

Chapter 1

INTRODUCTION

The violation of human rights has started from the very beginning of human civilization. The culture of violation of human rights through emergency is very common all over the world, especially in the third world countries.¹

The present State of Emergency is one of the most widely discussed issues in the socio-political context of Bangladesh today. Since our independence we have faced a state of emergency for five times, including the emergency declared on 11th January 2007. Though it is a very interesting subject-matter for discussion, it has not been clearly and legally defined anywhere by any law or in our constitution. There are emergency provisions in the constitutions of some countries, including Bangladesh. Normally emergency means an unexpected occurrence requiring immediate action. In *Bhagat Singh vs. King Emperor*, Lord Dunedin said, “A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action”. But according to the view of our constitution it means the existence of a condition whereby the security or economic life of Bangladesh or any part thereof is threatened by war, external aggression or internal disturbance.²

In Indian sub- continent the history of declaring a state of emergency came through the Government of India Act 1935. Under article 102 of the Act the

¹ Emajuddin Ahmed, *The Military Rule and The Myth of Democracy*, 1st ed., (Dhaka: UPL, 1987), p. 4.

² Shahnaz Huda, “*Human Rights under Emergency Situations*” The Dhaka University Studies Part-F, Vol: III.

Governor General could declare emergency if, in his opinion, a grave situation existed whereby the security of India was threatened whether by war or internal disturbances³. The Indian constitution provides the provision of emergency under article 352 (1): "If the President is satisfied that grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance beyond the power of a provincial Government to control, he may issue a proclamation of emergency".³

In conformity with the aforesaid article Pakistan introduced the provision of state of emergency in article 191 of the constitution (1956) and also included this provision in the constitution of 1962. It is a matter of regret that the proclamation of emergency in both India and Pakistan were not for the welfare of the people. In its twenty three year long history, Pakistan witnessed a series of actions taken by the ruling elite or sometimes by one individual in the office of the president under the garb of these emergency provisions. Golam Mohammad and Iskandar Mirza used this emergency power to perpetuate their rule and thereby they destroyed political institutions. The emergency which was proclaimed in 1965 due to war with India was not withdrawn till the mass-upsurge forcing Ayub Khan in 1969 to leave power. The experience of Pakistan shows that whenever such power was enshrined in the constitution, however well intentioned the laws might have been the tendency to use or, in most cases, misuse them was overwhelmingly predominant. These authoritarian powers were, therefore, considered contradictory to the concept of nourishing a living democracy. For this bad history of exercising the emergency power, the Awami League did not introduce emergency provision in the original constitution in 1972, but after nine months of being in power, they passed the provisions of emergency by the second amendment.

³ Arthur Bioriedate Keith, "A *Constitutional History of India 1600-1935*" 2nd ed., (London: Methuen & Co Ltd. 1969), P. 364.

Chapter 2

GENERAL CONCEPTS

2.1 Definition of Emergency

These provisions in the constitutions of some countries but nowhere it is exactly defined what emergency is. Normally emergency means an unexpected occurrence” requiring immediate action. In *Bhagat Singh v. King-Emperor*, Lord Dunedin said, “a state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action.” Stiphen P. Marks says that emergency is a situation which results from temporary condition, which place institutions of the state in a precarious position, which leads the authorities to feel justified suspending the application of certain principles. Strictly speaking, the concept of emergency, from the view point of constitutional law, means the suspension of and restriction over certain fundamental rights of citizens in order to deal with a situation when the security of the state is threatened or the national interest is in peril. From the Bangladesh constitutional point of view, emergency means the existence of a condition whereby the security or economic life of Bangladesh or any part thereof is threatened by war or external aggression or internal disturbance.⁴

2.2 Classification of Emergencies

From the view point of territorial extent emergency may be of two types: National Emergency; and Partial or State Emergency.

⁴ Md. Abdul Halim, *Constitution, Constitutional law and Politics: Bangladesh Perspective*, 3rd ed., (Dhaka: CCB Foundation, 2008), p. 271.

When emergency is declared, whatever may be the reason behind the declaration, throughout the whole territory of the state, it is called national emergency. On the other hand, when emergency is declared in a particular area of a unitary state or in a state of a federation, it is partial or state emergency. For example, article 352 of the Indian Constitution provides that emergency may be declared throughout India or any part thereof. Likewise, article 356 provides state emergency. The Constitution of Pakistan also provides the same provisions.

On the basis of its nature emergency may be of following three types:

1. Emergency of War,
2. Emergency of Subversion: and
3. Economic Emergency.⁵

Explain these types of emergency-

1. Emergency of War

When emergency is declared as a result of war or external aggression, it is called emergency of war. For example, emergency of war was declared in British India during the Second World War. This emergency was declared by the British Government under the authority of the Emergency Power (Defence) Act. 1939. In independent India emergency of war was declared for two times. First in October, 1962 when China launched a massive attack on India's North-Eastern border. Emergency was declared under article 352 on account of external aggression. Second in December, 1971 when Pakistan attacked India.⁶

2. Emergency of Subversion

When emergency is declared due to internal disturbances within the state i.g. to suppress civil war or any anti-government movement or a riot in any particular area of the country or to face any natural disaster, it is called emergency of

⁵ *Ibid*, p. 273.

⁶ *Ibid*.

subversion. For example, in Bangladesh emergency 'was declared four times due to internal disturbance.⁷

3. Economic or Financial Emergency

When emergency is declared with a view to overcoming a situation in which the economy of the state is about to breakdown or has broken down, it is called economic emergency. It is worthy of notice here that from the broader point of view economic emergency should be included in emergency of subversion but constitutions and laws of some countries provide specifically, in addition to emergency of subversion, for economic or financial emergency. For example, article 360 of the Indian constitution specifically provides that if the president of India is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of it is threatened, he may declare emergency. Similar provision is provided for in article 235 of the Pakistan constitution. The constitution of Pakistan of 1956 also provided for such provisions (article 194).⁸

2.2.1 Distinction between Emergency of War and Emergency of Subversion

1. Emergency of war is connected with war or external aggression whereas emergency of subversion is connected with any type of internal disturbance within the territory of the state.
2. Generally emergency of war is declared throughout the country but emergency of subversion may be declared to any part of the territory.
3. Emergency of war is related to the question of sovereignty of a state because it is declared when the sovereignty of a state is threatened. But emergency of subversion has no relation with the question of sovereignty of a state.

⁷ *Ibid.*

⁸ *Ibid.*

4. The immediate purpose of emergency of war is to defend the sovereignty and security of the state whereas the purpose of emergency of subversion is to suppress the civil war or anti-government movement.⁹

2.2.2 Double Emergency

Somewhere provisions of double emergency are visible. Emergency is of three kinds which have been discussed earlier. This double emergency is not a class apart. While one type of emergency is in operation declaration of another type of emergency is called double emergency. For example, in India the proclamation of emergency of war made in December, 1971 was still in operation when another proclamation of emergency of subversion was made on 26 June, 1975 on the ground that security of India was threatened by internal disturbances. This double emergency continued for a long time. When Janata Party came to power in March, 1977 replacing the Indian National Congress the emergency of subversion declared in 1975 was withdrawn on March 22, 1977 and the emergency of war was withdrawn on March 27, 1977. The provision of this double emergency was inserted in the constitution by adding clause 9 to article 352.¹⁰

2.3 Need for Emergency Provisions

Providing for emergency provisions in the constitution is not an undemocratic something. Because the security of the state as a whole is of greater importance than the liberty of some individuals.

The state itself is destroyed or in great peril the liberties of the individual citizens stands annihilated. As Shukia V.N. says—

“Events may take place threatening the very existence of the state, and if there are no safeguards, against such eventualities, the state together with all that is desired to remain basic and immutable, will be swept away.”

⁹ *Ibid*, p. 274.

¹⁰ *Ibid*, p. 275.

It was also held in *R. V. 1-lailiday*,—

‘However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement.’

The necessity for suspension of certain rights in times of emergency is internationally recognized. Almost all regional and international instruments of human rights make provisions for suspension of rights in cases of emergency. Article 4(1) of the International Covenant on Civil and Political Rights, 1966, article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and article 27 of the American Convention on Human Rights, 1969 make, more or less, the same provision to the effect that in time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligation under the convention.¹¹

Thus providing for emergency measures suspending some fundamental rights is allowed both nationally and internationally. But the problem is that there is a danger in investing such discretionary power with the executive authority. Because such a provision carries with it the risk of abuse of power if stern safeguards against its abuse are not provided for specifically. Most governments in developing countries abuse emergency power for political purpose; they use it as a necessary weapon to suppress the opposition and to perpetuate power; they thereby destroy the democratic institutions. The Secretary General of the International Commission of Jurists in his introduction on an ICJ report on States of Emergency opined that the most serious human rights violations tend to occur in situations of tension when those in power are or think they are threatened by forces which challenge their authority if not the established order of the society.

¹¹ *Ibid.*

This is why he thinks that there is an understandable link between case of grave violations of human rights and state of emergency.¹²

2.4 History of Emergency Power

In Indian Sub-Continent the history of emergency power of the executive traces back to the Government of India Act, 1935. Under article 102 of the Act the Governor-General could declare emergency if in his opinion a grave emergency existed whereby the security of India was threatened whether by war or internal disturbances.’ This provision which is fully alien to the British democratic system was kept candidly as a weapon by the British ruler in India to perpetuate their colonial design. But unfortunately these undemocratic and democracy-destroying provisions continued to have place in the subsequent constitutions in the Sub-Continent although freedom was achieved and countries became independent sovereign states.

Keeping in line with the 1935 Act, the Indian constitution in article 352 provides for emergency provisions to the following effect: “352 Proclamation of Emergency”.

(1) If the President is satisfied that grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance beyond the power of a Provincial Government to control, he may issue a proclamation of emergency.”

Following the same line, the 1956 constitution of Pakistan incorporated this emergency provision in article 191. The 1962 Constitution of Pakistan also contained the same provision.

The experience of the application of the emergency provisions in Pakistan was extremely bitter. In its 23 year long history Pakistan witnessed a series of action taken by the ruling elite or sometimes by one individual in the office of the

¹² Dr. S. K. Kapoor, *International Law and Human Rights*, 12th ed., (Allahabad: Central Law Agency, 2003), pp. 57-59.

President under the garb of these emergency provisions.¹ The two Governor-Generals of Pakistan Golam Mohammad and Iskandar Mirza used this emergency powers to perpetuate their rule and thereby they destroyed political institutions. The emergency which was proclaimed in 1965 due to war with India was not withdrawn till the mass-upsurge forced Ayub Khan in 1969 to leave power whereas the war was over in three weeks. During this continued emergency the political opposition parties were suppressed and hundreds of citizens were put into prison for years together. Almost all the political leaders of Pakistan particularly the prominent ones in the former East Pakistan were extremely critical of this harsh law. The Awami League in particular, was committed since the formation of the United Front in 1954 to repeal not only the black laws but also to remove any scope or prerogative enabling an individual to retard the process of democracy. The experience of Pakistan showed that whenever such power was enshrined in the constitution, however well intentioned the laws might have been, the tendency to use or in most cases misuse them was overwhelmingly predominant. These authoritarian powers were, therefore, considered contradictory to the concept of nourishing a living democracy.¹³

With these experiences in mind, the Awami League Government did not want to leave any scope for such exercise of power by the president. As a result, in the original constitution of Bangladesh no provision was embodied for any emergency situations. The decision was bold, praise-worthy and conducive to the nourishment of living democracy. But sooner than 9 months had passed provisions for emergency were inserted in the constitution by the Second Amendment to the constitution of Bangladesh by the same party which made the constitution.¹⁴

¹³ M. Abdul Halim, *ibid.*, p. 275.

¹⁴ *Ibid.*

Chapter 3

EMERGENCY PROVISIONS UNDER THE CONSTITUTION OF BANGLADESH

3.1 Emergency Provisions in the Constitution of Bangladesh

Emergency provisions are dealt with part 9A of the Constitution. The part contains three articles 141A, 141B and 141C. Article 141A says.

“if the president 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, he may issue a proclamation of emergency”.

Thus the president can declare emergency on three grounds —war, external aggression or internal disturbance. Two types of emergency, therefore, can be declared under the constitution of Bangladesh - emergency of war and emergency of subversion.

The Emergency provisions in Bangladesh are listed under Articles 141A to 141C of Part IXA,¹⁵ which mentioned below-

Article 141A¹⁶ Proclamation of Emergency- (1) If the President 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, he may issue a Proclamation of Emergency:

Provided that such Proclamation shall require for its validity the prior counter signature of the Prime Minister.

¹⁵ *The Constitution of the People's Republic of Bangladesh, 1972.*

¹⁶ *Ibid.*, Art. 141A.

(2) A Proclamation of Emergency-

(a) May be revoked by a subsequent Proclamation;

(b) Shall be laid before Parliament;

(c) Shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before that expiration of the meets after its re-constitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

(3) A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Article 141B¹⁷ Suspension of provisions of certain articles during emergencies - While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 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 this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetence, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

¹⁷ *Ibid.*, Art. 141B.

Article 141C¹⁸ Suspension of enforcement of fundamental right during emergencies- (1) 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 this 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.

(2) An order made under this article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this article shall, as soon as may be, be laid before Parliament.¹⁹

3.2 Who & under what circumstances can emergency be declared

Article 141A says that the president can declare emergency whenever he thinks that a grave emergency exists in which the security or economic life of Bangladesh or any part thereof is threatened by war, external aggression or internal disturbance.

Article I 41A (3) says that a proclamation of emergency may be declared before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Again, the proviso of article 141A (1) says that the proclamation of emergency shall require for its validity the prior counter signature, of the prime minister. Thus virtually the declaration of emergency depends on the wish of the prime minister. Whenever the prime minister advises the president to declare emergency the president is bound to do so. The declaration of emergency,

¹⁸ *Ibid.*, Art. 141C.

¹⁹ [<http://www.hrschool.org/doc/mainfile.php/lesson52/>, last visited on 22 January 2010.]

therefore, depends on the subjective satisfaction of the executive and the court cannot question the justifiability of such satisfaction.²⁰

3.3 Constitutional backwardness and emergency provision

It is to be agreed that we cannot get absolute perfection in all of our works or acts, as we are human being. It depends upon certain circumstances. However, it is to say that our Constitution is not fully perfect. There are some reasons behind this imperfection. One of them is the post-war situation. We had had an infant State after independence. In that condition there was the existence of an immediate necessity of Constitution for the formation of the new born country. The Constitution makers made the Constitution within an improper time to face the political situation. That is why there was a possibility to have some flaws in the Constitution and the same was happened.

Another reason for having backwardness in the Constitution is that the political intention. That is, different times, different ruling parties amended the Constitution for the favor of their own. Some of the amended provisions are omitted and some of them still exist.

Some positive provisions of the Constitution became meaningless because these provisions are not inaugurated in the proper Part of the Constitution. These provisions became meaningless in a sense that the Part which they belong has no judicial enforceability.²¹

Articles 141A, 141B and 141C

According to this Article President can declare emergency if he is satisfied that there exists a grave emergency in which the security or economic life of Bangladesh, or any part thereof is threatened by war or external aggression or internal disturbance.

²⁰ Mahmudul Islam, *Constitutional Law of Bangladesh*, 2nd ed., (Dhaka: Mullick Brothers, 2002), p. 449.

²¹ Mahmudul Islam, *ibid*, p. 450.

So the President can issue Proclamation of emergency on the aforesaid three grounds. Precisely speaking, there is no objection about the first and second ground as they are defined in the international law. But the question is about the third one. This term ‘internal disturbance’ is uncertain and vague. So the President can proclaim emergency in the peacetime to suppress the oppositions.

Again, the proviso of Article 141A (1) provides that the proclamation of emergency shall require for its validity the prior counter signature of the Prime Minister.

So, the point is that virtually it depends upon the wish of the Prime Minister. Whenever the Prime Minister advises the President to declare emergency, the President is bound to do so. So it leads a great risk of abuse of power.

Another important and most debating matter in the recent time is the Sub-Clause (c) of Clause 2 of this Article. It says that, a proclamation of emergency “shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:

Provided that if any such Proclamation is issued at the time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its reconstitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.”²²

This is a vague provision and that is why the Fakhruddin’s Caretaker Government lasted almost 2 years.

²² Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman*, 1st ed., (Dhaka: UPL Prokashoni, 2003), p. 58.

3.4 Judicial safeguard of Constitution

In order to know about the safeguard of the Constitution of Bangladesh we shall have to know about the supremacy of the Constitution. Because, so far Constitutional Supremacy is ensured in a country, the safeguard of the Constitution of that country is ensured by the judiciary to that extent.

Another thing is that the prevalence of Supremacy of Constitution depends upon the judiciary. It makes the Constitution Supreme over Parliament and Parliament is bound to exercise its functions according to the prescribed manner of the Constitution. It is possible only when there is a written Constitution. In most of the cases the written Constitutions declare that the Constitution shall be the Supreme and Fundamental Law of the land and no other law can be inconsistent with it.

Also Constitutional Supremacy is known as the judicial supremacy in the sense that the judiciary such as the Highest Court of the land is supreme over legislature. Because the judiciary is invested with the power to examine the validity and constitutionality of any legislation made by the Parliament and can declare a law void on the ground of inconsistency with the Constitution. On the basis of this theory the three organs of the State cannot do anything beyond the constitutional limitation.²³

²³ Md. Altap Hossain, *Constitutional Law*, 6th ed. (Dhaka: City Law Books, 2008), p.126.

Chapter 4

EMERGENCY PROVISIONS UNDER THE CONSTITUTIONS OF INDIA AND PAKISTAN

4.1 The Emergency Provisions under the Indian Constitution

PART XVIII

Emergency Provisions

Article 352²⁴ provides the Proclamation of Emergency-

(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

Explanation.—A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

(2) A Proclamation issued under clause (1) may be varied or revoked by a subsequent Proclamation.

(3) The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of

²⁴ *The Constitution of the Republic of India, 1950. Art. 352.*

Cabinet rank appointed under article 75) hat such a Proclamation may be issued has been communicated to him in writing.

(4) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People has been dissolved, or the dissolution of the House of the People takes place during the period of one month referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(5) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (4):

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days, a resolution approving the

continuance in force of the Proclamation has been also passed by the House of the People.

(6) For the purposes of clauses (4) and (5), a resolution may be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting.

(7) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a Proclamation issued under clause (1) or a Proclamation varying such Proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such Proclamation.

(8) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a Proclamation issued under clause (1) or a Proclamation varying such Proclamation,—

(a) to the Speaker, if the House is in session; or

(b) to the President, if the House is not in session, a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution.

(9) The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or [armed rebellion] or imminent danger of war or external aggression or [armed rebellion], whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

Article 353²⁵ provides Effect of Proclamation of Emergency-

²⁵ *Ibid.* Art. 353.

While a Proclamation of Emergency is in operation, then—

(a) Notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) The power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List:

Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India,—

(i) The executive power of the Union to give directions under clause (a), and

(ii) the power of Parliament to make laws under clause (b), shall also extend to any State other than a State in which or in any part of which the Proclamation of Emergency is in operation if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.

4.2 The Emergency Provisions under the Pakistan Constitution

PART X

Emergency Provisions

Article 232²⁶ provides the Proclamation of emergency on account of war, internal disturbance, etc.-

²⁶ *The Constitution of the Islamic Republic of Pakistan, 1956, Art. 232.*

(1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.

(2) Notwithstanding anything in the Constitution, while a Proclamation of Emergency is in force,

(a) Majlis-e-Shoora (Parliament) shall have power to make laws for a Province, or any part thereof, with respect to any matter not enumerated in the Federal Legislative List or the Concurrent Legislative List;

(b) The executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority of the Province is to be exercised, and

(c) the Federal Government may by Order assume to itself, or direct the Governor of a Province to assume on behalf of the Federal Government, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province other than the Provincial Assembly, and make such incidental and consequential provisions as appear to the Federal Government to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to any body or authority in the province:

Provided that nothing in paragraph (c) shall authorize the Federal Government to assume to itself, or direct the Governor of the Province to assume on its behalf, any of the powers vested in or exercisable by a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

(3) The power of Majlis-e-Shoora (Parliament) to make laws for a Province with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the

imposition of duties upon the Federation, or officers and authorities of the Federation, as respects that matter.

(4) Nothing in this Article shall restrict the power of a Provincial Assembly to make any law which under the Constitution it has power to make but if any provision of a Provincial law is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) has under this Article power to make, the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Provincial law, shall prevail and the Provincial law shall, to the extent of the repugnancy, but so long only as the Act of Majlis-e-Shoora (Parliament) continues to have effect, be void.

(5) A law made by Majlis-e-Shoora (Parliament), which Majlis-e-Shoora (Parliament) would not but for the issue of a Proclamation of Emergency have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation of Emergency has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

(6) While a Proclamation of Emergency is in force, Majlis-e-Shoora (Parliament) may by law extend the term of the National Assembly for a period not exceeding one year and not extending in any case beyond a period of six months after the Proclamation has ceased to be in force.

(7) A Proclamation of Emergency shall be laid before a joint sitting which shall be summoned by the President to meet within thirty days of the Proclamation being issued and,

(a) Shall cease to be in force at the expiration of two months unless before the expiration of that period it has been approved by a resolution of the joint sitting; and

(b) Shall, subject to the provisions of paragraph (a), cease to be in force upon a resolution disapproving the Proclamation being passed by the votes of the majority of the total memberships of the two Houses in joint sitting.

(8) Notwithstanding anything contained in clause (7), if the National Assembly stands dissolved at the time when a Proclamation of Emergency is issued, the Proclamation shall continue in force for a period of four months but, if a general election to the Assembly is not held before the expiration of that period, it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.

Article 233²⁷ provides the Power to suspend Fundamental Rights, etc., during emergency period-

(1) Nothing contained in Articles 15, 16, 17, 18, 19, and 24 shall, while a proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall to the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.

(2) While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any Court for the enforcement of such of the Fundamental Rights conferred by Chapter 1 of Part II as may be specified in the Order, and any proceeding in any Court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.

(3) Every Order made under this Article shall, as soon as may be, be laid before a joint sitting for approval and the provisions of clauses (7) and (8) of

²⁷ *Ibid*, Art. 233.

Article 232 shall apply to such an Order as they apply to a Proclamation of Emergency.²⁸

Chapter 5

STATE OF EMERGENCY AND RELATED LEGISLATIONS IN BANGLADESH

5.1 State of emergency, January 2007

On 11 January 2007, Bangladesh's President Iazuddin Ahmed proclaimed a state of emergency, and on the following day a group of bureaucrats and retired military generals took power in Bangladesh. This situation continues at the time of writing. The alleged justification for this takeover was the violence and instability plaguing the country due to clashes between the previous ruling party and its opposition. From October 2006 to January 2007 there were numerous deaths due to the violence, while transportation and other strikes rendered the entire country immobile.²⁹

The present state of emergency bans all political association, as well as basic civil liberties. Moreover, the military is given the power of magistracy; military and other law enforcement officials now have the authority to make arrests without warrants. This has led to significant arbitrary arrests, detention, torture and ill treatment of ordinary citizens, from shopkeepers and agricultural workers, to human rights activists and professionals. Most persons are initially detained under the 1974 Special Powers Act, which allows police to propose to

²⁸ [<http://www.pakistani.org/pakistan/constitution/part10.html>, last visited on 02.02.2010.]

²⁹ [<http://www.bdresearchpublications.com/journal/>, last visited on 02-02-2010.]

the district commissioner that any person shall be detained for a certain amount of time.³⁰

The courts are unable to receive writ petitions under the state of emergency provisions. However, the Appellate Division of the Supreme Court spent over a month to hear cases protesting such arbitrary detention, after a series of debates between the government and the defendants regarding judicial authority. By the time the courts declared the detentions illegal, most of the victims had been implicated in fabricated cases, thereby keeping them in detention. Furthermore, the local magistrates responsible for their detention or release are under government influence. The government in turn, is under military influence.

In actual fact, there is a parallel military administration in the country, without whose green signal the civilian administration does nothing. Controversial institutions such as the Elections Commission and the Anti Corruption Commission have already been reformed, with key posts given to persons with military backgrounds. This has led to around 30 former ministers from both political parties being held for corruption charges--unthinkable under previous administrations. Even Tarique Rehman, son of former Prime Minister Khaleda Zia, has been in detention for corruption since 7 March 2007. A number of laws--in the guise of ordinances--have been imposed, restricting normal activity and movement. While these laws are purportedly being used to detain politicians and other influential figures, all of whom have until now enjoyed blanket immunity for their illegal activities, the same laws are denying justice to innocent victims who are arbitrarily detained and tortured. Meanwhile, newspapers and electronic media have been warned not to publish any material deemed 'anti-nationalist'. Many media personnel have also been detained for

³⁰ *Ibid.*

illegal activities. In this way, the increasing repression and violence of the military is not widely spoken of.³¹

5.2 Legislation

It is important that legislation be progressive and adhere to international standards of human rights. The drafting and passing of legislation is therefore an important process, to be done by competent and intelligent bodies. In democratic societies, this process is usually undertaken by the national parliament or legislative body, with input from civil society as well as political parties. Public participation and rigorous debate work to prevent harmful legislation from being enacted.

With the recent increase in draconian laws around the region, human rights are being systemically denied however. The following are a few such laws in place in Bangladesh.³²

Emergency Powers Ordinance 2007

Section 5

(1) Any order relating to any authority delegated by dint of, or under, this Ordinance shall not be challenged before any court.

(2) Under certain circumstances if any authority, by dint of, or under this Ordinance, passes any order, or any order is considered as signed under this Ordinance, then the courts shall deem that order passed or signed under the Evidence Act 1872.

Section 6

(1) Any action done or order passed under, or authorized by this Ordinance on good faith by any person designated by this Ordinance shall not be

³¹[http://en.wikipedia.org/wiki/Fundamental_right, last visited on 05-02-2010.]

³² [http://www.hurights.or.jp/asia-pacific/no_10/no10_protection.htm , last visited on 18-02-2010.]

prosecuted or charged under any civil or criminal procedures, or any kind of litigation shall not be registered.

(2) Unless any evident provision under this Ordinance, no civil or criminal case, or any other legal proceedings shall be lodged against the government for any harm occurred as a result of any action, or any order done on good faith under the authority of this Ordinance.³³

Emergency Powers Rules 2007

Section 2 defines the “Law and Order Maintaining Forces” to include the Bangladesh police department, the Armed Police Battalion, Rapid Action Battalion, Ansar (village defence) force, Battalion Ansar, Bangladesh Rifles (border security force), Coast Guard force, National Security Intelligence, members of the Defence Intelligence Agency and the Armed forces. This is a significant number of personnel given extraordinary powers of arrest and detention without warrant; section 16 gives the 'Law and Order Maintaining Forces' the power to arrest any person on suspicion without warrant, while section 20 explicitly states that all personnel can “take any step including the use of force” to carry out any orders under these Rules. Section 21 provides for the detention of these persons under the Special Powers Act of 1974. Moreover, according to section 10 all offences under the Emergency Rules are non-bailable. This provision is emphasized by section 19d, which states that regardless of sections 497 and 498 of the Code of Criminal Procedure, if any inquiry, criminal investigation or trial is in progress under sections 14 and 15 of the Emergency Rules, the accused persons shall not be entitled to appeal for bail before any court or tribunal.

In other words, disregarding basic human rights and principles of fair trial, state security forces can arbitrarily arrest and detain individuals without warrant or evidence; in fact, they can 'produce' evidence through the use of force. Such

³³ *Ibid.*

circumstances are conducive to widespread human rights abuse and corruption. Many human rights defenders are also being targeted by security forces and implicated in false cases.

While enormous power is given to security forces, basic rights of citizens are suspended. Section 3 of the Emergency Rules bans all rallies, processions and meetings, while section 5 places strict restrictions on news, photos, statements, opinions and comments, editorials, talk shows and other discussion forums. The suspension of their rights to freedom of expression, association and their right to seek remedies mean that victims suffer in silence. They are unable to voice their grievances through ordinary channels of communication. They cannot seek relief from the courts or other agencies. With the ban on all political activity, as well as the fact that many political leaders and party members are detained in prisons and facing trials for corruption, there is no one to speak out against the military backed government. The few individuals left are too scared to do anything but praise the government.

Even prior to the state of emergency in Bangladesh, the country had numerous repressive pieces of legislation. Section 54 of the Code of Criminal Procedure 1898 permits arrest on a 'reasonable suspicion' of a crime, and was the most commonly used provision by the police to arrest individuals and pry information out of them.³⁴

Section 54 of the Code of Criminal Procedure 1898

Any police officer may, without an order from a Magistrate and without a warrant, arrest-

First, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

³⁴ [<http://www.hrschool.org/doc/mainfile.php/lesson52/>, last visited on 03-03-2010.]

Secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

Thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

Fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property [and] who may reasonably be suspected of having committed an offence with reference to such thing;

Fifthly, any person who obstructs a police officer while in the execution of his duty, or has escaped, or attempts to escape, from lawful custody;

Sixthly, any person reasonably suspected of being a deserter from the armed forces of;

Seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

Eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

Ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.³⁵

Section 132 of the Code of Criminal Procedure

³⁵ *Ibid.*

Furthermore, under section 132 of the Code of Criminal Procedure, no criminal complaint can be lodged against any official without prior sanction from the government. This means that complainants must first lodge a case with a magistrate, argue the case and have it investigated simply in order to get it opened. Furthermore, an accused person who is found to have been acting "in good faith" or on orders from a superior shall never be charged and his actions shall never be considered a crime. These provisions appear to have been incorporated into Bengal's criminal procedure by the British colonial regime to protect its personnel at all costs from being pursued into a court by a "native" whom they had wronged. It is also an article that seems to have much more in keeping with antiquated French administrative regulations than with the common law tradition.³⁶

Section 86 of the Dhaka Metropolitan Police Ordinance

Section 86 of the Dhaka Metropolitan Police Ordinance was also frequently used by police in Dhaka to make arrests without valid reason after dark wherever someone is found without any 'satisfactory explanation'. It carries a one year penalty, fine, or both.

Section 86 of the Dhaka Metropolitan Police Ordinance

If any person is found between dusk and dawn

- a) Equipped with dangerous machinery without any satisfactory explanation; or,
- b) Covering the face or disguised or masked without any satisfactory explanation; or,
- c) Present in the house of anybody else or in a building of anybody else or on board a boat or in any vehicle without any satisfactory explanation; or,

³⁶ *Ibid.*

d) Lying or moving in or on any street, any yard or any other place without any satisfactory explanation; or,

e) Entering into any house along with weapons without any satisfactory explanation; then, that person shall be imprisoned up to a maximum of one year or shall be fined up to two thousand Taka, or both.

The Special Powers Act 1974

The Special Powers Act 1974 allows police to propose to the district commissioner--who is also the district magistrate--that any person shall be detained for a certain amount of time. This continues to be used in conjunction with the emergency regulations to arbitrarily detain individuals.

Moreover, section 46 of the Constitution empowers the government to extend immunity from prosecution to any state officer on any grounds:

Notwithstanding anything in the foregoing provisions of this part, Parliament may by the law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area), to make the above-mentioned law.

Although this provision was originally intended with reference to the 1971 war for independence from Pakistan, it is now used to protect police and joint operations units from prosecution for human rights abuses. Notably, the Joint Drive Indemnity Ordinance 2003 removed from the hands of victims and their families the right to take legal action against soldiers, police and other security forces responsible for the gross abuses that occurred from 16 October 2002 to 9 January 2003 under Operation Clean Heart.

The law legalizing the Rapid Action Battalion (RAB) is also problematic. The Armed Police Battalions (Amendment) Act 2003, which has its origins in the

Armed Police Battalions Ordinance 1979, gives the RAB wide responsibilities, including "intelligence in respect of crime and criminal activities" and "investigation of any offence on the direction of the Government". Section 6B (1) further states that "The Government may, at any time, direct the Rapid Action Battalion to investigate any offence".

The Rapid Action Battalion, which was inaugurated on 26 March 2004 and began its operations on June 21 of the same year, is depicted by the government of Bangladesh as an elite joint-operations crime-fighting force. In fact, RAB personnel operate as hired guns for whichever political party happens to have its hands on the reins of power. Through systemic violence and trademark "crossfire" killings, their great success has been the spreading of more panic and lawlessness throughout Bangladesh: the very things needed to justify the RAB's continued existence.

The government of Bangladesh told the UN Special Rapporteur on extrajudicial executions that under the 2003 act the RAB is "guided strictly by the Code of Criminal Procedure". In reality, nothing could be further from the truth:

According to section 103 of the code, police who search a certain premises must first obtain two or more "respectable inhabitants" of the locality to witness the search and countersign any record of seized items. When RAB personnel take persons in their custody to search and retrieve weapons or other illegal objects from premises at 3am they completely ignore this obligation. It is under these circumstances that RAB personnel conveniently get into "crossfire" and the person in their custody dies. Perhaps the RAB members are not complying with the code out of concern for the safety of the respectable inhabitants. Anyhow, so far as Bangladesh is concerned the reference to the Code of Criminal Procedure is spurious for the reason that the code works primarily to block the possibility of any complaint against state officers.

Moreover, the mingling of both personnel and law in the RAB has intentionally caused confusion. The majority of RAB personnel are soldiers.

Out of the nine of its 12 regional battalion commanders listed on its website at time of writing, eight are army lieutenant colonels. Only one is a police officer. Informed observers in Bangladesh tell that the overwhelming majority of the RAB command is from the military. In this, RAB is a replica of the joint-force used for the 86-Day Tragedy. However, RAB is part of the Bangladesh Police and technically under command of the police chief. Police personnel are obligated to follow the Police Regulation of Bengal and Police Act 1861. Yet the 2003 amended act makes no mention about whose guidelines it is meant to follow, and at the same time gives authority for the making of orders to the Ministry of Home Affairs rather than the chief of police. The multiplicity of persons apparently or actually in charge of the RAB, and duplication of command hierarchies, frees the RAB from any particular responsibility to anyone. Whereas the control of behaviour in law enforcement depends upon a sequence of functioning posts and departments, when these are jumbled up, maintenance of internal order is lost. All that is left is a RAB on the loose.

The systemic use of military personnel for policing has been the cause of repeated tragedies throughout Asia. The people of Bangladesh need only look to Nepal, Sri Lanka, Burma and Indonesia, among others, to obtain their lessons. Sri Lankan police were once relatively well-disciplined and law-abiding. Then they were told to hunt down insurgents and terrorists. The lessons learnt have carried on until today in horrendous forms of torture and killing for the most trivial reasons. In Burma, an army general is police commander. His men understand their duties only in terms of "security of the state". In Indonesia the police force under the Suharto regime was a part of the military structure itself. Now the country faces the monumental task of teasing the two apart. And Nepal is just starting to come to terms with what was done by joint operation forces under the royal dictatorship there in recent years. None of these are desirable models to be followed by Bangladesh.

While some laws are bad, others are non-existent. For instance, although article 35(5) of the constitution prohibits torture and the country has ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), there is as yet no law that prohibits and criminalizes the practice, as well as no means to lodge a complaint. The Bangladesh government said it will only apply article 14(1) of the UN convention--stipulating the right to redress, compensation and rehabilitation for victims--in accordance with existing laws. As there are no existing laws for redress, compensation and rehabilitation, it is not difficult for the government to say that it has fulfilled its obligation by doing nothing. This inaction also applies to Bangladesh's submission of periodic reports to the CAT Committee; its first report was due in 1999 and second in 2003, neither of which have been submitted.

The adoption and enforcement of the above laws clearly indicates that torture and extrajudicial killings are deliberate government policy in Bangladesh. This is the case even though Bangladesh is a member of the UN Human Rights Council, as well as party to key international human rights covenants such as the CAT. These international obligations are routinely ignored, while state and government officials take care to protect themselves under laws like the Joint Drive Indemnity Ordinance, or now, under the emergency regulations.³⁷

5.3 Implications of emergency

First, the duration of emergency can continue for 120 days, unless before the expiration of that period, it has been approved by a resolution of parliament.

Second, although the Constitution is not suspended, certain fundamental rights of citizens are suspended during the operation of the emergency. Fundamental rights, such as, freedom of speech including freedom of press, freedom of movement, freedom of assembly, freedom of association, freedom of

³⁷ [<http://www.bdresearchpublications.com/journal/>, last visited on 03-03-2010.]

occupation and rights to property are suspended. This means no citizen can resort to enforcement of these rights through the High Court. It is reported that immediately after the proclamation of emergency; the Press Information Department under the information ministry verbally imposed censorship of media and directed them not to be critical of the government. The restrictions were imposed, claims by the authorities, as was the practice in the past.

Third, the while the emergency is in operation, the President has the power to declare that the right to move any court for the enforcement of such of the fundamental rights as may be specified in the presidential order and all proceedings pending in any court for enforcement of the right, shall be suspended.³⁸

5.4 Difference between Martial Law & Emergency:

Proclamation of emergency is different from Martial Law where the Constitution is either dissolved or suspended. Declaration of Martial law is an extra-constitutional event, whereas declaration of emergency is within the ambit of the Constitution. The Chief Martial Law Administrator can act or do, ignoring the provisions of the Constitution and has an unfettered power. Emergency is declared to meet an unusual situation for a temporary period. It runs for 120 days in Bangladesh. The Constitution allows it.

Finally, after independence, the framers of the 1972 Constitution never thought of inserting emergency provisions because they are too idealistic in considering that such provisions were contrary to principles democracy. However it appears they forgot the reality and adopted a utopian Constitution. Within two years three amendments were inserted to meet the reality including the emergency provisions in the Constitution.³⁹

³⁸ “*Declaration of emergency and its implications*” by Barrister Harun ur Rashid Former Bangladesh Ambassador to the UN, Geneva.

³⁹ *Ibid.*

Chapter 6

RECOMMENDATIONS AND CONCLUSION

6.1 Misuses of Emergency Power and Recommendations for its prevention:

Firstly, the validity of a proclamation of emergency depends on three things: war, external aggression and internal disturbances. First two grounds are specifically defined; so there is no objection to them; but the third ground (internal disturbance) is not defined anywhere. So it is a vague term and due to the absence of a definition the executive can easily misuse the emergency power. In Bangladesh emergency has been declared for five times. Every time it was declared on the ground of internal disturbance, but the true scenario is different. The 3rd and 4th emergencies were declared for political purposes to suppress the anti-government movement and to perpetuate the un-democratic rule, during the regime of the autocratic President Ershad. But the 1st and 2nd emergencies were declared due to other reasons. Of the two, the 2nd emergency was declared for facing an unexpected situation after President Ziaur Rahman's murder in 1981. But the 5th emergency was declared to stop political hazards created by the two big political parties and their alliances in connection with national election scheduled to be held on 22 January 2007. Senior advocate Mahbubur Rahman (ex-minister) has said that if the emergency had not been declared on 11 January, 2007, civil war would have started. In Pakistan there were also the practices of declaring emergencies on the plea of internal disturbance as a weapon to suppress the opposition and anti government movement. In India, to prevent this sort of

widespread misuse of emergency Prime Minister Morarji Desai inserted the word 'armed rebellion' in lieu of internal disturbance by the 44th amendment of the constitution. The following recommendations appear to be pertinent in the circumstances now obtainable in our country:

(1) For the purpose of preventing the abuse of emergency such a term as 'armed rebellion' or a specific definition of internal disturbance should be inserted in our constitution.

(2) Sometimes the executive misuses the power of declaring emergency with the assent of the parliament. If parliament is not in session or parliament remains dissolved, special session may be called by the President for obtaining approval of the parliament.

(3) The system of continuing emergency beyond four months (120 days) after its declaration without approval of parliament is an irregular one. A resolution for such an approval is to be passed by not a simple majority, but by at least two-third majority. Passing of the resolution for the approval of the extension by a simple majority is not reasonable. Mandatory time limit should be given for the continuance of emergency. That is why the past executive authority misused the emergency when it was promulgated for the 3rd time in 1987. So there must be a fixed time after which the executive shall place it before the parliament for approval. The fixed time may be within 30 to 60 days. For its approval the resolution should be passed by two-third majority of present MP's of the emergency session. In support of our recommendation we want to highlight the system of India and Pakistan relating to this matter. In India, once emergency is declared it has to be approved by parliament within one month and this resolution must be passed by two third majority in each house, otherwise, after one month, emergency will cease to operate. In Pakistan the proclamation of emergency is to be laid before the parliament as soon as practicable in accordance with the constitution of 1956 and 1962. But under the present constitution of Pakistan it is to be put up before the parliament within two months.

(4) Another interesting point is that there is no provision in our constitution for summoning a special or emergency session of the parliament when it is not in session. But the provision for such emergency session should be inserted to monitor and control the emergency situation. For example our neighboring country, Pakistan has the provision in their constitution for joint sitting of parliament to be summoned by the President within 30 days of the declaration of emergency. In India also there is provision for special sitting of the parliament in the context of emergency. In case of practices in western countries like the UK, there is also provision for joint sitting of parliament. During the emergency at the time of the Second World War the British Parliament called a special session of both the Houses of parliament and the session continued until the war ended. In our constitution, such a provision should be inserted as early as possible to stop the mishandling of emergency.

(5) Another important shortcoming of our constitution is that there is a provision that emergency will remain in force even its being approved by the parliament. It means that if emergency is once declared and it is approved by the parliament, the executive can continue it according to its whim. So it is an undemocratic process. For stopping the misuse of this measure we should insert a fixed time like 3-4 months and, after expiry of this period, the emergency shall need further approval. And after such an approval the emergency shall remain in force for a further period to be stipulated in the approval.

(6) According to article 141B, six fundamental rights shall stand automatically suspended after the declaration of emergency. However the proclamation of emergency does not always mean the suspension of fundamental rights. At any rate, suspension of fundamental rights is an undemocratic process and, as our country is a democratic country, we should not resort to it. After achieving independence, what the people aspired after was a constitution where the fundamental rights would be ensured. In Germany, there is provision for declaring emergency but there is no provision for suspension of fundamental

rights. Almost the same provisions have been included in the constitution of the Republic of Singapore³⁸. The 44th Amendment of Indian Constitution provides that at the time of war or external aggression the six fundamental rights will remain suspended, but at the time internal disturbance these will remain in force. Such provisions as these should be introduced in the Constitution of Bangladesh. Actually government should take more care of our citizen's rights at the time of emergency. If it becomes necessary after a period, the suspension of the six fundamental rights should be withdrawn.

(7) Another minus point of our constitution is that according to the article 141C; the President has the right to suspend other fundamental rights also. Previously, at the time of all emergencies in our country, the enforcement of other fundamental rights were declared suspended for months. No democratic principle can justify such a situation. There are some rights which have no connection with emergency; such as right to property. This right is also suspended with other rights and it cannot be accepted by any civilized nation. In India, through the 44th amendment of article 359, the suspension of rights mentioned in article 20 and 21 has been stopped⁴⁰. So it should be specifically pointed out in our constitution which particular rights would be suspended during the emergency of war and which during the emergency of internal disturbance.

(8) We have no specific law by which the Caretaker Govt. can declare emergency, or continue it for an indefinite period, without the sanction of the Parliament. The King or Queen of UK has no special power to declare emergency. But emergency may be declared under Emergency Powers Act of 1920 and 1964 by the Queen. In USA there is also no provision for declaring emergency in the constitution without the authority of law made by the Congress. So we need a special law passed by the parliament to declare emergency and continue in case of necessity.

(9) During the time of emergency, the provision for the writ of habeas corpus remains suspended until the withdrawal of emergency; but it is a wrong

provision. Arbitrary arrest and detention by the executive without speedy trial is also a wrong process. If the detention is not in conformity with the provision of law under which a man is purported to be detained, he should have the right to agitate the court of law in the proper way⁴¹. In the UK, at the time of emergency, the writ of habeas corpus is not suspended and the Emergency Power Act expressly prohibits the alteration of the existing procedure of criminal cases and no punishment is inflicted on any person without trial.

(10) The suspension of politics and political activities should be withdrawn as early as possible. This is because stoppage of political activities for an indefinite period is not good for democracy as well as for the international field. The outgoing US ambassador Butanes has said, “Ban on internal politics should be withdrawn as early as possible”. This opinion is of very great importance.

(11) The High Court Division may *Suo motu* proceed in any matter relating to law. The Justices on the basis of newspaper- comments proceed *Suo motu*.

(12) The twelfth point is that the Supreme Court can order the payment of compensatory cost to the person arrested illegally or intentionally at the time of emergency as in the case of *Bilkiss Akter Hossain vs. Govt.* Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

(13) Thirteenth point is that the detainee should be given all reasonable opportunities to immediate and regular access to a lawyer, family members and a unbiased medical board.

(14) Fourteenth point is that the government should obey the orders of the courts entirely and immediately. A high power judicial review board can be made by the government to justify the functions of government relating to law and order.

(15) The government can appoint experts as temporary advisors only for

the emergency period to monitor government functions. The government can also make a recommending committee by selecting members from top political parties. It can be asserted at last that it is the duty of the executive authority to make the environment normal as by withdrawing the emergency and handing over the power to the elected government or make a sound environment for holding a free and fair election.

6.2 Concluding Remark

From the foregoing discussion and analysis it is clear that the emergency provisions have both some good and bad sides. Because of the faults of the provisions of emergency, all previous governments had scope for abusing it as a weapon to oppress the oppositions and remain in power. Special provisions are to be used with care and discretion. If we can not do so, perhaps we should not have this provision at all. As this law has some limitations, it is the call of the day to amend the emergency provisions in an acceptable and logical way. So, we hope that government will take necessary steps to amend the emergency provisions as early as possible.