystal clear from the plain language of the said clause (2) that our Constitutional-makers realised the need to set up an independent body or commission which would be permanently in session with at least one officer, namely, the CEC, and left it to the President to*

further add to the Commission such number of ECs as he may consider appropriate from time to time. Clause (3) of the said Article makes it clear that when the Election Commission is a multi-member body the CEC shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of Article 324 insofar as the Constitution of the Election Commission is concerned."

Proviso to Clause (5) of Article 118 provides that an Election Commissioner shall not be removed from his office except in the like manner and on the like grounds as a Judge of the Supreme Court. The Indian corresponding provision has been provided in the proviso to clause (5) of Article 324. It has been further provided that "the

conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment". The Election Commission should be equipped with all facilities and should also be allowed to function independently. It should be allowed to develop as an institution. To restore the peoples confidence, right persons for the office of the Chief Election Commissioner and other members should be appointed upon consultation with the all major political parties. Even under the present Care-taker Government system if impartial persons are not appointed in the Commission, no general election will be held fairly and impartially.

Considering these provisions it has been argued in T.S. Seshan (Supra) "*These two limitations on the power of Parliament are intended to protect the independence of the CEC from political and/or executive interference*". The expression 'conduct of elections' is wide amplitude which would include power to make all

necessary provisions for conducting free and fair election. To maintain the purity of elections and in particular to bring transparency in the election process in Association of Democratic Reforms (Supra), Shah,J. concluded:

> *"The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word 'elections' is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.*
>
> *The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the*

avowed purpose of having free and fair election. Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen of anticipated by the enacted laws or the rules."

From the above arguments and the constitutional provisions, the first and foremost thing to be looked into is that the Election Commission should be protected from political influence or interference. There should be transparency in the selection process. The Commission should be constituted with the persons who are perceived to be impartial. Therefore the arguments that the Care-taker Government system has been introduced with the main 'objective to hold free, fair and peaceful general election to

the parliament’ is based on misconception of law. The arguments that confidence of the people in the Election Commission was eroded by its holding of an election generally perceived not to be free and fair which resulted in a serious Constitutional crisis, the Thirteenth Amendment to the Constitution was made to restore the peoples confidence in the democratic process is devoid of substance on the Constitutional as well as jurisprudential point of view. If the political institution like ‘The Executive’ contain in Part IV of the Constitution can ensure free and fair elections for effective participation by the people, then there is no need for providing an independent Election Commission in the Constitution. The Constitution-makers entrusted with the task for conducting elections upon the Election Commission and not upon the executive Government for transacting the business of holding a free and fair election.

The further arguments that the Thirteenth Amendment introduced the Care-taker Government so as to enable the Election Commission to hold a more free and fair election and to promote effective participation by the people are contrary to the tenet of the Constitution. The impugned amendment has been inserted in Part-IV under the heading 'The Executive' of the Constitution. For holding election independently the Constitution provided Articles 118, 119, 120, 121, 122, 123, 124, 125 and 126 in Part VII under the heading 'Elections' and the corresponding laws framed for the purpose.

For achieving the Constitutional mandates for holding free and fair election, it has been provided in Article 126 that the Executive authorities shall '*assist the Election Commission in the discharge of its functions'. Similar language has been used in Part VI in Article 112 of the Constitution which states 'All authorities, executive and judicial, in the republic shall act*

in aid of the Supreme Court'. The Executive authorities act in aid of the Supreme Court whenever a direction or an order or a declaration is made by it since the Supreme Court of Bangladesh has been invested with the power to investigate and punish for any contempt for violation of such order or direction or undermining its authority, which power is lacking in the Election Commission.

In the Representation of the People Act, 1951 (India), the Regional Commissioner or the Chief Electoral officer of the states has been authorised to ask from (a) every local authority (b) every university established by the Central or Provincial Act, (c) a Government company, and (d) any other institution, concern or undertaking wholly or substantially by funds provided directly or indirectly by the Central or Provincial Government to make available to any Returning Officer such staff as may be necessary for the performance of duties in connection with an

election under section 159. Section 160 authorises requisition of premises, vehicles for election purpose. Section 146 has invested the Election Commission with the powers to make inquiry relating to any complaint if made by affidavit and it can exercise the powers of a civil Court while trying a suit under the Code of Civil Procedure and on enquiry if it is found that any offence described in sections 175, 178, 180, 228 of the India Penal Code has been committed by any person, the Commission may, after recording the facts constituting the offence forward the case to a Magistrate having jurisdiction to try the same. It has also been provided that any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Penal Code.

Similar provisions as contained in section 146 should be incorporated in Chapter VI of the Representation of the People Order, 1972. The Election Commission should be allowed to take

penal actions against Government servants entrusted with election responsibilities if they violate its order or direction, and the public administration along with the police administration should be placed under the Commission during the election period. The Commission should be given full power to transfer any Government servant during the interregnum period. The Election Commission should also be afforded all staff and employees according to its requirement and while any Government officer or employee is given on deputation to the Commission or is entrusted with election responsibility, such officer or employee should have to be guided by the disciplinary rules of the Election Commission.

We achieved our freedom and got a Constitution at the cost of millions of martyrs with a view to enjoying the fruits of a historic struggle for national liberation. The Executive is under obligation to assist the Election Commission in discharge of its functions for making the

Constitution a class apart from other Constitutions of comparable description. It is a manifestation of what is called “the people’s power’. It is difficult to conceive that the Executive authorities will not follow a direction or order of the Election Commission in the interest of holding free and fair elections, which is a basic feature of the Constitution. If the 'Executive' sincerely desires the Election Commission to hold free and fair elections, it is their duty to see what are the loopholes in part VII of the Constitution and the law promulgated by the Parliament in exercise of powers under Article 124 and to make such amendments which are practically necessary for presenting the elections of the members of Parliament generally perceived to be free and fair for effective participation by the people.

Md. Joynul Abedin,J. argued that the election laws in the countries of the subcontinent show that the Election Commission of Bangladesh is

sufficiently strong and independent in matters of its operation and decision making. It has financial autonomy which is all the more important for discharging its functions independently. If that being the position, the arguments of Md. Jainul Abedin,J. that the Care-taker Government system was introduced for holding free, fair and impartial election to the Parliament is self contradictory. Learned Judge again argued that the status of Election Commission and the electoral system in Bangladesh, is by far sound and efficacious. The only important factor that needs to be looked at and considered is to ensure that the persons in authority and the leaders of political parties must have real and clear conception of democracy and its values and norms. This can be achieved, learned Judge argued, by not mere authorizing of the same but by initiating its practice and true culture and religiously practicing the same at all level in the national life and body polity. The learned Judge goes on

saying that political leaders are holding hostage to special interest groups and this in turn compels the leaders to make corrupt decision and consequently various democratic and important institutions in the country are increasingly becoming dysfunctional.

Md. Awald Ali,J. argued that the first essential of a democratic Constitution is that the entire people must be presented in the legislature by their nominee to be elected periodically by them. Learned Judge added that if the people really believe in democracy and want to practice democracy then Articles 48(3), 56 and 57(3) of the Constitution should be suspended or kept in abeyance for the period of three months. Learned Judge also argued that the Election Commission must be made more powerful and independent by making appropriate legislation. I find fallacy in the arguments of the learned Judge. There are conflicting arguments which are apparent from the above observations.

Mirza Hossain Haider,J., on the other hand, argued that for the sake of practicing democracy necessary amendments can be made to the Constitution. The learned Judge then argued that the Election Commission created under the Constitution is a high Constitutional authority charged with the duty of ensuring free, fair and impartial election and the purity of the electoral process. To effectuate the Constitutional objectives and purpose, it is to draw upon all incidental and ancillary power for holding free and fair election. Developments may also be made in this sector for its proper functioning depending on the required necessity. But man made situation, it is argued, intended to deter or obstruct holding free and fair election should be sternly dealt with. The learned Judges admitted that the Election Commission is independent and strong enough to represent free and fair elections, and that the election laws should be

made more effective by making appropriate amendments for the purpose.

There is apparent inconsistency in the arguments of the learned Judges while maintaining the impugned amendment. If the existing laws are not sufficient to equip the Commission with the powers for presenting a fair election, those laws should be amended or new laws be promulgated, and the corresponding provisions contained in Part-VII of the Constitution should in case of necessity be amended. The legislature instead of taking steps in that regard introduced a hotch-potch system dismantling the Parliamentary form of Government even for a short time, which instead of addressing the issue properly complicated the governance of the country leading to chaos and confusion. The institution set up under the Constitution shall seek to give effect to democracy which is to be sustained by adult suffrage, fundamental rights and independent judiciary.

There is no dispute that a Constitution is a living instrument and that it grows with the passage of time but by the same time, it should not be ignored that the Parliament cannot amend the Constitution according to its volition or to the detriment of the Parliamentary system of the Government only because the members wish to change the system. It should be remembered that the representatives of the people can not destroy essential element of its basic structure as argued by the learned Judges. It is absolutely wrong in assuming that Parliament may bring any amendment to achieve its goal for institutionalising the democracy. The Parliament has the power to amend the Constitution but subject to certain limitations as will be discussed lateron. Every Constitution is founded on some social and political values. Legal rules are incorporated to build a structure of the political institution aimed at realizing and effectuating those values.

Constitutional provisions cannot be in collision with each other and certainly cannot be vague, ill defined and indefinite. There can not be a provision in a Constitution which will lead the country into chaos, confusion and anarchy and a democratic Republic can not be converted by the Parliament to a authoritarian regime for achieving something which could have been achieved by other means. The scheme envisaged by the Constitution does not permit the Parliament to encroach upon the area reserved by Article 55. Constitution is an elaborate document. It embodies a list of fundamental rights and a number of Directive Principles of State policy. A good number of provisions have been included to avoid some of the difficulties which were experienced in the working of other Constitutions. Detailed provisions relating to the working of various institutions set up under the Constitution have been included, mainly with a view to avoiding difficulties which

a newly born Democratic Republic might experience in working of the Constitution efficiently.

All Government organs and institutions owe their origin to the Constitution and derive their powers from its provisions. These organs and institutions enjoy only such powers as are conferred on them and function within limits demarcated by the Constitution. Parliament is no exception and, unlike British Parliament, can not claim unlimited powers. It must function within its limits and its actions are subjected to judicial scrutiny. It has given power to amend Constitution, but the power to amend must be exercised within the bounds of the Constitution. Besides conforming to the procedures laid down for the purpose, the power to amend should not be exercised so as to destroy or abrogate the basic structure or frame work of the Constitution. Mr. Muhammad Mohsen Rashid in the context of the matter has argued that there cannot be a provision in a Constitution which brings the country to the

precipice and leaves it to find its path thereafter. The persons in power changed a secret document like the Constitution which should not provide a system not suited to the aims and aspirations of the people. Such inconsistencies seem petty but in practice are capable of ruining the fabric of peaceful democracy in this country.

Constitution is the Supreme lex in our country is beyond the pale of any controversy. All organs of the state derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. This includes, the judiciary, the executive and the legislature. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act of Parliament. In words of Sir Edward Coke the principles to be considered are: (1) what was the law before the Act was passed; (2) what remedy Parliament has appointed, and (3) the reason of the remedy.

The Parliamentary System of Government abhors absolutism and it being the cardinal principle that no one howsoever lofty, can claim sole authority given under the Constitution, mere co-ordinate constitutional status or even the status of exalted Constitutional functionaries, does not disentitle this Division from exercising its jurisdiction of judicial review of actions which partake the character of changing the system of the Government. The legislature undoubtly has plenary powers but such powers are controlled by the basic concepts of the Constitution and can be exercised within the legislative fields allotted to its respective jurisdiction. It should be remembered that the basis of such power is the Constitution. No organ of the state can claim sovereignty or supremacy over the other. Each organ has to function within its four corners of the Constitutional provisions. The doctrine of Parliamentary sovereignty as it obtains in England

does not prevail in Bangladesh except to the extent provided for by the Constitution.

Dr. Kamal Hossain argued that the Rule of law has to be rigorously maintained and that calls for a truly independent judiciary to uphold the Constitution and the law and to exercise powers of judicial review whenever an election is seen to become unfair due to lack of neutrality and impartiality of those, who are entrusted with the Constitutional and legal responsibility for ensuring that it is free and fair. Independence of the judiciary itself has to provide checks on the Care-taker Government to ensure that independence is not infringed. As observed earlier, the judiciary cannot solve all the problems of the people or the State. If an election is held unfair the Court will exercise powers of judicial review of the result of such election if a proper petition is filed by an aggrieved person but the judiciary cannot assume the role of the Executive or the Election

Commission for ensuring the neutrality for holding a Parliamentary election. This is the function of a particular organ of the State. Dr. Hossain has referred to the case of Secretary Ministry of Finance Vs. Md. Masdar Hossain, 52 DLR(AD) 82, in which, this Division argued on the point of independence of judiciary as under:

> "*The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and can not be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provision of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provision of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115,*

Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the legislation or rules. What cannot be done directly cannot be done indirectly."

I fail to understand why Dr. Hossain has referred to the above decision which does not support his views. Dr. Hossain submitted that the Thirteenth Amendment was already part of the Constitution when it was expressly stated by this Division in the Masdar Hossain case that there is no provision in the Constitution which curtails the independence of judiciary. Supplementing the above arguments, Mr. Mahmudul Islam added that there is no provision in the Constitution which curtails the independence of Judges of the superior Court. Mr. Islam has referred to a Canadian Supreme Court decision in Walter Valente V. The Queen, (1985) 2SCR 673, wherein it was found “Judicial independence is a "*foundational*

principle" of the Constitution reflected in section 11(d) of the Canadian Charter of rights and Freedoms, and in both ss.96-100 and the preamble to the Constitution Act, 1867.....It serves 'to' safeguard our Constitutional order and to maintain public confidence in the administration of justice..... Judicial independence consists essentially in the freedom to render decisions based solely on the requirement of laws and justice."

Mr. Islam argues that the judiciary be left free to act without improper interference from any other entity i.e. the Executive and Legislative branch of the Government not impinge on the essential authority and function. According to Mr. Islam, there is nothing in the Constitution which can be even remotely said to be interfering with the adjudicative functions of the Judges of the Supreme Court. Furthermore, the provision of the Supreme Judicial Council further secures the tenure of service of the Judges of the Supreme

Court. Mr. Islam has reflected one side of the coin ignoring the other side. Learned Amicus Curiae fails to consider that the independence of judiciary will not only be affected but also put the judiciary as a whole into controversy if the system of selection of the Chief Advisor from amongst the retired Chief Justices or retired Judges of the Appellate Division is retained and ultimately the public perception towards the judiciary will be bound to erode.

Mr. Islam himself admitted that the office of the Chief Advisor is a dangling carrot before the Judges of the Appellate Division which shall prevent them from dispensing justice impartially. However, according to Mr. Islam this would not be treated as something which interferes with the adjudicative functions of a Judge or curtails his service facilities or affects his tenure in any manner. According to Mr. Islam, the Judges have taken oath to do right to all manner of people, without fear or favour, affection or ill will. If

a Judge refrains from passing the right judgment lest the Government will be angry with him and shall not appoint him as Chief Advisor after his retirement, it has nothing to do with the performance of his duty as a Judge and it can not be said that he was prevented from doing the right. According to Mr. Islam, if a Chief Justice or a Judge of the Appellate Division retires, he ceases to be a member of judiciary. By his appointment as Chief of the Care-taker Government the judiciary is not in any way be involved.

Before I deal with the arguments, I would like to reproduce a passage quoted by Dr. Hossain in his written argument from a judgment of US Supreme Court that extracted from Tagore Law Lectures, 1959 as under:

> "*The judiciary has no arm or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of Government. Those two historical sources*

or power rests in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products or time and experience. But they flourish when Judges are independent and courageous."

In Abdul Bari Sarker Vs. Bangladesh and others, 46 DLR(AD)37, a retired Judge of the High Court Division was appointed chairman of the Court of Settlement on contract basis for one year but within three months his contract was cancelled. He challenged the order of cancellation by a writ petition. Article 99 prohibited appointment of a retired Judge in any office of profit in the service of Republic. This prohibition was lifted by an amendment made in 1976. The purpose behind

this prohibition was that the high position and dignity of a Judge should be preserved and respected even after retirement and if any provision was made for holding of office after retirement then, a Judge while in service of the Supreme Court might be tempted to be influenced in his decisions in favour of the authorities keeping his eyes upon a future appointment. In the context of Article 99 this Division observed: "*The purpose behind this prohibition was that the high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his retirement. Further that if any provision was made for holding of office, after retirement, then a Judge while in service of the Supreme Court might be tempted to be influenced in his decisions in favour of the authorities keeping an eye upon a future appointment*."

R.C. Rahoti, C.J. in an article published on 22nd February, 2005 on ‘Canons of Judicial Ethics’ observed 'independence' and 'impartiality' are

most crucial concepts. The two concepts are separate and distinct. 'Impartiality' refers to a state of mind and attitude of the Court while ‘independence’ refers not only to the state of mind or attitude, but also to a status or relationship to others – particularly to the executive branch of Government – that rests on objective conditions or guarantees. In K. Veeraswami V. Union of India (1991), 3 SCC 655, the concept of judicial independence has been described: *“To keep the stream of justice clean and pure the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not succeptible*

to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office-holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of judiciary. In short, behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.....They are required to 'uphold the constitution and the laws' 'without fear' that is without fear of executive; and 'without favour' that is without expecting a favour from the executive. (emphasis added).

People's expectation of 'independence' and 'impartiality' in the judiciary is much higher than any other organ. The society has got a right demand, better governance from the judiciary. The judiciary in every polity has been provided with several immunities under their respective

Constitutions to ensure their smooth and impartial functioning. If the judiciary by its performance and conduct does not meet the expectation for which such Constitutional protection has been provided, the judiciary will be reduced to any other organ of the state. When the last Parliamentary election was scheduled to be held under the Care-taker Government, a retired Chief Justice was to take office as Chief Advisor as per clause (3) of Article 58C. There was protest against his appointment by one political party on the ground that he was a partisan Chief Justice. There was much agitation which culminated into untold incidents, strikes, violences and ultimately the said learned Chief Justice declined to assume the office of Chief Advisor but in the mean time, the nation had to face lot of sufferings. If he was not impartial as alleged, then what would have been the fate of the pronouncements made by him when he was a Judge in both the Divisions of the Supreme Court?

The selection process provided for in clauses (3) and (4) of Article 58C and the provisos is so vague that there is scope for the President to exercise arbitrary discretionary power. Learned counsel appearing on behalf of the appellant and amici curiae conceded that after the introduction of the system, there is scope for the Executive to interfere with the administration of justice and to politicize the judiciary particularly at the time of elevating a Judge in the Appellate Division keeping eyes upon his future appointment as Chief Advisor after retirement. This would gravely undermine the independence of judiciary, for a Judge of the High Court Division would then be working constantly under the apprehension that if he does not fall in line with views of the Executive or delivers judgments not to its liking he would not be elevated to the Appellate Division. The Judges are made of sterner stuff, some Judges may on account such apprehension, be

induced, either consciously or deliberately; to do that which pleases the Executive.

To avert any injury if they are competent, it would not be difficult for them to find arguments to justify their action in falling in line with the wishes of the Executive – it would also shake the confidence of the people in the administration of justice in cases where the Government is a party. In view of the above, I find it appropriate to quote an observation of Ganvillee Austin in “The Constitution; cornerstone of a nation" (1972).

> *“If the beacon of the judiciary is to remain bright, court must be above reproach, free from coercion and from political influence*.”

There is no gainsaying the fact that by the Constitution (Fourteenth Amendment) Act, 2004, Article 96(1) was amended and the retirement age of the Judges had been increased to 67 years from the age of 65. A Section of civil society and

lawyers raised eyebrows questioning the transparency and propriety of such amendment, which according to them was, in fact, done looking towards a particular Judge to head the office of the Care-taker Government. This apprehension itself is injurious to judiciary. There has been consistent pressure from the Government servants and the Judges of lower judiciary to increase the retirement age on the reasoning that the lifespan of the citizens of the country has increased and therefore, at least the retirement age should be increased to 60 years. Despite such demand, the Government raised the retirement age of the Judges of the Supreme Court abruptly without increasing the retirement age of the other Judges and employees of the Republic. This increase of the retirement age of the Judges speaks volume as to the motive of the Executive Government.

If this system is allowed to continue the apprehension in the minds of the people cannot be said to be exaggerated and there will be

likelihood of politicizing the higher judiciary – this will certainly erode the people's perception towards the independence of judiciary. So, I fully agree with the opinion expressed in K.Veeraswami that Judges of the higher echelons should have been ‘without expecting a favour from the executive’ and that they should be kept from political influence if the beacon of judiciary is to remain bright.

To hold the general election of the members of Parliament peacefully, fairly and impartially, the only solution is to strengthen the Election Commission. Besides, the officers of the public administration and the law enforcing agencies who are directly and indirectly involved in the process of Parliamentary election should be placed under the Election Commission with full powers to take penal actions against them in case of disobedience of its orders and directions during the period from the date of submission of the nomination paper till the date of final

publication of the election results in the official Gazette. There is no dispute in this regard and Md. Joynul Abedin, J. had recommended 10 points for electoral reform. Md. Awlad Ali, J. was also of the view that: “The Election Commission must be made more powerful and independent by making appropriate legislation.” Mirza Hussain Haider, J. echoed to the above views and observed ‘Developments may also be made to this sector for its proper functioning depending on the required necessity.” Dr. Kamal Hossain suggested the following proposal for strengthening the Election Commission for holding free and fair election.

> "*The appointment of the Chief Election Commissioner and Election Commissioners should be made after consultation with the opposition parties and with sections of society which enjoy public respect and confidence. The Election Commission should also have the*

full control and command over the law enforcing agencies and defense service personnel".

Dr. Zahir also made the following suggestion:

"The Election Commission should be made all powerful, and the voter list should be made electronically, and if necessary by going from house to house three months before the election with notice to all political parties and accompanied by their representatives to update the list."

Now, if the functions of the Executive are assigned to the Judges of the higher judiciary even though retired then the judiciary will be taken in disrepute all the time. The Executive Government and the political parties are required to see how the transition of power has to be made peacefully after a free and fair election of the members of Parliament. If the existing law and the provisions contained in Part VII of the

Constitution are not adequate and sufficient to present to the nation free and fair elections by the Election Commission, necessary amendments should be made in that regard so that the Election Commission can present a free and fair election.

I find force to the suggestion of Dr. Hossain for strengthening the Election Commission. By the same time, I find substance in the contention of Mr. Mohsen Rashid that if a political party can run a Government for five years and thereafter, if it fails to co-operate with the Election Commission in holding free and fair elections, it is a matter of shame to the nation that the people who elected their representatives and trusted them as trustees could not be trusted for holding free and fair elections. It is their inability to perform responsibilities reposed upon them and to rectify their misdeeds, the Judges should not be dragged on in the political arena, which is not its appropriate field to deal with the Executive. The Constitution has delineated the roles of the

Executive, of the Judiciary and the Legislature. The President of India on the occasion of Golden jublee celebration of the Supreme Court of India on 28th January, 2000 said:

> *"the judiciary in India has become the last refuse for the people and the future of the country will depend upon fulfillment of the high expectations reposed by the people in it."*

The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a Parliamentary democracy. What it prohibits is such exercise of function of the other branch which results in wresting away of the regime of Constitutional accountability. In Ram Jawaya Kapur V. State of Punjab, AIR 1955S.C.549, the Supreme Court of India observed:

> *"The Indian Constitution has not indeed recognised the doctrine separation of powers in its absolute rigidity but the functions of different parts or branches*

of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature."

Baron Montesquieu for ensuring the liberty of the subject realised that there could be oppression by means of the law, as well as, outside it and that is why in his Book XI, "On The English Constitution" in Chapter VI, had made more practical recommendations for the organisation of Government. He argued on the doctrine of separation of powers. He begins with a classification of the functions of Government. He argued by stipulating that there should be three branches or agencies of Government to correspond

to the three functions: *“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty .....Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. If it were joined to the executive power, the Judge might behave with violence and oppression. There would be an end to everything, if the same man or the same body, whether of the nobles or of the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes.”*

Montesquieu’s argument clearly expressed the three agencies should perform their respective functions of the Government separately. That is certainly the essence of the doctrine i.e. one

agency of the Government should not be performing the function appropriate to another. He also gave some support to the notion of there being ‘checks and balances’ by which the branches of the Government might legitimately influence or even impose certain limits on each other’s actions. The doctrine of the separation of powers was therefore put forward as a prescription of what ought to be done for the promotion of certain values, and the question of its validity is a question of political theory.

I hope that the expectation of the people should not be diminished by bringing the Judges to the activities of the executive. As regards the power of amendment of the Constitution, B.H. Chowdhury,J. in Anwar Hosain Chowdhury, (1989) BLD (SPL)1 argued that independence of the judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitution; *“The doctrine of basic structure is a new one and*

appears to be an extension of the principle of judicial review. Although the U.S. Constitution did not expressly confer any judicial review. Marshall CJ held in Marbury V. Madison, (1803) I Cranch 137, that the court, in the exercise of its judicial functions, had the power to say what the law was, and if it found an Act of Congress conflicted with the Constitution it had the duty to say that the Act was not law. Though the decision of Marshall CJ is still being debated the principle of judicial review has got a wide acceptance not only in the countries that are under the influence of common law but in civil law countries as well." In that case it was ruled that it was inherent in the nature of juridical power that the Constitution is regarded as the Supreme law and any law or Act contrary to it or infringing its provisions is to be struck down by the Court in that the duty and function of the Court is to enforce the Constitution. The Constitution of United States does not confer any

power on the Supreme Court to strike down laws but the Supreme Court of United States ruled so.

Shahabuddin,J. in Anwar while concurring with the above views argued, even if the 'constituent power' is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge. In that sense there is hardly any difference whether the amendment is a law, for it has to pass through the ordeal of validity test. "Sovereignty" belongs to the people and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that this basic structure cannot be wiped out by amendatory process. However, in reality, people's sovereignty is assailed or even denied: under many devices and 'cover-ups' by holders of power, such as, by introducing 'controlled democracy', basic democracy or by super-imposing thereupon some

extraneous agency, such as a Council of Elders or of Wiseman. If by exercising the amending power people's Sovereignty is sought to be curtailed it is the Constitutional duty of the Court to restrain it and in that case it will be improper to accuse the Court of acting as 'super-legislators'.

The power of Judicial review of a constitutional provision cannot be restricted. The Superior Courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its jurisdiction are all allied concepts and the same can never be taken away. It is the function of the Judges of the highest Court to pronounce upon the validity of laws. This Court has the power to interpret any provision of the Constitution or any legal instrument, even if that particular provision is a provision which seeks to oust the jurisdiction of this Court. Many Framers, Federalists expected the undemocratically selected Court, at least on occasion, to strike down

statues it believed were in conflict with the Constitution. James Madison, for example, pointed out that Bill of rights would protect individuals from abuse by majority. And he immediately added:

“Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for the Constitution by the declaration of rights. (James Madison, speech in Congress proposing Constitutional Amendments in James Madison writings 437, 449)

Alexander Hamilton wrote the same in ‘The Federalist Papers’ that Constitution’s limitations can be preserved in practice in no other way than through the medium of Courts of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void otherwise all reservations of particular rights or

privileges would amount to nothing (Federalist-78). Hamilton said, ‘interpretation of the laws is the proper and peculiar province of the Courts’. James Iredell,J. elaborated on Hamilton’s argument assuming the need for an institution that would have the power to strike down an unconstitutional law. Iredell,J. concluded that the Courts must have the power of judicial review. They may abuse the power, but one can find safeguards against abuse in the transparency of the judicial process, which allows the public to assess the merits of the judicial decision and the Judges’ own desire to maintain a strong judicial reputation.

Jainul Abedin,J. though noticed the observations of Sahabuddin,J. in Anwar Hossain that any amendment of the Constitution is subject to the retention of the basic structures and the Court has power to undo an amendment if it transgresses its limits and alters basic structure of the Constitution, however, observed that Article 48(3) has suspended for a limited

period, that Article 58E has not amended Article 48, that unless clause (1A) of Article 142 is declared void, it should be held valid and that the impugned amendment has not amended the preamble. There is apparent inconsistency in the above opinion. It may be observed that clauses (1A), (1B) and (1D) of Article 142 which were added by the Second Proclamation Order No.IV of 1978 had been declared ultravires the Constitution by this Division in the Constitution Fifth Amendment case.

Md. Awlad Ali, J. observed that the impugned amendment has not amended any Provision of the Constitution and thus it has not been required to refer to a referendum under Article 142(1A). Mirza Hussain Haider, J. is of the opinion that the impugned amendment has not violated Article 142(1A) and also not ultra vires the Constitution. The substance of the opinions of the learned Judges is that the impugned amendment has not amended the preamble, Articles 8, 48 and 56 of the

Constitution and thus, the amendment is not void and that the impugned amendment has not destroyed the basic structures of the Constitution. These observations are inconsistent, inasmuch as, it has also been observed "unless this amendment namely clause (1A) is declared void by a Court of law the same should be held to be valid. Consequently if any amendment is found to have amended the preamble, Article 8, 48 and 56 of the Constitution, the amending Bill must be referred for referendum before it is assented by the President".

The majority articles of our Constitution are aimed at furthering the goals of social, political and economic revolution by establishing the conditions necessary for its achievements. That is why, the Parliament can not destroy its identity merely because they have the required number of member of Parliament to change its identity. In the manner the Constitutional conventions of England so also those of the American conventional

rules which are being followed for over centuries without allowing to dismentle them treating them as constitutional bindings, in the like manner we are bound to perserve the fundamental features of our Constitution. The framework of the Constitution must survive any amendment made to it. To ascertain the meaning of a particular provision of a statute or Constitution, it must not read in isolation. First of all the internal context which includes the preamble should be read. If the internal context can not resolve the vagueness, resort may be had to the external context which includes the history leading to the enactment and to the proceedings of the Parliament. If one has to ascertain the true meaning of the Constitution, he must be guided by the rules of grammer, by his knowledge of the historical background and by the conclusions to be deduced from a careful study of the judicial decisions.

Therefore I endorse the views of the learned Chief Justice that the Constitution (Thirteenth Amendment) Act, 1996 violates the basic features of the Constitution and accordingly it has been legally declared void. I also endorse the views expressed in the judgment prepared by the learned Chief Justice including its operating part. Before parting with, considering the burning issue of the day, I am of the view that the next two Parliamentary elections may be held under the existing system in the light of the above observations subject to the condition that the selection of the Chief Adviser may be made not from among the retired Chief Justices retired next before the last retired Chief Justice or the retired Judges of the Appellate Division retired last in accordance with Clauses (3) and (4) of Article 58C. It is hoped that the Parliament shall promulgate necessary laws, during this period and if necessary, to amend the Constitution for institutionalizing and equipping the Election

Commission to conduct free and fair Parliamentary elections independently.

J.

Md. Abdul Wahhab Miah, J: I have had the privilege of going through the judgments proposed to be delivered by my Lord, the Chief Justice pronouncing the majority view and my learned brother, Muhammad Imman Ali, J. I regret that I could not agree with the findings, the reasoning and the decision given by my Lord, the Chief Justice as to the unconstitutionality of the Thirteenth Amendment and also giving direction upon the Parliament to amend the Constitution in a particular way as stated in the concluding portion of the judgment in order to hold the 10th and 11th general elections of members of Parliament under the Non-Party Care-taker Government.

Though I am in agreement with my learned brother Muhammad Imman Ali, J as to the finding given by him that the Thirteenth Amendment was neither illegal nor *ultravires* the Constitution and does not destroy any basic structures of the Constitution, but with respect I could not agree with his finding that the Non-Party Care-taker Government system has become unworkable due to the improper exercise of power of the President under "Article 58C(3), (4), (5) and (6) which led to the unnatural and unconstitutional State of affairs in 2007" and in order to avoid recurrence of such a situation, the mode of setting up of the interim Government, by whatever name it may be called, is to be replaced by another system.

In view of the above, I find no other alternative but to give my own view points as to the constitutionality of the Thirteenth Amendment as

challenged before the High Court Division, which will appear from the Rule issuing order in the course of my discussions and findings hereinafter.

This appeal has arisen out of a certificate given by a Full Bench of the High Court Division on 04.08.2004 under article 103 of the Constitution of the People's Republic of Bangladesh (the Constitution) in Writ Petition No.4112 of 1999.

The background of giving the certificate by the Full Bench of the High Court Division is as follows:

Mr. M. Saleem Ullah, deceased, an Advocate of this Court, filed the writ petition before the High Court Division challenging the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996) (annexures-A, A1 to the writ petition) as *ultravires* the Constitution. The writ-petitioner also sought a Rule upon the respondents to show cause as to why the previous actions and deeds done or taken in any manner in pursuance of the impugned (Thirteenth Amendment) Act, 1996 (hereinafter referred to as the Thirteenth Amendment) should not be ratified and condoned as transactions past and closed. The Rule was issued in the following terms:

> "Let a Rule Nisi be issued upon the respondents calling upon them to show cause as to why the impugned Constitution, (Thirteenth Amendment) Act, 1996 (the Act I of 1996) (Annexure-"A"& "A-1" to the writ petition) should not be declared to be ultra vires of the Constitution of the People's Republic of Bangladesh and of no legal effect and/or pass such other for further order or orders as to this Court may deem fit and proper."

In the writ petition, the writ-petitioner stated, *inter alia*, that he was a practising Advocate of the Supreme Court Bar Association and it was his sacred duty as a citizen to safeguard and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. The petitioner was also the Secretary General of the

Association for Democratic and Constitutional Advancement of Bangladesh (ADCAB) which had been working for people's awareness to guard the violation of the Constitution and the rule of law. The main contention of the petitioner in challenging the Thirteenth Amendment passed by the Sixth Parliament introducing the concept of non-representative government in the Constitution, was that the same was *ultravires* the Constitution being violative of democracy, a basic and fundamental structure of the Constitution and also being violative of the mandatory provisions of article 142(1)(1A) of the Constitution. Although the said amendment was passed by the Parliament disregarding the Constitution, the President assented to it on 28th March, 1996 without referring the question to a referendum as required under article 142(1)(1A) of the Constitution to ascertain and assess the opinion of the people as to whether the impugned Act in the form of bill should be assented to as the same amended articles 48 and 56 of the Constitution.

Originally the writ petition was filed impleading Bangladesh, represented by the Secretary, Ministry of law and Parliamentary Affairs; Secretary, Jatiya Sangsad and the Chief Election Commissioner. After the issuance of the Rule, one Mr. Amanullah Kabir was added as respondent No.5 as an intervener. Thereafter the General Secretary, Bangladesh Awami League and the Secretary General of Bangladesh Nationalist Party (BNP) were added as respondent Nos.6 and 7 respectively. Respondent Nos.1, 5 and 6 contested the Rule by filing affidavits-in-opposition separately.

Respondent No.1, Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs by filing an affidavit-

in-opposition denied the statements made in the writ petition that the 13th Amendment incorporating articles 58A, 58B, 58C, 58D and 58E by way of amendment to the Constitution introducing the concept of Non-Party Care-taker Government, was violative of the basic and fundamental structures of the Constitution i.e. the democracy and the democratic system of government as enshrined in the Constitution. It was asserted that the 13th Amendment is, *intra vires the Constitution. Free and fair election is indispensable for the running of democracy and there cannot be any democracy without giving the people free hand in electing their representatives. But the experience showed that Parliamentary election held during "the period the party government remains in power is visited with unlawful and illegal use of the government machinery by the party in power affecting the fairness of the election", the manifestation of which was amply demonstrated in* Magura by-election held in 1994. As a result, the then opposition political parties demanded Non-Party neutral Care-taker Government while the general parliamentary election is held and the impugned Act was passed pursuant to the said demand and it can easily be seen that induction of the Non-Party neutral Caretaker Government is not negative of democracy, rather it is an aid of democracy. The Thirteenth Amendment has not amended articles 48 and 56 of the Constitution, but has merely provided additional measures to be operative during a very short period when the general parliamentary election would be held. Even though it is assumed without conceding that the Thirteenth Amendment has effected amendment of articles 48 and 56 of the Constitution as they stand now, there was no necessity of holding a referendum inasmuch as the provisions of clause (1A) to article 142(1) for holding a referendum is

ultravires the Constitution as this clause was not introduced in the Constitution by an Act of Parliament, but it was introduced by a Martial Law Proclamation in 1978 by a Martial Law Administrator. The Thirteenth Amendment was passed to preserve and ensure democracy and effective participation of the people in the affairs of the Republic and it is incorrect to say that the exercise of government power for the interregnum period as envisaged by the impugned Act is destructive of democratic values. There was no illegality in holding the last general election and as such, the question of condonation or of legalisation under the doctrine of State necessity does not arise. The "impugned act was passed on the demand of the party now in power and the impugned Act being a valid amendment of the Constitution the question (sic) repealing the impugned Act does not arise." The Non-Party Care-taker Government during the period of general parliamentary election is a settled question and accepted by the people and all parties. The petitioner is a mere busy-body and is trying to unsettle the settled issues "which may create commotion in the polity and in such situation, it is clear that this petition has not been made *bonafide*." (The affidavit-in-opposition was sworn by the then Secretary, Ministry of Law, Justice and Parliamentary Affairs on the 4th day of April, 2000).

Respondent No.5, Amanullah Kabir, in his affidavit-in-opposition, contended, *inter alia*, that the petitioner had no *locus standi* to file the writ petition. He was not aggrieved by the Thirteenth Amendment of the Constitution. He was a mere busy-body and the writ petition was nothing but an abuse of the process of the Court. The Thirteenth Amendment is not *ultravires* the Constitution. The concept of Care-taker Government has been incorporated in the Constitution with a view to institutionalise

democracy in Bangladesh. The impugned Thirteenth Amendment has been made not in violation of article 142(1)(1A) of the Constitution. The Thirteenth Amendment has not amended articles 48 and 56 of the Constitution. In any view of the matter, article 142(1)(1A) is *intravires* the Constitution. Bangladesh is a Westminister type democracy under the written Constitution. Free and fair election is an essential pre-requisite of a democracy. Unless a free and fair election is ensured, democracy cannot survive. For various reasons, democracy is twilit affair in Bangladesh. Democratic process was thwarted many times. With the exception of 1954 elections, all elections in this country under a party government were not free and fair. There were widespread allegations of vote rigging and manipulation of the elections by the party in power in the Parliament election held in 1973, 1979, 1986, 1988 and February, 1996. As a result of the sad and unhappy experiences of unfair elections under a party government, the Jamaat-e-Islami Bangladesh in 1984 for the first time raised the demand of holding Parliamentary elections under a Care-taker Government. Gradually, all opposition political parties of the country agreed to this demand which became a popular issue and after the fall of the then Government in 1990, Parliamentary elections for the first time were held under a Care-taker Government in February, 1991. Thereafter, by the Thirteenth Amendment, the concept of Care-taker Government was incorporated in the Constitution with a view to institutionalise democracy. The Care-taker Government is an aid of democracy which is one of the basic pillars of the Constitution. Assuming but not conceding that the impugned Thirteenth Amendment has amended articles 48 and 56 of the Constitution, temporary suspension of any provision of the Constitution is

not an amendment within the meaning of article 142 of the Constitution. The provision of article 142(1)(1A) together with other provisions of the Constitution introduced by the Constitution (Fifth Amendment) Act, 1979 is not void and inoperative inasmuch as the Fifth Amendment was necessitated by the Fourth Amendment which destroyed the concept of democracy and the rule of law. There was no necessity to go through any referendum under article 142(1)(1A) of the Constitution. The question of giving go-by to Parliament and President by the introduction of the non-elected and non-representative Government, does not arise at all. The concept of Care-taker Government has been misunderstood and misinterpreted by the petitioner, the sole intention of which is to preserve and protect democracy by ensuring the effective participation of the people in running the affairs of the Government for all time to come. Because of the introduction of the Care-taker Government for the brief period of 90 days, the fragile democracy in Bangladesh has survived. The concept of Care-taker Government has been introduced in the Constitution to protect and safeguard democracy. It is designed to be an aid of democracy and not for its destruction. It was a popular demand. People have accepted it. It is for the greater interest of the public good of the country. It is wholly constitutional. The petitioner being a busy-body has filed the application with the *malafide* intention of destroying the democracy of the country.

In the affidavit-in-opposition of respondent No.6, General Secretary, Bangladesh Awami League, it was contended, *inter alia*, that Bangladesh Awami League is a political party which has been spearheading the struggle of the people of Bangladesh towards establishing a democratic polity. The struggle for democracy stems from the very inception of the

party itself. The party actively participated in the language movement followed by various struggles and demand for general election during those days in Pakistan. It led the alliances to the provincial election in 1954 on the basis of 21 points programme which included the social, political and economic rights of the people of the then East Pakistan including the demand for holding election on the basis of universal adult franchise and autonomy and proper representation of the then East Pakistan. Though *'Juktofront'* led by Awami League had a sweeping victory by defeating the Muslim League the fruits of the election could not be enjoyed by the people of the then East Pakistan because of imposition of Governor's rule under section 92A of the Government of India Act, 1935. It was further followed by the repression and detention of the leaders of Awami League and thousands of political activists in the country. The Governor General took over the power by dissolving the Central Ministry and the Constituent Assembly. Such unconstitutional steps were challenged in the Court. Again Awami League helped to bring about a Constitution in which democracy and an election through which a responsible accountable Government could be formed. But instead of having an election under the provisions of 1956 Constitution, Martial Law was imposed in October, 1958; Constitution was abrogated and no election was held in Pakistan until 1970. In the meanwhile, Awami League advanced the six points programme, first point is: holding free and fair election on one person one vote basis. An election was won in 1970. Awami League held the majority seats. Though Awami League prepared a draft Constitution on the basis of six points programme, the Constituent Assembly was not allowed to sit and an unjust war was inflicted to cleanse Bengali nation and its aspiration. Bangabandhu

Sheikh Mujibur Rahman as the elected representative having overwhelming majority gave a clarion call to drive out the occupying forces and declared independence of Bangladesh in the early hours of 26th March, (past midnight of 25 March), 1971 on the basis of which proclamation of independence was made on 10th April, 1971 along with Law Continuance Enforcement Order. Following victory over the Pakistani occupying forces on 16th December, 1971 the Constituent Assembly of Bangladesh consisting of all elected representatives framed the Constitution of Bangladesh in which emphasis was given again on democracy and democratic polity. In order to ensure democratic governance, a free and fair election is a *sine qua-non.* The process of election and electoral machinery went through gross abuse during the period of martial law starting from 'yes/no' vote upto the election of Parliament. Election lost its credibility and through the so-called election unconstitutional usurpers tried to legitimise their unconstitutional usurpation in a pattern followed by both Martial Law regimes by adopting the so-called Fifth and Seventh Amendments passed by the Parliament brought into existence through rigged election. In 1990, all political parties joined a mass movement which resulted in resignation of the regime known as "autocratic regime." General Ershad had to resign on the face of the mass upsurge. He handed over power, as per the demand of the alliances of all political parties, to the then Chief Justice, Mr. Justice Shahabuddin Ahmed. The Government headed by the then Chief Justice brought about a concept of 'neutral caretaker government' introduced on the basis of public demand in order to restore credibility to election for ushering in an elected Government through free and fair election. The nature and the manner of

the struggle for democracy has taken different shapes in different countries at different times of their development. The struggle for democracy “is not a one-act play, but an expression of a continuing urge for freedom, a freedom to choose and in the process to empower the people.” This struggle, being the main theme of the political struggle of Bangladesh, was manifested during Pakistan era, sometimes through language movement, sometimes through resistance movement against autocracy, sometimes through electoral campaign and at times through the struggle for autonomy, having reached its climax in the war of independence, all having a common thread and objectivity, forming the mainstream of struggle culminating in an independent Bangladesh. The ideals and aspirations, the basic norms and the values for which the valiant freedom fighters laid down their lives, are embodied in the Constitution. The second phase of the struggle is: to defeat the forces hijacking the State power, subverting the constitutional and democratic process and to restore democratic process on the constitutional rail. The respondent has further been struggling to protect, sustain and cherish the constitutional sovereignty and integrity and thereby to establish rule of law “and the right to choose” through a free and fair election. Since the birth of Bangladesh, there have been two major collapses of the constitutional regime, once with the killing of Bangabandhu Sheikh Mujibur Rahman, in 1975 and the other with the dislodging of- an elected Government, in 1982. Independence was won in 1971 and a Constitution was given to the people through their elected representatives in 1972 under the leadership of the father of the nation. With his fall, the Constitution and the democracy fell. So fell, the rule of law and human rights fell as well.

The second part of the struggle for restoration of constitutional process and a democratic polity through free, fair electoral process, was led by Sheikh Hasina as President of the party since her return from exile in 1982. The history of this struggle, a saga of our brave people, needs to be appropriated in the perspective of a main theme, that is, the process through which people struggle for their own empowerment while the political struggle helps creating the environment for the people to exert their rights and for the fulfilment of their democratic rights and aspirations. This can be sustained only through a free and fair election which is fundamental feature of democracy. The concept of neutral caretaker government as envisaged by the people is a government which will be solely and exclusively committed to the empowerment of the electorates free from fear and pressure of muscle and money power, so that they can freely choose the government they want. After the government was sworn in in 1991, Parliament passed the Twelfth Amendment to the Constitution in order to restore parliamentary democracy. But due to the gross abuse of the electoral process in the past, the party which went to power in 1991 also indulged in same kind of abuse, first in Mirpur by-election and then in Magura by-election. People of Bangladesh, having experienced the gross abuse, rigging, corrupt practices in election process and having confidence in the Supreme Court and in free and fair election under the former Chief Justice Shahabuddin Ahmed, raised their voices in order to ensure free and fair election under a neutral caretaker government, to become part of a continuing constitutional dispensation. The demand started for the introduction of neutral caretaker government as a feature in the Constitution. But the Government, in power in 1996, without giving any

heed to such demand, held a so-called election on 15th February, 1996 which was boycotted by all opposition political parties. People *en-mass* boycotted the so-called election. The Government showed over 60% turn up of voters in the so-called election. The election was rejected en-mass by the people and the nation. This led to 23 days of non-cooperation movement, finally culminating in the passage of the Thirteenth Amendment to the Constitution hurriedly prepared and passed by the short lived Parliament introducing a Care-taker Government to be headed, if available by the immediate past Chief Justice of Bangladesh. On 31 March, 1996 a Care-taker Government was formed, of which the former Chief Justice was made the Chief Adviser. The interim Government, thus evolved in Bangladesh is the outcome of a political and historical process stated hereinabove. This arose out of mass movement ultimately having constitutional recognition by way of the Thirteenth Amendment. Under the consecutive martial law, the electoral process was destroyed as evidenced in 1979 and 1986. Election was perceived as a necessary compulsion for the usurper in order to get a three-fourths majority to legitimize themselves. Those regimes, then to ensure the legitimization process in order to give the civilian look, played every possible trick to ensure three-fourths majority. In the process, they prepared a rigging manual for election which was known as made-up election by involving the entire administration. The destruction and weakness of the electoral system was not only witnessed under the unconstitutional regime, but the similar weakness surfaced during a democratic regime as evidenced in Mirpur by-election and Magura by-election and the latest in Dhaka-10 by-election held on 1st July, 2004. All

these abuses and derelictions justify holding of election under a neutral caretaker government.

The respondent further contended that the neutral government, as envisaged in the Thirteenth Amendment, is a short term administrative mechanism and procedure for ensuring a full term truly elective, representative and democratic government, which, as experienced, cannot be accomplished by a partisan government, howsoever, elected. During the days of the neutral caretaker government installed as per the Thirteenth Amendment, the President, being elected and the government operated by a Council of Advisers being responsible to the President, the representative character of the Government as a whole is not totally lost. In the absence of neutral caretaker government as envisaged in the Thirteenth Amendment, in the original dispensation, the period assigned for preparation and holding election and installing a new government, the Parliament stands dissolved, the Prime Minister of the dissolved Parliament ceases to have accountability to their constituents and the Cabinet is asked to continue as the interim government, remains bereft of representative character and accountability to the Parliament. In other words, had there been no Thirteenth Amendment, the interim government, otherwise operating in the period and set for preparation and holding the election and installing the newly elected Parliament and the government, would have been non-representative and non-accountable in the same way and manner as the caretaker neutral government as envisaged in the Thirteenth Amendment. The only difference between the caretaker government as under the Thirteenth Amendment and the interim government of the period otherwise for preparation and holding the election and installing the newly elected

government, is that the former is non-partisan and neutral and hence capable of ensuring free and fair election while the latter is not as experienced in the past. The caretaker neutral government under the Thirteenth Amendment operates within the ambit of representative responsibility of the President for aiding the Election Commission in holding free and fair election and is not necessarily entitled and competent to bring about substantial policy changes which remain within the domain of the government to be elected. Such a government, therefore, cannot be said to be a negation of the principle of democratic governance chosen by the people of their free will from time to time. There is no reference to articles 8, 48 or 56 or to the Preamble, in the bill introducing the Amendment, hence there was no need or occasion for sending it to referendum. Therefore, the President was not expected to get the bill examined whether the bill had any connection remote or otherwise, with articles 48 and 56 nor the Constitution contemplates such scrutiny which cannot be resolved without a referendum perhaps by sending it to the Appellate Division of the Supreme Court of Bangladesh, nor the question was ever raised at the relevant time either in the Parliament or outside. After two consecutive elections having been held and about eight years having elapsed in the meanwhile the matter cannot now be reopened nor process reversed. Article 48 cannot be interpreted in such manner to create an obligation on the President which the President is not competent to perform. Since the bill, on the face of it, did not mention about amendment to articles 8, 48 and 56 or to the Preamble of the Constitution, there was no scope for sending it to referendum. There is no reference to any of the entrenched provisions as made in article 142(1)(1A). The President was

expected to follow the procedural part as far as the requirement so warranted. Other than that Parliament was competent to pass an amendment bill and it was so brought about by the Thirteenth Amendment with two-thirds majority. The respondent joins issue with the petitioner as to the democracy being the corner stone of the Constitution and it is not to give a go-by to the system of a neutral caretaker government as formed. This is not in order to introduce a 'non-elected', 'non-representative' government as alleged. But this has been brought in order to reinforce a truly democratic government to be ushered in through a free and fair election. It became a necessity, in a nascent democracy, an Election Commission without the institutional support and with poor law enforcing agencies, becomes vulnerable to power, pressure, money and muscle, Non-Party Care-taker Government headed by immediate past former Chief Justice was conceived. There is, however, need for improving the system by introducing further checks and balances in selecting the members of the Care-taker Government and it's working mechanism to ensure that it does not induce any erosion to the concept of independence of judiciary. But the need for a caretaker government has become a constitutional necessity from the historic experience of the major political parties as shared with others and the electorate in general. Without a credible election, democracy becomes a mockery and in the process of establishing democratic polity as a whole; "exercise of the governmental powers for the interregnum (i.e. 90 days period of caretaker government) cannot be destructive of the democratic values enshrined in the Constitution", as a matter of fact, this interregnum reassures and reaffirms the democratic continuity and succession of power through democratic process by ensuring free and fair

election. Magura by-election did not bring about or threaten any constitutional chaos as alleged, but the rigging of the by-election resulted in complete loss of credibility in the electoral process. Awami League along with all other political parties in the opposition reached a consensus that in order to hold free and fair election neutral caretaker government was an imperative and the entire people were mobilised behind this demand and the concept received a universal acclamation by way of consensus. The writ petition has been filed in order to reverse the course of constitutional history purporting to destablise democratic polity. So, what the Parliament would shy away from, the petitioner purports to get done through judicial pronouncement. This being a political issue fulfilling a historic need ought not to be so interfered with and a system discarded as it does not, in any way, derogate the democratic norm and practice, but Thirteenth Amendment provides a promise and a pledge of a neutral caretaker government. This, as expected, ought to be able to deliver a free and fair election, determined by the political will of the people, being the same constitutional command as being determined by the political will of the people.

The writ-petitioner filed an affidavit-in-reply to the affidavit-in-opposition filed by respondent No.1 only reiterating the statements made in the writ petition and stating further that it was not correct that he had no *locus standi* to file the writ petition. It was not correct that “during the period the party Government remains in power is visited with unlawful and illegal use of the Government machinery by the party in power affecting the fairness of the election.” It cannot be tacitly declared by the impugned Amendment that elected and chosen representatives of the people in the

Parliament, who form the Government, are constitutionally inept, corrupt and not reliable and incompetent to run the affairs of the Republic during the general election in the country. The writ-petitioner also denied that "the impugned Act was passed to preserve and ensure democracy, and effective participation of the people in the affairs of the Republic." The petitioner denied the further statements made in the affidavit-in-opposition that "Non-Party Care-taker Government during the period of general parliamentary election is a settled question and accepted by the people and all parties." The general election to the Seventh Parliament was held under the colour of the Thirteenth Amendment coupled with the doctrine of necessity, but nevertheless, the impugned Act remains invalid.

The petitioner also filed two supplementary affidavits one on the 9th day of April, 2000 and the other on the 6th day of July, 2004. In the first supplementary affidavit, the petitioner took an additional ground in support of the main writ petition. In the second supplementary affidavit, it was stated, *inter alia*, that under the amended Constitution by the impugned Act, former Chief Justice, Mr. Justice Mohammad Habibur Rahman took office as the Chief Adviser of the Care-taker Government, and after announcement of the election result, Begum Khaleda Zia, the Chairperson of Bangladesh Nationalist Party (BNP) termed the elections as "elections of rigging." The second general elections were held in 2001 under the Care-taker Government of former Chief Justice, Mr. Justice Latifur Rahman who took oath of office on 28.02.2001 at 7:30 p.m. and within a few hours at night there was an administrative reshuffle even without forming his Care-taker Government under article 58C of the amended Constitution. Sheikh Hasina, President of Bangladesh Awami League, was critical and vocal;

she termed the assumption of the office of Care-taker Government as a 'civilian coup (d'etats)' and termed Justice Latifur Rahman 'a betrayer' and *'persona non grata'*. She gave statements to the press on different occasions claiming vote-rigging disputing the neutrality of the former Chief Justice. In his defense, the former Chief Justice maintained that he had a home work before he took office, giving an impression that his 'executive mind' was, however, working since before his assumption of office. The Chief Adviser of Care-taker Government has assumed a political character, and the major political parties of the country have developed a sense of political maneuvering in the appointment of Judges keeping an eye on who will reign on the eve of the general elections. The Supreme Court Bar Association raised its voice through a resolution dated 28.07.2002 against 'political appointments' of Judges, when three Additional Judges of the High Court Division appointed during Awami League governance were not confirmed in 2002. The Government ignoring the recommendation of the Chief Justice did not confirm six Additional Judges of the High Court Division in 2003 who were appointed by the predecessor Government, protesting which the Supreme Court Bar Association by its resolution dated 21.02.2003 decided to assemble at the entrance of the Supreme Court building on 22.02.2003. The Executive Committee by its resolution dated 03.07.2003 decided to abstain from attending the Courts of both the Divisions of the Supreme Court of Bangladesh on 05.07.2003 in order to uphold the *"independence of judiciary and as a mark of protest against the lack of transparency in the process of appointment and confirmation of Judges and repeated action of the Government subjecting such process of appointment and confirmation*

to undue political influence, interference....” In order to resolve the crisis eight senior Advocates of the Supreme Court, namely: Dr. Kamal Hossain, late lamented Syed Ishtiaq Ahmed, Dr. M. Zahir, Mr. Abdul Malek, Mr. Mahmudul Islam, Mr. Mainul Hossain and Mr. Ajmalul Hossain made a joint statement wherein they urged that independence of judiciary is a fundamental pillar and an integral part of the basic structures of the Constitution and the appointment of Judges is related with independence of judiciary. They deprecated the introduction of party politics in the matter of appointment of Judges and lastly appealed for a solution on the basis of recommendation made by the Chief Justice. The political view of the government also reflected in appointing the Judges of the Appellate Division. Discussion was being made openly when the government appointed a Judge in the Appellate Division superseding Mr. Justice Syed Amirul Islam, the senior most Judge of the High Court Division. The Bar in its General meeting held on 13.07.2003 viewed that “the Chief Justice would fail his constitutional duty in the event the Chief Justice recommends any Judge other than Mr. Justice Syed Amirul Islam, or more that (sic) one Judge with him for appointment in such vacancy of the Appellate Division which will occur in August, 2003.” The Bar further decided to refrain from felicitating the newly appointed Judge of the Appellate Division. The Senior Advocates of the Supreme Court Bar Association made a joint Memorandum wherein they expressed their concern that *“the present system for judicial appointment is liable to be abused by the executive, has been abused in the past and is being abused by the present executive in making appointments of Additional Judges of the High Court Division, the appointment of permanent Judges of the High*

Court Division, and appointment of Judges to the Appellate Division."... "this crisis... irreparably damage our judicial system and the independence of judiciary." The Bar in its General meeting held on 26.07.2003 unanimously approved and adopted the said Memorandum in presence of the Senior Advocates, namely: Mr. Shawkat Ali Khan, Mr. Shafique Ahmed, Mr. Abdul Baset Majumder, Mr. Ajmalul Hossain, Mr. A.B.M. Nurul Islam, Mr. Rafique-ul Huq, Mr. Khondker Mahbub Hossain, Mr. Muhammad Ayenuddin, Mr. Humayun Hossain Khan and other learned Members of the Bar. Parliament by the Fourteenth 14th Amendment of the Constitution extended the service period of the Judges by two years. The Main opposition Awami League and other opposition parties linked this amendment to accommodation of the former Chief Justice K.M. Hassan as Chief Adviser of the next Care-taker Government.

These are all pleadings of the respective parties.

The Thirteenth Amendment was first challenged by one Syed Mashiur Rahman by filing Writ Petition No.1729 of 1996. A Division Bench comprising Mr. Justice Md. Mozammel Haque and Mr. Justice M.A. Matin summarily rejected the writ petition mainly on the ground that the provision of the Thirteenth Amendment did not fall within the definition of alteration, substitution or repeal of any provision of the Constitution and as such, it was not an amendment as contemplated under article 142 of the Constitution. The learned Judges observed as follows:

> "Since the provisions of the Thirteenth Amendment Act, as it appears to us, do not come within definitions of alternation, substitution or repeal of any provision of the Constitution and since for temporary measures some provisions of the Constitution will remain ineffective, we do not find any substance in the submission of the petitioner that Article 56 of the Constitution had been in fact amended by Thirteenth Amendment Act. It appears that those

> provisions were made only for a limited period for 90 days before holding general election after dissolution of the Parliament. We find that no unconstitutional action was taken by the legislature and as such we do not find any reason to interfere with Thirteenth Amendment Act. We do not find any merit in the application. It is summarily rejected."
> This order was reported in 17BLD, 55.

Later, the petitioner of Writ Petition No.4112 of 1999 challenged the Thirteenth Amendment as *ultravires* the Constitution and the Rule was issued in the terms as quoted at the beginning of this judgment. A Division Bench of the High Court Division comprising Shah Abu Nayeem Mominur Rahman and Md. Abdul Awal, JJ, after hearing the learned Advocate for the writ-petitioner and Mr. Fida M. Kamal, learned Additional Attorney General for respondent No.1 and Mr. M. Amirul Islam for respondent No.6 passed an order on 21.07.2003 stating that since they could not agree with the order passed in the case of Syed Muhammad Mashiur Rahman, reported in 17 BLD 55, on the validity of the impugned Act, the matter should be sent to the learned Chief Justice for a reference to a decision by a Full Bench as required under rule 1 of Chapter VII of the High Court Division Rules and accordingly, they sent the same to the learned Chief Justice. The Division Bench while expressing their views on the point whether the Thirteenth Amendment, in fact, amended articles 48 and 56 of the Constitution refrained from considering the question whether the same was violative of any basic structures of the Constitution. The learned Chief Justice by his order dated 16.06.2004 constituted a Full Bench with 3(three) learned Judges of the High Court Division, namely: (a) Md. Joynul Abedin, J (b) Md. Awlad Ali, J and (c) Mirza Hossain Haider, J to resolve the issue. The précis reference made to the Full Bench was as follows:

> "Having regard to the gravity and importance of the issues raised in the writ petition, including that of destruction of basic structure of the Constitution, we are of the opinion that the Full Bench, if constituted, should decide all issues raised in the writ petition and particularly the issue whether the Act 1/96 has caused amendment in the provisions of Articles 48(3) and 56 of the Constitution requiring assent thereto through referendum as contemplated by (sic) 142(1A), (1B) and (1C) of the Constitution."

After hearing the writ petition, the Full Bench by the judgment and order dated the 4th of August, 2004 discharged the Rule without any order as to cost and at the same time gave certificate to appeal to this Division under article 103(2)(a) of the Constitution on the prayer made by Mr. M. I. Farooqi, learned Counsel for the writ-petitioner. The Full Bench while discharging the Rule held as follows:

(i) The writ petition was maintainable.
(ii) The Constitution (Thirteenth Amendment) Act, 1996 (the Act No.1 of 1996) is valid and constitutional.
(iii) The Constitution (Thirteenth Amendment) Act, 1996 has not amended the Preamble, articles 8, 48 and 56 of the Constitution and it was, therefore, not required to be referred to referendum.
(iv) The Constitution (Thirteenth Amendment) Act, 1996 has not affected or destroyed any basic structure or feature of the Constitution, particularly the democracy and the independence of judiciary.
(v) Clauses (1A), (1B) and (1C) to article 142 of the Constitution are valid and consequently any amendment to the Preamble and Articles 8, 48 and 56 of the Constitution must observe the formalities provided in clauses (1A), (1B) and (1C) to Article 142 of the Constitution.

The Full Bench was presided over by Md. Joynul Abedin, J. Though the two other learned Judges agreed to the conclusion and the result of the Rule, each of them gave their own reasonings by writing separate judgments in holding the views as stated hereinbefore. Because of the certificate given by the Full Bench in the above backdrop, the writ-petitioner, Mr. M. Saleem Ullah filed the appeal in question. The appellant also filed Civil Petition for Leave to Appeal No.596 of 2005 which was

tagged to be heard along with the appeal. In the meantime, Mr. M. Saleem Ullah died and in his place Mr. Md. Ruhul Quddus, Advocate and then Mr. Abdul Mannan Khan were substituted. And presently, the appeal and the leave petition are being prosecuted by Mr. Abdul Mannan Khan. And accordingly, both the appeal and the leave petition have been heard together and are disposed of by this judgment.

Concise statement has been filed on behalf of the appellant in compliance with rule 1, Order XIX of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988. In the concise statement, nothing new has been stated other than the grounds on which the Thirteenth Amendment was challenged before the High Court Division.

Respondent No.1 has also filed concise statement in compliance with rule 2 of Order XIX of the above mentioned Rules praying for dismissal of the appeal. In the concise statement of the respondent, no new point has been taken or urged other than the points taken and urged in the affidavit-in-opposition filed before the High Court Division. In the concise statement 4(four) reasons have been taken, reason No.I relates to referendum under article 142(1)(1A) of the Constitution which has lost its legal force in view of the judgment passed by this Division in Civil Petition for Leave to Appeal Nos.1044 and 1045 of 2009 arising out of judgment and order dated 29th August, 2005 passed by the High Court Division in Writ Petition No.6016 of 2000 name of the parties being Bangladesh Italian Marble Works Limited-vs-Government of Bangladesh and others commonly known as Fifth Amendment case. Reason Nos.II, III and IV are as follows:

"II.	Because, the member of the Parliament being elected for a certain period and Prime Minister being the member of the Parliament is being requested by the President to continue till

	the next government enter into the office for this period is not as a public representative, thus argument of the writ petitioner that the Caretaker Government being not elected by the people cannot be continued to run the Country is not a valid argument and thus not tenable.
III.	Because, democracy is one of the basic feature of the Constitution and for effective running and practice of the democracy the Constitution having been amendment(sic) incorporating System of Caretaker Government, same can not be treated as unconstitutional.
IV.	Because the Articles of the Constitution having not been amended on the other hand some Articles have been added without changing the form of Government or system for running the State, the claim of the appellate(sic) that by 13th Amendment the basic feature of the Constitution has been changed is not correct."

As constitutional points of great public importance are involved in the appeal and the leave petition, Mr. T. H. Khan, Dr. Kamal Hossain, Mr. Rafique-ul Huq, Dr. M. Zahir, Mr. Mahmudul Islam, Mr. Rokanuddin Mahmud and Mr. Ajmalul Hossain, were appointed as amici curiae to assist the Court. Though Mr. M. Amirul Islam represented respondent No.6 before the High Court Division, he was also appointed as an amicus curiae.

Mr. M. I. Farooqui, learned Counsel, appearing for the appellant and leave petitioner, has submitted that by the Thirteenth amendment, two basic structures of the Constitution, namely, democracy and independence of judiciary have been destroyed. Therefore, the amendment is liable to be declared ultra vires the Constitution. He has elaborated his argument by submitting that by the Thirteenth Amendment article 48, a key-stone of the Constitution, has been amended. He, by referring to clause (2) of article 55 has submitted that because of the Thirteenth Amendment, the provisions of article 55 shall remain suspended and thus the mandate of the people, who elected the Prime Minister, has been taken away and thus the supremacy of

the people has been undermined; by inserting article 58A in the Constitution except clauses (4), (5) and (6) of article 55, all other provisions of Chapter II of the Constitution have been made ineffective during the Non-Party Care-taker Government and thus what was grafted in the Constitution by the Constituent Assembly, has been done away with. Mr. Farooqui has further submitted that the Thirteenth Amendment, in fact, has amended the preamble and articles 8, 48 and 56 of the Constitution. Therefore, before assenting to the bill by the President, the same was required to be sent to a referendum under article 142(1)(1A) of the Constitution, but that was not done and thus the Thirteenth Amendment was made without following the constitutional mandate and as such, the same is liable to be declared *ultravires* the Constitution. He has further submitted that because of the Thirteenth Amendment, the concept of Non-Party Care-taker Government has been brought into the Constitution in place of the elected representatives of the people and thereby the Republic and the democratic structure of the Constitution which were engrafted in the Constitution by the Constituent Assembly, have been given a go-by; during the Non-party Care-taker Government the executive power of the Republic shall vest in the Chief Adviser, an unelected person for 90 (ninety) days and thereby the mandate as given in article 7 of the Constitution that "All powers in the Republic belong to the people" shall be nowhere, but the Full Bench while finding the Thirteenth Amendment *intravires* the Constitution has failed to consider this aspect of the case in its true perspective.

Mr. Farooqui has further submitted that in the Thirteenth Amendment provisions for appointment of the retired Chief Justices of

Bangladesh and the retired Judges of this Division as Chief Adviser of the Caretaker Government having been made, the independence of judiciary has been impaired, as in view of their chances to become the Chief Adviser of the Care-taker Government, while in service they might be tempted to be influenced in their decision in favour of the authority keeping an eye upon a future appointment; the provisions for making the retired Chief Justices and the retired Judges of this Division as the Chief Adviser of the Non-Party Care-taker Government by the Thirteenth Amendment has politicised the office of the Chief Justice making it vulnerable to all sorts of maneuvering and political attacks and by such provisions, separation of powers, another basic structure of the Constitution, has also been destroyed, but the learned Judges of the High Court Division wrongly found that the impugned amendment has not impaired the independence of judiciary and separation of powers. He has further submitted that by amending article 61 of the Constitution, the concept of two executives, that is, a dyarchy has been injected in the Constitution whereas the framers of the Constitution conceived only one executive to be headed by the Prime Minister and this has also added to the destruction of the Republic character of the Constitution; with reference to article 58C he has argued that succession to the office of the Chief Adviser starts from clause (3) thereof and if the succession fails and eventually, the President takes over as the Chief Adviser then he has a chance to become autocratic and in that case, the democratic character of the Republic shall totally be destroyed and on that count the Thirteenth Amendment does not also stand to scrutiny. Mr. Farooqui has further submitted that in case the President is compelled to summon the Parliament under the situation as contemplated

in clause (4) of article 72 of the Constitution during the tenure of the Non-party Care-taker Government, there shall be an anomaly causing uncertainty in the country what would happen to the immediate Prime Minister and thus the country shall run in vacuum, but the Full Bench has failed to consider this aspect of the case in considering the vires of the Thirteenth Amendment. He, by referring to the developments, which took place during the last Care-taker Government during the period 2006-2008, which have been brought to the notice of this Division by filing an application under the head "An application for bringing on record the developments during the last Care-taker Government of the period 2006-8", has further submitted that the Non-Party Care-taker Government failed to work, so there is no reason to keep it in the Constitution. He, by referring to article 58D, has further argued that the said newly inserted article shows that the Non-Party Care-taker Government shall discharge its functions as an interim Government and shall carry on the routine functions of such Government with the aid and assistance of persons in the services of the Republic; and except in the case of necessity for the discharge of such functions, it shall not make any policy decision, but in an emergency such as, on foreign policy matter, there cannot be anything as routine functions and decision has to be given immediately, so Non-Party Care-taker Government suffers from lack of proper authority to take decision on policy matter and as such, is not an effective system of governance for 90 days and for such lack of power on such Government, the country may suffer. Therefore, the Thirteenth Amendment cannot stand in the Constitution and the same has to be declared *ultravires* the Constitution.

Mr. Farooqui in support of his contentions has referred to the cases of Jamil Haque and others-vs-Bangladesh and others, 34 DLR(AD) 125, Mujibur Rahman-vs-Government of Bangladesh 44DLR(AD) 111, Abdul Bari Sarker-vs-Bangladesh, represented by the Secretary, Ministry of Establishment and others 46 DLR(AD) 37, Secretary, Ministry of Finance-vs- Md. Masdar Hossain and others 20 BLD(AD) 104=52 DLR(AD) 82, Anwar Hossain Chowdhury-vs-Government of Bangladesh, represented by the Secretary, Ministry of Law and Justice, 41DLR(AD)165=BLD special issue, Ruhul Quddus, Advocate-vs-Justice M.A. Aziz 60 DLR, 511.

Mr. Farooqui has also referred to the correspondence between President Roosevelt and the Chief Justice of the Supreme Court of the United States of America which took place in 1942 as was reproduced in an article written by Mr. M.A. Mutaleb, Advocate, Mymensingh Bar Association in 29 DLR.

Mr. Muhammad Mohsen Rashid, learned Counsel, appearing for the appellant and petitioner with the leave of the Court has made submissions in line with Mr. M.I.Farooqui and has further added that by the impugned amendment, the role of the people of Bangladesh has been denied for 90 days, as during this period the country shall be governed by the unelected people and by such constitutional dispensation, the supremacy of the people as enshrined in article 7 as well as the preamble of the Constitution has been impaired, therefore, the impugned Thirteenth Amendment is liable to be declared *ultravires* the Constitution. Mr. Mohsen Rashid has relied upon the case of Kesavananda Bharati-vs-State of Kerala, AIR 1973 (SC) 1467 in addition to the cases relied upon by Mr. Farooqui.

Although, as per the precedence, the learned Attorney General was supposed to argue first, he opted to argue last. Accordingly, I have noted the submissions of the amici curiae first as per their seniority and then the learned Attorney General.

Mr. T. H. Khan has submitted that points raised by the appellant in the appeal as well as in the leave petition have been correctly answered by the Full Bench comprising 3(three) learned Judges upon lengthy discussions and as such, the impugned judgment and order does not call for any interference by this Division. Mr. Khan has further submitted that before striking down the Thirteenth Amendment, the history behind passing it, has to be taken into consideration and also to see why the then Chief Justice Shahabuddin Ahmed was approached to become the Acting President of the country in 1990 when the autocrat General Ershad had to resign as a result of mass movement. He has further submitted that the Constitution of any country is not a revelation and is amendable to amendment to suit the need of the people and the State, and the Thirteenth Amendment to the Constitution was brought in the Constitution to strengthen democracy and not to destroy it, because the concept of interim Government as provided in articles 57(3) and 58(4) of the Constitution failed to work to ensure free, fair, impartial and credible general election of members of Parliament. He has further submitted that election is the vehicle of democracy as without wheels a vehicle cannot move, similarly without free and fair election democracy cannot work. To ensure the democratic right of the people, the Thirteenth Amendment was enacted and thus, to empower them to select their own representatives. The main purpose behind the introduction of the concept of Non-party Care-taker

Government in the Constitution was to have a free, fair and impartial general election of members of Parliament. He referred to the great saying of Sir Winston Churchill:

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

and submitted that the concept of Care-taker Government has been brought in the Constitution by the Thirteenth Amendment to ensure the right of vote of the little man of Churchill; under the concept of Non-Party Care-taker Government 3(three) general elections of members of Parliament have already been held and the people by participating in those three elections, on a large scale, elected their representatives to form the government and thus, they have accepted the system. So, the question of declaring the Thirteenth Amendment as *ultravires* the Constitution does not arise at all. Mr. Khan has also submitted that the provisions made in the Thirteenth Amendment making the retired Chief Justices of Bangladesh and the retired Judge of this Division eligible to be the Chief Adviser has, in no way, impaired the independence of judiciary; article 96(2) of the Constitution has ensured that no Judge shall be removed from his office except in accordance with the provisions as stipulated in clauses (3)-(7) thereof. Therefore, the tenure of a Judge being fully secured, the Chief Justice or Judge of this Division who is supposed to be the Chief Adviser after retirement has no reason to be apprehensive of his office and as such, there is no reason to be influenced or allured to perform the judicial function as a sitting Judge in favour of the authorities keeping an eye upon

such future appointment. Mr. Khan has lastly suggested that since the Prime Minister has already spoken about the amendment of the Constitution very soon the matter may be left to the Parliament to reform Non-Party Care-taker Government, if any. However, he contended that Non-Party Care-taker Government is a must for sustaining democracy, a basic structure of the Constitution, so the Thirteenth Amendment has to stay in the Constitution.

Dr. Kamal Hossain has submitted that this Court has a special role to play as a guardian of the Constitution and in interpreting any provision of the Constitution, this Division should not approach in a mechanical way and should keep in mind that the constitutional process is carried on and extra-constitutional force does not get chance to intervene in the matter. He has further submitted that the Constitution is a living document and must be durable and at the same time, it has to be responsive to the need of the people keeping intact its basic structures and interpretation has to be given to give life to it. He has further submitted that the constitutionality of the Thirteenth Amendment has to be looked into keeping in view the whole scheme of the Constitution, the aspiration of our forefathers as well as the object and reason in passing the same; it was through a historic liberation struggle that we won our right to make a Constitution, the dreams which were woven into the constitutional demands were those of a democratic political order in which power would truly belong to the people to be exercised through a sovereign parliament, composed of representatives elected on the basis of universal adult franchise through free and fair elections, free from manipulation by money

and muscle and would be totally committed to end exploitation through implementing programme for fundamental economic and social change, but that was impaired because general election of members of Parliament under the party Government lost all its credibility and in the name of election what happened could not be said to be election. Dr. Hossain re-called the situation under which the then autocrat President General Ershad had to resign in 1990 and Justice Shahabuddin Ahmed, the then Chief Justice had to take over the office of the Acting President of the country who had held a fair and impartial election of members of Parliament, and then Magura-2 by-election held on 20.03.1994 and the movement by all the political parties and the members of the civil society to evolve a method and mechanism to hold free and fair election and then the consensus of all the political parties of the mechanism of Non-Party Care-taker Government as a life-saving of the Constitution and the party in power which came to power through the election of members of Parliament held on 15.02.1996 passed the Thirteenth Amendment by two-thirds majority with the sole motive to hold free, fair and impartial general elections of members of Parliament so that the people can choose their representatives who in turn would form the government and thus the people's supremacy as enshrined in article 7 of the Constitution has been ensured and successive elections have already been held under the new dispensation and thus, the people have accepted the mechanism. So, the question of declaring the Thirteenth Amendment *ultravires* the Constitution does not arise at all. He has further submitted that the approach which the apex court should adopt is to recognize that the impugned amendment was made in the context of the situation which prevailed in 1996 and the experience of holding free, fair

and impartial general election of the members of Parliament held in 1990 when Chief Justice, Shahabuddin Ahmed was the acting President of the country. He has further submitted that understanding from the broader aspect, the legitimacy of the Sixth Parliament which passed the Thirteenth Amendment cannot be challenged as the next Parliament was known as Seventh Parliament and although all major political parties boycotted the election held on 15.02.1996, the Thirteenth amendment was passed by the Sixth Parliament as consensus of all parties including the party in power and they also participated in the subsequent elections.

Dr. Kamal Hossain has further submitted that the argument that the amendment of article 61 of the Constitution by the Thirteenth Amendment has created dyarchy and given dictatorial powers to the President is tendentious and show lack of understanding of a constitutional mechanism adopted by consensus to meet the widely shared concern to supplement the Election Commission's capacity to ensure free and fair election. He concluded by saying that the Thirteenth Amendment has not, in any way, impaired democracy, the Republic character of Bangladesh and the independence of judiciary as well as separation of powers.

In support of his contentions, Dr. Hossain referred to the cases of Secretary Ministry of Finance-vs-Md. Masdar Hossain and others 52 DLR(AD) 82, S.P.Gupta V.M. Tarkunde, J. L. Kalra and others, AIR 1982 (SC) 149, Abdul Bari Sarkder-vs- Bangladesh and others 46 DLR(AD) 32, Constitutional Law of Bangladesh by Mr. Mahmudul Islam, Second Edition pages 25 and 29, page 14 of Amarta Sen's, The Argumentative Indian Writings on Indian History, Culture and Identical, Picador, 1st

Edition, 2006 and page 73 of Chapter III, The politics of Wealth of Al Gore's, The Assault on reason, The Penguin Press (USA), 2007.

Mr. Rafique-ul Haque has submitted that the concept of Non-Party Care-taker Government is contrary to the basic structures of the Constitution, but it is an evil necessity in order to ensure free and fair general elections of members of Parliament. He has further submitted that there was provision for Care-taker Government in the Constitution itself for holding general election of members of Parliament when the Parliament is dissolved; under articles 57(3) and 58(4) of the Constitution, the Prime Minister and the other Ministers continue till election is held and the new Prime Minister enters upon his office. But the concept of Non-Party Care-taker Government was introduced in 1996 in a very critical situation in the country; people lost confidence in the then Government as to the general election of members of Parliament and accordingly, it was proposed that the Non-Party Care-taker Government should be formed. At the relevant time, BNP was in power, the demand was from all the other political parties to have a Non-Party Care-taker Government for the purpose of holding free, fair and impartial general election of members of Parliament and after series of discussions such idea was approved as a consensus including the party in power and accordingly, the Thirteenth Amendment was passed by the Members of Sixth Parliament. Mr. Haque has further submitted that though the concept of Non-Party Care-taker Government is contrary to the basic structures of the Constitution, if the same is abolished then 1/11 may come again, so he has submitted that the system should be continued. He has made a categorical submission that even if the highest Court declares the Thirteenth Amendment as illegal, the BNP will not

participate in election, then again there will be chaos in the country like, 1996. Mr. Haque opposes the involvement of judiciary directly with the Non-Party Care-taker Government because it has raised an apprehension in the mind of the litigant people that in view of such provision whether they can expect free, fair and impartial decision from the Judges and there is also a chance of unhealthy competition of superseding the senior Judge. He has further submitted that in order to hold free and fair election, Election Commission should be strengthened with wide powers. He has also given a suggestion as to the formation of a Caretaker Government without the retired Chief Justice of Bangladesh and the retired Judge of this Division as the Chief Adviser.

Dr. M. Zahir, echoing with the submission of Mr. Rafique-Ul Haque, has submitted that the Non-Party Care-taker Government is against the basic structures of the Constitution. The concept of Non-Party Care-taker Government is a natural stigma/লজ্জা on the honesty of all political parties and the elected Government of this country. He, however, by referring to the Care-taker Government of Australia, has suggested a modality of a Care-taker Government instead the present one with 10(ten) persons, 5(five) each to be nominated by the leader of the house and the leader of the opposition respectively in presence of the President who will form the Caretaker Government. He has further suggested that in selecting the Chief Election Commissioner and the other Commissioners, the system as followed in India may be adopted. He has also suggested that at the time of election, the Army must be under the Command of the Election Commission and before election voters list must be prepared within a period of 30(thirty) days.

Mr. M. Amir-ul Islam, has submitted that merely holding an election, cannot give legitimacy to the result of the election unless the process of such election is transparent. He has further submitted that our past experience shows that the election held under the political Government was not free and fair and the people who are the supreme authority to decide their representatives could not exercise their right of adult franchise because their votes were hijacked by muscle power and money. By referring to the Proclamation of Independence, the Preamble and article 7 of the Constitution, Mr. Islam has submitted that people are the master to select their representatives to form the Government and to ensure that free and fair election is a must; free and fair election is no less a fundamental right than the other fundamental rights and the political justice has to be ensured by the State to its citizens for which the country has been liberated and that political justice can be ensured through a free and fair election which the people of this country could not exercise in the past in the election held under the political government and as a consequence of the people's movement and then on the basis of consensus, the Thirteenth Amendment was passed by the Sixth Parliament. He has further submitted that in our Constitution as well as many other Constitutions such as India and Pakistan, there are provisions for interim government to carry on with the administration for the period in between the dissolution of Parliament and till the successor enters upon office on the basis of next election of Parliament. In this regard, he referred to clause (3) of article 72 of the Constitution and submitted that after the dissolution of Parliament the tenure of the elected Government expires and then the elected Government which remains in power ceases to have been elected and representative

character. So, there is nothing wrong in the mechanism of Non-Party Care-taker Government to be manned by the unelected people for 90 (ninety) days and the objection raised by the appellant against the system is mere technicality and the introduction of Non-party Care-taker Government in the Constitution has not, in any way, destroyed democracy, a basic feature of the Constitution. He has further submitted that the Thirteenth Amendment did not come into the Constitution in an easy way and it was the outcome of the people's movement which, in fact, had its root in Magura by-election. In this regard, he traced back the history behind enactment of the Thirteenth Amendment as detailed in the affidavit-in-opposition filed on behalf of respondent No.6 before the High Court Division and he continued to submit that by the Thirteenth Amendment, the boat of democracy, which was about to sink, was salvaged and the people's right to vote freely and fairly has been restored. So, in effect the democratic right of the people has been protected rather than destroyed. Mr. Islam has further submitted that the Thirteenth Amendment has no constitutional problem, the same having been passed on consensus by all political parties including the party in power. Mr. Islam has lastly contended that the Thirteenth amendment, in no way, has impaired democracy and independence of the judiciary at all and therefore, the question of declaring the same *ultravires* the Constitution does not arise at all. However, he, like Mr. T.H.Khan, has suggested that improvement may be made in the system in the experience of the last 3(three) Care-taker Government, but that must be on the basis of consensus amongst the political parties as was reached in 1996.

Mr. Amirul Islam in support of his submissions has referred to the cases of Election Commission, represented by the Chairman (Chief Election Commissioner) –vs-Alhaj Advocate Mohammad Rohmat Ali M.P. and others 26 BLD (AD) 121, Marbury –vs- Madison 1 Crunch 137 (1803) and Dred Scott-vs- Sondford, 19 Howard 393 (1857).

Mr. Mahmudul Islam, at the very outset, has submitted that the constitutionality of the Thirteenth Amendment has to be examined accepting that there is no Fifth Amendment in the Constitution. He has further submitted that constitutionality of a provision of the Constitution cannot be decided without considering the context behind passing the same. Mr. Mahmudul Islam like the other amici curiae: Mr. T.H. Khan, Dr. Kamal Hossain, Mr. Amirul Islam, recalled the incidents and the other experiences which the people of the country had in the elections held under the political Government in the past including Magura-2 by-election and the movement of all opposition political parties including the civil society and then the people at large for a mechanism for holding the general election of members of Parliament in a free and fair manner; democracy and democratic process as contemplated in the Constitution can only be possible when there is free and fair election; but things came to such a pass that rigging, in the election by the party in power, became the rule rather than an exception and Magura by-election offered the example of worst form of rigging; all opposition political parties other than the party in power protested and took to the street, there was serious erosion in the law and order situation, public works came to a standstill; in the meantime, Parliament's tenure came to an end and an election without participation of the major political parties except BNP took place, and after much haggling,

a political accord was reached which resulted in the Thirteenth Amendment and a reasonably free and fair election took place for constitution of the Seventh Parliament and all these efforts were made to save democracy and to keep the constitutional process going on. Mr. Islam referred to a similar situation which prevailed in Pakistan in March, 1977, when Bhutto's party won the general election with a thumping majority, opposition parties alleged massive rigging in the election, there was passionate agitation and disturbance resulting in loss of lives, inter-party negotiations failed on the issue of an interim authority with adequate powers to supervise fresh election. As a result, the Army Chief of Staff imposed Martial Law; the difference between the two situations is obvious he submitted. In our country, the parties agreed to have election during the regime of neutral Care-taker Government during the period of general election of members of Parliament and thus saved democracy from the imposition of Martial Law, while in Pakistan democracy suffered because of failure to agree on the issue of Care-taker Government.

Mr. Mahmudul Islam has further submitted that this Division has a responsibility to see the likely consequences if the Thirteenth Amendment is declared *ultravires*; if the Thirteenth Amendment is held invalid today, it is almost certain that the opposition parties will not participate in the election and then democracy will be a far cry; it is true that the provisions of the Thirteenth Amendment suspends representative Government for short interregnum, but ensures operation of democracy in the country. He has further submitted that in social engineering, there is no panacea which can cure all political maladies in all places, and for all times, what suits Great Britain may not suit Bangladesh. In the present context of the

political maturity of the people of Bangladesh, in his opinion, there is no alternative to holding election under a Care-taker Government to preserve the democratic character of the Constitution and the country and democracy has to be suspended for a little while for its ultimate survival. In a representative democracy like ours, people select their representatives in a free and fair election and we tried to do so in the English way, but failed and then came the Thirteenth Amendment. He has further submitted that when the Head of the State is elected by the people, either directly or indirectly, the State is called a Republic and the Constitution is said to have provided a Republic character. Article 48(1) clearly provides that the President will be the Head of the State and he shall be elected by the people's representatives in Parliament in accordance with the law made by Parliament in this behalf. The Thirteenth Amendment has not introduced any provision which can be said to have altered article 48(1) in any manner and therefore, by the Thirteenth Amendment the Republican character of the Constitution has not been changed. In a representative democracy, it is the people who select their representatives in an election held in a free and fair manner and if the Non-Party Care-taker Government system goes then money and muscle power will rule in the election and in the process, the thugs and the thieves will get elected and thus, the democracy will again be a far cry and thus the supremacy of the people as enshrined in article 7 of the Constitution will be nowhere. He has further submitted that he does not see any impediment for the learned Judges to perform the judicial functions independently and thus, impairing the independence of judiciary because of the Thirteenth Amendment. He, by referring to a decision of the Canadian Supreme Court as quoted in the Book titled Canadian Constitutional Law,

Fourth Edition, has submitted that security of tenure, financial security and Administrative independence are the 3(three) "core characteristics" or "essential conditions" of judicial independence and that it is a pre-condition to judicial independence that they be maintained and be seen by a reasonable person who is fully informed of all the circumstances" to be maintained and the Constitution has guarded all the above 3(three) conditions, so the argument that by the Thirteenth Amendment, the independence of judiciary has been destroyed, has no factual and legal basis.

Mr. Mahmudul Islam has further submitted that the Thirteenth Amendment has not made any provision for appointment of the sitting Chief Justice of Bangladesh or a sitting Judge of this Division as the Chief Adviser and when a Judge retires, be it the Chief Justice or the Judge of this Division, he ceases to be a part of judiciary and by the appointment of a retired Chief Justice or Judge of this Division as the Chief Adviser, the judiciary will not, in any way, be involved. He continued to submit that unless any Court or its presiding officer goes for judicial legislation or is entrusted with some core Administrative work question of impingement of another basic structure of the Constitution, separation of powers, cannot be alleged. Mr. Mahmudul Islam has further submitted that if the Thirteenth Amendment is struck down free and fair election of Parliament shall be an illusion and in the process the democracy shall get a set back. Non-Party Care-taker Government system must be there because of the social and political situation of our country. He has further submitted that a law cannot be declared invalid because it can be abused and if there is any abuse of the law, judiciary is

there to adjudicate such abuse; some imaginary or etherial idea such as a Chief Justice or a Judge of this Division who has chance to become the Chief Adviser may be allured and for some reason may be influenced by the highest executive and may become partisan and may act in a manner subservient to the Government and thus, the independence of judiciary may be impaired, shall not make a law invalid and he has submitted that the Thirteenth Amendment is, in no way, *ultravires* the Constitution.

Mr. Mahmudul Islam has lastly submitted that in the recent past the power to constitute caretaker government had been abused, but merely for such abuse, the 13th Amendment cannot be held unlawful and measures are to be taken to prevent such abuse rather than abolition of the system introduced by the amendment; reform of the provisions of law to prevent its abuse is the combined function of the Executive and the Legislature and not of the Judiciary and that endeavour is at present being done by a Special Committee of Parliament and therefore, there is no need to disturb the committee. Mr. Islam in support of his contentions has referred to the cases of Secretary, Ministry of Finance, Government of Bangaldesh-vs-Md. Masdar Hossain and others 20BLD(AD)104 =52DLR(AD)82 and Walter Valente-vs-Her Majesty the Queen, (1985) 2 R.C.S 673.

Mr. Rokanuddin Mahmud has submitted that the Thirteenth Amendment was the outcome of the emotion of the entire nation. He re-called the circumstances which prevailed in the country before passing the Thirteenth Amendment prompting the Sixth Parliament to pass the same. A Care-taker Government system was already in the Constitution; after the tenure of Parliament expired, the Government in power continued to hold the office of Prime Minister until his successor entered upon the office and

if such system was acceptable, there was no reason to declare the Thirteenth Amendment *ultravires* the Constitution as the existing system has simply been replaced by the Non-Party Care-taker Government to ensure free, fair and impartial general election of members of Parliament. He has further submitted that in the Constitution, there is a scheme as to how democracy shall work and be practised and to understand that if article 7 of the Constitution is read with the preamble of the Constitution, it will appear that people is supreme and all powers belong to them and the Thirteenth Amendment is based on article 7 of the Constitution as it has ensured people's participation in the general election of members of Parliament to select their own representatives to form the Government in a free and fair election which became simply impossible under the political Government. In this regard, he continued to submit that the people of the country have already witnessed the benefit of the Thirteenth Amendment as in the 3(three) elections held under the Non-party Care-taker Government, they could go to the polling centers and cast their votes freely without any influence of money and muscle. He has also made an oblique reference to the elections previously held under the political government by saying that previously no Government in power was ousted through election process which could not happen in a democracy and if the margin of votes are taken into account, then it will be seen the election under the party in power was not free and fair. And only after the introduction of Thirteenth Amendment in the Constitution, the party in power was ousted because they did not secure necessary numbers of seats of members of Parliament to form the Government. He has further submitted that independence of judiciary is definitely a basic structure of the Constitution and by the

Thirteenth amendment, the independence of judiciary has not, at all, been impaired. Part-VI of the Constitution has dealt with judiciary and this part has no connection with the legislature and the executive and the Thirteenth Amendment has, in no way, touched the functioning either of the Chief Justice of Bangladesh or the Judges of this Division or any Judge of the High Court Division independently. He elaborated his submissions by pointing out that the executive only gives appointment of the Judges and then they have no control over them and the Judges perform their functions independently and a Judge can be removed by the Supreme Judicial Council only after following the procedure as laid down in clauses (3) to (7) of article 96 of the Constitution. He has further pointed out that no guideline has been prescribed in the Constitution as to what would amount to gross misconduct and the procedure to be followed in the matter of inquiry by the Supreme Judicial Council and it is the prerogative of the Supreme Judicial Council to decide what would amount to such gross misconduct of a Judge and what procedure would be followed by it in holding the inquiry. He has further submitted that Parliament has no power to constitute the Bench to hear a case and it is the Chief Justice who constitutes the Bench. The power of judicial review of this Court also has, in no way, been affected or touched by the Thirteenth Amendment. And he posed a question, then how has the independence of judiciary been impaired? It is the mere hypothetical feeling of the writ-petitioner that the independence of judiciary has been impaired without giving due attention to the constitutional provisions which have ensured the independence of the Judges to dispense justice to the litigant people, as per their oath, they have taken. To head the Non-Party Care-taker Government by the retired Chief

Justice and the retired Judge of this Division was the only choice of the people who were fighting to have a free and fair election and no other post or person was acceptable to the people and, in fact, the choice of the post of retired Chief Justices and the retired Judge of this Division rescued the situation and such device could neither be said to be undemocratic nor destructive of the independence of judiciary; the people of this country has got the highest respect and faith in the judiciary which is reflected in their demand when they ask for judicial inquiry to find out the truth of any incident of public importance and in fact, the Judges of the Supreme Court or the members of the Subordinate Judiciary conduct such inquiries. He drew our attention to the fact that Chief Justice, Shahabuddin Ahmed after having performed as the Acting President of the country came back to the judiciary and again performed as the Chief Justice of Bangladesh and retired as such, but nobody could question his neutrality and impartiality as a Judge; what Chief Justice, Shahabuddin did is that he stayed back in the cases which were decided during his time as Acting President. And this fact itself, *prima-facie*, shows how a Judge performs his adjudicative functions with independence and impartiality keeping his oath in mind. The post of Chief Adviser is a political office, so there is a chance of criticism, but it is the retired Chief Justice or the retired Judge of this Division, as the case may be, who will hold the office. Therefore, the criticism of the Chief Adviser, if there be any, shall, in no way, have any impact upon the Judiciary and Independence of the sitting Judges as they will be performing their functions as per their oath which they took after their appointment.

Lastly, Mr. Mahmud echoed the voice of Mr. Mahmudul Islam that it is not correct to say that during the Non-Party Care-taker Government,

the country will be run totally by unelected people because the President to whom the Non-Party Care-taker Government shall be collectively responsible is the person elected and therefore, neither the Republican character of the country nor the democracy will be absent during the short period of 90(ninety) days, so the question of declaring the 13th Amendment as *ultravires* the Constitution does not arise at all.

Mr. Ajmalul Hossain has made submissions in line with Mr. M.I. Farooqui, Mr. Mohsen Rashid and Dr. M. Zahir. He has very strongly echoed with them that the Thirteenth Amendment has destroyed the 3(three) basic structures of the Constitution, namely: the democracy, the independence of judiciary and the separation of powers. He has, however, very frankly stated that as he was not present in Bangladesh during the period when the Thirteenth Amendment was passed, so he had/has no idea about the scenario which was there in the country as submitted by Mr. T.H.Khan, Dr. Kamal Hossain, Mr Rafique-ul Haque, Mr. M. Amirul Islam, Mr. Mahmudul Islam and Mr. Rokanuddin Mahmud. He has further submitted that by making the Election Commission more powerful and independent, free, fair and impartial general elections of members of Parliament can be ensured under the political government, the Non-Party Care-taker Government as introduced by the Thirteenth Amendment for holding such election is not, at all, necessary and the same be struck down. He has referred to a number of cases in support of his contentions under 7(seven) heads viz (a) Democracy, (b) Separation of power, (c) independence of judiciary, (d) Rule of law (e) Judicial Review, (f) Court to follow principle and (g) No reference to political party in the Constitution. The cases are (1) R.C. Poudyal-vs-Union of India and others, AIR

1993(SC) 1804, S.R. Chaudhuri-vs- State of Punjab and others, AIR 2001 (SC)2707; Peoples Union of Civil Liberties –vs-Union of India, AIR 2003(SC) 2363, Kuldip Nayar –vs-Union of India, AIR 2006(SC)3127, Keshavananda Bharati -vs-State of Kerala, AIR 1973 (SC)1461, Indira Gandhi –vs-Raj Narayan, AIR 1975 (SC) 2299; Union of India –vs-Association for Democratic Reforms, AIR 2002 (SC) 2112; Samata–vs-State AP, AIR 1997 (SC) 3297; Valsamma Paul –vs-Cochin University, AIR 1996 (SC) 1011, the 5th Amendment case, Special Reference No.1 of 2009, 15 BLC (AD) 1, Abdul Mannan Bhuiyan –vs-State, 60 DLR (AD) 49, Indira Gandhi-vs-Raj Narayan, AIR 1975 (SC) 2299, Ram Jawaya –vs-State of Punjab, Air 1955 (SC) 549, Sultana Kamal –vs-Bangladesh, 14 BLC, 141, Anwar Hossain Chowdhury-vs- Government of the People's Republic of Bangladesh and others, 41DLR(AD) 165, Golak Nath –vs-State of Punjab, AIR 1967 (SC) 1643; Idrisur Rahman (Md) and others –vs- Bangladesh, 61 DLR 523, Kanhival Lal –vs- Trenedi; AIR 1986 (SC) 11.

Mr. Mahbubey Alam, learned Attorney General, appearing for respondent No.1, has supported the Thirteenth Amendment by saying that the then ruling party was compelled to go for the amendment in the face of the popular demand from the political parties and the civil society. The learned Attorney General has further submitted that the constitutional changes took place because of historical events and the same thing happened in passing the Thirteenth Amendment in the backdrop of Magura-2 by-election and the past experience of the other elections held under the political party in power. He referred to the system of the Government working in Japan and Bhutan by saying that Monarchy is

there, but democracy is being practised. Mr. Attorney General has further submitted that the Republican character of a country is lost only when a dictator comes to power, because of the introduction of Non-party Care-taker Government by the Thirteenth Amendment, Republican character of the Constitution and the country has not been destroyed, rather it has strengthened democracy; the President being an elected person and during the Non-Party Care-taker Government, he remains as the Head of the State and the Non-Party Care-taker Government collectively remain responsible to him, so the Republican character of Bangladesh is, in no way, affected. He, by referring to the Indian Constitution, has submitted that India's President has the power to impose its rule in any State in case of necessity and in fact, in the past President's role in some States of India was imposed, but that, in no way, destroyed its democratic character. He has also submitted that the Thirteenth Amendment has not at all touched Part-VI of the Constitution which has dealt with judiciary and by making provisions for the retired Chief Justices of Bangladesh and the retired Judges of this Division to become the Chief Adviser, the independence of judiciary has not at all been impaired. In conclusion, he prayed for dismissing the appeal and the leave petition.

Before I proceed to examine the constitutionality of the Thirteenth Amendment, I want to make a few things clear. These are:

(a) From the impugned judgment, it is clear that the points argued on behalf of the writ-petitioner before the High Court Division were:

(i)	Since by inserting articles 58A and 58B-58E in the Constitution by the Thirteenth Amendment democracy, a basic structure of the Constitution, has been destroyed, the same is void and is liable to be declared *ultravires* the Constitution.

(ii)	The impugned Act having amended articles 48 and 56 of the Constitution was liable to be sent to referendum as envisaged in article 142(1)(1A) of the Constitution but it was not done. Hence the Thirteenth Amendment is liable to be declared *ultravires* the Constitution.
(iii)	Article 58C(3) and (4) having provided for the retired Chief Justice of Bangladesh and the retired Judges of this Division to become the Chief Adviser of the Non-Party Care-taker Government has in effect impaired the independence of judiciary inasmuch as such position tends to make a Judge act in a manner subservient to the Government.

(b) But, before this Division, a new point, namely, that by making provisions in the Thirteenth Amendment for the retired Chief Justices of Bangladesh and the retired Judges of this Division to become the Chief Adviser of the Non-Party Care-taker Government, separation of powers, another basic structure of the Constitution, has also been destroyed, has been argued.

(c) From the impugned judgment, it further appears that on behalf of the contesting respondent Nos.1, 5 and 6, the then Attorney General Mr. Hasan Arif, Mr. Abdur Razzaque and Mr. M. Amirul Islam respectively made submissions supporting the constitutionality of the Thirteenth Amendment providing for the Non-Party Care-taker Government in the Constitution. It further appears that although the BNP got itself added as respondent No.7, neither filed any affidavit-in-opposition nor contested the Rule, but fact remains that during the hearing of the Rule, it was in the government.

(d) The impugned judgment further shows that the learned Attorney General further contended that because of insertion of articles 58A-58E in the Constitution articles 48 and 56 of the Constitution were not amended. Therefore, the impugned Act was not required to be

sent to referendum as envisaged in article 142 (1)(1A). The learned Attorney General also argued the point of *locus standi* of the petitioner to file the writ petition and that the writ petition was not maintainable being hit by the principle of *res-judicata*.

(e) The learned Attorney General and Mr. Abdur Razzaque further argued that even prior to the Thirteenth Amendment, there was a caretaker system in the Constitution and in that the Prime Minister was allowed to run the Government on the dissolution of Parliament till the general election of members of Parliament was held and the Parliament was constituted although he (the Prime Minister) ceased to be an elected representative of the people on the dissolution of Parliament.

(f) Mr. M. Amirul Islam, however, argued that the concept of Non-Party Care-taker Government might not be, any longer, considered as a full proof mechanism and it might be required to be replaced by an even more efficacious and effective system for holding a free, fair, peaceful and independent general elections of members of Parliament provided that a consensus is again reached in this regard by the people's representatives. He suggested that the nation might even think of a National Government as an alternative beneficial system to Non-Party Care-taker Government. He further submitted that since the impugned Act did not directly amend the preamble and articles 8, 48 and 56 of the Constitution there was no requirement to send the same to referendum as required under article 142(1)(1A) of the Constitution and the impugned Act is valid.

(g) The two amici curiae appointed by the High Court Division, namely, Mr. Rafique-ul Haque and Mr. Abdul Wadud Bhuinya also argued that the impugned Act, not having directly amended the preamble and articles 8, 48 and 56 of the Constitution, was not required to be sent to referendum as envisaged in clause (1A) of article 142(1) of the Constitution and the impugned Act is valid and constitutional. However, Mr. Rafique-ul Haque syllogistically argued that the provisions made in the Thirteenth Amendment for the retired Chief Justices of Bangladesh and the retired Judges of this Division to head Non-Party Care-taker Government as the Chief Adviser, have affected and impaired the independence of judiciary and he suggested that the representatives of the people should put their heads together again to find a suitable mechanism for "obtaining free, fair and independent election without involving the Judges and the Chief Justice in the process in particular."

(h) From the above, it is clear that neither the learned Advocate for the writ-petitioner nor the then learned Attorney General appearing for respondent No.1, nor the learned Advocates for respondent Nos.5 and 6 and the amici curiae appointed by the High Court Division ever raised any question that democracy and independence of judiciary are not the basic structures of the Constitution. It is also to be noted that none raised any question either before the High Court Division or before this Division as to the power of judicial review of the High Court Division under article 102 of the Constitution and this Division under article 103 in striking down a constitutional provision or amendment brought in the Constitution if the same is

found to have impaired or destroyed any of the basic or fundamental structures of the Constitution.

(i) Mr. T. H. Khan and Mr. Mahmudul Islam never argued before this Division that this Division should refrain from deciding the constitutionality of the Thirteenth Amendment; they simply suggested that the matter of reform in the Non-Party Care-taker Government system, if any, should be left to the Parliament submitting with force that there is no alternative to the system of Non-Party Care-taker Government as introduced by the Thirteenth Amendment to ensure the democratic right of the people and to empower them to elect their own representatives in a free, fair and impartial elections of members of Parliament.

(j) All the 3(three) learned Judges of the Full Bench in unequivocal terms have said that 'democracy' and 'independence of judiciary' are the two basic structures of the Constitution.

The learned Judges of the Full Bench in coming to the conclusions as noted hereinbefore gave their reasoning as follows:

Md. Joynul Abedin J: The petitioner had *locus standi* to file the writ petition and the same was not barred by the principle of *res judicata*; the impugned Act has not amended the preamble and articles 8, 48, 56 and 142 of the Constitution "requiring reference of the said Bill to referendum" as required by clause (1A) of article 142(1) thereof; amendment cannot be made by implication or as a consequence; operation of article 48(3) of the Constitution has been suspended for a limited period and as such, it cannot be said that article 58E has amended the article; the impugned Act was passed to strengthen, consolidate and institutionalise democracy in Bangladesh; the concept of Caretaker Government was very much in the Constitution as apparent from articles 57(3) and 58(4) thereof and in view of article 58A as incorporated in the Constitution that shall remain suspended when the Non-Party Care-taker Government under Chapter IIA is formed; the original concept of Caretaker Government run by the Prime Minister could not ensure free and fair election of members of Parliament for the reason that although the

Prime Minister used to run the Government during the interregnum and held "the general election to the Parliament", but the election was not free and fair inasmuch as "the Government men and machinery were used by such Government to influence the election result in favour of the political party to which the Prime Minister belonged"; clause (1A) of article 142(1) as brought in the Constitution in 1978 is valid and part of the Constitution; it is widely known and appreciated that the Judges and the Chief Justices of the Supreme Court of Bangladesh are not only most learned persons, but also by virtue of their training and holding of such high office, they are normally considered to have attained and acquired a status and image of upright, qualified, impartial and independent persons in the contemporary time; the legislature, therefore, in its wisdom preferred them as persons of high moral and impartial character and dignity and high calibre and most capable for discharging the powers and functions as adviser and the Chief Adviser in the Non-Party Caretaker Government; "We therefore do not find any reason or justification to question, suspect or undermine the wisdom of the legislature in this regard"; no system should be taken to be a "fool-proof one" and it is up to the parliament in future to bring any amendment to the Constitution to achieve the end for consolidating and institutionalising democracy in the country. "But till then, since we find the impugned Act valid and constitutional, the present constitutional dispensation i.e. the non-party caretaker government system for holding free, fair and peaceful election to the parliament must be retained."

Md. Awlad Ali, J: The Thirteenth Amendment as enacted by the parliament which is under challenge is the outcome of the consensus of the political parties; major political parties and also the small parties struggled for a system where all citizens, may be an indigent, under-privileged and a citizen having enough wealth and power will have the equal opportunity to exercise his voting power to elect representatives of his or their own choice in the election of parliament; theoretically the Thirteenth Amendment is also based on the general will of the people's demand or popular demand, was accepted and people agreed to adopt and practice the system as envisaged therein; no segment of people opposed the Thirteenth Amendment and it was enacted in aid of democracy not in derogation of democracy as enshrined in the Constitution; "if we really believe in democracy and want to practice democracy" then what is the harm if certain provisions as laid down in Articles 48 (3), 56 and 57(3) of the Constitution are suspended or kept in abeyance for a period of three months', because the people wanted a system where democratic norms for free and fair election would be adhered to; in the scheme of the impugned legislation, it is well thought out plan which is based on the political consensus that a retired Chief Justice shall hold the office of the Chief Adviser and in case of non-availability of such person alternatives are mentioned there in the relevant articles; the Thirteenth Amendment is an apparatus set in the body of the Constitution and "that apparatus during the period of 90 days will regulate certain provisions of the Constitution i.e. it will

keep certain provisions ineffective and after general election and constitution of a new parliament the apparatus itself will become inoperative" and the articles contained in Chapter IIA will remain as dead articles until the dissolution of parliament for the purpose of holding general election; the Thirteenth Amendment has not amended any provision of the Constitution and as such, Act 1 of 1996 was not required to be referred to a referendum as contemplated in clause (1A) of article 142(1) of the Constitution; if after dissolution of parliament general elections to parliament are held under the party Government or in the system that existed in the Constitution the voting power may be monopolised by a sectional interest or interests at the expense of the rest of the citizens.

Mirza Hussain Haider, J: Through the constitutional process of "Non-Party Caretaker Government" free will of the people for exercising their fundamental right of casting vote in the general election has contributed to the establishment of democracy in its true meaning, as such, the people of Bangladesh with such amendment came up with a popular slogan "আমার ভোট আমি দিব যাক খুশি তাক ॥ `eÖ; the people have accepted the concept of "Non Party Caretaker Government" which has given the real meaning to the term "Democracy" and the democratic process as a whole; Thirteenth Amendment has actually strengthened and improved the system of holding free, fair and impartial elections by which the people can exercise their fundamental rights freely in electing the government. So, if democracy is taken as a basic structure of the Constitution "the Thirteenth Amendment cannot be said to be ultravires since improvement, which is permissible, has been brought in the system;" neither the long title nor the amendment itself shows that there was any breach of the provision of article 142 as a whole; in view of the provisions as incorporated in the impugned Act the provision of referendum as in article 142(1A) was not attracted; with the dissolution of parliament out going Prime Minister loses his character as an elected representative; holding of an election impartially free from influence or power under a partisan Government becomes a remote proposition as they continue to retain their affiliation with their party; moreover they are also eligible to participate in the ensuing election. Chapter-II and chapter-IIA are alternative to each other, one will exist in the absence of the other, when one operates the other remains suspended; the concept of suspension of certain articles of the Constitution including the enforcement of fundamental rights, has already been provided explicitly in the Constitution itself under certain situation as in articles 141B and 141C of Part-IXA of the Constitution; keeping certain provisions ineffective or suspended for a particular period, for the sake of the others and thereby allowing the people to exercise their fundamental rights or electing the democratic government freely and fairly cannot be termed as unconstitutional; the Parliament by its absolute majority rightly passed the amendment in question with full consent of all the political parties making provisions of the retired Chief Justices as the head of the Non-Party Care-taker Government; it is not correct that the Thirteenth Amendment has

> brought about an allurement for the Judges or interference in the judiciary; an impartial Non-Party Care-taker Government can only be headed by a person who had been heading the impartial judiciary, the Chief Justice of the country, upon whom the people have full trust and confidence.

In the above backdrop, I do not consider it at all necessary to discuss about the power of judicial review of the High Court Division under article 102 of the Constitution and of this Division in appeal under article 103 thereof arising out of such proceeding. I proceed on the premise that by now it is well settled by this Division as well by the other apex Courts of the sub-continent and those of the United States of America and the Great Britain that the superior Court in exercising its power of judicial review can see the constitutionality or *vires* of an Act passed by Parliament bringing an amendment to the Constitution by way of addition, alteration, substitution or repeal by Act of Parliament and can very well strike down an Act or a constitutional provision if the same is found to have impaired or destroyed any of the basic or fundamental structures of the Constitution. In this regard, I consider one authority enough, namely, the case of Anwar Hossain Chowdhury-vs-Government of the People's Republic of Bangladesh and others 41 DLR(AD)165=BLD Special issue, 1989 to rely on for the proposition.

In view of the submissions of the learned Counsel for the appellant in the appeal and the leave petition, the learned Attorney General for respondent No.1 as well as the amici curiae, the pleadings of the respective parties and the findings given by the Full Bench as noted hereinbefore, the questions to be decided in this appeal and the leave petition are:

(i)	whether the Thirteenth Amendment has amended the preamble and articles 8, 48 and 56 of the Constitution,
(ii)	whether, in view of insertions of article 58A in Chapter-II and articles 58B-58E by opening a new chapter, Chapter IIA under the head Non-Party Care-taker Government in Part IV of the

	Constitution, democracy, a basic structure of the Constitution, has been destroyed or impaired,
(iii)	whether, by making provisions for the retired Chief Justices of Bangladesh and the retired Judges of this Division to head the Non-Party Care-taker Government as the Chief Adviser in the Thirteenth Amendment, the independence of judiciary and separation of powers, the basic structures of the Constitution, have been impaired or destroyed.
(iv)	whether, by amending article 61 of the Constitution by the Thirteenth Amendment, the concept of two executives, that is, a dyarchy has been injected in the Constitution during the period of Non-Party Care-taker Government.
(v)	whether, in view of the provisions of article 58D as inserted in the Thirteenth Amendment of the Constitution that the Non-Party Care-taker Government shall discharge its functions as an interim Government and shall carry on the routine functions of such Government with the aid and assistance of persons in the service of the Republic and, except in case of necessity for the discharge of such functions, it shall not make any policy decision, shall suffer from any lack of jurisdiction to make policy decision in an emergency such as on foreign policy matter.

However, the questions as formulated hereinbefore, are not discussed serially and there may be overlapping.

To answer the questions, I consider it very pertinent and relevant to see first the meaning of the term/word democracy as used in the Constitution. Although, the term/word democracy has been used in the Preamble and in articles 8 and 11 of the Constitution, the same has not been defined or interpreted anywhere in the Constitution. It is most necessary because the whole argument, by the learned Counsel for the appellant and petitioner, the learned Attorney General for respondent No.1 and the amici curiae, is centered around democracy; democracy is also referable to articles 48 and 56 of the Constitution.

Democracy is probably the most emotionally provocative term/word in the world's political vocabulary. In other words, it is not so easy a term/word to decipher and there cannot be one definition to give a full and complete meaning of democracy. Even the communist Russia claims itself

to be the only true democracy. Even then we have to see the meaning and the implication of the term/word democracy in the context of our constitutional dispensation; the constitutionality of the Thirteenth Amendment would largely depend upon the understanding of this term/word. As per Oxford English Dictionary 'democracy' means "1. a system of government in which all the people of a country can vote to elect their representatives." As per Black's Law Dictionary, 'democracy' means "Government by the people, either directly, or through representatives." As per Chambers Dictionary, 'democracy' is "a form of government in which the supreme power is vested in the people collectively, and is administered by them or by officers appointed by them, the common people; a state of society characterised by recognition of equality of rights and privileges for all people; political, social or legal equality."

Various statesmen and political thinkers have defined democracy in various ways. The definitions of democracy by leading authorities may be grouped under two major ideas or schools of thought. One holds that "democracy means simply a particular form of Government" a form in which "the people" or "the many" exercise political control. The other view is that 'democracy' is much more than a mere form or system of government; that it is, first and foremost, a philosophy of human society, a "way of life", a set of ideals and attitudes motivating and guiding the behaviour of members of a society toward one another, not only in their political affairs, but also in their economic, social and cultural relationships as well. The term/word 'democracy' is of Greek origin, and its formal meaning is "rule by the multitude", supports the narrower definition given above. Lord Bryce defined democracy as follows:

> "I use the word in its old and strict sense, as denoting a Government in which the will of the majority of qualified citizens rules, taking the qualified citizens to constitute at least three-fourths, so that the physical force of the citizens coincides (broadly speaking) with their voting power."

According to Harold J, Laski *"the essence of the democratic idea" is "the effort of men to affirm their own essence and to remove all barriers to that affirmation."* He stressed the demand for equality-economic and social, as well as political-as the "basis of democratic development". He believed that "so long as there is inequality, there cannot be liberty." R.M. Maclver indicated the difficulty of separating democracy as a form of Government from democracy as a way of life, when he said:

> *"we do not define democracy by its spirit, since democracy is a form of government... But men have struggled toward democracy not for the sake of the form but for the way of life that it sustains."*

Justice Mathew said "Democracy means the rule of majority." As per Sir Ivor Jenning democracy is "the vesting of the political power in free and fair election."

Democracy is both: a form of Government and a philosophy of living together. It is, indeed, a government in which the people or a majority of them possess the power of final decision on major questions of public policy. However, such a government exits not as an end in itself but as means towards more important ends. Those ends are difficult, if not impossible, to enumerate in any exhaustive fashion, each new era in human, affairs brings new problem, new needs and new goals for democracy. However, a truly democratic nation constantly strives toward "the good life" for all its inhabitants; the maximum of individual liberty consistent with general security, order, and welfare; the widest possible opportunities for all, to the end that men may become as nearly equal as their native capacities will allow; the fullest development of each human

personality; and the active participation of the largest possible number of citizens in the process of Government. To quote A.D. Lindsay *"the end of democratic government is to minister to the common life of society, and to remove the disharmonies that trouble it";* Abrahma Lincoln the great President of the United States of America said in his Gattesberg address *"ours is a government of the people, by the people, for the people".* In this address of Abrahman Lincoln the minimum content of a government has been spoken of. And such a minimum content of a government is possible only when the people will have a chance to exercise their right of adult franchise in a free, fair and impartial election. And the election must be so as Mr. T.H.Khan stressed that Sir Winston Churchill's little man must be able to walk into the little booth with a little pencil to make a little cross on a little bit of paper freely and fairly. And if the little man cannot walk into the little booth with the little pencil to make his little cross on a little bit of paper to select his own representative then the democracy shall be a far cry and shall be in the Constitution only for the psychological satisfaction of the people of this country. Win in the election of a particular candidate or party by foul means such as by manipulation, coercion, intimidation and exerting undue influence upon the Government machinery is a defeat and destruction of democracy which is the fundamental structure of the Constitution for which our martyrs shed their blood with aspiration that they will get a society free from all kinds of exploitation and their fundamental rights will be ensured. Democracy cannot have permanent form or shape and is still an evolving theory of governance and it will vary from country to country and nation to nation. However, in a compact way, it can be said that democracy is the rule of majority elected by the people

for a specified period upon exercising their right to vote in a free and fair election for their well being in all fields: economic, social and political and for their good governance as well.

I do not want to make this judgment more voluminous unnecessarily by deliberation on the question as to whether democracy is one of the basic structures of the Constitution or not, because there can be no argument that democracy is not a basic structure of our Constitution. Moreover, as pointed out hereinbefore, the learned Counsel for the appellant and petitioner, the learned Attorney General and the amici curiae, have not raised any such absurd question before us. And all made their submissions accepting that democracy is a basic structure of our Constitution. The High Court Division also held that democracy is a basic structure of our Constitution. I am also not oblivious of the well settled legal proposition that while deciding a case, a Court shall not embark upon unnecessary academic discussions and shall confine itself within the issues, which will crop up from the pleadings of the respective parties. (see the cases of Kudrat-E-Elahi Panir-vs-Bangladesh and another, 44DLR(AD)319, Bangladesh and others-vs-Md. Idrisur Rahman and others, 17BLT(AD)231, Moudud Ahmed, Moulana Matiur Rahman Nizami, Mrs. Sheikh Hasina Alias Sheikh Hasina Wazed-vs- Md. Anwar Hossain Khan(dead) and others, 28BLD(AD)81 and Mr. Mahamudul Alam Montu-vs-Sanwar Hossain Talukder and others, BLD1990(AD)237.)

Taking it as an accepted position that democracy is a form of government chosen by the people of a country for their good governance and well being and that it is the rule of majority elected by the people for a specified term upon exercising their right of vote in a free and fair election,

let us see what form of government was given by our Constituent Assembly in the Constitution and what the position of such form of Government was in the Constitution when the Thirteenth Amendment was enacted on 25th of March, 1996 and assented to by the President on 28.03.1996.

In the original Constitution which was adopted, enacted and given to ourselves by the Constituent Assembly, it was the parliamentary form of government. In Part IV like the present state of the Constitution, there were two chapters, Chapter-I and Chapter-II. Chapter I dealt with the President. A combined reading of articles 48-54 of Chapter-I shows that the President was not vested with the executive power like the present constitutional dispensation. Provisions were made for election of the President by members of Parliament. Chapter II dealt with the Prime Minister and the Cabinet. Clause (1) of article 55 provided that there shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate. Clause (2) of article 55 provided that the executive power of the Republic shall, in accordance with the Constitution, be exercised by or on the authority of the Prime Minister. In the present context, clauses (2) and (4) of article 56 of the original Constitution are very relevant. But I consider it better to quote the entire article which is as follows:

> *"56. (1) There shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister.*
> *(2) 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, subject to clause (4), no person shall be eligible to be so appointed unless he is a member of Parliament.*

> *(3) The President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament.*
> *(4) A Minister who at the time of his appointment is not a member of Parliament shall, unless elected as a member of Parliament within a period of six months from the date of such appointment, cease to be a Minister.*
> *(5) If occasion arises for making any appointment under clause (2) or clause (3) between a dissolution of Parliament and the next following general election of members of Parliament, the persons who were such members immediately before the dissolution shall be regarded for the purpose of this clause as continuing to be such members."*

Reading together clauses (2) and (4) of article 56, it *prima-facie* appears that under the original dispensation of the Constitution, one could become a Minister without being a member of Parliament and could remain so for a period of 6(six) months if he was not elected as member of Parliament within the said period.

The above system of government continued till passing of the Constitution (Fourth Amendment) Act, 1975 which was assented to by the President on the 25th January, 1975. Instead of parliamentary form of government, presidential form of government was introduced by this Amendment. Chapters I and II of Part IV of the Constitution were substituted as a whole making the President all powerful to be elected in accordance with law by direct election and the post of Vice-President was created to be appointed by the President. The executive authority of the Republic was vested in the President to be exercised either directly or through officers, subordinate to him in accordance with the Constitution. In Chapter II under the head- The Council of Ministers, it was provided as follows:

> **"58. Council of Ministers.−(**1) There shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by the Council or a Minister to the President shall not be inquired into in any court.
(3) The President shall, in his discretion, appoint from among the members of Parliament or persons qualified to be elected as members of Parliament, a Prime Minister and such other Ministers, Ministers of State and Deputy Ministers as he deems necessary:
Provided that a Minister of State or Deputy Minister shall not be a member of the Council.
(4) The President shall preside at the meetings of the Council or may direct the Vice-President or Prime Minister to preside at such meetings.
(5) The Ministers shall hold office during the pleasure of the President.
(6) A Minister may resign his office by writing under his hand addressed to the President.
(7) In this article, "Minister" includes a Prime Minister, Minister of State and Deputy Minister." and
(b) Chapter III shall be omitted (Chapter III dealt with local Government)

Reading of the above article as introduced by the Fourth Amendment of the Constitution shows that to become the Prime Minister, the Minister, the Minister of State and the Deputy Minister, it was not necessary to be a member of Parliament; it was sufficient to be qualified to be a member of Parliament and the Prime Minister and the other Ministers used to hold the office during the pleasure of the President.

Then again, in 1991, the Constitution was amended by the Constitution (Twelfth Amendment) Act, 1991 and instead of presidential form of government, parliamentary form of government was re-introduced vesting the executive power of the Republic in the Prime Minister and then came the Thirteenth Amendment introducing the Non-Party Care-taker Government. And we are to test the constitutionality of the Thirteenth Amendment bearing in mind the parliamentary form of Government as introduced in the Constitution in 1991 by the Twelfth Amendment and not the Parliamentary form of Government which was adopted, enacted and

given by the Constituent Assembly on the eighteenth day of Kartick 1379 B.S. corresponding to 4th day of November, 1972.

To comprehend the constitutional scheme of democracy and the democratic process as were given by the Constituent Assembly and then by the Parliament by the Fourth Amendment and the Twelfth Amendment respectively and to see whether the Thirteenth Amendment has destroyed or impaired such democracy and democratic process, we have to consider the Preamble, articles 7, 8, 11, 55 and 56 of the Constitution along with articles 65 and 72 as they stand today in view of the judgment passed by this Division in the Fifth Amendment case. We have also to consider article 123(3) of the Constitution as it stood before the Thirteenth Amendment in juxtaposition with article 123(3) as it stands today with the other articles as mentioned above. We have also to bear in mind that this Division has a special role as the guardian of the Constitution and in interpreting any provision of the Constitution, this Division has to see that the constitutional process is carried on and extra-constitutional force does not get a chance to interfere in the matter. In interpreting the above constitutional provisions, we are also to bear in mind the principle of constitutional interpretation that every part of the Constitution from the Preamble to the last schedule is the Constitution of the People's Republic of Bangladesh. And every provision of the Constitution is essential and all these provisions must exist in harmony and there cannot be any conflict between any provision of the Constitution and no provision will be subordinate to the other. The construction of one part throws light on the other part and the construction must hold a balance between all parts thereof. It is also to be presumed that all provisions of the Constitution are harmonious and by no stretch of

imagination, one provision of the Constitution can be in conflict with the others as the framers of a written Constitution could never intend for such conflict and anomaly.

The preamble, articles 7, 8, 11, and 56 read as follows:

"

PREAMBLE

We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;

Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S., corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

8. (1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

(2) The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

11. 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.

56. (1) There shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister.

(2) 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.

(3) The President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament.

(4) If occasion arises for making any appointment under clause (2) or clause (3) between a dissolution of Parliament and the next following general election of members of Parliament, the persons who were such members immediately before the dissolution shall be regarded for the purpose of this clause as continuing to be such members."

The preamble of the Constitution unequivocally speaks that along with other high ideals, democracy inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the national liberation struggle and shall be one of the fundamental principles of the Constitution. The preamble has further pledged that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation-a society in which rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. Article 7 has mandated that all powers in the Republic belong to the people and their exercise, on their behalf, shall be effected only under, and by the authority of, the Constitution. People, as used in the article, definitely connote the nation: the inhabitants of this country, the general population and the citizens of this country. In the modern system of democracy, because of

the size of the population in a State like ours, it is impossible to practise democracy as it originated and was practised in the City State of Greece where the whole body of citizens used to form the Assembly, which was vested with the supreme authority. Freedom and rule of law were the two aspects of the City State. The Athenians called “no man their master”. Then came the question of general will or will of the people as propagated by Jean Jacques Rousseau in his book “The Social Contract.” The general will is the application of human freedom to political institution. In the modern state in a nation of any size, this principle has now been firmly established for choosing a certain number of agents or representatives who are numerous enough to speak for the whole people and few enough to meet at one place. The first essential of a democratic constitution is that the entire people must be represented in the legislature by their nominee to be elected periodically by them. The object, being the popular will, should be reflected in the legislature. The same political concept has been enshrined in article 7 of our Constitution which says all powers in the Republic belong to the people and the Constitution is the solemn expression of the will of the people. If we see the language of the latter part of clause (1) of article 7 “and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution”, it will appear that power on behalf of the people shall be exercised under a mechanism provided in the Constitution itself. More significantly article 7 does not say about democracy, but it is article 8 which says about democracy and article 11 says that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of human persons shall be guaranteed and in which effective participation by the people

through their elected representatives in administration at all levels shall be ensured.

Part-IV of the Constitution has dealt with the Executive. In this part there are five chapters. Chapter-I has dealt with the President. Article 48(1) has stated that there shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law. Clause (2) thereof has provided that the President shall, as Head of the State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by the Constitution and by any other law. Clause (3) has stated that in the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister. Proviso to clause (3) has stipulated that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court. Other clauses of article 48 have dealt with the provisions as to the qualifications to be the President. The other articles, namely, 49-54 have dealt with the term of office of the President; President's immunity; procedure of impeachment of the President; removal of the President on ground of incapacity and the provision for discharging the functions of the President by the Speaker if a vacancy occurs in the office of the President or if the President is unable to discharge the functions of his office on account of his absence, illness or any other case.

Chapter II of Part IV has dealt with the Prime Minister and the Cabinet. Clause (1) of article 55 has mandated that there shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time

designate. Clause (2) of article 55 has in clear terms stipulated that the executive power of the Republic shall, in accordance with the Constitution, be exercised by or on the authority of the Prime Minister. Clauses (3) (4) (5) and (6) of article 55 are as follows:

> "(3) The Cabinet shall be collectively responsible to Parliament.
> (4) All executive actions of the Government shall be expressed to be taken in the name of the President.
> (5) The President shall by rules specify the manner in which orders and other instruments made in his name shall be attested or authenticated, and the validity of any order or instrument so attested or authenticated shall not be questioned in any court on the ground that it was not duly made or executed.
> (6) The President shall make rules for the allocation and transaction of the business of the Government."

Article 56(1) as quoted hereinbefore has provided that there shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister. Article 56(2) has mandated that the appointment of the Prime Minister, and other Ministers and of the Ministers of State and the Deputy Ministers, shall be 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. Articles 57 and 58 have provided for the tenure of the office of the Prime Minister and the tenure of office of other Ministers.

Part V has dealt with the Legislature. In this part, there are 3(three) Chapters. Chapter-I has dealt with Parliament. First article of this Chapter is article 65. Clause (1) of article 65 has mandated that there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of the Constitution, shall be vested the

legislative powers of the Republic provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect. Clause (2) of article 65 is of paramount importance which says that Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as Members of Parliament. I consider it profitable to quote clause (2) of article 65 for ready reference which reads as follows:

> "(2) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as Members of Parliament."

Clause (3) of article 56 of the Constitution has clearly mandated that to be a Prime Minister one must be a member of Parliament who shall appear to the President to command the support of the majority of members of Parliament. And definitely, the only way to be a member of Parliament is through an election to be held in accordance with law as provided in clause (2) of article 65 as quoted above.

Now, if we go back to article 7 of the Constitution and place the same in juxtaposition with article 55 of the Constitution, it will appear that the powers on behalf of the people of the Republic shall be exercised by the Prime Minister and his other colleagues of the Cabinet through rules of business to be made by the President, who heads the State. So it is the people of the Republic who do govern themselves through their elected representatives.

As already stated hereinbefore, in the preamble of the Constitution, there is specific reference to democracy and the democratic process; in article 7 there is no reference to democracy; in article 11, it has been specifically stated that the Republic shall be a democracy. In none of these articles, there is any reference to election which is specifically mentioned in sub-article (2) of article 65 of the Constitution. Article 122(1) has mandated that the elections to Parliament shall be on the basis of adult franchise. Article 122(2) has detailed who shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament. In this regard, it is also necessary to consider the Proclamation of Independence which was made on 10th of April, 1971 from Mujibnagar, the first document which set forth the constitutional background of Bangladesh. The proclamation reads as follows:

"Proclamation of Independence

The Proclamation of Independence dated 10th April, 1971 issued from Mujibnagar reads:

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971 to elect representative for the purpose of framing a Constitution,

.....

And

Whereas General Yahya Khan summoned the elected representatives of the people to meet on 3rd March, 1971 for the purpose of framing a Constitution,

And

Whereas the Assembly so summoned was arbitrarily and illegally postponed for indefinite period,

....

And

Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for elected representatives of the people of Bangladesh to meet and frame a Constitution and give to themselves a Government,

And

Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

We, the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a constituent Assembly, and having held mutual consultations, and in order to ensure for the people of Bangladesh equality, human dignity and social justice;

declare and constitute Bangladesh to be sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman, and

do hereby affirm and resolve till such time as a Constitution is framed, Bangabandhu Sheikh Mujibur Rahman shall be President of the Republic and Syed Nazrul Islam shall be the Vice-President of the Republic, and that the President shall be Supreme Commander of all the Armed Forces of the Republic,

shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon,

shall have the power to appoint a Prime Minister and such other ministers as he considers necessary,

shall have the power to levy taxes and expend monies,

shall have the power to summon and adjourn the constituent Assembly, and

do all other things that may be necessary to give to the people of Bangladesh an orderly and just government,

We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers

due to any reason whatever the Vice-President shall have and exercise all the powers, duties and responsibilities herein conferred on the President.

.....

We further resolve that this Proclamation of Independence shall be deemed to have come into effect from 26th day of March, 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali, our duly constituted Potentiary, to give to the President and Vice-President oaths of office."

(Proclamation of Independence has been quoted from the Eight Amendment judgment).

Bangladesh emerged as an independent country on 16th December, 1971 when the national liberation struggle ended. Provisional Constitution of Bangladesh Order, 1972 was promulgated on the 11th day of January, 1972 whereupon Justice Abu Sayed Chowdhury became the President and Sheikh Mujibur Rahman (as in the gazette) assumed the office of the Prime Minister. Thus, clear shift had been made to the future constitutional framework from the presidential system to Parliamentary system. Then the Constituent Assembly of Bangladesh Order, 1972 (P.O. 22 of 1972) was promulgated on 23rd March, 1972 "for the functioning of the Constituent Assembly." Paragraph 7 of the Order stated "The Assembly shall frame a Constitution for the Republic." In paragraph 1 of the Fourth Schedule to the Constitution it was mentioned "upon the commencement of this Constitution, the Constituent Assembly, having discharged its responsibility of framing a Constitution for the Republic, shall stand dissolved." As already stated hereinbefore on the eighteenth day of Kartick, 1379 B.S. corresponding to the 4th day of November, 1972 A.D., our Constituent Assembly chose parliamentary form of Government vesting the

executive power of the Republic upon the Prime Minister. By article 151 of the Constitution P.O.22 of 1972 was expressly repealed.

Proclamation of Independence which has been quoted hereinbefore clearly referred to the "free elections" that were held in Bangladesh from the 7th day of December, 1970 to the 17th day of January, 1971 to elect the representatives for the purpose of framing a Constitution and also referred to the circumstances under which elected representatives failed to meet on the 3rd day of March, 1971 to frame a Constitution and to give themselves a form of government. And in fact, it is the people's representatives who were elected in the free and fair election held from the 7th day of December, 1970 to the 17th day of January, 1971 for the purpose of framing a Constitution. And they formed the Constituent Assembly of Bangladesh by virtue of the provisions of P.O.22 of 1972 to frame a Constitution for the Republic, who adopted, enacted and gave to ourselves the Constitution which came into operation on the 16th day of December, 1972.

To make the people of Bangladesh powerful and sovereign in its true sense as envisaged in article 7 of the Constitution their right to choose their own representatives to form the Government through the exercise of their right of adult franchise is to be ensured, which is only possible in a free, fair and impartial election. In the absence of free, fair and impartial election, the democracy will be a far cry and the people's powers or their supremacy will only remain in the document named the Constitution of the People's Republic of Bangladesh. Had there been no free elections in 1970 as mentioned in the Proclamation of Independence, the people of this soil would not have got the chance to elect their own representatives for the purpose of framing a Constitution and then possibly they would not have

the mandate to declare independence and to give to ourselves a democratic Constitution after the country was liberated from the occupation forces. As discussed hereinbefore, presently ours is a Parliamentary form of Government introduced in 1991 by the Twelfth Amendment of the Constitution. In other words, it can be said parliamentary executive form of Government. It will be a mockery to say that all powers of the Republic belong to the people unless they get a chance to practise democracy, that is, the right to choose their own representatives in a free, fair and impartial general election of members of Parliament as provided in article 65(2) of the Constitution.

The entire Part-VII of the Constitution has been devoted to elections. In this part, there is no chapter. It starts with article 118. This article says that there shall be an Election Commission for Bangladesh consisting of a Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time direct, and the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf, be made by the President. Clauses (2), (3), (4), (5) and (6) of article 118 have dealt with as to who shall act as the Chairman of the Commission, the term of office of an Election Commissioner, the independence of the Commission, the condition of service of Election Commissioners and the manner of removal of an Election Commissioner from his post respectively. In article 119 functions of the Election Commission have been enumerated. It is better to quote the article as a whole for ready reference:

> "119.(1) The superintendence, direction and control of the preparation of the electoral rolls for elections to the office of President and to parliament and the conduct of such elections shall vest in the Election Commission which shall, in accordance with the Constitution and any other law-
> (a) hold elections to the office of President;
> (b) hold elections of members of Parliament;
> (c) delimit the constituencies for the purpose of elections to the office of President and to Parliament; and
> (d) prepare electoral rolls for the purpose of elections to the office of President and to Parliament;
> (2) The Election Commission shall perform such functions, in addition to those specified in the foregoing clauses, as may be prescribed by this Constitution or by any other law."

The other articles of the part, namely, 120-125 have dealt with the matters such as staff of Election Commission, what shall be the electoral roll for the Constituency, qualifications for registration as voter, time for holding elections, power of Parliament to make provisions as to elections, validity of election law and elections. Article 126 has mandated that it shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions.

The fact that the Constitution speaks about democracy and also election of members of Parliament by direct election in accordance with law and article 11 of the Constitution specifically says 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 free and fair election of members of Parliament is a must to achieve those goals. In the context, it is important and pertinent to see what the impact of election is in a democracy, particularly in a parliamentary form of Government like ours as today.

Like democracy, election has not been defined in anywhere in the Constitution though election has been used in many articles such as:

articles 65(2), 66(2), 67(1), 70(1), 71(2), 72(4), 74(1)(2), 119)1), 122(1), 123(1)(2)(3)(4), 124, 125 of the Constitution. Election has also not been defined in the Representation of the People Order, 1972(hereinafter referred to as the RPO, 1972) under which election of members of Parliament is held. And that being the position, we have to fall back upon the dictionary meaning of election. As per Oxford English Dictionary, 7th edition, 'election' means "the process of choosing a person or a group of people for a position, especially a political position, by voting; 'election' is an occasion on which people officially choose a political representative or government by voting." As per Chambers Dictionary, 'election' means "the act of electing or choosing, the public choice of a person for office, usu. by the votes of a constituent body; free will; the exercise of god's sovereign will in the predetermination of certain persons to salvation (theol); those elected in this way (bible). As per Black's Law Dictionary, 'election' means "3.The process of selecting a person to occupy an office (usu. a public office) membership, award or other title or status of members of Parliament." If we consider the above dictionary meaning of election along with article 122 of the Constitution, it will appear that the election process should be such that people's right of choice through adult franchise to select their own representatives in the Parliament, i.e. members of Parliament, should not, in any way, be hindered and obstructed.

Election of what type? Election dominated by muscle power, money, rigging and manipulation and exertion of undue influence upon the Government machinery; a farcical election where people's vote will be hijacked by putting undue pressure and coercion and threat and thus to give scope to the thugs and thieves to get elected as submitted by Mr.

Mahmudul Islam to rule the country for long 5(five) years, that is, minus the mandate of the people, or a free, fair and impartial election and thus, ensuring people's right to choose their own representatives to be governed as mandated in article 7 read with articles 122 and 65(2) of the Constitution. Free and fair election is a must for the sustenance of democracy and the democratic process. In the case of Sreemati Indira Gandhi-vs- Raj Narayan, AIR1975 (SC) 2299 it was held: free and fair election is also a basic structure of the Indian Constitution and by majority view, the amendment brought in the Indian Constitution by the Thirty Ninth Amendment was declared unconstitutional, as it violated the principle of free and fair election. In the case of Election Commission, In Special Reference No.1 of 2002 (2002) 8 SCC 237, (Gujrat Assembly Election Matter) Mr. Justice V.N. Khare observed that

> "It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical free and fair election is the substratum of democracy. If there is no free and fair periodical election, it is the end of democracy and the same was recognised in M.G. Gill-vs-Chief Election Commissioner thus: (SCC p 419, para 12.)
> **"12.** A free and fair election based on universal adult franchise is the basic, regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicial roles in the total scheme directed towards the holding of free elections, are the specifics ... The super authority is the Election Commission, the kingpin is the Returning Officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions."

In the same reference, Arjit Pasayat, J also observed that "free, fair and periodical elections are the part of the basic structure of the Constitution of India (in short "the Constitution"). In a democracy, the little man-voter-has overwhelming importance and cannot be hijacked from the course of free and fair elections.

108. "Democracy and "free and fair election" are inseparable twins. There is almost an inseverable umbilical cord joining them(emphasis given). The little man's ballot and not the bullet of those who want to capture power (starting with booth-capturing) is the heartbeat of democracy. Path of little man to the polling booth should be free and unhindered, and his freedom to elect a candidate of his choice is the foundation of a free and fair election. Sir Ivor Jennings rightly said *"In democracy political power rests in free elections."*

Reading the Proclamation of Independence along with the Preamble and articles 7, 8, 11, 56, 65(2) and 122 of the Constitution as discussed above, I find myself in respectful agreement with the views of the Indian Supreme Court and hold that like democracy, free and fair election is also a basic structure of our Constitution; democracy and free and fair election are so inextricably mixed with each other that one cannot be separated from the other. Minus free and fair election, democracy cannot be conceived of and practised in its true sense. If there is no free and fair election then the people shall be defrauded of their sovereign powers as envisaged in article 7 of the Constitution engrafted by the Constituent Assembly. Free and fair election can be compared with the heart of a human body, if heart fails a man dies, so without free and fair election, the democracy would automatically die. Mr. T.H.Khan has also rightly said that free, fair and impartial election is the vehicle of democracy; the learned Attorney General, amici curiae, Dr. Kamal Hossain, Mr. M. Amirul Islam, Mr. Mahmudul Islam and Mr. Rokanuddin Mahmud echoed the same voice of Mr. T. H. Khan. To give effect to the constitutional mandate as envisaged in article 7 of the Constitution that all powers in the Republic belong to the

people; free, fair and impartial election has to be ensured and that is how the democracy and the democratic process shall be carried out, which is the main theme of our Constitution. Otherwise, the martyrs who sacrificed their lives in the national liberation struggle shall be betrayed.

In the above backdrop, we are to examine the core question whether democracy, a basic structure of the Constitution, has been destroyed or impaired by the 13th Amendment as argued by Mr. M.I. Farooqui, Mr. Mohsen Rashid and 3(three) amici curiae: Mr. Rafique-ul Huq, Dr. M. Zahir and Mr. Ajmalul Hossain. But, before I consider it, it is very essential and relevant to see what Constitution is and when a Constitution can be amended.

In all cases except that of the United Kingdom, the fundamental provisions of the governmental system are set forth in a document or set of documents which, as a document, is called the Constitution. A Constitution is different from statutes in nature and character. It is an organic instrument; it grows with the passage of time. It is general in its statements, while a statute is generally specific. Unlike a statute which is liable to revisions to meet different situations, a Constitution is intended to be permanent and to cover all situations of the unfolding future regarding the political organisation of a nation. Above all, it is a document under which laws are made and from which laws derive their validity. Every Constitution is founded on some social and political values and legal rules are incorporated therein to build a structure of political institutions aimed to realise and effectuate those values. Therefore, the legal rules incorporated in the body of a Constitution cannot be interpreted in isolation from those social and political values and the purposes which emerge from

the scheme of the Constitution. That is why Lord Wilberforce in Fisher held that though the rules of statutory interpretation will generally be applicable, the Court has to take as a point of departure for the process of interpretation a recognition of the character and origin of the Constitution. Need for recognition of the character and origin arises for giving purposive interpretation of a Constitution. (Mahamudul Islam, Constitutional Law of Bangladesh, Mallick Brothers, Dhaka, Second Edition, Pages 25 and 29.)

Bangladesh is a Republic and the Constitution is its supreme law being the solemn expression of the will of the people and this has been firmly asserted in article 7 of the Constitution when it says "... and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Mr. T. H. Khan and Dr. Kamal Hossain have rightly submitted that the Constitution is a living document and must be durable and at the same time, it has to be responsive to the need of the people keeping intact its basic structures and interpretation has to be given to give life to it. Though a Constitution is meant to be permanent, all changing situations cannot be anticipated or envisaged; amendment may be necessary to adopt to future development; provisions are thus made in the Constitution itself to respond to the dynamics of the changing circumstances, that is why the Constituent Assembly incorporated article 142 in the Constitution. In the case of PV Naransimha Rao-vs-State CBI/SIE (1998) 4SCC, 626 Justice S.C. Agarwal observed that "parliamentary democracy is a part of the basic structure of the Constitution which cannot be altered. But improvement of the system alone is permissible." In the case of Golaknath and others –vs-State of Panjab and another (1967) 2 SCR, 762 Justice R.G. Bachawal observed

that *"A static system of law is the worst tyranny that any constitution can impose upon a country. An unamenable constitution means that all reforms and progress are at a standstill."*

I conclude by saying that Constitution can be amended by way of addition, alteration, substitution or repeal by Act of Parliament to respond to the dynamics of the changing circumstances and as per the need of the people and to strengthen and institutionalise the basic structures and features of the Constitution, but not by destroying or impairing such structures and features.

Let us see what is in the Thirteenth Amendment. To have a ready reference, I consider it necessary to quote the entire Act which is as follows:

" ১৯৯৬ সনর ১ নং আইন "

An Act further to amend certain provisions of the Constitution of the People's Republic of Bangladesh.

Whereas it is expedient further to amend certain provisions of the Constitution of the People's Republic of Bangladesh for the purposes hereinafter appearing.

It is hereby enacted as follows:

1.	**Short title.—**This Act may be called the Constitution (Thirteenth Amendment) Act, 1996.
2.	**Insertion of new article 58A in the Constitution. —**In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, after article 58, the following new article shall be inserted, namely:-
	"58A. Application of Chapter. —Nothing in this Chapter, except the provisions of article 55(4), (5) and (6), shall apply during the period in which Parliament is dissolved or stands dissolved; Provided that, notwithstanding anything contained in Chapter IIA, where the President summons Parliament that has been dissolved to meet under article 72(4), the Chapter shall apply."
3.	**Insertion of new Chapter IIA in the Constitution. —**In the Constitution, in Part IV, after Chapter II, the following new Chapter shall be inserted, namely:-

CHAPTER IIA-NON PARTY CARE-TAKER GOVERNMENT

58B. The Non-Party Care-taker Government.—(1) There shall be a Non-Party Care-taker Government during the period from the date

on which the Chief Adviser of such government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of Parliament.

(2) The Non-Party Care-taker Government shall be collectively responsible to the President.

(3) The executive power of the Republic shall, during the period mentioned in clause (1), be exercised, subject to the provisions of article 58D(1), in accordance with this Constitution, by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Care-taker Government.

(4) The provisions of article 55(4), (5) and (6) shall (with the necessary adaptations) apply to similar matters during the period mentioned in clause (1).

58C. Composition of the Non-Party Care-taker Government, appointment of Adviser, etc.—(1) The Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisers, all whom shall be appointed by the President.

(2) The Chief Adviser and other Advisers shall be appointed within fifteen days after Parliament is dissolved or stands dissolved, and during the period between the date on which Parliament is dissolved or stands dissolved and the date on which the Chief Adviser is appointed, the Prime Minister and his cabinet who were in office immediately before Parliament was dissolved or stood dissolved shall continue to hold office as such.

(3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an Adviser under this article:

Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice.

(4) If no retired Chief Justice is available or willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this article:

Provided that if such retired Judge is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.

(5) If no retired Judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh who are qualified to be appointed as Advisers under this article.

(6) Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the

President shall assume the functions of the Chief Adviser of the Non-Party Care-taker Government in addition to his own functions under this Constitution.

(7) The President shall appoint Advisers from among the persons who are-

(a) qualified for election as members of Parliament;

(b) not members of any political party or of any organisation associated with or affiliated to any political party;

(c) not, and have agreed in writing not to be, candidates for the ensuing election of members of Parliament;

(d) not over seventy-two years of age.

(8) The Advisers shall be appointed by the President on the advice of the Chief Adviser.

(9) The Chief Adviser or an Adviser may resign his office by writing under his hand addressed to the President.

(10) The Chief Adviser or an Adviser shall cease to be Chief Adviser or Adviser if he is disqualified to be appointed as such under this article.

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

(12) The Non-Party Care-taker Government shall stand dissolved on the date on which the Prime Minister enters upon his office after the constitution of new Parliament.

58D. Functions of Non-Party Care-taker Government.—(1) The Non-Party Care-taker Government shall discharge its functions as an interim government and shall carry on the routine functions of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions it shall not make any policy decision.

(2) The Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially.

58E. Amendment of article 61 of the Constitution.- Notwithstanding anything contained in articles 48(3), 141A(1) and 141C(1) of the Constitution, during the period the Non-Party Care-taker Government is functioning, provisions in the Constitution requiring the President to act on the advice of the Prime Minister or upon his prior counter-signature shall be ineffective. ”

4. **Amendment of article 61 of the Constitution.-** In the Constitution, in article 61, after the word “law” at the end, the commas, words and figure “and such law shall, during the period in which there is a Non-party Care-taker government under article 58B, be administered by the President.”

5. Amendment of article 99 of the Constitution.-In the Constitution, in article 99, in clause (1), after the words “quasi-judicial office”, the words “or the office of Chief Adviser of Adviser” shall be inserted.

6. Amendment of article 123 of the constitution.-In the Constitution, in article 123, for clause (3) the following shall be substituted, namely:-

"(3) A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration."

7. Amendment of Article 147 of the Constitution.-In article 147, in clause (4),-

(a) for sub-clause (b) the following sub-clause shall be substituted, namely:-

(b) for sub-clause (d) the following sub-clause shall be substituted, namely:-

(d) Minister, Adviser, Minister of State or Deputy Minister,"

8. Amendment of article 152 of the Constitution.- In the Constitution, in article 152, in clause (1)-

(a) after the definition of the expression "administrative unit:, the following definition shall be inserted namely:-

"Adviser" means a person appointed to that office under article 58C;

(b) after the definition of the expression "the capital" the following definition shall be inserted, namely:-

Chief Adviser" means a person appointed to that office made article 58C."

(section 9 of the Act has not been quoted as the same has dealt with the Third Schedule to the Constitution regarding oath of office and oath of secrecy to the Chief Adviser and the Advisers).

A cohesive reading of the various provisions of the Thirteenth Amendment shows that Non-Party Care-taker Government was introduced by the Thirteenth Amendment to give all possible aid and assistance to the Election Commission that may be required for holding the general elections of members of Parliament peacefully, fairly and impartially. And to that end, the provisions, in the Constitution requiring the President to act on the advice of the Prime Minister or his prior counter-signature as provided in articles 48(3), 141(1) and 141(c)(1), have been made ineffective during the period of functioning of Non-Party Care-taker Government.

Now, a question arises when the framers of the Constitution have clearly mandated in article 126 of the Constitution that it shall be the duty

of all executive authorities to assist the Election Commission in the discharge of its functions then what the necessity of having a Non-Party Care-taker Government to assist the Election Commission to hold the general election of members of Parliament is as introduced in the Constitution by the Thirteenth Amendment. To answer the question, we have to see the context and the historical background behind the enactment of the Thirteenth Amendment as rightly submitted by Mr. T. H. Khan, Dr. Kamal Hossain, Mr. M. Amirul Islam, Mr. Mahamudul Islam, Mr. Rokanuddin Mahmud and lastly, the learned Attorney General. In this regard, it will not be out of place to see the constitutional scheme in our Constitution as to the amendment of the provision of the Constitution and in enacting and amending the ordinary law. Article 142 has been specially incorporated in Part X of the Constitution under the head "AMENDMENT OF THE CONSTITUTION" empowering the Parliament to amend the provision of the Constitution by way of addition, alteration, substitution or repeal by Act of Parliament. Clause (a)(ii) of article 142(1) has clearly provided that no Bill for amendment of the Constitution shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament, whereas an Act amending a statute other than the Constitution can be passed by a simple majority of the votes of the members present and voting. This will be clearer if we have a look at article 75(1)(b) with article 80(1)(2) and (3) of the Constitution which read as follows:

> "75(1) Subject to this Constitution−
>
> (a) .....
>
> (b) a decision in Parliament shall be taken by a majority of the votes of the members present and voting, but the person presiding

> shall not vote except when there is an equality of votes, in which case he shall exercise a casting vote;
> 80. (1) Every proposal in Parliament for making a law shall be made in the form of Bill.
> (2)When the Bill is passed by Parliament it shall be presented to the President for assent.
> (3) The President, within fifteen days after a Bill is presented to him, shall assent to the Bill or declare that he withholds assent therefrom or, in the case of a Bill other than a Money Bill, may return it to Parliament with a message requesting that the Bill or any particular provisions thereof be reconsidered and that any amendments specified by him in the message be considered; and if he fails so to do he shall be deemed to have assented to the Bill at the expiration of that period."

From the above constitutional provisions, it is clear that if Parliament passes a Bill for making a law by a majority of the votes of the members present and voting and the Bill is presented to the President, he shall have no choice but to assent to the Bill within 15(fifteen) days unless he declares that he withholds assent therefrom or, in the case of a Bill other than a Money Bill, may return it to Parliament with a message requesting that the Bill or any particular provisions thereof be reconsidered and that any amendments specified by him in the message be considered.

The above constitutional scheme of amendment of the Constitution shows that the framers of the Constitution wanted that the provision of the Constitution should be amended only when two-thirds of the total number of members of Parliament passes the same. The inner intention of the framers of the Constitution is that the provision of the Constitution should not be subjected to frequent amendments like an ordinary law, because to have two-thirds majority of the total number of members of Parliament is not that easy.

The historical background behind introducing the concept of Non-Party Care-taker Government in the Constitution by the Thirteenth Amendment has been vividly stated in the affidavits-in-opposition filed by

respondent Nos.1, 5 and 6, particularly respondent No.6. The sum and substance of the affidavits are that there were widespread allegations of vote rigging and manipulation of the election results by the party in power in 1973, 1979, 1986, 1988 and lastly in 1996; because of the unhappy experiences of the unfair elections under party Government, the demand for holding Parliamentary elections under a neutral caretaker Government, was raised by one party and gradually all the opposition political parties of the country agreed to this demand and after the fall of the then autocrat General Ershad in 1990, elections of members of Parliament for the first time were held under a Care-taker Government on 27.02.1991, wherein Chief Justice, Shahabuddin Ahmed was the acting President. The party which went to power in 1991 also indulged in the same kind of abuse in the election process firstly: in Mirpur by-election and then in Magura by-election. People of Bangladesh having experienced the gross abuse, rigging, corrupt practices in the election process and having confidence in the Supreme Court and also having confidence in free and fair election under the former Chief Justice Shahabuddin Ahmed raised the demand for introducing the concept of neutral caretaker government in the Constitution in order to ensure free, fair and impartial election. But the Government in power in 1996 held the general elections of members of Parliament on 15th February, 1996 which was boycotted by all the political parties in opposition which led to 23 days non-cooperation movement. From the affidavit-in-opposition of respondent No.6, it is also apparent that all the opposition political parties including respondent No.6, Bangladesh Awami League and the people of all walks of life joined the demand of holding the elections of members of Parliament under a neutral caretaker government

and the concept received a universal acclaim and eventually, all political parties including the party in power reached a consensus for the introduction of Non-Party Care-taker Government in the Constitution.

From the pleadings of the respective parties and the submissions of the majority of the amici curiae and the learned Attorney General, it is clear that the elections held in this country under the political government, that is, party in power were never free, fair and impartial. The elections held under the political government were tainted with manipulation, rigging and hijacking, the only philosophy was to win the election by whatever means and it reached its pit-bottom in the by-election of Magura. Manipulation of the election result by way of rigging, use of money and muscle power and also influencing the administration became the rule rather than an exception in the general elections held under the party in power. In the elections held under the political party in power whosoever was the little man of Mr. Churchill, he could not walk into the little booth with a little pencil to make a little cross on a little bit of paper. So, not only the political parties but also the whole nation was united for a device to ensure their right of adult franchise to elect their own representatives in a free and fair election which is the main theme of the Proclamation of Independence, the preamble and articles 7, 8, 11, 65(2) and 122 of the Constitution and that was achieved on the basis of discussions and consensus finally culminating in the passing of the Thirteenth Amendment with the sole motive to hold a free, fair, peaceful, impartial and credible general election of members of Parliament majority of whom will ultimately form the Government. In this regard, I may reproduce a portion of the discussions made in the Parliament when the Bill on the Thirteenth Amendment was

placed in the Parliament particularly the statement made by the then Law Minister as quoted in the judgment of Awlad Ali, J.

> "নির্বাচন কমিশনক সাহায্য ও সহায়তা করার জন্য এবং সংবিধান অর্পিত যে ক্ষমতা রয়ছ সেই ক্ষমতা প্রয়াগ কর দায়িত্ব পালনর জন্য একটি নির্দলীয় ও তত্ত্বাবধায়ক সরকারর Non-Party Care-taker Government গঠন নিয় আলাচনা করত হচ্ছ। আজক সরকার নির্বাচন চালা-চ্ছ। প্রশ্ন যখন উঠছ আমরা বিশষভাব মন করছি যে, জনসমক্ষ একটি নির্দলীয় তত্ত্বাবধদায়ক সরকার একান্ত প্রয়াজন।"

In the context, I would also like to draw the attention to the deliberations of the members of Parliament in the Parliament when the Thirteenth Amendment bill was placed in the Parliament as have been quoted in the judgment delivered by my learned brother Muhammad Imman Ali, J.

From the above, it is also clear that the necessity of introducing the Non-Party Care-taker Government was felt by the members of Parliament and after discussions in the Parliament by the votes of two-thirds majority the Thirteenth Amendment was passed on the 25th day of March, 1996. So, practically the Thirteenth Amendment was passed as per the will and demand of the people. And through this newly formulated constitutional device 3(three) consecutive successful general elections of members of Parliament were held, which were widely acclaimed both at home and abroad as free, fair and credible neutral election except the respective political party which failed to secure majority seats in Parliament to form the Government.

One may ask a question as to whether opposition political parties had any *locus standi* or standing to make any such demand and reach on a consensus with the party in power to introduce the system of Non-party Care-taker Government culminating the passing of the Thirteenth

Amendment. The political parties are not something foreign or strange to our Constitution. Our Constitution has recognised the political parties very much unlike the Indian Constitution. In article 152, political party has been defined as follows:

> " 'Political Party' includes a group or combination of persons who operate within or outside Parliament under a distinctive name and who hold themselves out for the purpose of propagating a political opinion or engaging in any other political activity."

And a group or combination of persons as mentioned above definitely include the people as envisaged in article 7 of the Constitution.

Political party has also been recognised in the RPO, 1972. In clause (xiva) of article 2 of the RPO, 1972 political party has been defined as "political party" means a political party as defined in article 152(1) of the Constitution. Provisions have been made in Chapter VIA of the Order, 1972 for registration of political parties with the Election Commission, on fulfilling certain conditions as detailed in the Chapter, cancellation of such registration under certain circumstances, to finalise nomination of candidate by central parliamentary board of the party in consideration of panels prepared by the members of Ward, Union, Thana, Upazila or District Committee as the case may be, of concerned constituency, including receipt of donations or grants from any person, company, group of companies or non-government organization. In Chapter III of the RPO, 1972 under the head Election, provisions have been made for nomination to the election of members of Parliament by a registered political party, the allocation of symbol to the contesting candidate set up by a registered political party. In Chapter IIIA under the head "ELECTION EXPENSES" provisions have been made for maintaining proper account by every political party of all its income and expenditure for the period from the date

of publication of notification for submission of nomination paper under article 11(1) till the completion of elections in all constituencies in which it has set up candidates and such account shall show clearly the amount received by it as donation above taka five thousand from any candidate or any person seeking nomination or from any other person or source giving their names and addresses and the amount received from each of them and the mode of receipt, and the submission of expenditure statement giving details of the expenses incurred or authorised by it in connection with the election of its candidates for the period from the date of publication of the notification under clause (1) of article 11 of the RPO till the completion of elections in all constituencies to the Commission for its scrutiny within 90(ninety) days of the completion of election in all constituencies and the consequences of such failure. In this regard, we must also recall a historical fact which took place in 1990. When General Ershad resigned from the post of President as the result of mass movement, on the request of three Main Political Alliances and parties of the country, the then Chief Justice, Mr. Justice Shahabuddin Ahmed agreed to accept the post of Vice-President and thus to take the reins of neutral and impartial Government as its head and he acted as the Acting President till the establishment of the 5th Parliament and then on the basis of assurance given by the three Main Political Alliances that after having run the Government temporarily till the establishment of an elected democratic Government through a free, fair and impartial election to Parliament, he would be allowed to return to the office of the Chief Justice of Bangladesh the Constitution (Eleventh Amendment) Act, 1991 (Act 24 of 1991) was passed allowing him to resume the duties and responsibilities of the Chief Justice of Bangladesh. So, the existence of political parties and their role in our national life and politics cannot be just denied and ignored. For giving permanent and meaningful shape to democracy the people of the country or the political parties on the basis of

consensus reached amongst them may agree to a type of interim Government as happened in the instant case under the name Non-Party Care-taker Government as introduced in the Thirteenth Amendment. We should not be obsessed only with the term/word democracy without seeing its real meaning and implication in the constitutional scheme as discussed hereinbefore.

Discussions and consensus are also very important components for the sustenance of democracy. And it was a very laudable and good instance and gesture in the political arena of our country which is beset with rivalry and mudslinging that the party in power and the opposition political parties could come to such a consensus. Noble laureate, Amarta Sen in his book "The Argumentative Indian, Writings on Indian History, Culture and Identity," Picador 1st Edition, 2006 has rightly said

> "Public reasoning includes the opportunity for citizens to participate in political discussions and to influence public choice. Balloting can be seen as only one of the ways- albeit a very important way- to make public discussions effective, when the opportunity to vote is combined with the opportunity to speak and listen, without fear. The reach- and effectiveness- of voting depend critically on the opportunity for open public discussion.
> A broader understanding of democracy−going well beyond the freedom of elections and ballots−has emerged powerfully, not only in contemporary political philosophy, but also in the new disciplines of 'social choice theory' and 'public choice theory' influenced by economic reasoning as well as by political ideas. In addition to the fact that open discussions on important public decisions can vastly enhance information about society and about our respective priorities, they can also provide the opportunity for revising the chosen priorities in responses to public discussions. Indeed, as James Buchanan, the founder of the contemporary discipline of public choice theory, has argued: "the definition of democracy as "government by discussion" implies that individual values can and do change in the process of decision-making. The role of the argumentative tradition of India applies not merely to the public expression of values, but also to the interactive formation of values, illustrated for example by the emergence of the Indian form of secularism ..."

As stated hereinbefore, the appointment of Chief Justice Shahabuddin Ahmed as the Vice-President of the country was also made

on the basis of consensus of all opposition political parties plus the civil society and other eminent citizens of the Country, under whose Acting presidentship a free and fair general election of members of Parliament was held on 27.02.1991. Similarly on the basis of consensus of all political parties who represented in the Parliament including the party in power the Twelfth Amendment of the Constitution was passed by the Fifth Parliament introducing the parliamentary form of Government, as it stands today, in the Constitution.

It is also very pertinent to state that when the Rule of the writ petition was heard by the Full Bench of the High Court Division on 20.06.2004, 30.06.2004, 06.07.2004, 07.07.2004, 13.07.2004, 14.07.2004, 20.07.2004 and 21.07.2004 the then learned Attorney General, Mr. Hasan Arif as the highest law officer of the country supported the Thirteenth Amendment as it is now being supported by Mr. Mahbubey Alam, the incumbent Attorney General which fact also shows no change of mind and stand of the two successive Governments as to the necessity of Non-Party Care-taker Government for holding the general elections of members of Parliament in a free, fair and impartial manner which was introduced in the Constitution by the Thirteenth Amendment.

It would not be out of context to say that those are the political parties who participate in the general elections of members of Parliament by nominating their own candidates and by giving their political manifesto and programme and after the election is over, the President in exercise of his power under article 56(3) of the Constitution, appoints a member of Parliament who appears to him to command the support of the majority of the members of Parliament and

our experience shows that it is always the Chief of a political party who commands such support and is elected as leader of the parliamentary party and thus, becomes the Prime Minister. And the political party which secures the next highest number of seats in the Parliament always elects its President/Chairman/ Chairperson as the leader of its parliamentary party and he sits in the opposition Bench in the Parliament as the leader of the opposition. If we just see the formation of present Government and the Ninth Parliament, the things will be clear. In the last general elections of members of Parliament, Bangladesh Awami League and its allies won the majority of seats in the Parliament and Sheikh Hasina, the President of Bangladesh Awami League was invited by the President to form the Government and accordingly, she formed the Government and became the Prime Minister of the country. BNP secured the second highest number of seats in Parliament and its Chairperson, Begum Khaleda Zia having been elected as leader of its parliamentary party became the leader of opposition. So, how can we undermine and ignore the consensus reached between the political party in power and all opposition political parties in 1996 as to the necessity of introduction of Non-Party Care-taker Government in the Constitution culminating the passing of the Thirteenth Amendment terming the same to be the result of political agitation or movement like any other political issue which might be agitated by a particular political party or group? No question can be raised now as well, as to the competence of the Sixth Parliament which passed the Thirteenth Amendment. It cannot also be unnoticed that not only the legislative Acts but also the executive and the administrative actions carry the presumption of constitutional validity and an elected

Parliament cannot be held to be illegally constituted merely because the opposition political parties boycotted the elections of the Sixth Parliament; the Sixth Parliament must legally be taken to have been validly constituted as the election thereof was not set aside following the provisions of the Constitution and the RPO, 1972. On the contrary, all political parties accepted the Thirteenth Amendment passed by the Sixth Parliament and they and the people at large participated in three subsequent general elections of members of Parliament held following the provisions of the Thirteenth Amendment. More significantly the Seventh Parliament was constituted on the basis of the general election of members of Parliament held under the Non-Party Caretaker Government after dissolution of the Sixth Parliament.

In my view, such a move by the political party in power and the opposition political parties was a very positive and healthy sign in the political arena of our country where there is always an environment of animosity and adversarial feeling. I am constrained to say that animosity and adversarial atmosphere amongst the political parties is so high in degree that when one political party goes to power, the leader of opposition in the Parliament is determined not to sit together and even not to meet each other on the occasion of national events. The people of this country expect that this kind of consensus as was reached in 1991, on the issue of re-introducing parliamentary form of Government from the Presidential form and then in 1996, on the issue of introduction of Non-Party Care-taker Government in the Constitution for ensuring free, fair and impartial general election of members of Parliament always, takes place on all national issues between the party in power and the parties in opposition and if that

happens definitely, our country shall be the role model of democracy and shall prosper as well.

With this background, let us examine whether the concept of Non-Party Care-taker Government introduced in the Constitution by the Thirteenth Amendment by adding a new article in Chapter I and by adding a new Chapter as Chapter-IIA and by inserting therein articles 58B-58E as quoted hereinbefore in Part-IV is in conformity with the constitutional scheme of democracy or not.

To win in the election of a particular candidate or party by foul means viz by manipulation, coercion, intimidation and exerting undue influence upon the government machinery is surely a defeat and destruction of democracy which is the fundamental structure of the Constitution for which our martyrs sacrificed their lives with aspiration that they will get a society free from all kinds of exploitation and their fundamental rights shall be ensured. Free and fair election goes with the basic structure of the Constitution very much as discussed hereinbefore. And free and fair election is a precondition for choosing or selecting people's representatives and thus to materialise the main theme of article 7 of the Constitution that all powers belong to them. Democracy becomes meaningful only when a man, no matter how small his power is, can cast his 'vote' freely in a fair election. In this context, at the risk of repetition, I consider it beneficial to quote Sir Winston Churchill:

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

From the above famous quotation of Sir Winston Churchill, we can easily say that in order to accept an election as free and fair, the test would be whether a little man could walk into the polling centre with a little pencil and exercise his right of adult franchise by putting a little cross on

the little bit of paper (ballot paper) freely without any influence or pressure. In other words, the most important question is whether an adult citizen could exercise his right of franchise freely and fairly without any inducement, fear, influence or any other compelling circumstances and if that could not be, then the whole process of the rule of majority becomes questionable and in the process, people's empowerment as envisaged in article 7 of the Constitution becomes jeopardized. Therefore, to practice democracy and to give it an institutional shape, it is imperative that periodic, free and fair elections are conducted. And in the absence of such election democracy would be only in theory and not in practice and that would ultimately lead to destruction of democracy.

One may argue that if election of a particular polling centre or more than 1(one) centre of a constituency or the constituency as a whole is not held fairly, freely and peacefully and the voters are not allowed to cast their votes as per their own choice and in the process, the election results are rigged or manipulated, then that would be the violation of the election laws which can be taken care of by terming the same as election dispute and the defeated candidates shall have the chance to take the dispute to the Election Tribunal, to be formed by the Election Commission, but for such violation of election laws in holding the election or an election dispute cannot justify the introduction of Non-Party Care-taker Government in the Constitution. But, that argument does not hold good for the simple reason that the context and the history behind the enactment of the Thirteenth Amendment as discussed hereinbefore has shown that rigging in the election by using muscle power, money and manipulation of result by the party in power by exerting undue influence upon the Government machinery, became

the rule rather than an exception in the general elections of members of Parliament held under the political party in power. We should not forget that general elections of members of Parliament in our country is held in a day and if by resorting to massive rigging and exerting undue influence upon the administration, election results are manipulated and thus, the party in power secures majority seats in Parliament and forms the Government then it would be meaningless to take the election dispute to the Election Tribunal which is also time consuming. And through such manipulated result, the party in power shall merrily rule the country though it had no such mandate from the people, which will be against the spirit of article 7 of the Constitution.

By the Thirteenth Amendment, in Chapter II of Part-IV after article 58, a new article as article 58A has been inserted keeping article 58 intact. By this new article, except the provisions of article 55(4), (5) and (6), nothing of the Chapter has been made applicable during the period in which Parliament is dissolved or stands dissolved. By the amendment, a new Chapter, namely, Chapter IIA has been inserted after Chapter II in Part IV under the head "CHAPTER IIA-Non-Party Caretaker Government." And in this Chapter, articles 58B-58E have been inserted providing for the system of Non-Party Care-taker Government during the period from the date on which the Chief Adviser of such Government enters upon office after Parliament is dissolved or stands dissolved by reason of the expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of Parliament, providing amongst others that the executive power of the Republic to be exercised by or on behalf of the authority of the

Chief Adviser. Article 58C has provided for the composition of the Non-Party Care-taker Government to be headed by the Chief Adviser from amongst the retired Chief Justices of Bangladesh or the retired Judges of this Division, as the case may be, as provided in clauses (3)(4)(5) and lastly the President himself as the Chief Adviser and 10 (ten) other Advisers to be appointed by the President, the period within which the Chief Adviser and other Advisers shall be appointed by the President, the qualification for appointment as the Advisers, appointment to be made by the President or resignation of the Chief Adviser and the Advisers, cessation of the post of Chief Adviser and the Advisers, the status and entitlement of the Chief Adviser and other Advisers, the dissolution of Non-Party Care-taker Government. Article 58D has provided the functions of Non-Party Care-taker Government. In this article, there are two clauses: clause (1) has stated that the Non-Party Care-taker Government shall discharge its functions as an interim government and shall carry on the routine functions of such government with the aid and assistance of persons in the service of the Republic; and except in the case of necessity for the discharge of such functions, it shall not make any policy decision. In clause (2), it has been categorically sated that the Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially. By article 58E, the provisions of articles 48(3), 141A(1) and 141C(1) of the Constitution, have been made ineffective during the period of functioning of the Non-Party Care-taker Government. So,

as already detailed hereinbefore, the solemn purpose for which Non-Party Care-taker Government has been brought in the Constitution by way of insertions of articles 58B-58D, is to hold the general elections of members of Parliament peacefully, fairly and impartially.

As a corollary to the point, we are also to examine whether such concept of discharging the functions as an interim Government by the Non-Party Care-taker Government manned by unelected people is foreign or alien to our Constitution. If we passionately consider the provisions of articles 57(3) and 58(4) of the original Constitution as given by the Constituent Assembly and the said two articles as they stand today along with article 72(3) thereof, we would find that such concept was engrafted in the Constitution by the Constituent Assembly as well as by the Parliament which reintroduced the parliamentary form of Government in 1991. And although till date the form of Government has been changed twice (in 1975 and 1991) those provisions remained unaltered. The said articles run thus:

> **"57(3).** Nothing in this article shall disqualify Prime Minister for holding office until his successor has entered upon office.
> **58(4).** If the Prime Minister resigns from or ceases to hold office each of the other Ministers shall be deemed also to have resigned from office but shall, subject to the provisions of this Chapter, continue to hold office until his successor has entered upon office.

But, unfortunately, as has been discussed hereinbefore, the original concept of interim Government to be headed by the outgoing Prime Minister, could not ensure free and fair general elections of members of Parliament.

In this context, it is also necessary to consider article 123(3) of the Constitution, as it stood before the Thirteenth Amendment, and as it stands today, after the Thirteenth Amendment.

Before the Thirteenth Amendment, article 123(3) was as follows:

> "(3) A general election of members of Parliament shall be held–
>
> (a) in the case of a dissolution by reason of expiration of its term, within the period of ninety days preceding such dissolution; and
>
> (b) in the case of dissolution otherwise than by reason of such expiration, within ninety days after such dissolution;
>
> Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein."

The present article 123(3) stands as follows:

> "(3) A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration."

Actually, article 123 has dealt with the time for holding elections of the President and the members of Parliament. The marginal note of article 123 is "Time for holding elections." This article has nothing to do with the interim Government as was contemplated in article 57(3) and 58(4) of the Constitution before the Thirteenth Amendment and the Parliament. Article 123(3) which stood before the Thirteenth Amendment as quoted hereinbefore was engrafted by the Constituent Assembly and it remained unaltered till the Thirteenth Amendment was passed. If we carefully read article 123(3), as it stood before the Thirteenth Amendment, it will appear that the legislature conceived of two exigencies as to the time for holding general election of members of Parliament. One, under clause (3)(a), that is, to hold general election of members of Parliament in the case of a dissolution by reason of expiration of its term, within the period of 90 days preceding such dissolution and the other, under clauses(3)(b), that is, in the case of dissolution otherwise than by reason of such expiration, within 90 days after such dissolution. A proviso was also added to clause (3) to the effect that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the

expiration of the term referred to therein. A further reading of clause (3) of un-amended article 123 read with articles 57(3) and 58(4), it appears that the interim Government, as thought of by the Constituent Assembly and by the 5th Parliament which introduced the system of parliamentary form of Government, is relatable to sub-clause (3)(b) of article 123. Mr. Farooqui, by referring to the proviso to clause (3) of un-amended article 123, tried to argue that the legislature having clearly provided that the persons elected at a general election shall not assume office as members of Parliament except after the expiry of the term referred to therein shows that Parliament would exist even after election. But Mr. Farooqui failed to notice that the framers of the Constitution thought of both situations, that is, holding of election of members of Parliament before expiry of the term of Parliament as provided in article 72(3) and the holding of such election after the Parliament stands dissolved either after the expiry of the period of five years from its first meeting or the Parliament is dissolved by the President as contemplated in article 57(2) of the Constitution. It further appears that proviso to clause (3) of the un-amended article 123 was added because as per article 72(3) the term of Parliament is 5(five) years from the date of its first meeting. So, if the election of members of Parliament is held before the expiry of the said period of 5(five) years as contemplated in article 123(3)(a) naturally the right of the sitting members of Parliament shall continue till the period of 5(five) years expires. Mr. Farooqui has also overlooked that article 123 is in Part VII of the Constitution which has exclusively dealt with elections without having any reference to Part IV of the Constitution as well as Part V. Mr. Farooqui also failed to take notice the context in enacting the Thirteenth Amendment introducing the concept of Non-

Party Care-taker Government. As the political party in power failed to secure the holding of general election of members of Parliament in a free, fair and impartial manner and thus, to ensure people's real representation in the Parliament, the Non-Party Care-taker Government was introduced on the basis of consensus of all and accordingly present article 123(3) was substituted providing for holding general election of members of Parliament only after dissolution of Parliament whatever may be the cause of such dissolution which is quite in conformity with the provisions of un-amended article 123(3)(b) and also article 72(3) of the Constitution. If we give a mechanical meaning to the proviso to clause (3) of the un-amended article 123 that the legislature wanted to have general election of members of Parliament only within their term, then sub-clause (b) of clause (3) thereof would become absolutely nugatory vis-a-vis the other provisions of the Constitution such as articles 57(3), 58(4) and 72(3) which is inconceivable in interpreting the provisions of a written Constitution. In this regard, I also want to make it very clear that clause (4) of article 56 is relatable to the interim Government and it has nothing to do with the un-amended article 123(3), because 56(4) speaks about the period between a dissolution of Parliament and the next following general election of members of Parliament and in the clause, the legislature has used the words "the persons, who were such members immediately before the dissolution, shall be regarded for the purpose of this clause, as continuing to be such members." In the clause, it has not been stated that Parliament shall be deemed not to have been dissolved. The legislature has not said so rightly, because if they had said so, it would have created disharmony with the other provisions of the Constitution as already discussed hereinbefore.

Mr. M. I. Farooqui, Mr. Muhammad Mohsen Rashid and Mr. Ajmalul Hossain, argued with all the force at their command that during the Non-Party Care-taker Government:there remain no people, there exists no democracy. On their such submission, I posed a question to them whether the Prime Minister or other Ministers remain as elected representatives and the Cabinet remain responsible to Parliament even after the Parliament stands dissolved after the expiry of its term of 5(five) years from the date of its first meeting as mandated in article 72(3) or if at the advice of the Prime Minister before expiry of the period of 5(five) years, Parliament is dissolved by the President pursuant to the provisions of clause (2) of article 57. They were unable to give any clear and satisfactory answer or explanation, they simply relied upon the proviso to clause (3) and clause (4) of article 72 of the Constitution and article 56(4) thereof. I, for myself, tried to get the answer and I found the answer in the negative. With the dissolution of Parliament, either under article 72(3) or under article 57(2) of the Constitution, as the case may be, members of Parliament cease to be elected representatives of the people, so also the Prime Minister and his other Cabinet colleagues, and since no Parliament exists after its dissolution, they are not also responsible to Parliament. After dissolution of Parliament, the character of the Prime Minister and his other Cabinet colleagues is the same as that of the Chief Adviser and the Advisers respectively, because the words "dissolved" and "dissolve" respectively, as used in the two articles, connote "to separate or treat up and disperse, to terminate or dismiss an assembly, such as parliament, to officially end a parliament, to terminate, disperse" (Oxford Dictionary, 7th Edition, Samsad English to Bengali Dictionary, Fifth Edition). This will be more clear if we see the Bengali version of the words 'dissolved' and 'dissolve' used articles 72(3) and 57(2) of the Constitution. In both articles in Bengali, it has been stated as ". . . সংসদ ভাঙ্গিয়া যাইব; " ". . . সংসদ ভাংগিয়া দিবন।" The meaning of the Bengali words

"সংসদ ভাঙ্গিয়া যাইব; " "সংসদ ভাংগিয়া দিবন।" as used in the two articles do not require any explanation or elaboration to understand their implication as to position of the Prime Minister and the other Ministers after the Parliament is dissolved, because the words are self composed having no ambiguity. In this regard, the language of article 57(3) is very important. This article says that nothing in the article shall disqualify the Prime Minister for holding the office until his successor has entered upon office. The article has not said that the Prime Minister shall continue to be a member of Parliament until his successor has entered upon office. Moreover, a constitutional provision cannot be read in isolation and has to be read along with other related articles keeping in view the constitutional scheme as has been discussed above.

After dissolution of Parliament when the Prime Minister and his other colleagues in the Cabinet were allowed to hold the office of the Prime Minister and the Ministers respectively until their successors entered upon office under articles 57(3) and 58(4) of the Constitution; their position is equal to that of a Chief Adviser and the Advisers as provided in the scheme of Non-Party Care-taker Government. If after the dissolution of Parliament, the incumbent Prime Minister who ceases to be the elected representative of the people can continue as the Prime Minister why the Chief Adviser and the other Advisers would not be able to perform the routine functions of the Government whose main job is to give assistance to the Election Commission that may be required for holding the general election of members of Parliament peacefully, fairly and impartially.

Clauses (3) and (4) of article 72 read as follows:

> **72(3).** Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting:
>
> Provided that at any time when the Republic is engaged in war the period may be extended by Act of Parliament by not more

than one year at a time but shall not be so extended beyond six months after the termination of the war."

72(4). If after a dissolution and before the holding of the next general election of members of Parliament the President is satisfied that owing to the existence of state of war in which the Republic is engaged it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved to meet."

If we closely examine the proviso to clause (3) and clause (4) of article 72, it would appear that those provisions have been made only to meet the extreme extraordinary situations, that is, in case the Republic is engaged in war. Be that as it may, the legislature has made the said provisions because, if the Republic is engaged in war, its territorial sovereignty shall be at stake. But, that is again a very very remote situation. And I sincerely believe and hope that our beloved motherland, the Republic is never engaged in war and we maintain good relationship with all neighbours. We already struggled for our national liberation in 1971 and our three million people sacrificed their lives at the hand of the occupation force and their allies and our women were dishonoured, so we cannot afford any war in future because war destroys human civilization and causes human miseries and sufferings to the extreme.

It is to be noted that by inserting article 58A in Chapter-II of Part IV of the Constitution, except clauses (4), (5) and (6) of article 55 thereof, all other provisions of the Chapter have been made inapplicable during the period in which Parliament is dissolved or stands dissolved and by the proviso to article 58A Chapter II, as a whole, has been made applicable notwithstanding anything in Chapter IIA where the President summons Parliament that was dissolved to meet the situation under article 72(4). Again, this provision has been made only to meet the situation which may arise in case the Republic is engaged in war. But, because of this provision of summoning the Parliament, it cannot be said that other than the state of war, the Parliament shall be deemed to continue even after its

dissolution and thus, members of Parliament continue as the elected representatives of the people with the dissolution of Parliament to fit in the argument of the learned Counsel for the appellant and petitioner and amicus curiae, Mr. Ajmalul Hossain as noted hereinbefore. The argument that even after the Parliament is dissolved Bengali version being ". . . সংসদ ভাঙ্গিয়া যাইব", "সংসদ ভাংগিয়া দিবন।" the Prime Minister and his other colleagues continue to be the elected representatives of the people and they remain responsible to Parliament because of proviso to clause (3) and clause (4) of article 72, is absolutely fallacious and bereft of logic and reminds me of a very popular Bengali saying that "শালিশ মানি কিন্তু তাল গাছটি আমার।"

In this regard, I consider it necessary to discus the relevant provisions of the Constitution to have a clear understanding about Parliament. Parliament has been defined in article 152 of the Constitution as follows:

> "'Parliament' means the parliament for Bangladesh established by article 65"

So, as of necessity, we are to fall back upon article 65 of the Constitution. If we closely examine article 65 as a whole with X-ray vision, it will appear that Parliament as conceived of by the Constituent Assembly and continued to remain so till date is that it shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election. Thus, it is clear that Parliament, as conceived of in the Constitution, is a Parliament Member who shall be elected by the people in a free and fair election. If the candidates, in the general elections of members of Parliament, get themselves elected by use

of muscle power, coercion, threat, intimidation, money and exerting undue influence on the Government machinery, which became the rule rather than an exception in the elections with the party Government in power, as interim Government provided in articles 57(3) and 58(4) of the Constitution, they cannot be called people's representatives and Parliament consisting of such members of Parliament cannot be called a Parliament within the meaning of clause (1) of article 65. And such Parliament cannot have true representation of the people within the meaning of article 7 of the Constitution. Can a member of Parliament commanding the support of the majority of members of such Parliament have the mandate to rule the country for 5(five) years as the Prime Minister? My answer is an emphatic, "no". In this context, I am constrained to refer to the Sixth Parliament: election to the Sixth Parliament was held on 15.02.1996 which was boycotted by the major political parties in opposition and as per the affidavit-in-opposition filed by respondent Nos.1 and 6, it appears that election was not free and fair and consequently that Parliament did not last and was dissolved on 30th March, just after 42(forty two) days of the election. Had there been no consensus between the party in power and all other opposition political parties to pass the Thirteenth Amendment and then to dissolve the Sixth Parliament (if it continued), could it be said that it had true representation of the people and the Prime Minister so appointed by the President on the basis of such election be the Prime Minister in true sense? Again, the obvious answer will be, "no".

We should not confuse between two things, democracy and Parliament. Free and fair election is part of democracy and a fundamental structure of the Constitution. And Parliament is the product of democratic

process through a free and fair election. So, in the absence of free and fair election, Parliament cannot have real legitimacy and in such Parliament, people will have no representation. We should not also have any special fascination and love for the Parliament if its members are not elected by the people in a free and fair election and thus, do not have a true representation to the people.

As discussed above, the interim government, as conceived of by the Constituent Assembly and then re-introduced by the Twelfth Amendment as provided in article 57(3) and 58(4) of the Constitution, totally failed to ensure free and fair general election of members of Parliament, so the concept of interim government through a Non-Party Care-taker Government, has been introduced in the Constitution on the basis of consensus and that, in no way, clashes with democracy rather it has strengthened democracy and the democratic process as conceived of in the Constitution and has not destroyed or impaired democracy in any manner.

It is also very pertinent to state that Part IV which deals with the executive, as it stands today, is not the one given by the Constituent Assembly. The present Part IV is the dispensation given by the Fifth Parliament by the Twelfth Amendment of the Constitution and this was also done on consensus of all political parties. Now, if we recall the original Part-IV given by the Constituent Assembly which has been quoted hereinbefore, it would appear that in clause (4) of article 56 clear provisions were made for appointment of non Parliament member as Minister by the President on condition that he had to be elected within 6(six) months, which *prima-facie* proves that even the Constituent Assembly in their wisdom thought of inclusion of non-Parliament

Members to become the member of the Cabinet and allow such member of the Cabinet to continue for a period of 6(six) months without being member of Parliament; when the Constituent Assembly made provisions for making a citizen as Minister without being member of Parliament and allowed him to continue as such for 6(six) months then why the Chief Adviser and the Advisers cannot continue for 90(ninety) days. Moreso, in the present dispensation of Part IV, in article 56(2), there is clear provision for appointment as Ministers, Ministers of State and Deputy Ministers from amongst the non members of Parliament by the President upto one-tenth of the total number of the Ministers, the Ministers of State and the Deputy Ministers from amongst the members of Parliament. The provision for making the non members of Parliament as the Ministers, the Ministers of State and the Deputy Ministers has been made by the legislature in their wisdom possibly on the idea that in case the Republic needs the assistance of the expertise knowledge of a citizen, it can get his service. It will be quite relevant to mention that presently there are two Cabinet Ministers and one State Minister who are not members of Parliament and they are holding important portfolios. They are Mr. Shafique Ahmed, Mr. Dilip Barua and Mr. Yeasef Osman and the Ministries–they are manning–are Ministry of Law, Justice and Parliamentary Affairs, the Ministry of Industries and the Ministry of Science and Technology respectively. In this regard, it is also very relevant to say that the writ petitioner did not challenge the proviso to clause (2) of article 56 which has provided for appointment of non members of Parliament as Ministers, Ministers of State and Deputy Ministers. Besides, in the original Constitution in clause (3) of article 65 clear provision was made for fifteen reserved seats exclusively for women

members who shall be elected according to law by members of Parliament which now by way amendment stands at 45. Be that as it may, the very concept of appointment of non-parliament members as Minister, Minister of State and Deputy Minister being there in the original Constitution as well as in the present dispensation of the Constitution, I do not see anything wrong in making unelected people as the Chief Adviser and the Advisers to constitute the Non-Party Care-taker Government for 90 (ninety) days only. The objection of the writ-petitioner, in that respect, appears to me absolutely psychological and objection for the sake of objection.

From the discussions made above, it is clear that the 13th Amendment was a historical necessity under the changed socio political condition of our country for giving a complete meaning of democracy and also for making the existing provisions of interim government meaningful and more effective and to make the people sovereign as enshrined in article 7 of the Constitution.

I do not also find any substance in the submission of Mr. M. I. Farooqui, Mr. Moshen Rashid and amicus curiae, Mr. Ajmalul Hossain that for 90 (ninety) days democracy will be totally absent in the Republic and the people will be nowhere inasmuch as the President who remains as the Head of the State during the Non-Party Care-taker Government and to whom the Non-Party Care-taker Government shall be collectively responsible, is really not an elected person. The argument that the President not being elected by the direct vote by the people, he cannot be accepted as true representative of the people, cannot be accepted as valid, because, if we accept such argument then 4(four) articles of the Constitution shall

become redundant or otherwise nugatory which is unthinkable in case of a written Constitution. We must remember that every provision of the Constitution is essential and in harmony with the other provisions.

Let us see the relevant articles in the Constitution in this regard. In article 152, the President has been defined as follows:

> "The President" means the President of Bangladesh elected under this Constitution or any person for the time being acting in that office."

In article 152, there is no reference to direct or indirect election. It has simply said "elected".

Article 48(1) of the Constitution has said that there shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law. Article 119 has clearly provided, amongst others, that one of the functions of the Election Commission is the superintendence, direction and control of the preparation of the electoral rolls for election to the office of President and also to conduct and hold the election of the office of President in accordance with the Constitution and any other law. Article 123(1)(2) has provided time for holding election to the post of President within the period of ninety to sixty days and ninety days respectively under two different situations: one, in the case of a vacancy in the office of President occurring by reason of the expiration of his term of office and the other, in the case of a vacancy in the office of President occurring by reason of death, resignation or removal of the President. Proviso to clause (1) of article 123 has further provided that if the term expires before the dissolution of the Parliament by the members of which he was elected, the election to fill the vacancy shall not be held until after the next general election of members of Parliament, but shall be held

within thirty days after the first sitting of Parliament following such general election. And the law for holding the election of the office of President, as it stands today, is রাষ্ট্রপতি নির্বাচন আইন, ১৯৯১ which was enacted repealing President Election Ordinance, 1978. In this law as well, no reference has been made as to the indirect election.

From the above mentioned articles of the Constitution and the law, it is apparent that the legislature has not made any difference between direct and indirect election in respect of the election of the President, therefore, we should not endeavour to make any such difference. So, when the President has been described as a person elected in the Constitution how we can say otherwise. In view of the above, my irresistible conclusion is that the President being elected and the Government operated by a Council of Advisers during the period of Non-Party Care-taker Government being collectively responsible to him, the representative character of the Government is not at all lost; so also the democracy of the people. And the President being elected, he must be given due constitutional weight and value.

The submission of Dr. M. Zahir that the concept of Non-Party Care-taker Government introduced in the Constitution by the Thirteenth Amendment for holding the general elections of members of Parliament, is a natural stigma*/লজ্জা* for the nation and also the party in power, because the elected member of Parliament who commands the support of the majority of members of Parliament, who acts as a Prime Minister for 5(five) years, cannot be trusted for the period from the time of dissolution of Parliament and till his successor yet enters upon office, is bereft of any logic as well as factual backing, because the term of Parliament is five years from the date

of its first meeting and natural mandate of the people is only for five years and after the expiration of 5(five) years when Parliament stands dissolved, the mandate comes to an end. Article 57(3) only provided that the outgoing Prime Minister would not be disqualified for holding office, yet his successor entered upon office. The Constitution has not given any mandate to the Government in power or the Prime Minister to hold the election of members of Parliament. It is the Election Commission which has been given the charge/function to hold the elections of the President and members of Parliament as clearly provided in article 119 of the Constitution. So, why it should be a natural stigma/*লজ্জা* upon the nation or upon the political party in power if the general elections of members of Parliament are held under the Non-Party Care-taker Government after dissolution of Parliament when the Prime Minister ceases to have the representative character and to whom no mandate was given by the people to hold general elections of members of Parliament. I do not see any reason, for the Prime Minister, his other Cabinet colleagues and the party in power to take it as a stigma/*লজ্জা* to have the general election of members of Parliament under the Non-Party Care-taker Government or to be embarrassed or think themselves inept, corrupt and incompetent as stated in the supplementary affidavit filed by the writ-petitioner. Rather if the party in power under the leadership of the Prime Minister has done good things for the people, it should leave the office and face the people to facilitate the holding of free and fair general election of members of Parliament and get re-elected and then again form the government with the mandate of the people. Strange thing is that nothing has been said by respondent No.1, Bangladesh, represented by the Secretary, Ministry of Law, Justice and

Parliamentary Affairs about the stigma/লজ্জা in its affidavit-in-opposition filed before the High Court Division and in the concise statement filed before this Division in holding the general election of members of Parliament under the Non-Party Care-taker Government as submitted by Dr. M. Zahir. The submission of Dr. Zahir is self defeating as he himself suggested a modality of interim care-taker Government for holding the general election of members of Parliament by giving a reference to the Australian system.

Every nation and country has its own pride and prejudice and has the right to decide what the form of government including the interim one should be. As, in the Constitution itself, there was a form of interim government which failed to ensure free and fair general election of members of Parliament, on the basis of consensus, the concept of Non-Party Care-taker Government was introduced by the Thirteenth Amendment and that worked well and under the system, 3(three) elections have already been held with the mass participation of the people and thus, the people have accepted the mechanism and therefore, I do not see any reason to reverse the same after 15(fifteen) years. If there is any natural stigma/লজ্জা on our nation, it is: corruption, but the holding of general election of members of Parliament under Non-Party Care-taker Government is not. In fact, corruption is taking the shape of a menace; all development works are being hindered because of corruption for which good governance is also suffering a setback. Because of corruption, the bulk of the poor people of the country are deprived of their due share in the development of the country. And we all should create social awareness against corruption as well as put resistance against corruption.

We cannot bring a mechanism in the Constitution keeping in mind the socio economic condition of the United States of America or the Great Britain or Japan and even India and any other country as well. We must evolve a system of our own to suit our own need in the socio economic condition of our country. What suits the United States of America, Great Britain, Japan, India and any other country may not suit us. Yes, this is true, in the United States of America, Great Britain and Japan, even during the world war, no concept of non-party interim caretaker government was introduced to hold the election of the President and members of Parliament respectively. But the fact remains in those 3(three) developed countries, no situation like ours such as vote rigging and manipulation of election results by exerting undue influence upon the Government machinery by the party in power ever happened. Can we compare our GDP with the GDP of the United States of America, Great Britain and Japan? If not, why should we be so jubliant to follow them in the matter of election only? In India also the democratic process never suffered. No Martial Law was imposed. Our democracy is still in a nascent condition. It needs more nurturing. The context, as discussed above, shows that in the socio economic condition of our country, the holding of general election of members of Parliament under the Non-Party Care-taker Government is a must and the learned amici curiae: Mr. T. H. Khan, Dr. Kamal Hossain, Mr. M. Amirul Islam, Mr. Mahmudul Islam, Mr. Rokanuddin Mahmud and even Mr. Rafique-ul Haque, who said that the system is contrary to the basic structures of the Constitution and the learned Attorney General have also submitted that there is no alternative of Non-Party Care-taker Government to hold the general election of members of Parliament for the empowerment of the people as envisaged in article 7 of the Constitution and to institutionalise

democracy. In deciding the constitutionality of an amendment to the Constitution, the context cannot be ignored.

Mr. Hasan Arif, the then learned Attorney General, who appeared before the High Court Division in 2004 on behalf of respondent No.1, while the writ petition was heard, the party in power was BNP did not make any such complaint of stigma/*লজ্জা* as submitted by Dr. M. Zahir. Similarly, before this Division the incumbent Attorney General has not made any such complaint. Thus, it is clear that neither of the two respective learned Attorney Generals made any complaint as to the stigma/*লজ্জা* faced by the two successive Governments before the foreign dignitaries, foreign nations and foreigners because of the introduction of the system of Non-Party Care-taker Government in the Constitution for holding the general election of members of Parliament on dissolution of Parliament. Had there been any such situation or feeling of stigma/*লজ্জা* by the Governments before the foreign nations, foreign dignitaries or the foreign nationals at private or State level on the question of holding of general election of members of Parliament under the Non-Party Care-taker Government, then definitely that fact would have been brought by respondent No.1 in the affidavit-in-opposition filed before the High Court Division as well as in the concise statement filed before this Division. Dr. M. Zahir and Mr. Ajmalul Hossain, who are very widely travelled persons, also failed to say any of their personal experience and produce any material whatsoever before us to show that the introduction of the system of Non-Party Care-taker Government in the Constitution has, in no way, brought any adverse impact or embarrassment upon a citizen of this country including themselves or the Government. Dr. Kamal Hossain an internationally reputed lawyer has seriously opposed the submission of Dr. Zahir and

submitted that leaders of many countries enquired upon him to know about the Non-Party Care-taker Government system introduced in our Constitution for holding the general elections of members of Parliament with approval. Mr. M. Amirul Islam and Mr. Rokanuddin Mahmud who are also widely travelled persons on being asked as to whether they had faced any embarrassment abroad or in this country to any foreign national because of introduction of the system of Non-Party Care-taker Government during the general election of members of Parliament in the Constitution, they replied in the negative.

The difference between the interim Government, which was in the Constitution prior to the 13th Amendment vide articles 57(3) and 58(4) and the Non-Party Care-taker Government introduced by the Thirteenth Amendment, is that notwithstanding the fact that the outgoing Prime Minister and his Cabinet colleagues lose their representative character, they continue to retain their very strong and open affiliation with their party and they also contest in the election with their party manifesto and political programme and use all their amenities as the Prime Minister and the Ministers during the election and thus, the Administration becomes vulnerable to their influence in spite of the fact that article 126 of the Constitution has mandated that *"It shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions."* Whereas, in the latter case, the Chief Adviser shall be a person not related to politics and the other Advisers shall be appointed by the President from amongst the persons who are not members of any political party or, of any organisation associated with or, affiliated to any political party. Clause (c) of sub article (7) of article 58C has clearly mandated that

the Advisers must agree in writing not to be candidates for the ensuing election of members of Parliament. And naturally, they will have no reason to be partisan with any political party.

Which is more honourable, dignified and prestigious to go to power with the mandate of the people in a free and fair election or to go to power in a rigged election with manipulated result? I am of the view that, if a political party goes to power and forms the Government having the mandate of the people in a free, fair and impartial election, it will have more image and more respectability to rule the country for five years than to go to power and form the Government in a rigged and manipulated election result dominated by money and muscle power and also by exerting undue pressure upon the Government machinery.

Let us see whether the Thirteenth Amendment has destroyed the Republican character of Bangladesh or the Constitution because of the introduction of the Non-Party Caretaker Government in the Constitution.

When the Head of the State is a hereditary monarch, it is called monarchy, the monarch may not be sovereign, but titular. Great Britain, Australia, Canada, New Zealand and Japan fall into this category though these States are undoubtedly democratic. When the Head of the state is elected by the people either directly or indirectly, the State is called a Republic and the Constitution is said to have provided a Republican government. In article 152 of our Constitution, it has been said the "the Republic" means the People's Republic of Bangladesh. So we need not take the help of any other authority. Our Constitution originally provided in article 48(1) that there shall be a President of Bangladesh, who shall be elected by members of Parliament in accordance with the provisions

contained in the second schedule, so also now with the exception that in place of "in accordance with the provisions contained in the second schedule" now it is "in accordance with law." Present article 48(2) has provided that the President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by the Constitution and by any other law. Same was the article 48(2) in the original Constitution. The Thirteenth Amendment has not introduced any provision, which can be said to have altered or affected article 48(I)(2), in any manner. Thus, the office of the President still remains to be elected by members of Parliament in accordance with law and therefore, both the State and Constitution retains its Republican character notwithstanding the Thirteenth Amendment.

Another point to be addressed is: whether insertions of articles 58A, 58B-58E in the Constitution, can be regarded as amendment of the Constitution within the meaning of article 142 and whether, by such insertions, the Preamble and articles 8, 48 and 56 of the Constitution have been amended.

We have seen the Thirteenth Amendment Bill which was placed in the Parliament. The very Bill reads as follows:

"

A

BILL

further to amend certain provisions of the Constitution of the People's Republic of Bangladesh."

In the preamble of the Bill, it has been stated that "whereas it is expedient further to amend certain provisions of the Constitution of the People's Republic of Bangladesh for the purpose hereinafter appearing;" It further shows that in the short title of the Bill, it has been clearly stated that

"This Act may be called the Constitution (thirteenth Amendment) Act, 1996." And after the bill was passed and assented to by the President, the heading, the Preamble and the short title of the Act read as follows:

> "An Act further to amend certain provisions of the Constitution of the People's Republic of Bangladesh
>
> Whereas it is expedient further to amend certain provision of the Constitution of the People's Republic of Bangladesh for the purposes hereinafter appearing.
>
> It is hereby enacted as follows:
>
> 1. Short title.− This Act may be called the Constitution (Thirteenth Amendment) Act, 1996"

Thus, it is clear that the legislature themselves placed the Bill in the Parliament for amendment of certain provisions of the Constitution. And after the Bill was passed and assented by the President in the Preamble of the Act it has been stated whereas it is expedient further to amend certain provisions of the Constitution of the People's Republic of Bangladesh.

From the Act, it further appears that besides incorporating a new article in Chapter II as article 58A after article 58, a new Chapter as Chapter-IIA by inserting articles 58B-58E in Part-IV has been added in the Constitution, the Act has also amended articles 61, 99, 123, 147 and 152 thereof; necessary amendments have also been made in the Third Schedule to the Constitution.

As per Black's Law Dictionary, amend means

> "1. To make right; to correct or rectify; <amend the order to fix a clerical error> 2. To change the wording of; specif, to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words <amend the legislative bill>."

In the same Dictionary, amendment has been connoted as:

> "1.A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif, a change made by addition, deletion or correction; esp. an alteration in wording....2. The process of making such a revision"

The word amendment came for consideration in the case of Anwar Hossain Chowdhury; the two learned Judges of this Division, gave their valued opinion on the subject. Badrul Haider Chowdhury, J (as he then was) expressed his opinion as follows:

> "216. The term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed"

Shahabuddin Ahmed, J (as he then was) expressed his views as follows:

> "417. . . Amendment of Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structure. The Court, therefore, has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution."

Article 142 of the Constitution, as it stood on the date on which the Thirteenth Amendment was passed, empowered the Parliament to amend any provision of the Constitution "by way of addition, alteration, substitution or repeal by Act of Parliament" provided that (i) no Bill for such amendment thereof shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution; (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament. Clause (1A) to article 142(1) which was inserted by the second Proclamation (Fifteenth) Order, 1978 (Second Proclamation Order IV of 1978) required that notwithstanding anything contained in clause (1) thereof if any such Bill was passed which sought to amend the preamble or any provision of articles 8, 48 or 56 or article 142 itself, the same is presented to the President for assent, the President shall within the period of seven days after the Bill is presented to him cause to be referred to a referendum the question whether the Bill should or should not be assented to. In view of the judgment passed in the case of the Fifth Amendment of the Constitution by this Division, clause (1A) is no more in the Constitution. So the question of requirement for sending

the Bill for referendum by the President within the period of seven days after the Bill was presented to him whether the Bill should or should not be assented to as argued by Mr. Farooqui lost all its legal importance and implication and as such, the same does not require any further deliberation. Insertions of articles 58A and 58B-58E in the Constitution, are definitely amendment of the Constitution within the meaning of article 142 of the Constitution, but those read with the amendments of articles 61, 99, 123, 147, 152 and Third Schedule to the Constitution, in no way, amended the preamble and articles 8, 48 and 56 of the Constitution as vehemently argued by Mr. Farooqui.

What has been done by the Legislature, is that by inserting articles 58A-58E in the Constitution, the provisions of articles 48(3) and 56 of the Constitution, have been suspended or made ineffective during the period of Non-Party Care-taker Government. If we look at Part IXA of the Constitution, it will appear that the concept of suspension or making ineffective of certain articles of the Constitution, is not something new and it is very much akin to the Constitution. It is very relevant to state that Part IXA was not in the original Constitution adopted, enacted and given by the Constituent Assembly and this Part was incorporated in the Constitution by Act XXIV of 1973, that is, by the Constitution (Second Amendment) Act, 1973. Article 141A of this part has empowered the President to issue a Proclamation of Emergency if he is satisfied that a grave emergency exists in which the security or economic life of Bangladesh or any part thereof, is threatened by war or external aggression or internal disturbance. In original article 141A there was a proviso to the effect “provided that such

Proclamation shall require for its validity, the counter signature of the Prime Minister."

And then the said proviso was omitted by the Constitution (Fourth Amendment) Act, 1975 (Act No.11 of 1975) and again by the Constitution (Twelfth Amendment) (Act No.XXVIII of 1991) proviso was added which is as follows:

> "Provided that such Proclamation shall require for its validity the prior counter signature of the Prime Minister."

Article 141B has provided that while a Proclamation of Emergency is in operation, nothing in articles 36-40 and 42, shall restrict the power of the State to make any law or to take any executive action, which the State would, but for the provisions contained in Part III of the Constitution, be competent to make or to take. Article 141C has further provided that while a Proclamation of Emergency is in operation, the President may, on the written advice of the Prime Minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of the Constitution, as may be specified in the order, and all proceedings pending in any Court for the enforcement of the right so specified, shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. It is pertinent to note that in the original article 141C, the words "on the written advice of the Prime Minister" were not therein and the same were added by the Constitution (Twelfth Amendment) Act, 1991." In this regard, it is also pertinent to state that when Part IXA was inserted in the Constitution parliamentary form of Government was very much in vogue.

Therefore, keeping of certain provisions of the Constitution ineffective or suspended for certain period of time for the sake of the others as has been done by the Thirteenth Amendment, is not alien to the Constitution. By inserting article 58A in Chapter I after article 58 of Part-IV except the provisions of article 55(4), (5) and (6) all other provisions of the Chapter have been made inapplicable during the period in which Parliament is dissolved or stands dissolved to enable the people to exercise their constitutional right for electing their own representative in a free and fair election and such a device is no way in clash with the scheme of the Constitution.

Let us examine whether, by the Thirteenth Amendment, particularly by incorporating article 58C in the Constitution and by amending article 99 thereof making provisions for the retired Chief Justices of Bangladesh and the retired Judges of this Division to become the Chief Adviser, the independence of judiciary has been destroyed.

Mr. M. I. Farooqui and Mr. Mohsen Rashid have argued that the Thirteenth Amendment has infringed the independence of judiciary. Mr. Rafique-ul Haque and Mr. Ajmalul Hossain as amici curiae have also submitted that by making provisions for the retired Chief Justices of Bangladesh and the retired Judges of this Division to become the Chief Adviser, the judiciary has been brought under public criticism and thus, the independence of judiciary is being impaired. The reason of their such argument is that because of the scope of the retired Chief Justices and the retired Judges of this Division to become the Chief Adviser, the appointment of Chief Justice and other Judges of this Division, is being

politicised and the Judges, who have a chance to become the Chief Adviser, may be allured by the "dangling carrot."

To decide the point, I consider it necessary to see what is meant by judicial independence? Independence of judiciary is not an abstract concept and it has to be understood keeping in view the constitutional provisions. Mr. Mahmudul Islam has pointed out that depending on what we actually mean by the expression "judicial independence"; there are many things in the Constitution which can be said to curtail judicial independence. It can be said that the appointment of Judges by the executive curtail the judicial independence; one may argue that enactment of procedure of the Court by the legislature curtail the judicial independence of Judges to dispense true justice and so forth. But jurisprudentially, the expression 'judicial independence' has a definite meaning. And this was considered by this Division in the case of Secretary, Ministry of Finance-vs-Md. Masdar Hossain and others, 52 DLR(AD) 82. When the said case was decided the Thirteenth Amendment was very much in operation. In that case, Chief Justice Mustafa Kamal observed that:

> "The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasised by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly."

In that case, this Division found that there was no provision in the Constitution which curtails the independence of the Judges of this Court.

And indeed the Thirteenth Amendment deals only with the Chief Justice and the Judges of this Division. In the judgment a decision of the Canadian Supreme Court in the case of Walter Valente-vs-Her Majesty the Queen (1985) 2 RCS 673, was cited with approval to show the essential conditions of judicial independence. The citation reads as follows:

> "... Security of tenure because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of section 11(d) of the Charter. The essentials of such security are that a Judge be removed only for cause, and that cause be subject to independent review and determination by a process at which the Judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of section 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."
> In a later decision, in the case of British Columbia-vs-Imperial

Tobacco Canada Ltd (2005) 2SCR 473, 2005 SCC 49, 25 7 DLR(4^{th}) 193 the Canadian Supreme Court held:

> "(44). Judicial independence is a "fundamental principle" of the Constitution reflected in s.11(d) of the Canadian Charter of Rights and Freedoms, and in both ss.96-100 and the preamble to the Constitution Act, 1867 ...It serves "to safeguard our constitutional order and to maintain public confidence in the administration of justice"...
> (45). Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice" ... It requires that the judiciary be left free to act without improper "interference from any other entity"... i.e., that the executive and legislative branches of government not "impinge on the essential 'authority and function' ...of the court"...
> (46). Security of tenure, financial security and administrative independence are the three "core charactertics" or "essential conditions" of judicial independence... It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained ..."
> (47). However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including

> interference from the executive and legislative branches of government....”

Let us see whether the conditions of judicial independence as laid down by the Canadian Supreme Court and as approved by this Division in the case of Secretary, Ministry of Finance-vs-Md. Masdar Hossain are present in our Constitution. Article 96 of the Constitution has specifically provided about the tenure of office of Judges of this Court. Article 96(1) has provided that subject to the other provisions of the article a Judge shall hold office until he attains the age of 67 (sixty seven) years (at the relevant time it was 65 (sixty five) years); article 96(2) has clearly provided that a Judge shall not be removed from office except in accordance with the provisions of the article mentioned thereafter; article 96(3) has provided that there shall be a Supreme Judicial Council, which shall consist of the chief justice of Bangladesh, and the two next senior Judges. Provided that if, at any time, the Council inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member. The more important thing is that “guilty of gross misconduct” one of the grounds on which a Judge shall by order of the President, be removed on being reported to him by the Supreme Judicial Council has not been defined, that is, it is the Supreme Judicial Council which will decide what would amount to ‘gross misconduct’. Not only that full authority has been given to the Council to regulate its procedure for the purpose of an enquiry under the article. Thus, the executive has not been given any authority to meddle with the functions of the Supreme Judicial Council. From the above, it is clear that tenure of a Judge of this Court (both the

Divisions) is fully secured and a Judge is free to perform his adjudicative role without any interference from the executive and the legislative branch of the Government.

Article 147 of the Constitution has guaranteed the remuneration, privileges and other benefits, of the Judges of the Supreme Court by an Act of Parliament. And the Parliament has already passed an Act, namely, "The Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978" as amended from time to time.

So far as the administrative independence is concerned that has also been given to the Supreme Court. Article 113 of the Constitution has clearly provided that appointments to the staff of the Supreme Court shall be made by the Chief Justice or such Judge or officer of the Supreme Court as he may direct, and shall be made in accordance with rules made with the previous approval of the President by the Supreme Court. Article 113(2) has further provided that subject to the provisions of any Act of Parliament the conditions of service of members of the staff of the Supreme Court shall be such as may be prescribed by rules by that Court. Article 107 of the Constitution has given the Supreme Court the power to make Rules for regulating the practice and procedure of each of its divisions and of any court subordinate to it subject to any law made by Parliament.

The Thirteenth Amendment has not at all touched the provisions of the Constitution as discussed above and thus, to impair the 3(three) conditions of the independence of judiciary. In this context, Mr. T. H. Khan, Mr. Mahmudul Islam and Mr. Rokanuddin Mahamud have rightly pointed out that after the appointment of a Judge by the Executive, it does not have any control upon the Judges, in any manner, and the Judges are to

perform their adjudicative functions according to their oath. So, I do not see any impediment on the Chief Justice and the Judges of both Divisions of this Court to do their adjudicative functions independently because of the Thirteenth Amendment.

The judiciary depends for its effectiveness on the public confidence that it enjoys as was expressed by a distinguished Judge of the Supreme Court of the United States of America:

> "The judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of Government. Those two historical sources or power rests in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are independent and courageous."

To earn public confidence Judges must, in the last analysis, have the moral and intellectual fiber which must sustain their own spirit of judicial independence, as is wisely acknowledged by Venkataramian, J in the case of S.P. Gupta and others-vs- President of India and others AIR 1982 (SC) 152 in the following language:

> "But if the judiciary should be really independent something more is necessary and that we have to seek in the judge himself and not outside. A judge should be independent of himself. A judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful judge these elements should be curbed and kept under restraint and that is possible only by education, training, continued service and cultivation of a sense of humility and dedication to duty. These curbs can neither be brought in the market nor injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of judiciary will not suffer. But with all these measures being there still a judge may not be independent. It is the inner strength of judges alone that can save the judiciary."
>
> In this case, Bhagwati J said:

> "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective."

Bhagwati, J further said that:

> the Judges must uphold the core principle of the rule of law which says-*"be you ever so high, the law is above you."*

In the case of Anwar Hossain Badrul Haider Chowdhury, J (as he then was) after quoting the above observations of Bhagwati in the case of S.P. Gupta commented:

> "This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution."

In the said case (S.P. Gupta) Bhagwati, J also said that:

> "what is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence who are judicial statesmen with a social vision and a creative faculty and who have, above all, a <u>deep sense</u> of commitment to the Constitution with a activist approach and obligation for accountability, not to any party in power nor to the opposition.... We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the Constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives."

He quoted the eloquent words of Justice Krishna Iyer:

> "Independence of the judiciary is not genu-flexcion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure."

In the context of our Constitution as discussed above, the Chief Justice and the Judges of both Divisions are absolutely free to perform their adjudicative functions independently without any interference whatsoever from the executive and the legislative branch of the Government. And the Thirteenth Amendment, in no way, has even attempted to interfere with such functions of the Judges. But to make the judiciary really independent;

it would largely depend upon mental strength and uprightness of a Judge to perform his adjudicative functions according to his oath. A Judge must have firm commitment in the constitutional values to administer justice. A Judge must be independent of himself first and should have the independent spirit and values to overcome all odds which he might face on his way to discharge his adjudicative functions. And those cannot be injected into a Judge from outside.

The point that by making provision for the retired Chief Justices of Bangladesh and the Judges of this Division to become the Chief Adviser of Non-Party Care-taker Government, the appointments in those posts are being politicised and the office of Chief Adviser has become a dangling carrot and that because of such dangling carrot, the Chief Justice of Bangladesh or the Judges of this Division, who are expected to become the Chief Adviser, may not discharge their adjudicative functions/duties freely, fairly and impartially or one will try to supersede the other so that one can be the last Chief Justice and that the Judge who is expected to be the last Chief Justice may not, at all, be influenced for his post. But, in the mind of the people, there is always apprehension that in view of such provision whether they can expect free, fair and impartial decision from the highest judiciary of the country. And that 'Mr. X' is protecting the interest of the party in power only, because he wants to be the last retiring Chief Justice before the election, is based on total hypothesis, speculation and imagination and ifs and buts. The above noted point is based on the possible argument that the incumbent Government, as part of its election strategy, might seek to appoint and promote its preferred Judges as the Chief Justice and the Judges of this Division in a pre-determined plan to

ensure that he or she occupies the position of immediate past Chief Justice and thus, becomes the Chief Adviser and such manipulation may create instability within the highest judiciary, can very well be guarded against by the office being respected by the Executive on the one hand, and by those who are part of the judiciary when exercising their judicial powers strictly observing and maintaining strict neutrality, and not being susceptible to influence from any quarters.

The vires of an amendment to the Constitution or the provision of a Constitution cannot be adjudged or decided on the basis of ifs and buts and on etherial question as raised by the learned Counsel of the appellant and petitioner and the amicus curiae, Mr. Rafique-ul Haque. It has also to be borne in mind that an Act passed by the Parliament carries the presumption of constitutional validity unless it can be shown that the same impairs and destroys any of the basic structures of the Constitution and offends any of the fundamental rights as guaranteed in Part III of the Constitution. And, on such speculative, imaginary and etherial question article 58C of the Constitution and amendment to article 99, making provisions for the retired Chief Justices of Bangladesh and the Judges of this Division as the Chief Adviser, cannot be declared *ultravires*.

However, the argument, as indicated hereinbefore, is also not historically correct. The concept of Non-Party Care-taker Government was brought in the Constitution through the Thirteenth Amendment only on 25th March, 1996 when the Bill relating thereto was passed in the Parliament and finally on 28th March 1996 when the President assented to the bill and was gazetted on that very date. But prior to that no body thought of introducing the concept of Non-Party Care-taker Government in the

Constitution. Supersession also took place: first supersession took place on 13.08.1976 when Justice Debesh Chandra Bhattacharjja was elevated to the Appellate Division superseding Justice Ruhul Islam. Then again on 26.12.1985 when Justice M.H. Rahman (as he then was) and Justice A.T.M. Afzal (as he then was) were elevated to the Appellate Division superseding justice A.R.M. Amirul Islam Chowdhury and Justice Md. Habibur Rahman. Justice A.R.M. Amirul Islam Chowdhury and Justice Md. Habibur Rahman were elevated as a Judge of the High Court Division on 24.11.1973 and 20.12.1975 respectively and they were confirmed on 11.11.1975 and 20.12.1977 respectively, whereas Justice M.H. Rahman and Justice A.T.M. Afzal were elevated to the High Court Division on 08.05.1976 and 15.04.1977 respectively and they were confirmed on 08.05.1978 and 14.04.1979 respectively. Was there any dangling carrot in 1976 and in 1985? The answer is, 'no'. It is also necessary to keep on record that thereafter Mr. Justice A.R.M. Amirul Chowdhury and Mr. Justice Habibur Rahman were superseded by the other Judges. Had Mr. Justice A.R. M. Amirul Isalm Chowdhury not been superseded, he had every possibility to be retired as the Chief Justice of Bangladesh on 01.03.1996, whereas Justice M.H. Rahman retired on 01.05.1995 as the Chief Justice of Bangladesh and became the first Chief Adviser of the Non-Party Care-taker Government under the new constitutional dispensation brought by the Thirteenth Amendment. Of course, there were other suppersessions as well after the concept of Non-Party Care-taker Government was introduced by the Thirteenth Amendment on 28th of March, 1996. Some Judges, who were not superseded, were not elevated to the Appellate Division in spite of the fact that there were vacancies. I do

not consider it necessary to name all those Judges, as one may say that those Judges might not have been elevated for political consideration keeping in view the post of the Chief Adviser, but I am constrained to mention the name of Mr. Justice Syed Amirul Islam whose name has been specifically mentioned in the supplementary affidavit filed by the writ petitioner before the High Court Division. One thing I must say very emphatically that among the superseded Judges including Mr. Justice Syed Amirul Islam (when superseded he was the senior most Judge of the High Court Division), there were Judges who by no calculation, had the chance to become the Chief Justice and thus, had no chance to become the Chief Adviser. The superseded Judges and the Judges, who were not elevated to this Division in spite of the vacancies, retired as Judges of the High Court Division with frustration and pain in their hearts for no fault of their own. Had they been elevated to this Division, they would have retired with the dignity of a Judge of this Division and with the attending benefits. Thus, it is clear that it is not the post of Chief Adviser of the Non-Party Care-taker Government for which Judges were superseded or not elevated and may in future be superseded and not elevated to this Division, but it is the perception of the Executive which prevailed and may prevail in future in appointing Judges to this Division as well as the Chief Justice of Bangladesh.

We should not forget that the Judges take oath to do right to all manner of people, without fear or favour, affection or ill will. If a Judge does not pass the right judgment, the Government will be angry with him and shall not appoint him as the Chief Adviser after his retirement; if the Judge commits breach of his oath, has nothing to do with the performance

of his duties as a Judge and it cannot be said that he was prevented from doing justice. Mr. Mahmudul Islam has rightly submitted that the Executive has the discretion to allot a housing plot to the Judges of the Supreme Court, it cannot be said that this discretion interferes with the performance of the Judges' adjudicative role. In this regard, I reiterate the statement of the Supreme Court of Canada that the critical question is whether a Judge is free in performing his adjudicative role without interference from the executive and the legislative branch of the Government and the answer with reference to the provisions of the Thirteenth Amendment must be in the affirmative.

I am also constrained to say that neither the learned Counsel for the appellant and petitioner nor Mr. Rafique-ul Haque could refer to any single adjudicative function before us to show that the retired Chief Justices of Bangladesh, who became the Chief Advisers and the other retired Chief Justices or the retired Judges of this Division, who had the chance to become the Chief Adviser, while in office, ever performed any adjudicative function showing any biasness or leniency towards the Government in power to justify their submission that because of the dangling carrot, they acted in a particular way in breach of their oath. I could not persuade myself to agree with the submission of Mr. Farooqui and Mr. Rafique-ul Haque that because of the dangling carrot of the Chief Adviser, the Chief Justice, who heads the judiciary, would not perform his adjudicative functions independently according to his oath. We should not also forget that before becoming the Chief Justice of Bangladesh, a Judge has to perform his adjudicative functions in both Divisions for quite a number of years and during these years, he is trained to be honest, neutral and

impartial. Similarly, when a Judge retires from this Division, he also performs his adjudicative functions for quite a number of years with the same training and mental make up.

The post of Chief Justice is also not less honourable, dignified and prestigious than that of the Chief Adviser. I do not find any logic behind the etherial submission that while holding the post of high office of the Chief Justice, he will be biased in performing his adjudicative functions in favour of the Government because of his chance to become the Chief Adviser for 90(ninety) days only and that too to perform routine functions. This sounds to me simply ridiculous, humiliating and very much disturbing as well. If that is the perception of the Bar, the future of the judiciary must be bleak.

From the Full Bench judgment (Mirza Hossain Haider, J), it appears that Mr. Rafique-ul Haque, who was also appointed as amicus curiae by the Full Bench, took a different stand before the High Court Division on the question of retired Chief Justices of Bangladesh to become the Chief Adviser. Before the High Court Division, he opined that:

> "the Chief Justice while in his office cannot be allured nor can he be appointed as Chief Adviser, the question of such appointment arises only when he retires from that office. It is the office of the Chief Justice upon whom faith and trust of the people rests. Thus, a person having held the position of Chief Justice, he is ideally suited for the independent, impartial and trustworthy office of the Chief Adviser of the impartial Non-party Caretaker Government and has thus been selected for holding the said office."

But, in this Division, he shifted his position and took the stand that because of the Thirteenth Amendment, the last retiring Chief Justice who has a chance to become the Chief Adviser, the people have a perception that they may not get impartial Justice on which I have already given my finding hereinbefore.

From the judgment of Mirza Hossain Haider, J, it further appears that Mr. Haque produced the copy of the text of the debate held on the Thirteenth Amendment Bill in the Parliament wherein it has been categorically emphasized by all members present that:

> "the judicial system of the country and the judiciary is always impartial and the judiciary is performing its duty impartially. As such an impartial Non-party Caretaker Government can only be headed by a person who had been heading the impartial judiciary, the Chief Justice of the country, upon whom the people have full trust and confidence" (the quotation is in the judgment of the High Court Division).

In the judgment delivered by my learned brother Muhammad Imman Ali, J, the entire deliberations made in the Parliament on the Thirteenth Amendment Bill by the then Law Minister, have been quoted–which substantiates the English version as quoted in the judgment of Mirza Hossain Haider, J. These together show the trust and faith of members of Parliament upon the judiciary and the Chief Justice of Bangladesh who heads the judiciary.

A Chief Justice or the Judge of this Division, after his retirement, goes out of his office, so the question of influencing the judiciary by them does not arise at all. The post of Chief Adviser is a political post, so the possibility of criticism is there, but it is the retired Chief Justice or the retired Judge of this Division, as the case may be, who will hold the office. Therefore, the criticism of the Chief Adviser, if there be any, shall, in no way, have any impact upon the judiciary and the independence of the sitting Chief Justice and the other Judges of this Division who are oath bound to perform their adjudicative functions without fear and favour, affection or ill will and according to law.

The Non-Party Care-taker Government, in exercise of the executive functions of the Republic, shall assist the Election Commission that may be required to hold free, fair and impartial general elections of members of Parliament. And, if, for any reason, the prospective Chief Adviser feels that he has any bias towards a particular political party for which he may wish to win the election, in that case he should not accept the office of Chief Adviser of the Non-Party Care-taker Government as such bias or leaning will frustrate the will of the people and the concept of Non-Party Care-taker Government.

Be that as it may, the legislature in their wisdom have preferred the retired Chief Justices of Bangladesh and the retired Judges of this Division as persons of high moral and impartial character with dignity and capable for discharging the powers and functions of the Chief Adviser of the Non-Party Care-taker Government, I do not find any reason or justification to question, the wisdom of the legislature in this regard. I fully agree with Awlad Ali, J that in the scheme of the impugned legislation, it is a well thought out plan that a retired Chief Justice shall hold the office of Chief Adviser. It has also transpired from the pleadings of the respective parties, the submissions of the majority of the amici curiae and deliberations of the Parliament that the decision to make the retired Chief Justices of Bangladesh and the retired Judges of this Division as the Chief Adviser was based on political consensus as well as the demand of the whole nation.

In this regard, I also consider it very relevant to refer to Act 24 of 1991 which is as follows:

“ **১৯৯১ সনর ২৪ নং আইন**

An act further to amend the Fourth Schedule to the Constitution of the People’s Republic of Bangladesh

WHEREAS in the face of the country-wide popular upsurge for over-throwing the illegal and undemocratic government and giving democracy an institutional shape the then President was compelled to tender resignation;

AND WHEREAS after the historic success of the students, peasants, workers, employees, the people in general, the Main Political Alliances and parties and all professional organisations, regardless of their political affiliation, belief and leanings, the three Main Political Alliances and parties made an ardent call to the Chief Justice of Bangladesh, Mr. Justice Shahabuddin Ahmed to take the reins of a neutral and impartial government as its head;

AND WHEREAS the then President appointed Chief Justice Mr. Shahabuddin Ahmed as Vice-President in the vacancy caused by the resignation of the then Vice-President and tendered his resignation to him;

AND WHEREAS upon a positive assurance of the three Main Political Alliances and parties of the country to the effect that after having run the government temporally till the establishment of an elected democratic government through a free, fair, and impartial election to Parliament he would be eligible to return to the office of the Chief Justice of Bangladesh and with the noble purpose of restoring democracy the Chief Justice, on the 21st day of Agrahayan, 1397 B.S. corresponding to the 6th day of December, 1990, assumed the onerous responsibility of running an impartial government as Acting President;

AND WHEREAS during the period in which Chief Justice Mr. Shahabuddin Ahmed exercised the powers and performed the functions of the President in his capacity as Vice-President, a Parliament comprising people's representatives and a people's government have been established through a free, fair and impartial election;

AND WHEREAS it is expedient to make provisions for ratification and confirmation of the appointment of Chief Justice Mr. Shahabuddin Ahmed as Vice-President, the exercise and performance by him of all powers and functions of the President acting as such and all laws and Ordinances made by him and acts and things done and all actions taken by him in that capacity and for his return to the office of the Chief Justice of Bangladesh in accordance with the assurances of the people and the Main Political Alliances and parties.

I t is hereby enacted as follows:

1. Short title −This Act may be called the Constitution (Election Amendment) Act, 1991.

2. Amendment of the Fourth Schedule to the Constitution −In the Constitution, in the Fourth Schedule, after paragraph 20, the following new paragraph 21 shall be added, namely:−

"21. Ratification and confirmation of the appointment of Vice-President, etc.− (1) The appointment of, and the administration of oath to the Chief Justice of Bangladesh as Vice-President on the 21st day of Agrahayan, 1397 B.S. corresponding to the 6th day of December, 1990, and the resignation tendered to him by the then President and all powers exercised, all laws and Ordinances made and all orders made, acts and things done, and actions taken, or purported to have been made, done or taken by the said Vice-President acting as President during the period between the 21st day

> of Agrahayan, 1397 BS corresponding to the 6th day of December, 1990, and the date of commencement of the Constitution (Eleventh Amendment) Act, 1991 (Act No.XXIV of 1991) (both days inclusive) or till the new President elected under article 48(1) of the Constitution has entered upon his office(whichever is later), are hereby ratified and confirmed and declared to have been validly made, administered, tendered, exercised, done and taken according to law.
> (2) The said Vice-President shall, after the commencement of the Constitution (Eleventh Amendment) Act, 1991 (Act No.XXIV of 1991), and after the new President elected under this Constitution has entered upon his office, be eligible to resume the duties and responsibilities of the Chief Justice of Bangladesh and the period between the 21st day of Agrahayan, 1397 BS corresponding to the 6th day of December, 1990 and the date on which he resumes such duties and responsibilities shall be deemed to be the period of actual service within the meaning of section 2(a) of the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1982 (Ordinance No.XX of 1982).

Act 24 of 1991 as quoted hereinbefore reveals the fact of an ardent call in 1990 made by the political parties and all professional organisations regardless of their political affiliation, belief and leanings to the then Chief Justice of Bangladesh, Justice Shahabuddin Ahmed to take the reins of a neutral and impartial government as its head till the establishment of an elected democratic Government through a free, fair and impartial election to Parliament and not to anybody else. I must say that along with the ardent call to the Chief Justice Shahabuddin Ahmed to take the reins of a neutral and impartial Government as its head with the positive assurance of the three Main Political Alliances and parties of the country that after having run the Government temporarily till establishment of an elected democratic Government, he would be eligible to return to the office of the Chief Justice of Bangladesh and then the implementation of such assurance by passing Act 24 of 1991 by the Fifth Parliament on the basis of consensus is unique and in a class by itself and I am sure such an example cannot be found anywhere in the world. So, the trust, faith and confidence of the

people is always carried by the judiciary, the office of the Chief Justice and the persons holding such office. And the neutrality to the office of Chief Justice is such that when Chief Justice, Shahabuddin Ahmed, resumed the duties and responsibilities of the office of Chief Justice of Bangladesh, he stayed back in the cases which were decided during his time as Acting President. As per section 57 of the Evidence Act, this Division has to take judicial notice amongst others: the course of proceedings of Parliament and of any Legislature, which had the power to legislate in respect of territories, now comprised Bangladesh.

Parliament by two-thirds majority having passed the Thirteenth amendment on the basis of consensus of all making provision for appointment of the former Chief Justices of Bangladesh as the head of the Non-party Caretaker Government as the first option, which unequivocally shows the trust, faith and confidence in the judiciary as well as in the high office of Chief Justice as the symbol of fairness and impartiality–if any question is raised at all–it would be the duty of the legislature to come up with a different and better device to select or appoint an appropriate person in the key post of the Chief Adviser and that must be again on the basis of consensus of all political parties as was done in 1996. In this regard, Mr. T. H. Khan, Mr. M. Amirul Islam and Mr. Mahmudul Islam rightly submitted that the matter of reform of the Non-Party Care-taker Government should be left to the Parliament. Moreover, the Thirteenth Amendment, being already found to be constitutional a part of it, cannot be looked into separately.

The observations made by this Division, in the case of Abdul Bari Sarker-vs-Bangladesh, represented by the Secretary, Ministry of

Establishment and others, 46 DLR(AD) 37 and in the Eighth Amendment case that the purpose behind the prohibition in the original article 99 of the Constitution against the appointment of a retired Judge in any office of profit in the service of the Republic, was that high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his retirement and that if any provision was made for holding of office of profit after retirement, a Judge– while in the services of the Supreme Court– might be tempted to be influenced in his decision in favour of the authorities keeping his eye upon a future appointment, does not help Mr. Farooqui to substantiate his argument that the amending article 99 of the Constitution read with article 58C making provision for the retired Chief Justices or the Judges of this Division to become the Chief Adviser, has destroyed the independence of judiciary. The appointment of Chief Adviser of the Non-Party Care-taker Government cannot, in its truest sense, be said to be an appointment in any office of profit in the service of the Republic and this appointment cannot be equated with any other appointment in any office of profit of the Republic. The appointment of a retired Chief Justice or the retired Judge of this Division as the Chief Adviser is absolutely different from the appointment as was made in the case of Abdul Bari Sarker. From the pleadings of the parties and the submissions of the majority of the amici curiae, it is *prima-facie* clear that the provision for appointment of the retired Chief Justices of Bangladesh and the retired Judges of this Division as the Chief Adviser of the Non-Party Care-taker Government, was incorporated in the Constitution by the Thirteenth Amendment on the consensus of all political parties including the party in power and also on the basis of popular demand of the people in general and

in fact, it was the demand of the whole nation. So, the post of Chief Adviser cannot be compared with a particular post of office of profit in any particular department of the Republic, as was in the case of Abdul Bari Sarker. Such provision was incorporated in the Constitution to see that constitutional process of democratic polity continues as well as to salvage the country from the possible extra-constitutional interference as submitted by Mr. T. H. Khan, Dr. Kamal Hossain, Mr. Mahmudul Islam and Mr. Rokanuddin Mahmud. According to Mr. M. Amirul Islam by the Thirteenth Amendment, the boat of democracy which was about to sink was salvaged and the people's right to vote freely and fairly has been restored. Another broad fact we cannot forget is that the judgment in the Eighth Amendment case was passed by this Division on the second day of September, 1989 and thereafter, Chief Justice Shahabuddin Ahmed was appointed as the Vice-President of the Republic on the basis of consensus of all 3(three) political alliances after General Ershad resigned from the post of President as the result of mass movement and eventually, he (Chief Justice, Shahabuddin Ahmed) performed as the Acting President of the country under whom the first ever free and fair general elections of members of Parliament were held. Similar is the case in choosing the retired Chief Justices of Bangladesh and the retired Judges of this Division as the Chief Adviser of the Non-Party Care-taker Government. There are instances of appointment of the sitting Chief Justice and the sitting Judge in Great Britain as Ambassador and Minister respectively during the period of grave national emergency. Lord Reading, while he was the Chief Justice of England, was appointed as an Ambassador in Washington and Lord Macmillan another sitting Judge was appointed as a Minister of

Information during the world war. In both cases, the said Judges resigned from their judgeships and they did not receive any pension. And, in the case of Non-Party Care-taker Government it is not the sitting Chief Justice and the sitting Judge of this Division but the retired Chief Justices of Bangladesh and the retired Judges of this Division who have been made eligible to be the Chief Adviser and that has been done, as submitted by the above mentioned amici curiae to save the country from possible extra-constitutional interference, that is, from the imposition of Martial Law.

Mr. M. I. Farooqui, Mr. Mohsen Rashid and Mr. Ajmalul Hossain submitted that free, fair and impartial election can very well be held without Non-Party Care-taker Government, by strengthening the Election Commission giving it more powers. They further submitted that holding of free and fair election can also be ensured by reforming the Election Commission and the electoral system. They stressed that if that is done, the necessity of holding the elections of members of Parliament under the Non-Party Care-taker Government, at all, would not be necessary. But, I find the submission devoid of reality. The reality is that in an election held under the party in power, notwithstanding that the Prime Minister and the Cabinet lose their character of the people's representatives, they continue to retain their strong and open affiliation with their party and also participate in the election and they do not give institutional support to the Election Commission that may be required to hold the general elections of members of Parliament in a free, fair and peaceful manner. So, holding of election in a free, fair and impartial manner under a partisan Government, becomes a remote proposition. Even though this fact is admitted in the affidavit-in-opposition of respondent Nos.1 and 6, the thing will be clear– if we recall

the historical fact which took place in 1991 and 1994. When Chief Justice, Shahabuddin Ahmed was the Acting President, general elections of members of Parliament were held on 27.02.1991. At that time, Justice Mohammad Abdur Rouf, at that time a sitting Judge of the High Court Division, was appointed as the Chief Election Commissioner (he was appointed on 25.12.1990), Justice Syed Mesbahuddin Hossain and another sitting Judge of the High Court Division, Justice Naimuddin Ahmed, were appointed as the Election Commissioners (Justice Syed Mesbahuddin Hossain was appointed on 28.12.1990 and Justice Naimuddin Ahmed was appointed on 16.12.1990) and the election observers termed the election held on 27.02.1991 as free, fair and impartial. After the general election, Justice Naimuddin Ahmed came back to the High Court Division. But Justice Mohammad Abdur Rouf continued to act as the Chief Election Commissioner. Mirpur by-election was held on 03.02.1993 under the political Government. But the Election Commission headed by Justice Muhammad Abdur Rouf could not hold the election fairly, freely and impartially. The candidate of the party in power Syed Mohammad Moshen was declared elected. The defeated candidate of the opposition, Mr. Kamal Ahmed Mamjumder, raised allegations of vote rigging and manipulation of election result. Thus, the by-election under the party Government was questioned very much as not free, fair and impartial. Then, the by-election of Magura was held on 20.03.1994. In this by-election, there were also serious allegations of rigging and manipulation and the Election Commission headed by Justice Muhammad Abdur Rouf, which had successfully held the general election of members of Parliament on 27.02.1991, under the Acting Presidentship of Justice Shahabuddin Ahmed

in a free, fair and impartial manner, failed to hold the by-elections of Mirpur-Magura in a free, fair and impartial manner and thus, proved that election under the political party in power, was not possible in spite of the mandate given by article 126 of the Constitution that it shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions.

At the risk of repetition, I say that, in fact, Magura by-election gave a turning point in the democratic process in the political history of Bangladesh and the passing of the Thirteenth Amendment for holding the general elections of members of Parliament under the Non-party Care-taker Government (and by now 3(three) elections have already been held). Yet, for holding the general election of members of Parliament under the Non-party Care-taker Government, more steps may be taken to strengthen the Election Commission. Care and caution must be exercised in appointing the Chief Election Commissioner and the other Commissioners so that the person with high morality, integrity, uprightness and sagacity may be invariably chosen for the said office. The Election Commission must be made more powerful. We have noticed that by this time, many reformative steps have already been taken in the process of holding the general election of members of Parliament by incorporating necessary amendments in the RPO, 1972, such as registration of political parties, submission of accounts of the expenditure of election by the political parties and by the candidates, establishment of Electoral Enquiry Committee to ensure the prevention and control of pre-poll irregularities.

In this context, I am also constrained to say that even if elections in 1 (one), 2(two) or more by-elections of members of Parliament, are held

peacefully and fairly under the political party in power that, in no way, guarantees that the party in power, during the holding of next general elections of members of Parliament, would maintain its neutrality staying its hands off in exerting undue influence on the Government machinery and would assist the Election Commission in the discharge of its functions for holding the election in a free, fair and impartial manner, because by losing in 1(one), 2(two) or more seats in the by-elections of members of Parliament, the party in power loses nothing if it is in power with two-thirds or three-fourths majority. Similarly, holding elections of the local bodies by the Election Commission, under the political party in power in a free and fair manner, does not make any difference, because by holding such election, a political party does not go to power.

Mr. Rokanuddin Mahmud has rightly said that the people of the country have already witnessed the benefit of the Thirteenth Amendment, as in the 3(three) general elections of members of Parliament held under the Non-Party Care-taker Government, they were able to go to the polling centers and cast their votes freely without any influence of money and muscle power. I also find his submission quite logical when he said that previously no Government in power was ousted through election process, which could not happen in a democracy and it is only after the introduction of the Non-Party Care-taker Government by the Thirteenth Amendment in the Constitution that the party in power was ousted because they did not secure necessary seats of the members of Parliament to form the Government.

Another point raised by Mr. Farooqui needs to be addressed. The point is that by amending article 61 of the Constitution, the concept of two

executives, that is, a dyarchy has been injected in the Constitution whereas the framers of the Constitution conceived of only one executive to be headed by the Prime Minister and this has also added to the destruction of the democratic character of the Constitution; in view of the provision of article 58C(6) of the Constitution if the succession fails, eventually the President takes over the functions of the Chief Adviser, then he has a chance to become autocratic and in that case also, the democratic character of the Republic shall be totally destroyed. The submission of Mr. M. I. Farooqui, appears to me tendentious and demonstrates his unwillingness to give due importance to the short term constitutional mechanism on the basis of consensus of all to ensure free and fair general elections of members of Parliament, which was not possible in the election with the political party in power. Be that as it may, if we see article 61 in its original form– it would appear that the supreme command of the defence services of Bangladesh is vested in the President and the exercise thereof shall be regulated by law. By the Thirteenth Amendment, it has been added that "and such law shall, during the period in which there is a Non-Party Care-taker Government under article 58B, shall be administered by the President." The President, being the Head of the State and being elected according to the provisions of the Constitution and the law, I do not see anything wrong in authorising him to exercise the power of supreme command of the defence services of Bangladesh by administering law by him during the Non-Party Care-taker Government. Merely, because the law regulating the exercise of power of the supreme command of the defence services during the period of Non-Party Care-taker Government, be administered by the President, he does not become an autocrat. Moreso,

article 58B(3) has clearly provided that during the period of Non-Party Care-taker Government, the executive power of the Republic shall be exercised in accordance with the Constitution, by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Care-taker Government.

So far as the possibility of the President to assume the functions of the Chief Adviser under clause (6) of article 58C is concerned, it is the last and the remotest option and before that there are as many as five options and if that happens, then also the President has no chance to be autocratic as the head of Non-Party Care-taker Government, because his functions will be confined to the routine functions and he cannot make any policy decision, except in the case of necessity. Furthermore, there shall be 10 other Advisers and the President is also oath bound to act according to law. These are hypothetical questions raised by the appellant out of his own imagination have no practical impact on the relevant provisions of the Constitution and thus no chance to destroy the democracy.

In this regard, I also feel the necessity to consider another important article, namely: article 93 of the Constitution. Only one amendment was brought to this article by the Proclamations (Amendment) Order, 1977 (Proclamations) by omitting the words “Parliament is not in session” but that omission is no more because of the judgment passed in the Fifth Amendment case and now, the said words have again been restored. All other provisions of clauses (1)(2)(3) and (4) of the article, remained same since the Constitution came into operation on 16th December, 1972. This article has authorised the President to make and promulgate such Ordinance as the circumstances appear to him to be required when

Parliament is not in session, if he is satisfied that circumstances exist, which render immediate action necessary. This article has not spoken of any advice of the Prime Minister, as a pre-condition to make and promulgate such ordinance. So, the power of the President in making and promulgating the Ordinance remains same during the Non-Party Care-taker Government as under the elected Government. In view of the above, I do not find any substance in the submission of Mr. M. I. Farooqui that because of amendment of article 61, the President has chance to be autocrat and a dyarchy has been created.

The submission of Mr. M.I.Farooqui that the Non-Party Care-taker Government suffers from lack of authority to make any policy decision and for such lack of authority, the country may suffer particularly, on foreign policy matter which may require prompt decision, is also devoid of any merits. Because, in article 58D clear authority has been given to the Non-Party Care-taker Government to make policy decision on policy matter if it is necessary; we cannot also forget that the whole scheme of the Non-Party Care-taker Government is a short term constitutional administrative mechanism and procedure for ensuring full term truly elected representative government. However, though the legislature mandated that Non-Party Care-taker Government shall carry on the routine functions and it shall not make any policy decision, took care to authorise it to make policy decision in case of necessity, so it cannot be said that Non-Party Care-taker Government is absolutely bereft of total lack of authority to make policy decision in case of necessity. Therefore, the people and the country have nothing to suffer.

Equally, I do not find any substance in the submission of Mr. M. I. Farooqui as to the possible anomaly and uncertainty as to post of the Prime Minister in case the President summons the dissolved Parliament under article 72(4) of the Constitution. Because the legislature while enacting the Thirteenth Amendment of the Constitution took care of such situation by adding a proviso to article 58A to the effect that "provided that, notwithstanding anything contained in Chapter IIA, where the President summons Parliament that has been dissolved to meet under article 72(4) this Chapter shall apply." So, with the summoning of the dissolved Parliament Under article 72(4) Chapter II along with article 56(4) shall automatically be revived and then the President shall have the authority to appoint the Prime Minister in exercise of his power under article 56(3) thereof from amongst the persons who were the members of dissolved Parliament. Therefore, no anomaly and uncertainty as to the post of Prime Minister would arise.

The last point of attack on the Thirteenth Amendment by the appellant, is that by making the retired Chief Justices of Bangladesh and the retired Judges of this Division as the Chief Adviser, separation of powers, another basic structure of the Constitution, has been impinged. But I do not find any logic behind this argument. In the Thirteenth Amendment, no provision has been made for the sitting Chief Justice of Bangladesh or a sitting Judge of this Division to hold the office of Chief Adviser. When a Chief Justice or a Judge of this Division retires, he ceases to be a member of the judiciary. By such appointment, the judiciary shall, in no way, be involved. I fail to understand how the question of impingement of the basic structure of separation of powers, may arise

when no provision has been made in the Thirteenth Amendment for the sitting Chief Justice or Judge of this Division to become the Chief Adviser or the Adviser. Apart from this, the Constitution does not prescribe separation of powers in the real sense of the term. What the Constitution has done, can properly be described as broad distribution of powers among the three organs of the Government, namely: the Legislature, the Executive and the Judiciary. In spite of division of powers, Legislature performs some executive and some judicial functions. Executive performs some legislative functions and some functions of judicial nature. Judiciary also performs some functions of legislative and executive in nature. So, unless any Court or its presiding officer goes for judicial legislation or is entrusted with some core administrative work, question of impingement of separation of powers does not arise at all.

I find considerable force in the argument of Mr. Mahmudul Islam that an Act cannot be declared invalid on the ground that the same has been abused or there is chance of abuse if the same passes the test of a valid statute. The test of a valid statute has also been provided in the Constitution itself vide clause (2) of article 7 and article 26. The test of validity of an amendment to the Constitution is that the same does not impair or destroy the basic and fundamental structures of the Constitution. Mr. Farooqui, by referring to the events which took place during the period 2006-2008, has tried to justify that the introduction of Non-Party Care-taker Government has failed as the President himself assumed the functions of Chief Adviser when the main opposition political party refused to accept the immediate past Chief Justice, Justice K.M. Hassan as

the Chief Adviser, but the President, ultimately, had to resign from the post and Dr. Fakhruddin Ahmed was appointed as the Chief Adviser of the Non-Party Caretaker Government which remained in power for more than two years though the said government was supposed to be in power for only 90(ninety) days.

From the above, it is clear that the Thirteenth Amendment was abused. A reading of the provisions of article 58C, which has dealt with the composition of the Non-Party Care-taker Government, shows that the assumption of functions of the Chief Adviser by the President, is the last option and before that there are as many as 5(five) options. Unfortunately, the then President for the reasons best known to him, did not exercise the other options as provided therein when Chief Justice K. M. Hasan declined to accept the post of Chief Adviser on the objection of the opposition political parties and he himself assumed the functions of the Chief Adviser. Legislature, in its wisdom, has kept so many options for the post of Chief Adviser if the first option, that is, the immediate past retired Chief Justice declines to accept the post, but the President did not exercise those options. Is it the fault of the Thirteenth Amendment? The answer is obvious. If there was any fault, it is the fault of the President who was oath bound to follow the Constitution. Definitely, when the Thirteenth Amendment was passed, it became the part of the Constitution. So the President had no option but to follow it. The occurrences which happened during the period of 2006-2008, cannot be attributed to the Thirteenth Amendment and for such occurrences, the same cannot be declared *ultravires*.

The last Non-Party Care-taker Government could stretch their tenure beyond ninety days because of the fact that although, according to article 123(3) as amended by the Thirteenth Amendment, general election of members of Parliament is required to be held within 90(ninety) days after the Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration, no consequence has been provided therein if election is not held within the said period. Further in view of the language of article 58B(I) to the effect: "There shall be a Non-Party Care-taker Government during the period from the date on which the Chief Adviser of such Government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date, on which a new Prime Minister enters upon his office after the constitution of the Parliament." There is scope of extension of the period of Non-Party Care-taker Government till the date on which a new Prime Minister enters upon his office after the constitution of Parliament. And taking that advantage of the state of the above constitutional provisions, the Non-Party Care-taker Government, headed by Dr. Fakhruddin Ahmed, formed under the circumstances as stated in the application filed by the appellant under the head "for bringing on record the developments during the last Caretaker Government of the period 2006-8", continued for more than two years. But, fact remains, the main purpose for which the Non-Party Care-taker Government was formed, that is, to give the Election Commission all possible aid and assistance that may be required for holding the general elections of members of Parliament peacefully, fairly and impartially, was duly given by the Non-Party Care-taker Government and because of such assistance, the people could exercise their right of

adult franchise freely without fear of muscle power, coercion, intimidation and influence of money and the present Parliament is the result of the said election. And except the political party, which could not secure necessary number of seats of Parliament to form the Government, none raised any complaint as to any biasness of the Non-Party Care-taker Government in assisting the Election Commission for holding the general election of members of Parliament in a free, fair and peaceful manner. So, it is no use of blaming the Thirteenth Amendment. However, in the light of the above experience, necessary amendments may be made in articles 123(3) and 58B, so that the Non-Party Caretaker Government cannot extend/stretch its period beyond 90 days–If there is headache, one should see the doctor for its cause and to take medicine as per doctor's advice to get rid of such headache, if necessary to go for operation in the head, if so advised by the Doctor, but the head cannot be cut off as sought to be argued by the learned Counsel for the appellant–so, the law, the wanting in the law can very well be taken care of by making necessary amendment through discussions and by way of consensus as was reached in 1991 and 1996.

I cannot also ignore the apprehensions expressed by the two responsible Senior citizens of the country, who are also former Attorney Generals, namely: Mr. Rafique-ul Haque and Mr. Mahmudul Islam, in their verbal and written submissions. Mr. Rafique ul Haque in his written submission stated that:

> "It is very clear that even if the highest court declares the Thirteenth Amendment as illegal the BNP will not participate in the election."

He also made verbal submission that though the concept of Non-Party Care-taker Government is contrary to the basic structures of the

Constitution, it cannot be abolished now, if the same is abolished then 1/11 may come again.

> Mr. Mahmudul Islam in his written submission stated that:
> Today if the Thirteenth Amendment is held invalid, it is almost certain that the opposition parties will not participate in the election and democracy will be a far cry."

Mr. Mahmudul Islam, in his written submission, has also made a reference to the imposition of Martial Law in Pakistan in 1977. Although Bhutto's party won the general election with a thumping majority in March, 1977, opposition parties alleged massive rigging in the election giving rise to street agitation and disturbance resulting in loss of lives as inter party negotiation failed on the issue of an interim authority with adequate powers to supervise fresh election, the then Army Chief of Staff imposed Martial Law. But, because of the consensus amongst the parties in our country, the imposition of Martial Law was avoided and the boat of democracy which was about to sink was salvaged. And for this, tribute must be paid to our political leaders who showed their farsightedness, maturity and sincerity that the democratic process through the short term constitutional administrative mechanism continues in the country and in the process democratic polity be established to ensure people's supremacy as enshrined in article 7 of the Constitution.

If the apprehensions of the two responsible senior citizens of the country become true, in the event the Thirteenth Amendment is declared *ultravires* the Constitution then it would surely give rise to political chaos in the country which again would lead to a situation that occurred in 1996 as emerged from the pleadings of the respective parties and the submissions of the majority amici curiae and in that event, it shall have a serious impact on our economy and in the process, democracy and

democratic polity shall suffer; the country will be put back instead of going forward with prosperity. But, we cannot afford all these, particularly when the people have accepted the mechanism by participating in the 3(three) general elections of members of Parliament in large scale.

It is true that an Act passed by the Parliament amending the Constitution, cannot get seal of validity from this Division if the same injures or impairs the basic structures of the Constitution. But I have already found that the Thirteenth Amendment has, in no way, affected or impaired the basic structures of the Constitution. In this context, I do not see any reason to declare the Thirteenth Amendment *ultravires* the Constitution. It also appears to me that the issue of holding the general election of members of Parliament under Non-Party Care-taker Government is a settled one, so there is no reason to reverse the same after all these years.

The decisions cited by Mr. Ajmalul Hossain on 7 heads mostly from Indian Jurisdiction as have been noted while taking note of his submissions relate to the proposition that democracy is a fundamental structure of the Indian Constitution and also as to the power of judicial review of the superior Court in striking down an Act bringing amendment to the Constitution if the same impairs or destroys any of the basic structures of the Constitution. As I have already observed at the beginning of this judgment, no body disputed, either before the High Court Division or before this Division, that democracy is not a basic structure of our Constitution and that in exercising power of judicial review under article 102 of the Constitution and under article 103 thereof, has no power to strike down an amendment to the Constitution if the same impairs or

destroys the basic or fundamental structures of the Constitution. I did not feel it necessary to consider those decisions. The other decisions referred to by Mr. M. I. Farooqui also not being relevant in the context I have not considered those.

The context in enacting the Thirteenth Amendment as detailed in the affidavits-in-opposition filed by respondent Nos.1, 5 and 6 particularly respondent No.6 and as argued by the learned Attorney General and the majority of amici curiae as discussed hereinbefore, *prima-facie*, shows that the same was required under the changed circumstances, for giving a complete meaning and true practice of democracy and also for making the existing provisions of interim Caretaker Government meaningful and more effective and thus, to ensure the empowerment of the people as envisaged in article 7 of the Constitution.

Democracy, which was uncompromisingly fought for and achieved by the people of Bangladesh in 1990, much after the struggle of liberation and independence, by throwing aside the yoke of the autocratic rule, is a form of Government. Representative democracy, in which the powers of the majority are exercised within the constitutional framework, is known as constitutional parliamentary democracy. Such democracy requires to be nourished, sustained and consolidated through right culture, instillation and inculcation of certain democratic norms and values in the persons in authority and the Government as well as in the political parties. The important and overriding democratic values and principles lie in the exhibition of tolerance and respect for the view of others embraced with indivisible allegiance, loyalty and patriotism for the country. Politics of confrontation and violence being anathema to real democratic culture,

values, norms and practice must be shunned at any cost. The democratic and political culture is another important and indispensable factor in establishing democratic society and good governance in the country. Every democratic political party should not only be committed, but must also be seen to be committed to cherish and practise sound and healthy culture. But, unfortunately, these are absent in our political arena. And presently, it is animosity and rivalry which are reigning in the political climate of our country. We hope that in course of time the climate and culture of animosity and rivalry which are reigning in our political arena will very soon come to an end and a climate of co-existence with respect for each other, their leaders and political ideology, will soon be established. If these are achieved then free, fair and impartial election will not any more be a distant goal under the party in power. But till such time, there is no alternative of holding the general election of members of Parliament under Non-Party Care-taker Government to continue the democratic polity and thus to establish the sovereignty of the people as conceived of in article 7 of the Constitution by the Constituent Assembly reflecting the aspirations of our forefathers and for which our martyrs shed their lives in the liberation struggle in 1971.

The whole purpose of the Thirteenth Amendment is to give the people a constitutional safeguard for exercising their right of adult franchise freely, free from any muscle power, intimidation, inducement, duress or threat in selecting their own representatives, who will form the Government, for their governance for long 5(five) years. If the Non-Party Care-taker Government system goes then money and muscle power will again rule in the election and in addition the party in power as experience

showed will resort to undue influence upon the Government machinery to rig the elections and manipulate the results and in the process, democracy will again be a far cry and thus the supremacy of the people as enshrined in article 7 of the Constitution shall be only in the document, namely, the Constitution of the People's Republic of Bangladesh.

As I have already stated, hereinbefore, free and fair election is an inextricable part of democracy, a basic structure of our constitution. Without free and fair election democracy can never be practised in its true sense. The Thirteenth Amendment has, in fact, ensured holding of free, fair, impartial and credible general election of members of Parliament and by such election, the people can exercise their right of adult franchise in electing members of Parliament who will ultimately form the Government as provided in article 55 of the Constitution. So, introducing the concept of Non-Party Care-taker Government in the Constitution by the Thirteenth Amendment, the democracy, the independence of judiciary and separation of powers, in no way, have been affected or impaired. In fact, the Thirteenth Amendment has strengthened and institutionalised democracy.

The Thirteenth Amendment as passed by the Sixth Parliament is *intravires* but not *ultravires* the Constitution. The Thirteenth Amendment has become a constitutional necessity.

Lastly, as has already been held hereinbefore, the High Court Division in exercising its power of judicial review under article 102 of the Constitution and this Division under article 103 thereof, can very well declare an amendment brought to the Constitution by an Act of Parliament *ultravires* the Constitution if the same impairs or destroys any of the basic structures of the Constitution. But in exercising the power of judicial

review, neither the High Court Division nor this Division can give direction to the Parliament to amend the *void* Act in a particular manner. If this is done, that will be self contradictory and shall also be a transgression into the legislative power of the Parliament as provided in article 65(1) of the Constitution and shall also be against the constitutional scheme of broad distribution of powers among the 3(three) organs of the Government, namely: legislative, executive and judiciary. Similar view has been expressed by the Indian Supreme Court in the cases of Suresh Seth-vs-Commissioner, Indore Municipal Corporation and others, AIR2006(SC)767; Bal Ram Bali and another-vs-Union of India, AIR 2007 (SC) 3074; State of Jammu & Kashmir-vs-A.R. Zakki and others, AIR 1992(SC) 1546; Supreme Court Employees Welfare Association Etc-vs-Union of India & another, AIR 1990, (SC) 334; Narinder Chand Hem Raj-vs-Lt.Governor, Administrator, Union Territory, Himachal' Pradesh, AIR 1971(SC)2399; A.K. Roy Etc-vs-Union of India and another AIR 1982, 710; Union of India(Uoi)-vs-Prakash P. Hinduja and another, AIR 2003, (SC), 2612 and the State of Andhra Pradesh and another-vs-T. Gopal a Krishna Murthi and others AIR 1976 (SC) 123.

I could not also subscribe to the majority view that after an Act of Parliament amending the Constitution is declared *ultravires* the Constitution, the same can be given life in any form whatsoever. However, only the actions which were taken under the void law can be condoned. Such an exercise is also not contemplated in article 104 of the Constitution. Of course, in exercising the power of judicial review, the High Court Division as well as this Division can make observations in respect of a matter which comes to its notice in course of hearing, be it amendment of

any provision of the Constitution or any other Act or legislation or any other matter. In this regard, I cannot but refer one thing that in the short order passed on 10.05.2011 allowing the appeal by majority view, it was simply stated:

> "(1) .....
> (2).....
> (3) The elections of the Tenth and the Eleventh Parliament may be held under the provisions of the above mentioned Thirteenth Amendment on the age old principles, namely: quod alias no est licitum, necessitas licitum facit (That which otherwise is not lawful, necessity makes lawful), salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the Supreme law).
> The parliament, however, in the meantime, is at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Care-taker Government."

But, in the concluding portion of the judgment and in clause (12) of the summary under paragraph 44, the learned Chief Justice has added the following:

> "(2) তত্ত্বাবধায়ক সরকার শুধুমাত্র জনগণর নির্বাচিত জাতীয় সংসদ সদস্যগণ দ্বারা গঠিত হইত পার, কারণ, জনগণর সার্বভৌমত্ব ও ক্ষমতায়ন, গণতন্ত্র, প্রজাতান্ত্রিকতা, বিচার বিভাগর স্বাধীনতা সংবিধানর basis structure এবং এই রায় উক্ত বিষয়গুলির উপর সর্বাধিক গুরুত্ব আরাপ করা হইয়াছ"
>
> (12) সাধারণ নিবর্চান অনুষ্ঠিত হইবার ক্ষেত্র, জাতীয় সংসদর বিবচনা (discretion) অনুসার, যুক্তিসঙ্গত কাল (reasonable periond) পূর্ব, যথা, ৪২(বিয়াল্লিশ) দিন পূর্ব, সংসদ ভাঙ্গিয়া দেওয়া বাঞ্ছনীয় হইব, তব, নির্বাচন পরবর্তী নূতন মন্ত্রিসভা কার্যভার গ্রহণ না করা পর্যন্ত পূর্ববর্তী মন্ত্রিসভা সংক্ষিপ্ত আকার গ্রহণ করতঃ উক্ত সময়র জন্য রাষ্ট্রর স্বাভাবিক ও সাধারণ কার্যক্রম পরিচালনা করিবন,

The above additions as to the formation of the "তত্ত্বাবধায়ক সরকার" are not in conformity with the short order passed on 10.05.2011.

To Sum up:

(1) The Constitution is the supreme law of the Republic. Above all it is a document under which laws are made and from which laws derive their validity.

(2) We should not be obsessed with the term/word democracy without trying to see what it means and what its relationship with the free and fair general election of members of Parliament and what the constitutional scheme is in that respect.

(3) Democracy has not been defined anywhere in the Constitution though this has been used in the Preamble and in articles 8 and 11 of the Constitution. In a compact way, it can be said that democracy is the rule of majority elected by the people for a specified term upon exercising their right to vote in a free and fair election for their well being in all fields: economic, social and political and for their good governance as well.

(4) Democracy and free and fair election is inextricably mixed. Like democracy, free and fair election is also a basic structure of the Constitution. Without free and fair election, democracy can never be practised in its true sense.

(5) Like democracy, election has not been defined in anywhere in the Constitution though election has been used in many articles such as: articles 65(2), 66(2), 67(1), 70(1), 71(2), 72(4), 74(1)(2), 119)1), 122(1), 123(1)(2)(3)(4), 124, 125 of the Constitution. Election has also not been defined in the Representation of the People Order, 1972(hereinafter referred to as the RPO, 1972) under which election of members of Parliament is held. And that being the position, we have to fall back upon the dictionary meaning of election. As per Oxford English Dictionary, 7th edition, 'election' means "the process of choosing a person or a group of people for a position, especially a political position, by voting; 'election' is an occasion on which people officially choose a political representative or government by voting." As per Chambers Dictionary, 'election' means "the act of electing or choosing, the public choice of a person for office, usu. by the votes of a constituent body; free will; the exercise of god's sovereign will in the predetermination of certain persons to salvation (theol); those elected in this way (bible). As per Black's Law Dictionary, 'election' means "3.The process of selecting a person to occupy an office (usu. a public office) membership, award or other title or status of members of Parliament." If we consider the above dictionary meaning of election along with

article 122 of the Constitution, it will appear that the election process should be such that people's right of choice through adult franchise to select their own representatives in the Parliament, i.e. members of Parliament, should not, in any way, be hindered and obstructed.

(6) It will be a mockery to say that all powers of the Republic belong to the people as enshrined in article 7 of the Constitution unless the people get chance to practise democracy, that is, they can exercise their rights of adult franchise in selecting their own representatives in a free, fair and impartial general elections of members of Parliament; the 13th Amendment has ensured the said rights of the people and thus, has strengthened and institutionalised democracy and has not destroyed democracy.

(7) We should not confuse between two things, democracy and Parliament. Free and fair election is part of democracy and a fundamental structure of the Constitution. And Parliament is the product of democratic process through a free and fair election. So, in the absence of free and fair election, Parliament cannot have real legitimacy and cannot be said to be sovereign as well and in such Parliament, people will have no representation. We should not also have any special fascination and love for the Parliament if its members are not elected by the people in a free and fair election and thus, do not have a true representation to the people.

(8) Parliament as conceived of by the framers of the Constitution is a Parliament consisting of 300 members to be elected from single territorial constituency; election as referred to in article 65(2) of the Constitution definitely refers to free, fair and peaceful election; if the candidates in the general election of members of Parliament get themselves elected by use of muscle power and money, coercion, threat, intimidation and exerting undue influence on the Government machinery, they cannot be called people's representatives and Parliament consisting of such members cannot be called a Parliament in its true sense within the meaning of clause (1) of article 65 of the Constitution and such Parliament cannot materialise the aspirations and the dreams of our forefathers and the martyrs who sacrificed their lives in the liberation struggle in 1971.

(9) With the dissolution of Parliament either under article 57(2) or 72(3) of the Constitution, the members of Parliament including the Prime Minister and his other colleagues, in the Cabinet, cease to be elected representatives of the people and they no more remain responsible to the Parliament and thus to the people, therefore, the character of the unelected Chief Adviser and the Advisers of Non-Party Care-taker Government is same as that of the Prime Minister and his other Cabinet colleagues after the dissolution of Parliament. The argument that even after the dissolution of Parliament, the Prime Minister and his other colleagues continue to be elected representatives of the people because of proviso to clause (3) of un-amended

article 123 and article 72(4) of the Constitution is absolutely fallacious and bereft of logic inasmuch as if such argument is upheld then articles 57(3), 58(4), 72(3) and clause 3(b) of un-amended article 123 shall be rendered nugatory which is inconceivable in interpreting a written Constitution.

(10) Political parties are not strange in our Constitution like the Indian Constitution. Article 152 of the Constitution has recognised very much political party. Reading the definition of political party as given in the Constitution along with the provisions of the Representation of the People Order, 1972, political parties cannot be isolated from the people as used in article 7 of the Constitution and their role in our political and national life cannot also be denied. Therefore, the consensus reached amongst the political parties (party in power and opposition political parties) on the question of holding general elections of members of Parliament under the Non-Party Care-taker Government cannot be ignored just as the outcome of political agitation or like any other political demand made by any political party on a factional issue. We cannot also forget the historical fact that in 1990 when General Ershad resigned from the post of President as the result of mass movement, it is the three Main Political Alliances and parties who along with others, that is, all professional organisations regardless of their affiliation, belief and leanings made the then Chief Justice Shahabuddin Ahmed agreeable to accept the post of Vice-President and thus to take the reins of a neutral and impartial Government as its head with the positive assurance that after having run the Government temporarily till the establishment of an elected democratic Government through a free, fair and impartial election to Parliament, he would be eligible to return to the office of the Chief Justice of Bangladesh and then after the establishment of Parliament on the basis of general election of members of Parliament Act 24 of 1991 was passed to give effect to the said assurance allowing him to resume the responsibilities of the office of the Chief Justice of Bangladesh, on the basis of consensus which is unique and class by itself and I am sure such an example cannot be found anywhere in the world

(11) There will be no anomaly as to the premiership of the Republic in case the dissolved Parliament is summoned by the President under article 72(4) of the Constitution, because of the proviso to article 58A and article 56(4) of the Constitution.

(12) The system of interim Government was already there in the Constitution vide articles 57(3) and 58(4) of the Constitution, the Thirteenth Amendment has only brought some change in its formation under the name: Non-Party Care-taker Government for holding the general election of members of Parliament peacefully, fairly and impartially and thus, democracy, in no way, has been impaired.

(13) The provision for appointment of non-members of Parliament as Ministers, was provided in article 56(4) in the

original Constitution which was enacted, adopted and given by Constituent Assembly. Article 56(2) of the present Constitutional dispensation has also provided for appointment of non-parliament members as Ministers up to one-tenth of the total number of the Ministers appointed from amongst the members of Parliament. Therefore, there is no constitutional problem in the Thirteenth Amendment making provision for unelected persons to be the Chief Adviser and the Advisers. Presently, there are two Cabinet Ministers and one Minister of State in the Cabinet who are not members of Parliament.

(14) The Thirteenth Amendment is a short term constitutional administrative mechanism and procedure for ensuring a full term truly democratically elected Government, which has been experienced, cannot be accomplished by a partisan Government howsoever elected, the question of declaring the same ultra vires the Constitution does not arise at all.

(15) The President who heads the Republic is elected and if it is held otherwise than articles 48(1), 119(1)(a), 123(1) and 152 of the Constitution shall be rendered nugatory and in interpreting a written Constitution that is absurd. The Government operated during the period of Non-Party Care-taker Government being collectively responsible to the President, the representative character of the Government is not at all lost; there remain democracy and the people.

(16) During the period of Non-Party Care-taker Government, the President who is elected, remains as the head of the State. So, the Republic character of the State and the Constitution is not lost.

(17) By making provision for the retired Chief Justices of Bangladesh and the retired Judges of the Appellate Division to be the Chief Adviser, independence of judiciary has not at all been destroyed or impaired, because three core or essential conditions of judicial independence such as: (i) security of tenure (ii) financial security and (iii) administrative independence which are inherent in our Constitution have not, in any way, been affected or impaired by the Thirteenth Amendment.

(18) No provision having been made in the Thirteenth Amendment for the sitting Chief Justice or the sitting Judge of the Appellate Division for appointment as the Chief Adviser, separation of powers, has not been impinged. After a Judge retires be it the Chief Justice or the Judge of the Appellate Division, he ceases to be a part of the judiciary.

(19) The post of Chief Adviser is a political office, so there is possibility of criticism, but it is the retired Chief Justice or the retired Judge of the Appellate Division, as the case may be, who will hold the office, therefore, the criticism of the Chief Adviser, if any, shall in no way have any impact upon the independence of judiciary and the adjudicative functions of the Judges independently

(20) The etherial argument that because of the provisions made in the Thirteenth Amendment to make the Chief Justices of Bangladesh and the Judges of the Appellate Division as Chief Adviser, the appointment of Chief Justice and elevation to the Appellate Division is being politicised is not also historically correct, because in 1976 and in 1985 when the concept of holding general elections of members of Parliament under the Non-Party political Government was not even thought of, there were supersessions in appointing Judges to the Appellate Division (detailed given in the body of the judgment). It is the perception of the executive which plays the vital role in the appointment of a Judge to the Appellate Division and the Chief Justice as well and not the post of Chief Adviser.

(21) The observations made by this Division, in the case of Abdul Bari Sarker (46 DLR(AD) 37) and in the Eighth Amendment case that the purpose behind the prohibition in the original article 99 of the Constitution against the appointment of a retired Judge in any office of profit in the services of the Republic, was that high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his retirement and that if any provision was made for holding office of profit after retirement, a Judge– while in the services of the Supreme Court– might be tempted to be influenced in his decision in favour of the authorities keeping his eye upon a future appointment, does not help the appellant to substantiate his argument that the provisions made in the Thirteenth Amendment for appointment of the retired Chief Justices of Bangladesh and the retired Judges of the Appellate Division as Chief Adviser, has destroyed the independence of judiciary. The post of Chief Adviser of Non-Party Care-taker Government cannot, in its truest sense, be said to be an appointment in any office of profit in the service of the Republic of Bangladesh. The appointment of a retired Chief Justice and the retired Judge of the Appellate Division as the Chief Adviser is absolutely different from the appointment as was made in the case of Abdul Bari Sarker. From the pleadings of the parties and the submissions of the majority of the amici curiae, it is *prima-facie* clear that the provision was incorporated in the Constitution by the Thirteenth Amendment on the consensus of all political parties including the party in power and also on the basis of popular demand of the people in general and in fact, it was the demand of the whole nation. So, the post of Chief Adviser cannot be equated with a particular post of office of profit in any particular department of the Republic. Such provision salvaged the boat of democracy which was about to sink. We should not forget that after the judgment was passed in the Eighth Amendment case (judgment was passed on 02.09.1989) Chief Justice Shahabuddin Ahmed was appointed as the Vice-President of the Republic on the basis of consensus of the 3(three) Main Political Alliances after General Ershad resigned from the post of President as a result of the mass movement and

he (Chief Justice Shahabuddin Ahmed) performed as the acting President of the Republic under whom the first ever free and fair general election of members of Parliament was held on 27.02.1991.

(22) The submission, that because of the dangling carrot of the post of Chief Adviser, the Chief Justice and the Judges of the Appellate Division may be allured not to discharge their adjudicative functions impartially and may be biased towards the Government in power is absolutely imaginary, hypothetical, and etherial and on such submission, the Thirteenth Amendment cannot be declared invalid. Neither the learned Counsel for the appellant and petitioner nor Mr. Rafique-ul Haque could refer to any single adjudicative function before us to show that the retired Chief Justices of Bangladesh, who became the Chief Advisers and the other retired Chief Justices or the retired Judges of the Appellate Division, who had the chance to become the Chief Adviser, while in office, ever performed any adjudicative function showing any biasness or leniency towards the Government in power to justify their submission that because of the dangling carrot, they acted in a particular way in breach of their oath.

(23) The post of Chief Justice of Bangladesh is not less honourable or prestigious than that of the Chief Adviser. So there is no logic behind the submission that while holding the high office of Chief Justice, the Chief Justice will be biased towards the incumbent Government in performing his adjudicative functions because of his chance to become the Chief Adviser for only 90(ninety) days and that too to perform routine functions. Such submission sounds to me simply ridiculous, humiliating and disturbing as well. If that is the perception of the Bar, the future of the judiciary must be bleak.

(24) The legislature in their wisdom having preferred the retired Chief Justices of Bangladesh and the retired Judges of the Appellate Division as Chief Adviser of Non-Party Care-taker Government, I do not find any reason or justification to question the wisdom of the legislature in this regard. If any question is raised at all–it would be the duty of the legislature to come up with a different and better device to select or appoint an appropriate person in the key post of Chief Adviser and that must be again on the basis of consensus of all political parties as was done in 1996.

(25) The High Court Division in exercising its power of judicial review under article 102 of the Constitution and the Appellate Division under article 103 thereof can declare an amendment to the Constitution by an Act of Parliament *ultravires* the Constitution if the same impairs or destroys the basic structures of the Constitution. But in exercising such power of judicial review, neither the High Court Division nor the Appellate Division can give direction to the Parliament to amend the void Act in a particular manner. If this is done, that will be self contradictory and shall also be a transgression into

the legislative power of the Parliament and shall also be against the constitutional scheme of broad distribution of powers among the 3(three) organs of the Government, namely: legislative, executive and judiciary. After an Act of Parliament amending the Constitution is declared *ultravires* the Constitution the same cannot be given life in any form whatsoever, however, only the actions which were taken under the void law can be condoned. Such an exercise is also not contemplated in article 104 of the Constitution. Of course, in exercising the power of judicial review the High Court Division as well as this Division can make observations in respect of a matter which comes to its notice in course of hearing, be it amendment of any provision of the Constitution or any other Act or legislation or any other subject.

(26) An Act amending the Constitution cannot be declared *ultravires* the Constitution on the ground that the same has been abused or there is chance of abuse, if the same does not impair or destroy the basic and fundamental structures of the Constitution. The events which occurred in 2006-2008 show that the Thirteenth Amendment was abused. But those could not be attributed to the Thirteenth Amendment. The then President did not exercise the five options before he assumed the functions of Chief Adviser under clause (6) of article 58C as inserted by the Thirteenth Amendment for the reasons best known to him. If there was any fault, it was the fault of the President. So, it is no use of blaming the law.

(27) The context behind the enactment of the Thirteenth Amendment has shown that rigging in the general elections of members of Parliament by using muscle power and money and manipulation of the election results by exerting undue influence upon the Government machinery by the party in power, became the rule rather than an exception and the little man of Sir Winston Churchill could not walk into the little booth with his little pencil to put a little cross on a little bit of paper (ballot paper) freely as submitted by Mr. T. H. Khan.

(28) The Constitution can be amended by way of addition, alteration, substitution or repeal by Act of Parliament to respond to the dynamics of the changing circumstances as per the need of the people and to strengthen and institutionalise the basic structures and features of the Constitution, but not by destroying or impairing such structures and features.

(29) By inserting article 58A in Chapter II and by opening a new Chapter being Chapter IIA in Part IV and inserting therein articles 58B-58E, the Constitution has been amended but those read with the amendments of articles 61, 99, 123, 147, 152 and the Third Schedule to the Constitution, in no way, amended the Preamble and articles 8, 48 and 56 of the Constitution.

(30) The last Non-Party Care-taker Government could stretch

its tenure beyond 90(ninety) days because of the fact that although according to article 123(3) as amended by the Thirteenth Amendment, general election of members of Parliament is required to be held within 90(ninety) days after the Parliament is dissolved whether by reason of the expiration of its term or otherwise than by reason of such expiration no consequence has been provided therein if election is not held within the said period. Further in view of the language of article 58B(1) that "There shall be a Non-Party Care-taker Government during the period from the date on which the Chief Adviser of such Government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its terms till the date on which a new Prime Minister enters upon his office after the constitution of the Parliament." There is clear scope to stretch the period till the date on which the new Prime Minister enters upon his office after the constitution of Parliament. And taking that advantage of the state of the above constitutional provisions the last Non-Party Care-taker Government continued for more than 2(two) years. But the fact remains that the Non-Party Care-taker Government gave all possible assistance to the Election Commission that was required for holding the general elections of members of Parliament in a free, fair and impartial manner which is the product of the 9th Parliament. In the light of the above experience, necessary amendments may be made in articles 123(3) and 58B so that Non-Party Care-taker Government cannot extend its period beyond 90 (ninety) days and the general election of members of Parliament is held within the said period; the wanting in the law can very well be taken care of by making necessary amendments through discussion and by way of consensus as was reached in 1991 and 1996.

(31) The political party in power as interim Government failed to secure the holding of general election of members of Parliament in a free, fair and impartial manner and thus, to ensure people's real representation in the Parliament, so Non-Party Care-taker Government was introduced in the Constitution by the Thirteenth Amendment on the basis of consensus of all political parties and also the demand of the people in general and by now 3(three) general elections of members of Parliament have already been held and the people participated in those elections in large scale and thus, accepted the system and as such, there is no reason to reverse the same after fifteen years.

(32) If Non-Party Care-taker Government system goes off then money and muscle power will again rule in the election and in addition the party in power as experience showed, will resort to exert undue influence upon the Government machinery to rig the election and manipulate the results and in the process, democracy will again be a far cry and thus, the supremacy of the people as enshrined in article 7 of the Constitution shall be

nowhere.

(33) The holding of elections in 1(one), 2(two) or more by elections of members of Parliament in a free, fair and peaceful manner under the political party in power, in no way, guarantees that the party in power during the next general election of members of Parliament will not exert its undue influence upon the Government machinery and shall give institutional support to the Election Commission that may be required for holding the general election of members of Parliament in a free, fair and impartial manner, as mandated by article 126 of the Constitution, because by losing in 1(one), 2(two) or more seats in the by-elections of Parliament, the party in power loses nothing if it is in power with two-thirds or three-fourths majority. Similarly, holding elections to the local bodies by the Election Commission under the political party in power in a free and fair manner, does not make any difference, because by holding such elections a political party does not go to power.

(34) Discussions and consensus are very important components for the sustenance of democracy. No system is foolproof, so amendment in the form of Non-Party Care-taker Government, if any, may be made in the Constitution on the basis of discussions and consensus among the political parties as was done in 1996.

(35) Animosity and adversarial atmosphere amongst the political parties is so high in degree that when one political party goes to power, the leader of opposition in Parliament is determined not to sit together and even not to meet each other on the occasion of national events. General election of members of Parliament cannot be held under political party in power, so long this persists and presently, there is no alternative of Non-Party Care-taker Government to hold general election of members of Parliament in a free, fair and peaceful manner.

(36) General elections of members of Parliament in our country is held in a day and if by resorting to massive rigging and exerting undue influence upon the Government machinery, election results are manipulated by the party in power and thus, it succeeds in securing majority seats in Parliament and forms the Government, then it would be meaningless to resort to the election dispute to the Election Tribunal which is also time consuming.

(37) The difference between the interim Government, which was in the Constitution prior to the Thirteenth Amendment vide articles 57(3) and 58(4) and the Non-Party Care-taker Government introduced by the Thirteenth Amendment, is that notwithstanding the fact that the outgoing Prime Minister and his Cabinet colleagues lose their character as the people's representative, they continue to retain their strong and open affiliation with their party and they also contest in the election with their party manifesto and political programme and use all their amenities as the Prime Minister and the Ministers during the election and thus, the Administration becomes vulnerable to their influence and they succeed to manipulate the

election results. Whereas, in the latter case, the Chief Adviser shall be a person not related to politics and other Advisers shall be

appointed by the President from amongst the persons who are not members of any political party or, of any organisation associated with or, affiliated to any political party. And naturally, they do not have any reason to be partisan with any political party.

(38) Every Nation and country has its own pride and prejudice and has the right to decide what form of Government including the interim one should be. As, in the Constitution, there was a form of interim Government, which failed to ensure free and fair general election of members of Parliament and in the historical back ground as discussed in the body of the judgment, Non-Party Care-taker Government was introduced in the Constitution and we have already got the dividend thereof that the people, at large, were able to go to the polling centres and could cast their votes freely without any fear. Yet, for holding the general election of members of Parliament under the Non-party Care-taker Government, more steps may be taken to strengthen the Election Commission. Care and caution must be exercised in appointing the Chief Election Commissioner and the other Commissioners so that the person with high morality, integrity, uprightness and sagacity may be invariably chosen for the said office. The Election Commission must be made more powerful. We have noticed that by this time, many reformative steps have already been taken in the process of holding the general election of members of Parliament by incorporating necessary amendments in the RPO, 1972, such as registration of political parties, submission of accounts of the expenditure of election by the political parties and by the candidates, establishment of Electoral Enquiry Committee to ensure the prevention and control of pre-poll irregularities.

(39) By amending article 61 of the Constitution to the effect that "and such law shall, during the period in which there is a Non-Party Care-taker Government under article 58B, be administered by the President", no dyarchy has been created. Such argument of the learned Counsel for the appellant is tendentious and is bereft of non-consideration that the Thirteenth Amendment is a short term constitutional administrative mechanism to secure full term truly democratically elected Government. In the original article 61, it was clearly provided that the supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law. The President being elected, there is no wrong in administering such law by him for a very short period of 90(ninety) days. Moreover, article 58B(3) has clearly provided that the executive power of the Republic shall, during the period of Non-Party Care-taker Government be exercised, subject to the provisions of article 58D(1) in accordance with the Constitution, by or on the

authority of Chief Adviser and in accordance with the advice of the Non-Party Care-taker Government.

(40) The President has no chance to be an autocrat in case he assumes the functions of Chief Adviser, as he shall have to discharge such functions in accordance with the advice of the Non-Party Care-taker Government, that is, other 10 (ten) Advisers. Besides the President is also oath bound to act in accordance with the Constitution and the law. Article 93 of the Constitution which empowers the President to make and promulgate Ordinance, when the Parliament is not in session under the circumstances as stated therein, has not said anything about the prior advice of the Prime Minister in making and promulgating any such Ordinance, so the power of the President in making and promulgating the Ordinance is same in both form of Governments.

(41) The provision, for summoning a dissolved Parliament as provided in clause (4) of article 72, has been made by the legislature keeping in mind the extreme extraordinary circumstances only, that is, if the Republic is engaged in war and that provision, in no way, can be interpreted to fortify the argument that even after dissolution of Parliament under article 57(2) or clause (3) of article 72, the Prime Minister and his Cabinet colleagues remain responsible to Parliament and thus to the people. If that argument is upheld then it will create disharmony with the other provisions of the Constitution such as articles 57(2)(3) and 58(4) and un-amended article 123(3)(b).

(42) In article 123(3) as it stood before the Thirteenth Amendment, the legislature took care of two situations, one: to hold the general election of members of Parliament within the period of 90 days preceding the dissolution of Parliament by reason of the expiration of its term and the other within 90 days after the dissolution of Parliament otherwise than by reason of such expiration as contemplated in clause (a). Since elections of members of Parliament under the political party in power as interim Government as provided in articles 57(3) and 58(4) was done away with under the concept of Non-Party Care-taker Government by the Thirteenth Amendment only one situation, that is, holding general election of members of Parliament within 90 days after the dissolution of Parliament whether by reason of the expiration of its term or otherwise than by reason of such expiration has been provided which is quite in conformity with sub-clause (b) of clause (3) of un-amended article 123. Proviso to clause (3) of the un-amended article 123 that the persons elected at a general elections under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to in clause (a), was quite logical because if election is held within 90 days preceding the dissolution of Parliament as provided in clause (3)(a) of article 123, the members who were elected for 5(five) years from the date of first meeting, remain as members of Parliament till expiration of their term and that, in no way, can

justify the argument that even after the dissolution of Parliament, the same continues.

(43) There will be no dearth of power on the part of Non-Party Care-taker Government to make any policy decision in case of necessity for discharging its routine functions in view of the provision made in article 58D of the Constitution and therefore, the State has no chance to suffer in case any emergent situation arises to make any decision on foreign policy as argued by the learned Counsel for the appellant.

(44) The submission of Dr. M. Zahir that concept of Non-Party Care-taker Government introduced in the Constitution by the Thirteenth Amendment for holding the general elections of members of Parliament, is a natural stigma/*লজ্জা* for the nation and the political party in power because the elected member of Parliament, who commands the support of the majority of members of Parliament to act as the Prime Minister for 5(five) years cannot be trusted for the period from the time of dissolution of Parliament and till his successor yet enters upon the office, is bereft of any logic as well as factual backing, because the term of Parliament is 5 years from the date of its first meeting and the mandate of the people is only for 5(five) years and after the expiry of 5(five) years when the Parliament stands dissolved mandate comes to an end. Dr. M. Zahir and Mr. Ajmalul Hossin who are very widely travelled persons failed to say any of their experience and produce any material whatsoever before us to show that due to the introduction of the system of Non-Party Care-taker Government in our Constitution has, in any way, brought any adverse impact or embarrassment upon a citizen of this country including themselves or the Government. Dr. Kamal Hossain an internationally reputed lawyer seriously opposed the said submission of Dr. M. Zahir and submitted that the leaders of many countries enquired to him about the Non-Party Care-taker Government system introduced in our Constitution for holding the general election of members of Parliament with approval. Mr. M. Amirul Islam and Mr. Rokanuddin Mahmud who are also widely travelled persons on being asked as to whether they had any embarrassment abroad or in this country to any foreign national because of the introduction of the system of Non-Party Care-taker Government during the general election of members of Parliament in the Constitution, they replied in the negative.

(45) Article 57(3) of the Constitution provided that nothing, in the article, shall disqualify the outgoing Prime Minister for holding office, yet his successor entered upon the office. The Constitution has not given any mandate to the Prime Minister to hold the general election of members of Parliament. It is the Election Commission which has been given the charge/function for holding the elections of the President and the members of Parliament. So, why it should be a natural stigma//*লজ্জা* upon the nation or upon the Prime Minister if general election of members of Parliament is held under the Non-Party Care-taker

Government after the dissolution of Parliament when the Prime Minister ceases to have the representative character. I do not see any reason for the Prime Minister, his other Cabinet colleagues and the party in power to take it as a stigma/*লজ্জা* to have the general election of members of Parliament under Non-Party Care-taker Government. Neither the learned Attorney General has said about any such stigma/*লজ্জা* in his submission nor anything has been said in the concise statement filed by respondent No.1 (Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs) in that respect. Had the Government felt any such thing in course of its governance, the same would have definitely been said in the concise statement. It is to be further stated that no such thing was stated in the affidavit-in-opposition filed by respondent No.1 in the High Court Division as well. The submission of Dr. M. Zahir is self defeating, as he himself suggested a modality of interim Government for holding the general election of members of Parliament by giving a reference to the Australian system. If there is any natural stigma/*লজ্জা* on our nation, it is: corruption, but the holding of general elections of members of Parliament under Non-Party Care-taker Government is not. In fact, corruption is taking the shape of a menace; all development works are being hindered because of corruption for which good governance is also suffering a setback. Because of corruption, the bulk of the poor people of the country are deprived of their due share in the development of the country. And we all should create social awareness against corruption as well as put resistance against corruption.

(46) The concept of suspension of certain articles of the Constitution including the enforcement of fundamental rights, has already been provided explicitly in the Constitution itself under certain situations as contemplated in articles 141B and 141C of Part-IXA of the Constitution. Thus, keeping certain provisions of the Constitution ineffective or suspended for a particular period, for the sake of others to facilitate the people to exercise their right of adult franchise or electing the democratic Government in a free and fair general election of members of Parliament as provided in the Thirteenth Amendment is not alien to the Constitution and such a device is, no way, in conflict with the scheme of the Constitution. The words "on the written advice of the Prime Minister, by order" were not therein in the original article 141C and the same were added by the Constitution (twelfth Amendment) Act, 1991. It is pertinent to state that when Part-IXA was inserted in the Constitution Parliamentary form of Government was very much in vogue.

(47) **Q**uestion cannot be raised now as to the competence of the Sixth Parliament which passed the Thirteenth Amendment. It cannot be unnoticed that not only the legislative Acts but also the executive and the administrative actions carry the presumption of constitutional validity and an elected

Parliament cannot be held illegally constituted merely because the opposition political parties boycotted the elections of the Sixth Parliament; the Sixth Parliament must legally be taken to have been validly constituted because the election was not set aside following the provisions of the Constitution and the Representation of the People Order, 1972. Besides, all parties and the people participated in 3(three) subsequent general elections of members of Parliament and thus accepted the Thirteenth Amendment. More significantly the Seventh Parliament was constituted on the basis of the general election of members of Parliament held under the Non-Party Care-taker Government after dissolution of the Sixth Parliament.

(48) If the apprehensions (apprehensions have been detailed in the body of the judgment) of the two responsible senior citizens of the country, who are also former Attorney Generals, namely: Mr. Rafique-ul Haque and Mr. Mahmudul Islam become true in the event the Thirteenth Amendment is declared *ultravires* the Constitution then it would surely give rise to political chaos in the country which again would lead to a situation that occurred in 1996 as emerged from the pleadings of respective parties and the submissions of the majority amici curiae and in that event, it shall have a serious impact on our economy and in the process, democracy and democratic polity shall suffer; the country will be put back instead of going forward with prosperity. But, we cannot afford all these, particularly when the people have accepted the mechanism by participating in the 3(three) general elections of members of Parliaments in large scale; in fact, the holding of general election of members of Parliament under the Non-Party Care-taker Government is a settled one.

(49) In the short order passed on 10.05.2011 allowing the appeal by majority view, it was observed ". . . The parliament, however, in the meantime, is at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Care-taker Government." But, in the concluding portion of the judgment and in clause (12) of the summary under paragraph 44, the learned Chief Justice, has specifically observed in the form of direction that: "তত্ত্বাবধায়ক সরকার শুধুমাত্র জনগণর নির্বাচিত জাতীয় সংসদ সদস্যগণ দ্বারা গঠিত হইত পার, কারণ, জনগণর সার্বভৌমত্ব ও ক্ষমতায়ন, গণতন্ত্র, প্রজাতান্ত্রিকতা, বিচার বিভাগর স্বাধীনতা সংবিধানর basis structure এবং এই রায় উক্ত বিষয়গুলির উপর সর্বাধিক গুরুত্ব আরাপ করা হইয়াছ, (12) সাধারণ নিবর্চান অনুষ্ঠিত হইবার ক্ষেত্র, জাতীয় সংসদর বিবচনা (discretion) অনুসার, যুক্তিসঙ্গত কাল (reasonable period) পূর্ব, যথা, ৪২(বিয়াল্লিশ) দিন পূর্ব, সংসদ ভাঙ্গিয়া দেওয়া বাঞ্ছনীয় হইব, ত-ব, নির্বাচন পরবর্তী নূতন মন্ত্রিসভা কার্যভার গ্রহণ না করা পর্যন্ত পূর্ববর্তী মন্ত্রিসভা সংক্ষিপ্ত আকার গ্রহণ করতঃ উক্ত সময়র জন্য রাষ্ট্রর স্বাভাবিক ও সাধারণ কার্যক্রম পরিচালনা করিবন" These are not in conformity with the short order.

(50) The Thirteenth Amendment as passed by the Sixth Parliament is *intravires* but not *ultravires* the Constitution as the same has not, in any way, destroyed or impaired:

democracy, independence of judiciary and separation of powers, the fundamental structures of the Constitution. The Thirteenth Amendment has become a constitutional necessity.

I find no merit in the appeal and the leave petition. Accordingly, the appeal and the leave petition are dismissed.

J.

Nazmun Ara Sultana, J.: I have had the advantage of going through the judgments proposed to be delivered by A. B. M. Khairul Haque, the learned Chief Justice, Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J. I concur with the judgment and order passed by my brother, Md. Abdul Wahhab Miah, J.

J.

Syed Mahmud Hossain, J.: I have had the advantage of going through the judgments proposed to be delivered by A. B. M. Khairul Haque, the learned Chief Justice, Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J. I concur with the judgment and order passed by the learend Chief Justice.

J.

Muhammad Imman Ali, J.: By the judgment and the short order pronounced on 10.05.2011 the majority of the Hon'ble Judges sitting in this Division allowed the instant appeal, which arose out of Writ Petition No. 4112 of 1999. In the order it was declared that the Constitution (Thirteenth Amendment) Act, 1996 (Act No. 1 of 1996) was prospectively declared void and ultra vires the Constitution. It was further declared that

the election of the Tenth and Eleventh Parliament may be held under the provision of the above mentioned Thirteenth Amendment and that Parliament in the meantime was at liberty to bring necessary amendment excluding the provision of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Caretaker Government.

As I could not agree with the majority decision of my learned brothers, I shall, with the utmost respect, express my own humble views in the following opinion.

On 28.03.1996 the Constitution (Thirteenth Amendment) Act, 1996 (Act No.1 of 1996), (hereinafter referred to as the Thirteenth Amendment) was promulgated. By Section 2 a new Article 58A was introduced in the Constitution and by Section 3 a new Chapter IIA was introduced under the title "Non-Party Caretaker Government". In this way Articles 58A, 58B, 58C, 58D and 58E were inserted in the Constitution. The Thirteenth Amendment was initially challenged in Writ Petition No.1729 of 1996. That writ petition was summarily rejected on the ground that the provision of the impugned Act did not fall within the definition of alteration, substitution or repeal of any provision of the Constitution and as such it was not an amendment as contemplated under Article 142 of the Constitution. The selfsame Thirteenth Amendment was again challenged in Writ Petition No. 4112 of 1999 (the instant writ petition) contending that the said Act was ultra vires the Constitution. In view of the earlier writ petition, which had been rejected summarily, the Division Bench of the High Court Division considering the instant writ petition referred the same to the Hon'ble Chief Justice stating its opinion that "since important issues

were raised in the writ petition, including that of destruction of the basic structure of the Constitution, a full Bench, if constituted, should decide all issues raised in the writ petition and particularly the issue whether the Act No.1 of 1996 has caused amendment in the provision of Articles 48(3) and 56 of the Constitution requiring assent thereto through referendum as contemplated by Articles 142(1A), (1B) and (1C) of the Constitution". A full Bench was constituted, and on 25.01.2000 Rule was issued upon the respondents "to show cause as to why the impugned Constitution (Thirteenth Amendment) Act, 1996 (Act No.1 of 1996) (Annexures-'A' and 'A-1' to the writ petition) should not be declared to be ultra vires of the Constitution of the Peoples' Republic of Bangladesh and of no legal effect and / or pass such other or further order or orders as to this Court may seem fit and proper".

The Full Bench comprising three Hon'ble Judges of the High Court Division, after hearing the parties as well as two amici curiae and also considering the various affidavits and papers submitted by the parties, discharged the Rule. However, considering that the case involved a substantial question of law as to the interpretation of the Constitution, the High Court Division granted a Certificate under Article 103(2)(a) of the Constitution. In addition the learned Advocate for the writ petitioner filed Civil Petition for Leave to Appeal No.596 of 2005.

The Full Bench of this Division comprising seven Hon'ble Judges heard the learned Advocates on behalf of the parties as well as eight amici curiae. Four of the Hon'ble Judges, including the Hon'ble Chief Justice of Bangladesh who has authored the judgment of the majority, were of the view that the appeal should be allowed finding that the impugned Act No.1

of 1996 was ultra vires the Constitution, but at the same time held that in spite of the Thirteenth Amendment Act, 1996 being illegal, only the ensuing Tenth and Eleventh General Elections may be held, if so considered by Parliament, under the Caretaker Government system. It was also observed that Parliament in implementing the judgment of the majority may amend the Constitution (Thirteenth Amendment) Act, 1996 or may formulate a new Act, on condition that in the Caretaker Government system no retired Chief Justice or retired Judge of the Appellate Division shall be involved; the Caretaker Government will consist of only elected members of the Parliament; and from the date of declaration of the election schedule to the date of announcement of election result public administration, i.e., all persons in the administration connected with the election process shall remain under the control of the Election Commission. It is noted that the last two conditions were not in the short order announced on 10.05.2010.

With due respect of my leaned and noble brothers, I fail to understand how any Court of law can countenance the continuation of a constitutional provision which has been declared illegal and ultra vires the Constitution by the highest Court of the country.

Keeping such proposition in mind let me proceed to my opinion.

At the outset, I must say that thankfully I need not deal with the factual aspects of this case as those have been dealt with most elaborately by the Hon'ble Chief Justice in his judgment delivering the majority view. With respect, I would say that the judgment is a ***magnum opus*** which deals with the matters arising in this case in extreme detail by copious reference to numerous judgements and treatise from various parts of the world, which

have been rendered most eruditely in the mother tongue, although, again with respect, I cannot agree that the Bangla erudition will reach the masses in the far-flung corners of the country, and whether every man sitting in his village hut or even townhouse will be able to read and understand the contents thereof.

Since the majority judgment contains vast and exhaustive research material, I may be forgiven for referring to some of the quotations made therein.

There are a number of points, which, in my view, are beyond any controversy or doubt and require no argument in their support:

(i) All powers under the Constitution, including the Constitution itself emanate from the people;

(ii) Bangladesh is a Republic having a President and a Parliamentary democratic system of government headed by the Prime Minister with a single uni-cameral legislature known as the House of the Nation;

(iii) The Supreme Court has amongst its other duties, also the duty to interpret the law and the Constitution;

(iv) Parliament has the duty to enact laws, including the power to amend the Constitution;

(v) the Executive implements the laws so promulgated and the judiciary has a supervisory function to see that the laws promulgated by Parliament are in accordance with the provisions of the Constitution and that the implementation and interpretation of the law is consistent with the Constitution; and

(vi) The Judges of the Supreme Court are oath-bound to protect, uphold and preserve the Constitution. Above all it is the duty of the judiciary to protect the constitutional and other legal rights of the people.

The citations and observations made above (in the majority judgment) which lay down the principle to the effect that Parliament has power to make laws and to amend the Constitution have withstood the test of time. In spite of such power, Parliament still remains subservient to the law which it enacts and to the Constitution. The judiciary may give interpretation of any law or the Constitution. Having done so, it becomes subservient to the view taken by it. There is no gainsaying also that the Constitution is the Supreme Law of the land and any law which is inconsistent with the Constitution, to the extent of inconsistency is void. It also goes without saying that according to Article 7 of the Constitution all powers in the Republic belong to the people and that the Constitution is the solemn expression of the will of the people. Article 11 provides for effective participation of the people in the governance of the country through their elected representatives.

Most extravagant references have been made to numerous authorities in order to establish the principles that it is the power of the people which has created the Constitution; the Constitution is supreme; the demand of the people is for sustained democratic values; the power and the authority of the Supreme Court to ensure the right of the people in accordance with the Constitution; the indelibility of the basic structure of the Constitution etc. The real question in the case before us is whether the amendment brought about by the Thirteenth Amendment has affected the basic

structures of the Constitution and eroded the democratic character of governance.

The provision for amendment of the Constitution is found in Article 142 of the Constitution which allows amendment and provides how the amendment will take place. In my view, we need look no further than the decision of this Division in the case of Anwar Hossain Chowdhury Vs. Bangladesh reported in BLD (1989) (Special Issue) 1, wherein Shahabuddin Ahmad, J. (as his Lordship then was) opined as follows:

> "People after making a Constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures."

M H Rahman, J. (as his Lordship then was) opined as follows:

> "I am fully aware that when the Court examines the constitutionality of an amendment of the Constitution the initial presumption of validity is heavily in favour of the amendment and that the legislature deserves full deference in view of the doctrine of separation of power."

The questions that arose before the High Court Division in the instant case were as follows:

> "(1) Whether the incorporation of Articles 58A to 58E of the Constitution by virtue of the impugned Act can be considered as an amendment to the Preamble, Articles 8, 48 and 56 of the Constitution or at least to Articles 48 and 56 requiring approval thereof of the people by means of

the referendum before the assent of the President as contemplated under Clause (1A) of the Article 142.

(2) Whether the impugned Act having brought about the above amendment is destructive of the democracy which is one of the fundamental structures of the Constitution.

(3) Whether the amendment of Article 142 by adding Clauses (1A), (1B) and (1C) thereto by the Second Proclamation (Fifteenth Amendment) Order, 1978 can be said to be a valid constitutional amendment."

It may be stated here that in view of the judgement in **Khondker Delwar Hossain etc. – Versus- Bangladesh Italian Marble Works Ltd. and others, VI (B) ADC (2010) 1**, (the Fifth Amendment case) declaring the Second Proclamation (Fifteenth Amendment) order, 1978 to be ultra vires the Constitution, the requirement of any referendum has been obviated. Thus the only point out of the three points agitated before the High Court Division, which still required consideration was whether the Thirteen Amendment was destructive of democracy which is on of the fundamental structures of the Constitution. Other questions which arose incidentally were whether democracy and independence of the judiciary are basic features of our Constitution, and free and fair election being an inextricable part are also features of the Constitution.

As stated earlier, there can be no doubt that democracy, free and fair election, which is a part and parcel of democracy, and the independence of the judiciary are basic structures of the Constitution. The moot question is whether the Thirteenth Amendment has undermined or destroyed those basic structures.

All three Hon'ble Judges of the High Court Division came to the conclusion that the amendment introducing the Non-Party Caretaker Government is an apparatus or device which for a period of 90 (ninety) days would keep certain provisions of the Constitution suspended or ineffective. After the expiry of that period that apparatus itself would become ineffective. By a unanimous decision, the High Court Division held that the Constitution (Thirteenth Amendment) Act, 1996 was valid and constitutional, the said Act did not amend the Preamble, Articles 8, 48 and 56 of the Constitution and there was, therefore, no requirement for a referendum; the Act has not affected or destroyed any basic structure or feature of the Constitution, particularly the Democracy and Independence of the Judiciary; and clauses (1A), (1B) and (1C) of Article 142 of the Constitution are valid and consequently any amendment to the Preamble and Articles 8, 48 and 56 of the Constitution must observe the formalities provided in clauses (1A), (1B) and (1C) of the Constitution.

It is interesting to note that Md. Awlad Ali, J. in his separate opinion, while concurring with the lead judgement, pointed out that by Martial Law Proclamation one of the main pillars of the Constitution, namely secularism, was destroyed and such destruction of basic pillar or basic structure by Martial Law Proclamation was done by the Second Proclamation (Fifth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) and "the proclamation order or orders was ratified and confirmed by the Constitution (Fifth Amendment) Act, 1979 and that was made part of the Constitution." His Lordship went on to say that the insertion of clause (1A) of Article 142 was not a legislative act and Parliament had no power under Article 142 of the Constitution to change

the basic structure. Md. Awlad Ali J. observed that nobody had challenged such destruction of the basic feature of the Constitution by a Martial Law authority and that such "changing the basic pillar of the Constitution would be decided by the citizen of the country, by the future generation". We can now see the foresight of Md. Awlad Ali, J. since the Fifth Amendment Act was indeed challenged and has since been declared ultra vires the Constitution and with it has gone all those amendments made by the Martial Law Authorities.

We have to appreciate that the Constitution is the expression of the will of the people. Consciously the provision has been put in place for amendment of the Constitution by way of Article 142. Naturally, such provision is essential and reflects the supremacy of the will of the people. The absence of any provision for amendment would effectively diminish the power of the people. At the same time, it cannot be denied that any amendment by a Military authority is unlawful, since that is not a reflection of the will of the people. It was held in the case of Bangladesh Italian Marble Ltd. and ors-vs-Government of Bangladesh and ors. (2010) BLD (Spl) (HCD) 1, ***per*** A.B.M. Khairul Haque, J. (as his Lordship then was), "There is no such law in Bangladesh as Martial Law and there is also no such authority as Martial Law Authority. ..." Conversely, therefore, any amendment made by the representatives of the people can be accepted as lawful amendment, so long as it is within the provision of Article 142 of the Constitution and reflects the will of the people. The rigidness of the Constitution cannot be allowed to numb the senses of the people nor stifle its will. The people must be allowed to extricate themselves from any difficult situation or cater for any exigency arising by amending provisions

of the Constitution, as and when necessary. The very Constitution which is made by the people for the people cannot be allowed to paralyse the people. In order to weigh the validity or the necessity of any amendment, it must be established whether it was for the benefit of the people or whether the amendment would curtail their democratic right in any way to their detriment.

Theories propounded internationally and accepted globally have a place in our deliberations when we consider legal principles generally. However, those principles must be looked at in the context of the situation facing our country at the relevant time. In order to appreciate the necessity of the Thirteenth Amendment to the Constitution, it is necessary to look at the background which led to the promulgation of the said amendment.

It is a known fact that for almost a decade starting from 1982 the country was under autocratic rule. The public was disgruntled to the extent that there were open demonstrations against that regime, which became an everyday affair. Such open confrontation resulted in the ouster of the autocratic regime by public action. An extra-ordinary situation prevailed in the country at that time. The people by their power rid themselves of the shackles of dictatorship. There was euphoria. Then there came the need to re-establish democracy. In order to hold a fair election the then sitting Chief Justice of the country was appointed as Vice President at which point in time the then President tendered his resignation and then Justice Shahabuddin Ahmed became acting President of the country. He appointed other independent members to continue the functions of the interim Government. It may be remembered that at that time the provision of an interim Government, though in a different form, existed in Article 56(4)

whereby in the interim period between a dissolution of Parliament and the next following general election of Members of Parliament, the persons who were such members immediately before the dissolution were regarded for the purpose of this clause as continuing to be such members, and under Article 58(4) the Prime Minister and other Ministers continued to hold office until their successors entered upon office. Indisputably free and fair elections were held under acting President Shahabuddin Ahmed, who thereafter resumed his position as Chief Justice, and the Bangladesh Nationalist Party (B.N.P.) came into power in February 1991 with a mandate to govern for five years. Soon there developed dissatisfaction with the way in which the ruling party and its allied political parties were running the country. Agitation filled the streets. Once again, public demand grew to form a Non-Party-Caretaker Government so that free and fair elections could be held. The party in power was not amendable to the opposition's demand for a Non-Party-Caretaker Government. A group of eminent citizens attempted to barter a consensus amongst the party in power and the leading party in opposition in order to create an acceptable interim Government for the purpose of holding free and fair elections. The details of the dialogue between the leader of the opposition and the sitting Prime Minister mustered by the group of five eminent persons, of whom the leading personality was the eminent jurist, Syed Ishtiaq Ahmed, may be found in the book entitled "The Ishtiaq Papers" published in 2008 by the University Press Limited. The culmination of the discussions and dialogues was the ultimate formulation of the Thirteenth Amendment Act.

However, as appears to be the natural phenomenon in this country, the losing party had characterised the 1991 election as having been subtly

rigged. Similarly the party which was in power immediately before the 1996 election lost and claimed that the election held under the newly created Non-Party Caretaker Government was manipulated with help from the civil administration. The tables turned and in 2001 again the losing party, which had been in power up to the dissolution of Parliament, lost and claimed that the election was crudely rigged. In 2008 the losing party claimed that the election was fixed by the Caretaker Government and Election Commission with backing from the foreign powers and engineered with the help of digital means. Rare is the occasion when the losing party gracefully accepts defeat in any election, local or national.

It must not be forgotten that the Non-party Caretaker system grew out of the political parties' distrust for one another. Continuation of that system has progressively increased and hardened the level of that distrusting mentality, to the extent that one party accused the other of establishing a certain engineering mechanism to choose the next head of the Care-Taker Government. There is doubt whether this mentality will be outgrown in the foreseeable future. Hence, there has to be means of achieving at least a minimum level of neutrality in the election period for democracy to sustain.

Summary of arguments on behalf of the appellant

1. The system of Care-Taker Government is illegal and ultra vires the Constitution
2. It is undemocratic
3. It is contrary to the independence of the Judiciary

Legality of the Amendment

The duty of Judges is to decide any matter brought before them in the light of the existing law and all the attending facts and circumstances relevant to the matter in hand. I may respectfully quote P.N. Bhagwati J. in S.P. Gupta V. President of India AIR 1982 SC 149, "We have to examine the arguments objectively and dispassionately without being swayed by populist approach or sentimental appeal. ..... We have therefore to rid our mind of any pre-conceived notions or ideas and interpret the Constitution as it is, not as we think it out to be."

Any law promulgated by Parliament for the benefit of the people must by definition be good. As Mr. Mahmudul Islam, learned Counsel appearing as amicus curiae, submitted: "it has to be noticed that not only legislative acts but also executive and administrative actions carry the presumption of constitutional validity". It cannot be conceived that Parliament is empowered to enact bad laws. Disobedience of the law or improper application or interpretation of it does not make that law illegal or bad. It has been argued that the cause of the undesirable events which took place on 1/11 (2007) was the Thirteenth Amendment. The simple answer to this is that, those events occurred because the then President did not follow the letter of the Constitution relating to appointment of the Chief Adviser of the Non-Party Care-Taker Government. It may be recalled that without exhausting all the procedures in Article 58C(3), (4) and (5) he himself assumed the post of Chief Adviser of the Care-Taker Government. It is to be remembered that the success of any law lies not in its promulgation, but in its implementation, which was absolutely absent at that time. In a Constitutional democracy, no one is above the Constitution and the law. Each person in authority or holding any position of power has his power circumscribed by the Constitution. Even the President of the

country having some constitutional prerogatives must act in accordance with the provisions of the Constitution. By the end of 2006, when the time came to form the Care-Taker Government, the President was obliged to follow the clearly delineated path detailed in Article 58C(3), (4) and (5) before he himself assumed the functions of the Chief Adviser under Article 58C(6). The fact that he did not exhaust the procedures under sub-articles (3), (4) and (5) was challenged in Writ Petition Nos. 11263 of 2006 and 11470-2 of 2006. However, those petitions were not allowed to see the light of day. On the day when the petitions were moved before the High Court Division an application was filed by the Government before the Hon'ble Chief Justice with a prayer to constitute a Special Division Bench under Rule 1(iii) of Chapter II of Part-1 of the High Court Rules. The then Chief Justice in his wisdom did not constitute any Special Division Bench. On the other hand he arbitrarily stayed further hearing of those matters. At this juncture one recalls the quotation from the case of Asma Jilani V. Government of Punjab, PLD SC 139: "The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction."

The function of the Chief Justice is to administer justice when he is sitting in Court as a Judge. He, along with his brother Judges, has the right to decide in favour of or against any contention of the parties to the action. He is merely one of the arbiters. He also has the additional task of administering the day to day activities of the Courts under his jurisdiction. The question remains as to whether any Chief Justice has the authority to

prevent any legal action from being moved before the High Court Division, to be thwarted or shelved for any reason. Can the Chief Justice usurp the function of the High Court Division and prevent any cause being adjudicated? The Chief Justice cannot sit alone and cause the unnatural demise of a live petition. Looking at the situation philosophically, as did Md. Awlad Ali J., when the instant matter was before the High Court Division, it remains to be seen whether any hearty citizen will feel aggrieved enough to bring the matter before the High Court Division.

The pertinent question in the case before us is whether the people can curtail their own democratic right for any period when the country will be governed on a day to day basis by a group of persons who were not elected by them. It has to be borne in mind that the Thirteenth Amendment came at a time when the people at large had lost faith in the ability of the elected members of the Parliament to hold a free and fair election. The opposition alliance demanded a Non-Party Care-Taker Government to hold the general election because they had no faith and trust in the neutrality of the ruling party to hold a fair election, which is a precondition for sustained democracy. From experience it was seen that the party who was last in power exerted undue influence over the civil administration at the time of election resulting in rigging of the polls. As a result of the agitation of the opposition and their supporters the party in power introduced the Bill for amendment in Parliament which was ultimately passed. The preamble to the Bill provide as follows:

> "Whereas it is expedient to make further amendment in the Constitution of the People's Republic of Bangladesh for the purposes hereinafter appearing;

.....

.....

The statement of object and reasons for the amendment is stated at the end of the Bill as follows:

> "Whereas it is expedient to make further amendment in the Constitution of the People's Republic of Bangladesh for the object of constituting Non-Party Care-Taker Government in order to aid and assist the Election Commission in holding more free, fair and impartial general election of members of Parliament, as well as performing the functions conferred on it under the Constitution, this Bill introduced, by virtue of Article 142 of the Constitution, for the amendment of the relevant Provisions thereof with a view to achieving the above object".

Thus, it is quite clear that the amendment was enacted by Parliament through the will of all the people of this country, both those represented by the party in power and those represented by the parties in opposition. Such an act of Parliament can be said to be extra-ordinary, inasmuch as it reflects not only the will of the majority under a democratic system, nor just the will of the two thirds of the House of Parliament which is required for amendment of the Constitution, but in this case the amendment was a reflection of the will of the whole Nation. Hence, the amendment cannot be said to be unlawful. When the whole of the Nation demands passage of a particular provision, it cannot be said to be undemocratic. And when such a process and change was triggered by the political distrust, as noted above,

the alternative cannot be continuation of the outgoing party during the interim period. Hence, the elusive neutrality cannot realistically be achieved through continuation of the party in power during the election process. An alternative is crucial for continued sustainability of the democratic system.

Democratic character

It has been argued by the learned Advocate for the appellant that during the period when the Non-Party Care-Taker Government is in power, Democratic Rule is abrogated since the persons in the helm of power governing the country for the 90 (ninety) days period are not representatives of the people. In this connection it may be observed that during any interim period between the dissolution of the Parliament and the entering into office of the next elected Parliament the representatives who continue to govern the country are not strictly elected representatives. It should be borne in mind that this happens only once in every five years. The Prime Minister and other Members of Parliament are elected to represent their constituents for a period of 5 (five) years from the day when they enter into office till the day of dissolution of Parliament at the end of that period of 5(five) years or earlier if the elected representatives lose the mandate of the people and Parliament is dissolved by the President. Thus to think that the Prime Minister and the Ministers who continue after the dissolution of Parliament to hold office are the representatives of the people is a fallacy. Moreover, history of this country tells us that the party in power who continue after the dissolution of Parliament are, according to the losers in the election, unable to hold free and fair election to full satisfaction and invariably the party in opposition alleges undue influence

and unfair means exerted by the party last in power upon the civil administration during the election process. This is a common phenomenon both in case of national elections and local elections. The fact remains that the losing candidates cannot take their defeat gracefully. However, that cannot mean that all elections are ***ipso facto*** unfair. It would be uncharitable to say that the former Chief Justices, who headed the previous Care-Taker Governments, did not hold fair elections simply because those who had been defeated complained of rigging of the polls.

The Democratic character of our Parliament is unlike those of other countries, inasmuch as our system allows for unelected persons to be made technocrat Ministers and allows participation of female Members of Parliament who are not directly elected by the people to govern the country. Thus, in any event, ours is not strictly a true democracy since non-elected persons are able to take part directly in the governance of the country. Those technocrat Ministers and female members in the reserved seats do not represent any members of the public. However, this state of events is permitted by the Constitution and, therefore, can be said to reflect the will of the people. Hence, if the people can choose by provision in the Constitution to be governed by non-elected Ministers, and indirectly elected members, then there can be no harm in the people wanting to be governed by non-elected persons for a period of 90 (ninety) days, knowing full well that they choose to do so in the belief that they will thereby achieve a free and fair Parliamentary election which is the fundamental basis for democracy, a basic features of our Constitution.

One other aspect of the amendment may be considered here. It is not a requirement of the Non-Party Care-Taker Government to take part in the

election process save and except to give to the Election Commission all possible aid and assistance as provided by Article 58D(2). In my view, it is clearly a misconception to think that the Non-Party Care-Taker Government is in place to hold the election. In the 'Statement of objects and reasons for the amendment' as stated in the amendment Bill placed before Parliament, it was stated that the amendment in the Constitution was "for the object of constituting non party Care-taker Government in order to aid and assist the Election Commission in holding free, fair and impartial general election of members of Parliament, as well as performing the functions conferred on it under the Constitution ....." The amendment after passage through Parliament provides in Article 58D (1) that the Non-Party Care-Taker Government shall discharge its functions as an interim Government and shall carry on the routine functions of such Government with the aid and assistance of persons in the services of the Republic. Article 58D (2) provides that the Non-Party Care-Taker Government **shall give to the Election Commission all possible aid and assistance** (emphasis added) that may be required for holding the general election of members of Parliament peacefully, fairly and impartially. It is undoubtedly the Election Commission which is mandated to hold the general election. In this regard, I may refer to the deliberations which took place in Parliament when the Bill was placed before it. The relevant portions of the debate are reproduced below:

"msm` wewZK 24‡k gvP, 1996

[mswkøvb (Î‡qv`k ms‡kvab) wej, 1996]

e¨wióvi Rwgi DwÏb miKvi (gš¿x, AvBb, wePvi I msm` welqK gšÍe¨vjq)t gvbbxq ¯úxKvi, AvR‡K GB wejwU DÌvcb I we‡ePbvi Av‡M Avcbvi mvg‡b Avgv‡K Gi Dci GKwU outline Dc¯vcb Ki‡Z n‡”Q|

GB wejwU GKwU AZ¨š gj¨evb wQj| AvR‡K Avgv‡`i GB ms‡` 300 Rb m`m¨ mvaviY †fvUvi‡`i direct ‡fv‡U wbewPZ n‡”Qb Ges Zviv Avil 30 Rb gwnjv m`m¨ wbewPZ Ki‡Qb| GB wbevPb Aeva, mô I wbi‡c¶ fv‡e Abôv‡bi j‡¶¨ Avgv‡`i mswkøó wbevPb Kwgkb i‡q‡Q| Ges GB wbevPb Kwgkb‡K mvnvh¨ I mnvqZv Kivi Rb¨ Ges mswkøó‡b AwcZ †h ¶gZv i‡q‡Q, †mB ¶gZv c‡qvM K‡i `wqZ cvj‡bi Rb¨ GKwU wb`jxq ZËveavqK miKvi, non-party caretaker government MVb wb‡q Avgv‡`i Av‡jvPbv Ki‡Z n‡”Q Ges GUvi Rb¨ GB wej DÌwcZ n‡q‡Q| Avi †mB j‡¶¨ Avgv‡`i †h mswkøó‡b i‡q‡Q, †mB mswkøó‡bi we‡klÁ GKUv cwieZb Ki‡Z n‡”Q Ges Avgv‡`i‡K †mLv‡b GKUv bZb chapter mwb‡ek Ki‡Z n‡”Q| †h‡nZ GKUv bZb wb`jxq ZËveavqK miKvi ‰Zix Ki‡Z n‡”Q, Ges mswkøó‡b GKUv bZb chapter mwb‡ek Ki‡Z n‡”Q, †m‡nZ mswkøó‡bi wewfb Ab‡”Q` ms‡kvab Ki‡Z n‡”Q, A_vr A‡bK¸‡jv ms‡kvabx Avbvi c‡qvRbxqZv †`Lv w`‡q‡Q|

wgóvi ¯úxKvi, GB wejwU DÌvc‡bi ci Avgiv Avgv‡`i msm` m`m¨‡`i ms‡M Avjvc Av‡jvPbv K‡iwQ| Zviv A‡b‡K G‡Z ms‡kvabx w`‡Z Pvb| Avcbvi Awd‡m Zviv †mBme ms‡kvabx submit Ki‡Qb| Awg AvR‡K †gvUvgwUfv‡e GB nvD‡m welqwUi GKwU KvVv‡gv `vo Kiv‡Z Pvw”Q|

wgóvi ¯úxKvi, GB †h wb`jxq ZËveavqK miKvi it will be absolutely in the impersonal functioning of the state. Kvil g‡Li w`‡K †P‡q ev †Kvb cwUi w`‡K †P‡q Avgiv GB wb`jxq ZËveavqK miKvi ‰Zix KiwQ bv | Avgiv wb`jxq ZËveavqK miKvi ‰Zix KiwQ hv‡Z fwel¨‡Z GKwU Aeva, mô Ges wbi‡c¶ wbevPb nq, hv‡Z Kvil †Kvb IRi AvcwË bv _v‡K, we‡klÁ †Kvb `vex bv _v‡K, †KD hv‡Z ej‡Z bv cv‡i †h, †fv‡U wiwMs n‡q‡Q, †mB wbwgË AvR GB wejwU DÌvcb Kiv n‡q‡Q Ges AvR‡K we‡ePbvi Rb¨ G‡m‡Q|

wgóvi ¯úxKvi, Avgv‡`i †`‡k †h RwWwmqvwi, wePvi wefvM, GUv‡K Avgiv memgq Aeva I wbi‡c¶ †`‡LwQ Ges GUv Aeva I wbi‡c¶fv‡e KvR K‡i hv‡”Q| †mBRb¨ wb`jxq wbi‡c¶ ZËveavqK miKv‡ii cavb wn‡m‡e Avgiv evsjv‡`‡ki Appellate Division Gi chief justice A_ev evsjv‡`‡ki Ex-chief justice-‡K chief Adviser wn‡m‡e wb‡qvM`v‡bi K_v e‡jwQ Ges Zvi 10 Rb Adviser _vK‡eb| Ges whwb me‡kl Appellate Division †_‡K Aemi MnY K‡i‡Qb, c_‡g Zv‡KB Ab‡iva Kiv n‡e GB ZËveavqK miKv‡ii cavb nlqvi Rb¨| wZwb hw` iwR bv nb Ges Zvi hw` qualification bv †_‡K _v‡K Zvn‡j Zvi Av‡M whwb Aemi MnY K‡i‡Qb Zv‡K Ab‡iva Kiv n‡e| Zvil hw` †Kvqvwjwd‡Kkb bv _v‡K Ges wZwbl hw` iwR bv nb Zvn‡j Zvi Av‡M whwb Aemi MnY K‡i‡Qb Zv‡K Ab‡iva Kiv n‡e| GBfv‡e Avgiv µgvbmv‡i Ab‡iva Ki‡Z _vKe, hZ¶Y bv Avgiv cvB| wKš kZ n‡”Q, eqm 72 eQ‡ii †ekx n‡Z cvi‡e bv| hw` cv³b cavb wePvicwZ bv cvlqv hvq ZLb Avcxj wefv‡Mi AemicvB wePvicwZ hviv i‡q‡Qb meKwbô †_‡K ïi“ Kiv n‡e| c_‡g meKwbô †`Lv n‡e, Zvi hw` qualification _v‡K Ges wZwb hw` m¤§wZ †`b Zvn‡j Zv‡K ZËveavqK miKv‡ii cavb Dc‡`óv wnmv‡e wbh³ Kiv n‡e| Ges Zvi civgk gZ †cwm‡W›U evKx 10 Rb Dc‡`óv wb‡qvM Ki‡eb| Ggbl n‡Z cv‡i †h, †h mg¯Í AemicvB wePviK i‡q‡Qb Zv‡`i wfZ‡il hw` KvD‡K cvlqv bv hvq Zvn‡j †`‡ki GKRb cL¨vZ bvMwiK ev L¨vZbvgv bvMwiK whwb `¶, ivó cwiPvjbvi ¶gZv i‡q‡Q Ges whwb Aeva I mô wbevPb cwiPvjbv Kivi Rb¨ Av¯v fvRb, †miKg †jvK‡K †cwm‡W›U AvnŸvb Ki‡eb wb`jxq, wbi‡c¶ I ZËveavqK miKv‡ii cavb Dc‡`óv nlqvi Rb¨| Zv‡ZI hw` cvlqv bv hvq Zvn‡j Avgiv †`‡ki GKRb bvMwiK hvi `¶Zv I AwfÁZv i‡q‡Q whwb ivó cwiPvjbv Ki‡Z cv‡ib, whwb wbevPb Ki‡Z cv‡ib| mvaxb Aeva, Ges wbi‡c¶ Ges hvi integrity m¤‡Ü Kvil †Kvb ck †bB, Zv‡K gnvgvb¨ ivócwZ cavb Dc‡`óv wnmv‡e wb‡qvM Ki‡eb| evKx 10 Rb Dc‡`óv wb‡q cavb Dc‡`óv 3 gv‡mi Rb¨ KvR Ki‡eb| 3 gv‡mi wfZ‡i wbevPb hv‡Z nq, Zvi Rb¨ wbevPb Kwgkb‡K mvnvh¨ Ki‡eb| KviY wbevPbUv Ki‡e wbevPb Kwgkb| GLv‡b miKv‡ii †Kvb nvZ bvB|

AvR‡K miKvi wbevPb Pvjv‡”Q, ck hLb D‡V‡Q, Avgiv we‡klfv‡e g‡b KiwQ †h, Rbmg‡¶ GKwU wb`jxq, ZËveavqK miKvi GKvš c‡qvRb| ZLb GB wb`jxq ZËveavqK miKvi wbevPb Kwgkb‡K h_vh_fv‡e mvnvh¨ I mn‡hwMZv Ki‡e hv‡Z Aeva Ges wbi‡c¶ wbevPb n‡Z cv‡i”|

I would emphasise the assertion of the Hon'ble Minister presenting the Bill in Parliament that the [non-party care-taker government] "will be absolutely in the impersonal functioning of the state". And its purpose would be to ensure free, fair and impartial elections in the future.

Clearly there is a difference between aiding and assisting the Election Commission and holding the election. In my view, the problem is in thinking that the Care-taker Government would hold or oversee the elections. This is clearly a misconception. If one looks carefully at the Constitutional provision, it is evident that the interim government's duty is to carry out the day to day function of managing the affairs of the Republic, and except in the case of necessity for the discharge of such functions it shall not make any policy decisions. It, therefore, has no function in holding the elections. The only function it has in connection with the election is to 'give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially.' (Art. 58D (2)]

That the Care-taker Government has very limited power is further exemplified by Article 58E, which provides that, "Notwithstanding anything contained in Articles 48(3), 141A(1) and 141C(1) of the Constitution, during the period the Non-Party Caretaker Government is functioning, provisions in the Constitution requiring the President to act on the advice of the Prime Minister or upon his prior counter signature shall

be ineffective". Hence, it would not be correct to think that the head of the Care-taker Government would be stepping in the shoes of the out-going Prime Minister.

It should also be noted that there is an interim arrangement even before the interim Care-taker Government comes into being. Article 58C(2) provides that the Chief Adviser and other Advisers shall be appointed within fifteen days after Parliament is dissolved or stands dissolved, and during the period between the date on which Parliament is dissolved or stands dissolved and the date on which the Chief Adviser is appointed, the Prime Minister and his Cabinet who were in office immediately before Parliament was dissolved or stood dissolved shall continue to hold office as such.

So, for up to 15 days the Prime Minister and his Cabinet, who are no longer elected members or ceased to be s, will continue to hold office as they had done prior to the dissolution of Parliament, until the date on which the Chief Adviser is appointed. And for the remaining period from that time on till the date on which a new Prime Minister enters upon his office after the constitution of Parliament, the Care-Taker Government will carry out the executive functions of the State for the limited purpose as mentioned in Article 58D(1). Lest we forget, it is the people who chose to adopt this system for a period of 75 to 90 days after every five years; and they did so with a view to ensure free and fair elections which would sustain their democratic powers. Of course, they must also have had previous bad experiences in the back of their minds.

Independence of the Judiciary

The contention in essence is that because the head f the Care-Taker Government would be chosen from the last retired Chief Justice, or the retired Chief Justice previous to him, this leaves open the possibility that

the Hon'ble Chief Justice who would be in line to become the last or penultimate retired Chief Justice might be tempted to be influenced in his decisions in favour of the party in power, keeping his eyes upon the future appointment. To this end, Mr. M I Farooqui made his submission with reference to the decision in Abdul Bari Sarker V. Bangladesh, 46 DLR (AD) 37. He contended that Article 99 of the Constitution should be restored putting a total ban on appointment of a retired Judge to any public office whatsoever.

By reference to Secretary, Ministry of Finance V. Md. Masdar Hossain and others, 20 BLD (AD) 104, learned Counsel submitted that the independence of the judiciary could not be curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. Learned Counsel also referred to a number of instances where judges of the United States and England refrained from taking extra-judicial posts while holding judicial office or after retirement.

Dr. M. Zahir, appearing as amicus curiae submitted that the concept of Care-Taker Government was a natural stigma on the honesty of all political parties presupposing that the outgoing party cannot be relied upon to conduct a fair election. He submits that this is an honest 'confession' by admittedly unreliable politicians about their dishonesty or unreliability in the matter of elections. Drawing on the country's experience in 2007-2008, he submitted that the provisions relating to the non-party Care-Taker Government read with Article 141A-141C is a dangerous combination which could derail democracy and the rule of law for an indefinite period, not limited to the 90-days Care-taker Government.

However, one should not be oblivious of the intrinsically skeptical and suspecting nature of political parties in Bangladesh, which led to the creation of the Care-Taker Government concept in the first place. It was the distrust of opposing political leaders which created a stalemate in 1996, as exposed by 'the Ishtiaque Papers', which culminated in the Care-Taker Government system. Moreover, the system of Care-Taker Government should not be blamed for its inadequacies, which were indeed a result of the corruption of that system by none other than the political parties, which are alleged to have manipulated that system to achieve their political ends. It is alleged by one political party that the other party while in government extended the age of superannuation of Supreme Court Judges from 65 years to 67 years so that the last retiring Chief Justice would be a 'man of their choice', favouring their political ideology. That in my view is a slur not only on the political parties, but also on the office of the Chief Justice. No God-fearing Judge, let alone the Chief Justice, having a grain of conscience in him would remain 'the man of choice' of my political party after taking oath as a Judge. It would be fanciful thinking on the part of the political parties to consider any Judge to be 'their man of choice'. Moreover, it should be borne in mind that the Judges of the Supreme Court have no hand in altering the age of retirement of Judges, or in the supersession of Judges. If any mischievous calculation is made, then it is a done by the politicians and not the Judges.

Dr. Zahir observes that the concept of a Chief Justice being above politics and above controversy has been abandoned. But we find his view that everyone including a retired Chief Justice has the same mentality of being politically partial, to be rather uncharitable, especially from someone who has spent his whole life of practice as a lawyer before those every

Chief Justices, who by no means have shown partiality in their judgments. Every individual in any democratic society should have a political view, but that view is personal and any member of the judiciary should not allow his views to influence his judgement. That would be highly unethical, contrary to the Code of conduct, and would be totally unacceptable.

The provision for an interim government for when Parliament is dissolved exists under Article 56(4) read with Article 57(3). The Non-party Care-Taker Government was introduced in 1996 because the Government then in power failed to hold a free and fair election as demonstrated by the by-election in Magura and the farcical general election that followed. As Mr. Huq, learned Counsel appearing as amicus curiae observes, the people lost confidence in the then Government and at that critical point in time a Non-Party Care-Taker Government was a necessity. However, his view that such necessity or importance no longer subsists appears to be short-sighted. It cannot be imagined that while the same political parties and politicians remain, the deep-rooted distrust that they bore against each other will have disappeared. Perhaps such necessity will persist until a viable alternative system, acceptable to all concerned parties, is developed. And that can only arise if there is consensus.

Mr. Rafiqul Huq observes that there is a provision in the Thirteenth Amendment for the last retired Chief Justice or other Judges to be involved as Chief Adviser or Advisers of the Non-Party Care-Taker Government. But this has raised apprehension in the minds of the people that the Chief Justice or Judges who are expected to be Chief Justices and remain the last retired Chief Justice are not discharging their duties impartially or supersession is taking place in order to make one or the other Judge as the last retiring Chief Justice. He submitted that this kind of apprehension in

the mind of the people affects the respect for the highest judiciary. The apprehension is that this kind of manipulation is done with the aim that the last retiring Chief Justice of choice may serve the interests of the party in power as the Chief Adviser.

However, this apprehension presupposes that the Chief Adviser and the Care-Taker Government will have the power to influence the election process. As pointed out earlier, the Care-Taker Government is not mandated by the Constitution to have any activity in the election process, save and except to aid and assist the Election Commission. It appears that a cloud is being created by imagining non-existent powers of the Care-Taker Government and then assuming improper exercise of those powers in order to denigrate the system. At this juncture one may suggest that, in order to allay any misapprehension there should be a clear declaration that the Care-Taker Government or interim Government has no function in the holding of elections. With respect, one may also accept the suggestion made by Dr. Zahir that it is necessary to strengthen the Election Commission so that it can conduct the elections fairly and impartially without having to turn to the Care-Taker Government for support. The Election Commission itself may be given the authority to commandeer all necessary assistance and support from the civil administration. It will have at its disposal adequate numbers of members of the civil administration for the purpose of aiding and assisting in the election process. And only these civil administrative personnel will be under the control of the Election Commission. Equally, the services of the disciplined forces may be sought from the President, should it be felt necessary by the Election Commission for proper management of the election process.

Mr. Huq went on to argue that the non-party Care-Taker Government is still necessary because the party in power and the main opposition "are not behaving in the proper direction. They are critising each other without respect for other." Well, that takes us back to square one where the Care-Taker Government was created due to the mutual distrust of the opposing political forces. Perhaps, some such system of neutral interim Government will remain a necessity until the political parties learn to trust each other, at least for the three months necessary for holding general elections. If the Election Commission is given sufficient strength and authority to conduct the elections independently, with all aid and assistance at their command, then it would matter little as to who was heading the Care-Taker Government.

Mr. Huq has suggested that the judiciary should be kept out of the political arena. That is the best way to keep the Judges from being stigmatized due to no fault of their own. But one should reflect upon the need to involve the judiciary at the inception of the Care-Taker Government concept. The judiciary commands high respect now as it did then, when it was felt that only a Judge of the highest judiciary could be trusted to be impartial. This was the feeling of all political parties and hence the whole nation. The feeling persisted during the next two general elections. It was the subsequent alleged calculated manipulation of the retiring age of Supreme Court Judges for political ends that led to the maligning of the system of Care-Taker Government.

Again, going back to the empowered Election Commission, the limelight would be taken away from the head of the Care-Taker Government when the notion is obliterated from the minds of the people

that the Care-Taker Government has any function in conducting the elections. It would be immaterial whether the head of the Care-Taker Government was a retired Chief Justice or any other person of immaculate repute and personality.

With respect, I find good sense in the suggestion from Mr. Huq that the interim government should comprise an equal number of eminent or prominent persons nominated by the opposing political parties. This would give a balanced team who would check each other in their day to day activities during the relatively short period of two and half months when elections are conducted by the Election Commission. Of course, two opposing forces, no matter how mundane their activities, would require an 'umpire', especially in the charged atmosphere of suspicion and distrust. Who better to act as 'umpire' than a retired Judge who would have spent his working life on the Bench as an 'umpire'? As I perceive the situation, so long as the 'umpire' realises that the function of the interim government is only to carry out the day to day decisions in relation to running the country and strictly no involvement in the election process, he should be able to deter the other members of his team from delving in or interfering with the activities of the Election Commission. Of course, that is not to say that an impartial head of the interim government cannot be chosen from civil society. What is important is to ensure political neutrality of the person and his ability to control warring political stalwarts, who might justifiably be suspected of delving into the election process. Allegations of powerful Ministers and politicians visiting local constituencies, even when prohibited by law during the time of election, are not uncommon. It is most essential to allow the Election Commission to maintain the timeframe laid

down for the election without let, hindrance or interference from any quarter. That can be achieved only if the Election Commission is given all necessary powers and independence in the conduct of the elections. Mr. Huq goes on to state that the non-party Care-Taker Government is not in conformity with the fundamental structure of out Constitution, though he did say earlier that the system was still necessary. He pointed out that the Election Commission in India has been made powerful and independent, and neutral persons have been selected to form the Election Commission. Our Election Commission has been able to prove its transparency and neutrality in holding the general elections of 2008 and local elections. He suggested that we must have a powerful Election Commission its own budget.

Mr. Mahmudul Islam, on the other hand, firstly submitted that the impugned Amendment does not infringe the Republican character of the State / Constitution. The office of the President still remains to be filled up by the people's representatives and the Constitution retains its Republican character notwithstanding the Thirteenth Amendment. He further submitted that all efforts were made before the Thirteenth Amendment to save democracy and that if it is held invalid, it is almost certain that the opposition parties will not participate in the election and democracy will be a far cry. He added that it is true that the provisions of the Thirteenth Amendment suspend representative government for a short interregnum, but the Amendment ensures operation of democracy in the country. He submitted that there was no alternative to holding election under a Care-Taker government to preserve the democratic character of the Constitution and the country. Democracy has to be suspended for a little while for

ultimate survival of democracy. With regard to the independence of the judiciary being affected by the Thirteenth Amendment, he submitted that if a judge passes a judgment for receiving any favour or due to fear of government action, the judge commits breach of his oath; it has nothing to do with the performance of his duty as a judge. By the appointment of a retired Chief Justice or a judge of the Appellate Division the judiciary is not in any way involved.

Mr. T. H. Khan and Dr. Kamal Hossain, learned Counsel appearing as amici curiae submitted in support of the contention that the Thirteenth Amendment was not illegal or ultra vires the Constitution as there was a national consensus supporting electoral reforms to ensure free and fair elections and for that purpose the citizens may make informed choices. They also suggested supplementing the powers of the Election Commission to discharge its constitutional mandate. Both learned Counsel were infavour of retention of the system of Care-Taker Government since it was introduced following broad social and political consensus, which was a change brought about by the people to protect their rights to have effective participation in a free and fair election process. Mr. T. H. Khan submitted that if Part IXA of the Constitution does not destroy democracy, then Part IIA likewise does not do so.

Mr. M Amirul Islam, learned Counsel appearing as amicus curiae, made submissions in support of the legality of the Amendment, but emphasized the need to have a powerful Election Commission, and above all a correct Electoral Roll. He submitted that in 2006 the Election Commission failed to prepare an up to date voters' list and the then President took over the position of Chief Adviser. His action was

challenged in the High Court Division, but the Chief Justice stayed the matter.

Mr. Ajmalul Hossain, learned Counsel appearing as amicus curiae submitted that the Thirteenth Amendment is ultra vires the Constitution as it infringes the democratic nature of the Constitution since Article 7, Part I and Part II contemplate that the country should be governed by elected representatives of the people. Referring to the turn of events in 2006 he suggested that because the political party in opposition did not wish to have an election under the last retired Chief Justice, they took their agitations to the streets and as a result there was a Care-Taker government supported by the army for two years which destroyed the fundamental rights and rule of law.

It must be pointed out that what happened in 2006 was not a consequence of the legality or otherwise of the Thirteenth Amendment, but the failure of the then President to comply with provisions of the Constitution. He did not exhaust the options in Article 58C(3), (4) and (5), before declaring himself the Chief Adviser, which was in fact challenged before the High Court Division, as we note from the submissions of Mr. M Amirul Islam.

Mr. Rokan Uddin Mahmud, learned Counsel appearing as amicus curiae also submitted in favour of the legality of the Thirteenth Amendment. He referred to the convention whereby after the dissolution of the British Parliament, the outgoing Prime Minister continues until the new Prime Minister takes up his post. But during this interim period he remains unelected. A similar provision exists in our Constitution under Article

58(4). He submitted that if by such provision democracy is not infringed then Article 58B cannot infringe democracy.

Mr. Muhammad Mohsen Rashid, learned Counsel appearing for the appellant made submissions challenging the legality and vires of the Amendment. At the same time he admitted that "the country was coming out of crisis and it made sense to install a Care-Taker Government which could hold free and fair election it was only then that this form of Government aided in installing democracy". He however, gave the example of India thus, "In India the Election Commission was strengthened by a single man, Mr. T. N. Seshan. This man is individually responsible for changing the face of the Election Commission and today there are more than one billion beneficiaries of such an independent Election Commission. Currently the execution of elections under the Election Commission is such that no one dares to raise a voice or a finger towards that institution whilst having a Care-Taker Government which facilitates the holding of free and fair elections."

The learned Attorney General made submissions in favour of the Amendment pointing out that the Constitution allows non-elected Ministers and Women Members of Parliament who are not elected by the people. He adverted to the necessity of appointment of non-elected persons for the sake of holding free and fair elections. He submitted that the Thirteenth Amendment did not alter the basic structures of the Constitution.

Thus it is seen that the majority of the amici curiae were of the view that the Thirteenth Amendment is not ultra vires the Constitution but many of them were of the view that it cannot survive in the present form. There was general consensus that the Election Commission needs to be given full

independence and more power in order that it may hold free and fair elections.

Certainly, the Care-Taker Government system conceived in Bangladesh was quite unique and served its purpose well at the time. The system has been given a bad reputation due to political manipulation. However, a system of interim Government is not unknown and is in operation in many developed and less developed countries of the world. In any democracy there has to be an opportunity for the people to air their views periodically. Hence, elections are held after a stipulated period. Unless the outgoing government holds election during the pendency of its term of office, there will necessarily be a gap between dissolution of Parliament and the sitting of a new Parliament. Any party in power will always wield its might. In the context of our political rivalry, we cannot seriously expect the party in power to abstain from exerting unfair influence during elections. Hence, no fair election can be held while any particular party is still in power. Therefore, there is obvious need for a neutral interim Government. Mr. Huq's suggestion to allow the non-party Care-Taker Government to hold elections is fraught with the same dangers as existed under the Care-Taker Government resulting from the Thirteenth Amendment. What is necessary, with respect, is to totally do away with the notion that the Care-Taker Government is formed to hold elections. A careful reading of the Thirteenth Amendment would expose the fact that the Care-Taker Government is meant only for day to day Government of the country and has no express or implied power to act in relation to the elections, but only to aid and assist the Election Commission. With the

realisation that the Care-Taker Government or the Chief Adviser of the Care-Taker Government has no power or function with regard to the elections, the need for manipulations and adjustments for that post will be obviated. In such a situation no aspersions would be cast on the person appointed as the Chief of the neutral interim Government. As for appointment of the head of the interim Government, the suggestion to have the last three Chief Justices to select the Chief Adviser, is likely to lead to similar calculative manipulations as in the past. A better solution might be to allow the political parties to suggest five names, excepting ones which have held post in any political party; and any name found common be chosen to head the interim Government.

At this juncture, I would also suggest that the choice of the words "Care-Taker Government" gives the impression of a helpless situation, which may have been apt at the relevant time in 1996 when we needed the "care". However, the term "neutral interim Government" would appear to be apposite for the period in between dissolution of one Parliament, to be replaced by another.

Finally, I would venture to say that in a democratic society no law can be inscribed in stone. Society does not exist in solid state nor in inertia and cannot be expected to go into stagnation. The need for change arises every day in one form or another. Ours is a fragile democracy and the interim period between the dissolution of Parliament and the sitting of the next Parliament is the Achilles heel of that system. In 1996 there was clearly the need for a solution to a political quagmire. The people needed a way out, which they found in the form of the Non-Party Care-Taker

Government. The system worked to a great extent for two terms. For reasons which are alluded to above, the system became unworkable. Again, the people must be allowed to decide the solution to the problem. That can only be done through dialogue in Parliament by their elected representatives. The suggestions made above are mere suggestions. The Supreme Court or the Judges do not make law and it is not their mandate to do so. The Supreme Court has the authority given by the Constitution to declare any law to be ultra vires the Constitution. The Court may travel to the extent of recommending that Parliament should consider enacting a particular legal provision to cater for a given problem which has been brought to its notice, but that does not extend to law-making power.

In conclusion, I find that the Thirteenth Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution. The Republican and Democratic character of the Constitution was no more infringed after the Thirteenth Amendment than it had been before the Non-Party Care-Taker Government system was introduced. However, the system has become unworkable due to the improper exercise of power of the President under Articles 58 C(3), (4), (5) and (6), which led to the unnatural and unconstitutional state of affairs in 2007. In order to avoid recurrence of such a situation, the mode of setting up of the interim Government, by whatever name it may be called, is to be replaced by another system. It is fully within the power of the people to change the system which will serve them and sustain their democratic rights. It has to be borne in mind and that no system can ever be foolproof. Nevertheless, whatever new system is introduced, it will have to be acceptable to the people for it to have durability. As discussed above, the

people make their will known by exercising their democratic right through their elected representatives in Parliament.

With the above observations, the appeal is disposed of, without however, any order as to costs.

J.

Order of the Court

1. By majority judgment, the appeal is allowed. The impugned judgment and order of the High Court Division is set-aside.
2. The Constitution (Thirteenth Amendment) Act,1996 (Act 1 of 1996), is ultra vires the Constitution and hereby declared void prospectively.
3. The Civil Petition for Leave to Appeal No.596 of 2005 is accordingly disposed of.
4. The Government is hereby directed to pay honorarium of Tk.20,000/- to each of the Junior Advocates of the learned amici curiae.
5. There shall be no order as to costs.

C.J.

J.

J.

J.

J.

J.

J.

The 10th May,2011.
/Rezaul/B.R.
/Approved for Reporting/