

EMERGENCY POWERS AND CARETAKER GOVERNMENT IN BANGLADESH

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The present caretaker government, seemingly backed by the military, has been running Bangladesh under a state of emergency since early January 2007. Like the constitutions of most countries, the *Bangladesh Constitution* contains provisions for a state of emergency to deal with natural disasters, civil unrest or outbreak of war or war-like situations. After the events of September 11, 2001, many developed countries have passed laws, for example, extending powers to arrest, search, detain and interrogate suspects, which are normally associated with a state of emergency, as a tool to combat terrorism. During the period of emergency, certain protections guaranteeing fundamental rights are either restricted or suspended, or even compromised. In many countries, including Bangladesh, a state of emergency is often used as a tool to suppress criticism and opposition to the regime in power. It is mostly used for political persecution, including torture, in gross violation of human rights. Consequently, imposition of a state of emergency has serious political and legal ramifications. It transcends various branches of law, especially, international law, constitutional law and criminal law. This paper will analyse the declaration of a state of emergency from a constitutional law point of view and discuss whether this is an abuse of constitutional power and the political process. The aim of this paper is to argue the case for strengthening the political constitution by devising institutions and developing certain international standards to prevent future abuses, given the wide use of emergency powers throughout the world.

I. INTRODUCTION

This paper analyses the declaration of a state of emergency in Bangladesh from constitutional law and human rights perspectives. The Bangladesh Constitution, like most written constitutions, contains provisions for a state of emergency to deal with situations which either affect, or are likely to affect, a large number of people or their property, posing thereby a threat to public safety or the national economy. The salient feature of the emergency regime is the suspension of some fundamental human rights including normal protections under the criminal law, and the extension of police power to search, detain and interrogate, compromising the normal standards. However, this paper will not deal with the theoretical aspects of emergency powers.¹

The declaration of a state of emergency or the use of extraordinary powers undermines certain fundamental rights including basic due process rights and, as such, raises a number of legal and political concerns regarding the violation of human rights, more so in a country which has experienced substantial periods of military rule. The aim of the paper is to argue for strengthening the political constitution from future abuse in the name of an emergency. Another aim is to generate further academic discussion, in the light of lessons from Bangladesh, with regard to the violation of human rights, to highlight the urgency and importance of having a fresh look at the emergency provisions, and to help develop a new jurisprudence of emergency. As a tool against terrorism, many developed countries have passed laws somewhat similar to laws in countries with a state of emergency. Given

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1 There exists a vast literature dealing with theoretical aspects of emergency powers and the unilateral actions undertaken by the US President, George Bush and the Attorney General, John Ashcroft, after September 11. See, eg, Giorgio Agamben, *State of Exception*, (Kevin Attell trans, 2005 ed) [trans of: *Stato de eccezione* 2003]; David Cole and James Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (2nd ed, 2002); Stephen J Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement and Civil Liberties in the Wake of September 11* (2002); Harold Koh, 'The Spirit of the Laws' (2002) 43 *Harvard International Law Journal* 23.

its wide use and abuse worldwide, the paper thus suggests developing an international standard to deal with emergency powers. Wide discussion about emergency regimes is essential because public education and awareness is an important safeguard of civil liberties. This paper further argues for the upholding of a strict protection of fundamental human rights at all times and argues for designing a constitutional framework for a temporary state of emergency while upholding individual rights. Without the effective constraint of the rule of law, there is a real apprehension that the emergency regime may gradually give rise to a permanent police state.

II. NEED FOR AN EMERGENCY CONSTITUTION

It is recognised that extraordinary situations necessitate empowering the executive to take extraordinary measures to deal with the crisis, thereby raising public awareness with regard to the seriousness of the situation. More importantly, through this, the government tries to demonstrate that it is in full control of the situation and should be seen as taking action in dealing with the crisis.² During periods of emergency, certain provisions of the constitution guaranteeing fundamental rights are either restricted or suspended. However, in many countries, including Bangladesh, a state of emergency is often used as a vehicle to remain in power by suppressing the opposition and mostly used for political persecution, including torture, in gross violation of human rights.

However, sometimes it may be difficult to adequately deal with situations within the framework provided by the existing law, especially criminal law. 'This likely inability to effectively deal with the crisis clears the conceptual path for another way to confront the problem: the "state of emergency."³ The reason for allowing a declaration of a state of emergency has been an imminent threat to the wider society, which necessitates empowering the government to take extraordinary measures to protect lives and property. Thus, the emergency constitution should contain provisions to detain suspects threatening national security, without the criminal law's usual protections. Given the fact that the scale and nature of the future emergency are unknown, the government should have all tools at its disposal, including the declaration of a state of emergency, to deal with the crisis as it comes. Efforts to deprive the government of the power to declare a state of emergency altogether may limit its ability to respond to the situation. At the same time, giving a blank cheque to the government may result in the abuse of this extraordinary power. Consequently, most postwar constitutions provide for a declaration of a state of emergency with wide protection of core civil and political liberties during even the most severe crises. The purpose of the declaration of a state of emergency should be to reassure the public that the situation is under control, and that the state is taking effective short-term actions to normalise the situation. However, the declaration of a state of emergency in a way is an expression of no-confidence in the existing laws and the government's general capacity to discharge its functions by utilising existing laws. The declaration of a state of emergency in situations other than natural disasters is also an admission by the government of its failure to perform its functions to prevent events, or minimise their effects, leading to such a declaration. A distinctive interest may come into play when the government fails to perform its functions and the level of confidence is eroded in the government's ability to deal with a situation. In the face of such a failure, the government tends to become authoritarian and the norms of human rights are compromised. The abuse of fundamental rights during a state of emergency thus necessitates a re-look at the constitution and the development of new constitutional and other measures to deal with the protection of civil liberties. There is a need to establish a uniform procedural framework for the future exercise of all such powers.

Following the events of September 11, 2001, emergency powers are being widely used,

² A distinguished US constitutional law expert calls it the 'reassurance function'. See, eg, Bruce Ackerman, 'Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1037.

³ *Ibid* 1031.

or where a state of emergency is not formally declared, law enforcement agencies are provided with extraordinary powers even in some developed countries. The worry is whether these restrictive laws over the years lead to the creation of a permanent system of criminal justice for terrorism suspects. The pertinent question is how little evidence or mere suspicion is enough to justify how much detention? Consequently, the way in which these powers are structured is a matter of great importance. The manner in which emergency powers are structured is as much a product of the fundamental structures of political power and only a small part flows from the Constitution's texts or judicial precedents. Likewise, the role of the judiciary during the emergency is also influenced by political expediency. The role of the judiciary in this situation is relatively limited for reasons connected less to concerns about judicial capacity than to the political structures more directly. Any actual test of power is likely to depend on the imperatives of events rather than on abstract legal theories. The actions of the executive government will depend on the interplay of contingent political forces far more than on whatever constitutional interpretations the courts offer. Everything will 'depend on the imperatives of events and contemporary imponderables,'⁴ not 'law' in the usual sense. In the words of Mark Tushnet, 'the interplay of events and contemporary imponderables — that is, politics — is constitutional law in this domain.'⁵

The extraordinary powers granted during the emergency create a possibility that interested parties may have the temptation not to give up this new-found power. There is a danger that the government machinery will exploit the extraordinary powers to create too many 'emergencies', using a wide range of repressive measures, despite the adequacy of the more standard framework involving the criminal law.

The current war on terror or Bangladeshi particularities should not be allowed to divert attention from the more important task of institutional design to prevent future abuses of human rights. An elaborate set of emergency provisions in the Constitution is required. However, it is difficult to design a constitutional regime for a limited state of emergency, given the exact nature of emergency and response required to deal with it is unpredictable. It will then simply be a case of one size fitting all. Nonetheless, 'self-conscious design of an emergency regime may well be the best available defense against future breaches of human rights.'⁶

The judiciary, especially the higher judiciary, is expected to act as a watchdog to control panic-driven responses of the government to crises resulting in gross violations of human rights. However, sole reliance on judiciary without a detailed set of principles may not be enough. Judges should, and can, play a fundamental role in upholding fundamental rights and consequently can minimise further abuse. Their opposition to the continuation of the emergency regime will transform the nature of the political battle. Bypassing or ignoring the decisions of the court or even trying to manipulate the judiciary will seriously undermine the moral standing of the government and affect its ability to effectively govern. The government will then be seen as an enemy of the entire constitutional order. Consequently, an independent judiciary, willing to protect fundamental rights and constitutional order, acts as a deterrent against gross violations and reckless behaviour of the executive government.

If torture, abuse in the use of preventive detention powers, custodial deaths and extrajudicial killings are allowed unchecked then there is a danger that the law-enforcement agencies accused of violations will themselves be likely to become a pressure group in order to protect themselves from likely future retribution once the state of emergency is withdrawn. These officials may become sufficiently desperate to destabilise the situation and would have little motivation to bring normalcy sooner. On the contrary,

4 *Youngstown Sheet & Co v Sawyer*, 343 US 579, 637 (1952), quoted in Mark Tushnet, 'The Political Constitution of Emergency Powers: Some Lessons from Hamdan' (2006) *Schmooze 'tickets'*. Paper 73, 16. <http://digitalcommons.law.umaryland.edu/schmooze_papers/73> at 27 November 2008.

5 Tushnet, above n 4.

6 Ackerman, above n 2, 1030.

they may sabotage the efforts of the government so that order is not restored.

III. BACKGROUND TO THE DECLARATION OF EMERGENCY IN BANGLADESH

Bangladesh became independent from Pakistan in 1971, following a bloody war. The indefinite postponement of the summoning of the National Assembly and the refusal of the Pakistani military government to hand over power to the elected representatives following the general election resulted in mass protests. The use of military might in dealing with political problems led to the bloody war that cost the lives of millions of people and also resulted in the surrender of Pakistani forces on 16 December 1971, and the creation of Bangladesh. One of the reasons for the creation of Bangladesh was the aspiration of the people to establish a democratic society. Conversely, it may be said that Bangladesh became an independent country as a protest against military rule. Ironically, between 1975 and 1991, the country was either under direct or indirect military rule. Since independence, two presidents have been killed in military coups, martial law has been imposed three times and thrice a state of emergency has been declared.

Like many developing countries,⁷ in Bangladesh the holding of free, fair and credible elections remains a big legal and political challenge despite the existence of all formal institutions including an apparent independent Election Commission. Those in power have always manipulated the rules and institutions concerned with the election process. Consequently, the innovative idea of holding the election under a non-party caretaker government was conceived as a solution. It was perceived that the non-party neutral caretaker government would have no motivation to manipulate the electoral process as the members of this government are barred from contesting the election.⁸ Thus, the *Constitution (Thirteenth Amendment) Act 1996* was passed, requiring all future general elections in Bangladesh to be held in accordance with this amendment.⁹ Under this arrangement, the government, at the end of its tenure, rather than going into a caretaker mode should hand over power to a non-party caretaker government.

The amendment provided that after the resignation of the government, before a scheduled general election, the president shall invite the immediate past chief justice of the country to become the chief adviser (CA), or head of the caretaker government.¹⁰ These changes provided for the formation of a non-political caretaker government headed by the CA with the status and privileges of the prime minister.¹¹ Article 58C (1) says that, the 'Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisers.' The advisers are to be appointed by the president on the advice of the chief adviser.¹² The CA would exercise the executive power of the republic during the tenure of the caretaker government. The tenure of the CA commences from the moment of taking the oath of office and ends when a new prime minister is sworn in after the general elections.¹³ The amendment, in clear terms, made it mandatory to hold the general election within 90 days.¹⁴

7 The elections in Kenya and Zimbabwe are recent examples of the problems associated with holding credible elections.

8 Article 58C(7) of the *Bangladesh Constitution* requires that the members of the caretaker government not be 'members of any political party or of any organisation associated with or affiliated to any political party' and not permitted to be a candidate for the ensuing election'.

9 For a critical analysis of various provisions of the Thirteenth Amendment, see M Rafiqul Islam, 'Free and Fair General Elections in Bangladesh under the Thirteenth Amendment: A Political-Legal Post-Mortem' (July-December 1996) 26 *Politics, Administration and Change* 18.

10 *Bangladesh Constitution*, art 58C(3).

11 'The Chief Adviser shall have the status ... and privileges, of a Prime Minister and an Adviser shall have the status ... and privileges, of a Minister.' See *Bangladesh Constitution*, art 58C(11)

12 *Bangladesh Constitution*, art 58C(8).

13 *Ibid.*

14 '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.' See *Bangladesh Constitution*, art 123(3). This clause was substituted for the former clause (3) by the *Constitution (Thirteenth Amendment) Act 1996*, (Act 1 of 1996), s 6.

Two general elections were held under the *Constitution (Thirteenth Amendment) Act 1996*. Both these elections were widely accepted as reasonably free and fair, and resulted in a change of government in a peaceful manner.¹⁵ The four-party coalition headed by the Bangladesh Nationalist Party (BNP) with two other ultra-rightist religious parties (Jammat-Islami and Islami Oikko Joute), and a faction of the Jatiyo Party was elected in 2001 with more than a 75% majority,¹⁶ defeating the immediate past Awami League (AL) government. In the first general election held in 1996 under this amendment, the AL won by defeating the BNP led government of 1991-96. Thus, it appeared that democracy in Bangladesh was on the path to consolidation.

During its term of office (2001-06), the government continually manipulated the constitutional process by appointing people loyal to it and by designing institutions and laws to perpetuate its rule.¹⁷ From day one in office, it started reorganising the Election Commission,¹⁸ the police, the civil service, the army, Public Service Commission, university administrations, etc. Hundreds of police and defence officers lost their jobs.¹⁹ The party faithful were recruited into the police force and the public service. In short, all branches of the administration were filled up with supporters of the party. The loyal Election Commission also manipulated the electoral roll.²⁰ The government then created a new elite security force, Rapid Action Battalion (RAB), in the name of combating the deteriorating law and order situation. Hundreds of people died in the custody of this force. The official explanation for each death in custody was the same; namely, friends of the detainee attacked to snatch the accused and in the course of a gunfight that followed, the accused died in the crossfire.

The newly elected four-party coalition government appointed Mr Justice K M Hasan as the Chief Justice, ignoring the long-held tradition of appointing the most senior judge of the Appellate Division of the Supreme Court as Chief Justice.²¹ Mr Justice K M Hasan, before becoming a judge of the High Court Division, was the International Secretary of BNP. The judges in Bangladesh can remain in office till they are 65 years of age. At the end of his tenure of office at the age of 65, the government appointed another judge of the Appellate Division, once again, overlooking two other senior judges. The government then

15 An international election observer team comprising the representatives of the United States and the European Union, headed by former US President Jimmy Carter, monitored the poll and expressed their satisfaction over the holding of the election in 2001. For detailed comments of the international observer team see the *Bangladesh Observer* (Dhaka) 23 June 2001.

16 This majority was enough to amend the constitution.

17 For details of election manipulations in Bangladesh see A K M Masudul Haque, 'Free and Fair Elections in Bangladesh and the Illusion of a Neutral Caretaker Government' (Paper presented at ALTA 62nd Annual Conference, University of Western Australia, 22-23 September, 2007) <http://www.alt.edu.au/2007_published_conference_papers.html> at 27 November, 2008.

18 The Election Commission was filled with hardcore government supporters. The Election Commission appointed 345 new sub-district (*upazila*) election officers from amongst the cadres of the governing parties. Administratively, Bangladesh is divided into 6 divisions, 64 districts and 464 *upazila* (sub-districts).

19 Officials perceived to be supporters of opposition parties were removed from their jobs or given less important assignments, while the supporters of the party were promoted. Officers who were perceived to be non-political were either denied promotion or were not given any responsibility and made an 'officer-on-special duty'. Over 300 deputy secretaries were made 'officers on special duty on political grounds'. See 'Posts do not exist, still 332 more promoted', *Daily Star* (Dhaka), 16 October 2006 <<http://www.thedailystar.net/2006/10/16/d6101601149.htm>> at 27 November, 2008..

20 'A study by the U.S. National Democratic Institute had apparently found 13 million more names on the voter's list than would be eligible according to Bangladesh's population; election officials had, in spite of repeated urging, failed to correct the list. There had also been allegations that many eligible voters from minority religious communities had been left out of the registration process'. Quoted from UK Home Office RDS-IND, Country of Origin Information Service, *Country of origin information bulletin: Bangladesh*, Bulletin No: Bangladesh 1:2007 cited from US Commission on International Religious Freedom; 'Bangladesh: Decision to Postpone Election Offers a Second Chance', 12 January 2007, <<http://www.uscirf.gov>> at 27 November, 2008.

21 In Bangladesh, the Supreme Court is the apex court of the country. The Supreme Court is divided into two divisions, High Court Division and the Appellate Division. The Appellate Division is comprised of seven judges. The judges of the High Court Division are appointed by the president on recommendation by the chief justice. However, between 2001 and 2006, there were many instances when judges were appointed by the President on advice from the government without the recommendation of the Chief Justice. If any vacancy arises in the Appellate Division then the most senior judge (in terms of seniority of service as a judge) of the High Court is elevated to the position. Again, this norm has been violated by appointing junior judges, superseding the seniors. The chief justice is generally the senior most judge of the Appellate Division.

amended the constitution²² by extending the retirement age of judges from 65 to 67 so that the newly appointed chief justice would retire after the formation of the caretaker government. Thus, the amendment made sure that Mr Justice K.M Hasan remains as the immediate past chief justice so that he can assume the office of the chief adviser of the caretaker government.²³

IV. THE DECLARATION OF EMERGENCY AND THE ROLE OF THE PRESIDENT

On 20 October 2006, the 14-party opposition alliance declared that it would launch massive street agitations, indefinite strikes and blockades to protest against the handover of power to Justice K M Hasan after the completion of the government's five-year term of office.²⁴ On 27 October, Justice K M Hasan indicated his unwillingness²⁵ to be appointed as chief adviser. On 29 October 2006, the government completed its five-year tenure and resigned. The parliament was also dissolved on its expiration of tenure. Without exhausting other options available under the *Thirteenth Amendment Act 1996*, the President assumed the office himself.²⁶ So he was the President and, at the same time, also the Chief Adviser (Prime Minister). Thus, the very purpose of the Thirteenth Amendment to establish a neutral non-party caretaker government to hold a free, fair and credible election was defeated, with the titular President, being a nominee of the previous political government, assuming the role of the real head of the caretaker government. The assumption of the role of prime minister by the titular President, combining the two roles, was also against the principles of parliamentary democracy and, as such, was also against the basic structure of the Constitution.²⁷ This combination of two separate constitutional positions by the President without exhausting other options stipulated in the Constitution, has expectedly created a number of controversies including a challenge as to its validity in the Supreme Court. The way the Chief Justice interfered in the proceedings of this challenge, and in another case concerning various disclosures by the candidates before the election, created widespread resentment and even violent outbursts both inside and outside the court.²⁸ These unprecedented interventions of the Chief Justice in judicial proceedings

22 See the *Constitution (Fifteenth Amendment) Act 2005*.

23 For a discussion on the appointment of the Chief Justice and other judges, and the manipulation of judiciary during this period, see Haque, above n 17.

24 Hasan Jahid Tushar, "Opposition targets Hasan takeover", *Daily Star* (Dhaka), 20 October 2006, <<http://thedailystar.net/2006/10/20/d6102001011.htm>> at 27 November, 2008.

25 'K M Hasan steps aside for the sake of people', *The Daily Star* (Dhaka), 29 October 2006, <<http://www.thedailystar.net/2006/10/20/d6102901109.htm>> at 27 November, 2008.

26 The President then assumed the office of the Chief Adviser (CA) of the caretaker government and at the same time retained his position as the President. The *Constitution (Thirteenth Amendment) Act 1996* provided for a number of options to appoint the chief adviser of the caretaker government.

27 For discussion on the basic structure theory of the constitution and the rulings of the Bangladesh Supreme Court, see A K M Masudul Haque, 'State, Law and the Emergence of Public Enterprises in Bangladesh' in *Critical Reflections on Law and Public Enterprises in Bangladesh* (PhD Thesis, Warwick University, 1992) 54. The authority to change the basic structure of the court by the parliament was an issue in *Anwar Hossain Chowdhury and Others v Bangladesh*, BLD (SPI) Volume IX, 1989. In this case, the Appellate Division decided that the Eighth Amendment of the Constitution decentralising the High Court Division constituted a change in the 'basic structure' of the constitution. In 1981, the Supreme Court in the case of *Hamidul Huq Chowdhury v Bangladesh*, 33 DLR (1981) 394, observed that by incorporation of a provision relating to the proclamation of emergency by introduction of the Fourth Amendment to the Constitution by Act II of 1975, the basic and essential features of the constitution were altered and destroyed. The court observed: 'These alterations and amendments of the Constitution reduced the Constitution out of recognition. It was in our opinion, beyond the powers of Parliament as the donee of prescribed powers under a controlled Constitution to alter the essential features and basic structure of the Constitution.' These judgements were very much in line with article 7 of the *Bangladesh Constitution* proclaiming the supremacy of the Constitution.

28 The response to the Chief Justice's unprecedented interference in the proceedings of the court and the pro-government bias by the higher judiciary infuriated the lawyers. Lawyers attacked the Supreme Court building, damaged courtrooms and the Chief Justice's chamber. The car of a former state minister for law, parked outside the court building was set on fire. Twelve eminent Supreme Court lawyers were later charged with vandalism. The Chief Justice was seen as very partisan because the legislation enforcing separation of judiciary from the executive had been 'stalled by pro-government legal factions, led by the chief justice,' writes Mute magazine. The magazine further quotes a retiring High Court judge who commented on the blatant political corruption of the legal system: 'I have seen during my long 13 years in judicial career how the evil partisan political influence engulfed the sacred institution...'. See Marut Ret, 'Bangladesh: 'State of Emergency' Powers Extended and Tightened — Strikes and Demonstrations Banned, Media Gagged', *Mute*

of direct public interest precipitated the problems.

After assuming the office of Chief Adviser to the caretaker government, the President then appointed a 10 member advisory council. The general election was scheduled to be held on 22 January 2007. The failure of the President, as the Chief Adviser of the caretaker government, in maintaining neutrality (the very basis of the Thirteenth Amendment) further worsened the crisis.²⁹ Apart from the legality of the combination of presidential and prime ministerial powers in one hand, the President often ignored the advice of the advisers. Consequently four advisers resigned in protest.³⁰ As a result of the opposition's demand for a reorganisation of the Election Commission, the government then appointed two new election commissioners. These two new commissioners were also known supporters of the BNP.³¹ There were a number of newspaper reports that the President was acting under advice from the outgoing government. Thus, the new appointments further exposed the political bias of the President.³² Once more, almost all major opposition parties decided to boycott the general election as they feared that free and fair elections were not possible under that caretaker government headed by the partisan President, acting in favour of a political party, in breach of the oath of office.³³ Moreover, on 11 January 2007, the majority of his advisers decided not to support a decision to go ahead with the election on 22 January without the participation of opposition parties.³⁴ In this situation, the international community was also urging to postpone the election as, in the absence of the opposition parties, the election would not be a credible one and, given the political history of the country, it would be likely to lead to serious destabilisation and civil unrest.³⁵ The European Union and other international observers decided to withdraw from monitoring the election.³⁶ The President 'focused more on the timeliness of the elections

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- http://www.rsf.org/article.php3?id_article=20385 at 27 November, 2008.
- 29 Julfiqar A Manik writes, 'When the four-party alliance came to power, it did not confirm the services of 15 additional judges appointed during the previous Awami League rule, though these judges had the Chief Justice's recommendations in favour of them.' The 'government appointed 45 additional High Court judges in its five-year term.' Of these 45 judges, 19 new judges of the Supreme Court have been appointed on a single day solely on political considerations and in some cases against the advice of the Chief Justice. Reportedly it is the highest number of one-time appointments of High Court judges ever in the history of the country. It is alleged that due diligence was not shown by the government in the appointment of 19 High Court judges. See Julfiqar A Manik, '5 Years Alliance Rule Review: Judiciary made to wobble,' *Daily Star*, 1 November 2006 <<http://www.thedailystar.net/2006/11/01/d6110101108.htm>> at 27 November, 2008. For more details of manipulation of higher judiciary, see Haque, above n 16.
- 30 Shakhawat Liton, 'Four Advisers Resign in Frustration', *Daily Star* (Dhaka), 12 December 2006. <<http://thedailystar.net/2006/12/12/d6121201011.htm>> One of the resigning advisers, General Hasan Mashud Chowdhury (who currently heads the Anti-Corruption Commission), is quoted as saying 'from the very start it was clear that the president was a party [BNP] man. ... He was not detached from his party in the least ... [and had] totally failed in his job as a neutral administrator': quoted from International Crisis Group, *Restoring Democracy in Bangladesh, Asia Report No. 151*, (Dhaka/Brussels), 28 April 2008. For information about the Crisis Group, see International Crisis Group <<http://www.crisisgroup.org>> at 27 November, 2008.
- 31 One of them was also known to have been lobbying the BNP to obtain nomination to contest the general election from Habiganj constituency. Finally, the chief election commissioner, rather than resigning as demanded by the opposition, decided to go for 90 days leave — in other words, decided to step aside during the election period.
- 32 According to the *Daily Star*, the President had acted unilaterally and controversially on several occasions since assuming the role of CA, including appointing new election commissioners who were not seen as neutral, deploying the armed forces and being adamant about holding the general election on 22 January, even without the participation of all major parties. 'Fakhruddin new CA', *Daily Star* (Dhaka), 13 January 2007. <<http://www.thedailystar.net/2007/01/13/d7011301011.htm>> at 27 November, 2008.
- 33 Ibid. On 10 January 2007, the Awami League-led grand alliance of 14 opposition parties had announced to a rally of 100,000 supporters a renewed programme of general strikes and countrywide blockades in an effort to force the interim government to call off the general election of 22 January on the basis that it would not be fair.
- 34 'Bangladesh postpone elections', *Financial Times* (London) 12 January 2007 <<http://www.ft.com>> at 27 November, 2008.
- 35 *The Daily Star* writes that, 'The United States of America (US), United Kingdom (UK) and the European Union (EU) informed the caretaker government that a one-sided election will not be acceptable to the international community.' The paper further quotes Patricia Butenis, US Ambassador to Bangladesh, as saying, 'We've gone on record saying that we'd have difficulty finding a one-sided election credible.' 'Pressure on CA mounts to ensure all-party poll', *The Daily Star*, (Dhaka), 9 January 2007.
- 36 A few hours before the declaration of emergency, the United Nations suspended its technical support for the upcoming election, saying that the voting would not be 'considered credible or legitimate' because a major coalition of political parties was boycotting it. Two teams of American election observers withdrew earlier and the European Union cancelled a plan to send an election observation team to monitor the election for the same reason. 'Should the 22 January parliamentary elections proceed without participation of all major political parties, deployment of the armed forces in support of the election process raises questions,' said Ban Ki Moon, UN Secretary General in a statement. The statement

than on their fairness, ignoring many signs that their credibility was eroding'.³⁷

The agitation and protests of the opposition parties were gradually becoming violent, resulting in 40 deaths and causing anarchy. The President, under pressure from the armed forces and international community,³⁸ declared a 'state of emergency' under article 141A of the constitution³⁹ on the night of 11 January 2007 (that is, 11 days before the scheduled general election of 22 January 2007). The scheduled general election was postponed and the President resigned from the post of Chief Adviser of the caretaker government but retained the position of the President. Declaring an emergency, in addressing the nation over radio and television, the President finally admitted flaws in the process of updating the voter list and acknowledged that 'any election without the participation of all the parties will not be acceptable at home and abroad.'⁴⁰ The following day, a former governor of the Bangladesh Bank (the central bank of the country) and former official of the World Bank was appointed as the Chief Advisor to the caretaker government to head a 10-member caretaker government comprising a group of bureaucrats and retired military generals. The new government is fully backed by the armed forces.

V. EMERGENCY POWER ORDINANCE AND EMERGENCY POWER RULES 2007

The declaration of the state of emergency was followed by the promulgation of the *Emergency Powers Ordinance 2007* (EPO) and the *Emergency Powers Rules 2007* (EPR).⁴¹ The EPO and EPR have suspended many fundamental rights. It also suspended the rights of freedom of movement,⁴² freedom of assembly,⁴³ freedom of association,⁴⁴ freedom of thought, conscience and speech,⁴⁵ freedom of profession and occupation,⁴⁶ freedom to own property,⁴⁷ and protection of home and correspondence.⁴⁸ All political activities, both private and public, including activities of the trade unions, were banned. Political parties were required to close their offices and small private meetings at private residences were also banned.

Section 3 of the EPR prohibits any kind of association, procession, demonstration or rally without special permission from the authorities, and under section 3(4) any person found guilty of holding any meeting or demonstration faces two to five years of rigorous imprisonment. Additionally, Section 5 completely prohibits the publication of any criticism of the activities of the government that is deemed to be 'provocative' by the authorities, in news bulletins, video footage, talk shows, features, articles, editorials or

further warned that 'this may have implications for Bangladesh's future role' [in UN peace-keeping Missions]. Somini Sengupta, 'Bangladesh Leader Declares State of Emergency', *The New York Times* (New York), 11 January 2007. <http://www.nytimes.com/2007/01/11/world/asia/11cnd-bengla.html?_r=1&scp=1&sq=...> at 27 November, 2008.

37 Crisis Group, *Restoring Democracy in Bangladesh*, above n 30, 7.

38 The reports of Bangladeshi and foreign news media made it clear that the armed forces forced the President to declare a state of emergency and to postpone general elections scheduled to be held on 22 January 2007. See, eg, The *Prothom Alo* (*First Light*) in its leading article on the first anniversary of the declaration of emergency, 'Bango Bhabhaney shei shomoy ja ghatechilo' ['What happened then at the *Banga Bhabhan*']. Note, the *Banga Bhabhan* is the official residence of the president: *Prothom Alo* (Dhaka) 11 January 2008 <http://prothom-alo.com/archive/news_details_home.php?dt=2008-01-11&issue_id=48> at 27 November, 2008. The declaration of emergency also had the backing of so-called 'Tuesday Group'. Amongst the Tuesday Group, the prominent are the embassies of the United States, High Commissions of Great Britain, Australia and Canada.

39 The president may proclaim a state of emergency in accordance with article 141A of the *Bangladesh Constitution*. The article says that when '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.'

40 The full text of the President's speech was reported in all dailies published from Bangladesh on 12 January 2007.

41 For the full text of the EPO, see *Bangladesh Gazette Additional Issue*, 12 January 2007; and for the details of the EPR see *Bangladesh Gazette Additional Issue*, 21 March 2007.

42 *Bangladesh Constitution* art 36.

43 *Bangladesh Constitution* art 37.

44 *Bangladesh Constitution* art 38.

45 *Bangladesh Constitution* art 39.

46 *Bangladesh Constitution* art 40.

47 *Bangladesh Constitution* art 42.

48 *Bangladesh Constitution* art 43.

cartoons.⁴⁹

Section 16(2) of the EPR authorises any member of the ‘law and order maintaining force ... to arrest any person on suspicion without a warrant’.⁵⁰ Section 20 authorises the use of force to execute any order and grants immunity to the government from any prosecution. This section also authorises the ‘law and order maintaining forces’ to use force in order to execute any order issued under the EPR. Section 21 authorised the government to detain any person indefinitely without any charge under the *Special Powers Act 1974*. Above all, section 10 denies the right to apply for bail if detained under the Emergency Rules. This provision is emphasised by section 19d, which states that regardless of sections 497 and 498 of the Code of Criminal Procedure (the sections dealing with bail), if any inquiry, criminal investigation or trial is in progress under sections 14 and 15 of the EPR, the accused persons shall not obtain bail before any court or tribunal. These provisions thus threaten everyone with indefinite detention, without the traditional safeguards developed over many centuries of difficult struggle.⁵¹

The government later amended the EPR by adding new clauses.⁵² Section 18A(1) states that regardless of the provisions which exist in other laws or in the rules in question, the government or the Anti-Corruption Commission, in the public interest, may withdraw any case from the Sessions Court, Magistrate’s Court, Special Judges’ Court or Tribunal in any part of the country and transfer the case to a Special Judges’ Court for trial. Furthermore, section 18A(2) adds that the subsequent trial of any such transferred case shall be conducted under the EPR and the *Criminal Law Amendment Act 1958*. According to section 18B(2) the Special Judge is authorised to try any cases concerning all crimes under the EPR. The territorial jurisdiction of the Special Judges’ Courts have been widened to cover whole of Bangladesh. Section 21A(1) empowers the government to introduce any kind of administrative measures to assist inquiries, investigations, trials and any other actions it undertakes concerning crimes under the EPR. This is, in effect, a blank cheque to enable the government to carry out arbitrary arrest and detentions and then implicate them using fabricated charges while they are in detention. The police have now added section 16(2) by default to any complaints, meaning that the alleged accused has breached the EPR 2007. This has been done to instil greater fear in the minds of the accused and give the

49 For discussion on imposing control over the media, see Mahfuz Anam, ‘Gagging the Media is Not the Answer’, *Daily Star*, (Dhaka) 12 January 2007 <<http://thedailystar.net/2007/01/12/d7011201044.htm>> at 27 November, 2008. A number of local newspapers have reportedly been ordered to close. Two private television channels, ETV and CSB News, have been accused of broadcasting ‘provocative’ video footage and reports concerning riots in the country on August 23, 2007, following an incident at the sports arena of the Dhaka University involving some soldiers and students. The Press Information Department ordered them not to publish any more such programmes. This has been supplemented by an order to close down the CSB News TV channel. The officers of the armed forces monitor the television news bulletins and newspapers and threaten and intimidate editors by phone or in person. Television channels have stopped broadcasting many of their issue-based discussions and talk show programmes and newspapers are also engaged in self-censorship.

50 Section 2(a) of the EPR widens the definition of country’s ‘law and order maintaining force’ to include the Bangladesh Police, the Armed Police Battalion, the Rapid Action Battalion (RAB), Ansar (a village defence paramilitary group), Battalion Ansar (an armed village defence paramilitary group), the Bangladesh Rifles (border security force) the Coast Guard Forces, the National Security Intelligence Service, the Defence Intelligence Service and the armed forces. In other words, the policing responsibility is also given to various branches of the armed forces and other security agencies.

51 It may be mentioned that apart from the Emergency Rules (EPO and EPR) Bangladesh has numerous repressive laws allowing arbitrary detention and providing immunity to the perpetrators from prosecution. Section 54 of the *Code of Criminal Procedure 1898* permits arrest on ‘suspicion’ of a crime, and has been the most commonly used provision by the police to arrest individuals and pry information out of them. 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. Moreover, an accused 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’ victim of abuse. Neither the governments of Pakistan since independence from Britain in 1947 nor the governments in Bangladesh after independence from Pakistan in 1971 changed these provisions. Section 86 of the *Dhaka Metropolitan Police Ordinance* has also been frequently used by police in Dhaka to make arrests without valid reason after dark, whenever someone is found without any ‘satisfactory explanation’. It carries one year of imprisonment, a fine or both. The *Special Powers Act 1974* is another piece of legislation very often used. This Act allows authorities to detain any person for a specific period of time. The current government continues to use it in conjunction with the EPO and EPR to arbitrarily detain individuals.

52 For further details, see ‘HR Violations Widespread in Bangladesh’, *The South Asian* (Washington), 25 February 2008 <http://www.thesouthasian.org/archives/2008/hr_violations_widespread_in_ba.html> at 27 November, 2008.

authorities unjustifiable powers over these persons.

Under these rules, the accused is subject to summary investigation and trial. The courts are required to finish all legal proceedings including trial and sentencing within 45 days of the commencement of the trial, unless 'unavoidable circumstances' require an extension for a further 30 days. Generally, investigations by the police, prosecution and subsequent trials take on average 5-7 years due to inefficiency, political interference and corruption. Under the circumstances of Bangladesh, completion of the investigation and subsequent trial within 45 days raises many questions as to the credibility of those trials. These courts are seen like 'kangaroo courts', i.e., justice is meted out summarily.

Thus, by these amendments, the government has effectively bypassed the regular courts and ensured that the Special Judges' Courts, under the control of the specially appointed judges, are able to take over any case selectively transferred to them. This ensures that people who are being targeted by the government can be convicted under the arbitrary sections of the EPR. Special Judges' Courts have been established in dormitories located within the greater compound of the national parliament, a restricted zone for general public, in order to try people targeted by the government. Access to these Special Judges' Courts is restricted for common citizens. It may be mentioned that article 141B does not empower the president to suspend all fundamental rights in Chapter III of the *Bangladesh Constitution* during emergency. The authority of the president during emergency to suspend fundamental rights is limited to suspension of fundamental rights mentioned only in articles 36-40 and 42. In other words, the Constitution does not empower the president to suspend other fundamental rights apart from these articles. However, these trials clearly violate the inalienable right of every citizen to the protection of law under article 27 and to open and public trial guaranteed under article 31(3) of the Constitution.

VI. THE EPO AND EPR — A POLITICO LEGAL ANALYSIS⁵³

The EPR and the EPO, by suspending the safeguards from arrest and detention, effectively legalise arbitrary arrests and detention. The implications of the current laws are that everyone is subject to the risk of endless detention without any legal avenues of redress. According to the information collected by local and international human rights groups, over 250,000 people have been arbitrarily arrested and detained in the country during the first 13 months of the state of emergency, with a high proportion of them having been subjected to ill-treatment or torture — sometimes resulting in death — which remain endemic in the country.⁵⁴ These laws have in reality facilitated the process of torture of persons by the police, the armed forces, and paramilitary forces such as the Rapid Action Battalion (RAB) and the Bangladesh Rifles (BDR). Coercion, including torture, is used to make arrested persons sign blank documents, which the authorities then complete in order to suit any needs they may have, including exonerating themselves from wrongdoing, justifying their actions of falsely incriminating the concerned persons. Statements are also being forcibly extracted from victims and recorded using audiovisual equipment for the same reasons. This 'evidence' is then used against persons in court and, under the provisions of the emergency, cannot be challenged. Victims of torture or relatives of people who die in custody never receive any reparation or justice.

The country's prisons are overcrowded to the point that the government recently

⁵³ This part is written based on various sources, including newspaper reports, Human Rights Country Report prepared by US the State Department, Amnesty International's Report, Asian Legal Resource Council, informal discussions with many Bangladeshi politicians and civil servants, all of whom understandably wish to remain anonymous.

⁵⁴ The Hong Kong based Asian Legal Resources Centre estimates that between 11 January 2007 and 11 January 2008 'over 250,000 have been arbitrarily arrested and many such detainees have been tortured during this time.' (The Asian Legal Resources Centre is an independent regional non-government organisation holding general consultative status with the Economic and Social Council of the UN. It is also the sister organisation of the Asian Human Rights Commission). However, there were many reported deaths in custody and often with marks of severe torture. The number of people arrested just within a span of a month (between 28 May 2008 and 30 June 2008) is reported to be 50,215. Out of these, arrest warrants were issued only against 34,249 and others were arrested without any warrant. See *Daily Ittefaq* (Dhaka), June 30 2008 <<http://www.ittefaq.com/content/2008/06/30/news0463.htm>> at 27 November, 2008.

released several hundred detainees who were either convicted of lesser crimes, such as theft, or had been detained for lengthy periods during their trials. The authorities have begun using public and private houses, declaring them as ‘sub-jails’, in order to accommodate high-profile prisoners such as former ministers, law-makers, editors of newspapers and businessmen arrested under the government’s so-called anti-corruption drive.

Custodial deaths resulting from torture at the hands of the law-enforcement and security forces continue to occur, with over 126 deaths reportedly occurring in the first six months of the declaration of emergency. This practice is reminiscent of the ill-famous ‘Operation Clean Heart’ in late 2002.⁵⁵ On average, about 10 people die in custody every month. Extrajudicial killings have been on the increase during the state of emergency, further worsening the already serious situation. Not a single case of such gross human rights abuses as torture or extrajudicial killing can be pursued by the victims.⁵⁶ The ability to use force at will has increased the vulnerability of any persons that oppose the government, be they politicians, demonstrators, journalists or human rights defenders.⁵⁷ In many cases, the provisions of the EPR are being used retrospectively.⁵⁸

Human rights activists are becoming vulnerable in Bangladesh. Numerous human rights defenders have been threatened and intimidated, arbitrarily arrested and detained for months at a time, tortured and/or implicated in fabricated cases. As a result, most human rights organisations have put a halt to most investigative work, such as fact-finding missions to ensure the documentation of cases of human rights abuses. This could give rise to a situation where human rights abuses are increasing, but fewer reports are surfacing, which could send an erroneous signal to the outside world that the human rights situation is improving, while in reality it is getting worse.⁵⁹

Furthermore, Bangladesh had no national human rights commission, although the present government has formed a committee comprising bureaucrats to draft a concept paper for establishing such a commission. Recently the government announced the establishment of a National Human Rights Commission but it will take some time before

55 During ‘Operation Clean Heart’, 58 persons died in suspicious circumstances in detention when armed forces were called in by the four-party led coalition government for day-to-day policing to improve the deteriorating law and order situation in the country.

56 Impunity has been legislated in the past in Bangladesh. For example, the government passed the *Joint Drive Indemnity Act 2003* following the disastrous Operation Clean Heart, ensuring impunity for the perpetrators of torture and killings committed under this operation. Article 46 of the constitution empowers the government to extend immunity from prosecution to any state officer on any grounds. This provision was originally intended with reference to the 1971 Liberation War for independence from Pakistan. However, it is now used to protect law enforcing agencies including the armed forces 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 members of the armed forces responsible for gross abuses, including many deaths in custody that occurred from 16 October 2002 to 9 January 2003 under Operation Clean Heart.

57 For example, on 23 August 2007, some 12 journalists were arrested in trying to report an incident involving watching a game at the sports arena of the Dhaka University. The news of the incident soon spread to other universities. The students from Rajshahi University also started protesting the presence of the army in the campuses of various universities. The authorities firmly handled the situation by resorting to force, imposition of a curfew and by arresting a number of university teachers, students and journalists for violation of various provisions of the EPR. Teachers and students were later prosecuted and sentenced to various terms of imprisonment (between one year and five years). However, under pressure from various quarters, some of the teachers were later released on presidential pardon but with a record of conviction against them.

58 For example, on 13 June 2007, Noor Ali, managing Director of Unique Group of Companies, filed a case accusing Sheikh Hasina (Prime Minister between 1996-2001) and her two relatives of extortion of Tk 50 million from him in exchange for mediating a power plant deal in 1997 between the Power Development Board (PDB) and his firm. On the same day, another businessman, Azam J Chowdhury, filed another extortion case against Sheikh Hasina and her cousin. There were three other extortion cases against her filed in the same month, one by another businessman and two by the Anti-Corruption Commission. All these allegations relate to events at least 7 years prior to the declaration of the emergency. The timing of these cases and the use of emergency powers rather than using the provisions of the penal code clearly speak of misuse of emergency power for political reasons. Moreover, the retrospective use of EPR and EPO violates article 35(1) and (3) of the *Bangladesh Constitution*. For a summary of these five cases against Sheikh Hasina, see ‘Hasina cleared of Noor Ali’s extortion case’, *The Daily Star* (Dhaka), 6 November 2008, <<http://thedailystar.net/story.php?nid=62069>> at 27 November, 2008.

59 The UN ‘has accused the armed forces in Bangladesh of using murder as a means of law enforcement.’ See ABC Television, *7.30 Report*, 7 June 2008. Also see *Asian Human Rights Commission Report* (24 April 2008), *Amnesty International Report* (January 2008), and US State Department Report on *Human Rights situation in Bangladesh* (2008).

the commission becomes operative.

Provisions contained in the EPO and EPR are contrary to various national, municipal and other international human rights norms and standards.⁶⁰ For example, article 35(5) of the *Bangladesh Constitution* prohibits torture. It may be mentioned that international law strictly prohibits arbitrary detention. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a state party, guarantees 'the right to liberty and security of person'. Particularly, article 9(4) mentions that those arrested or detained are entitled to take proceedings before a court without delay to review the lawfulness of their detention and order their release if the detention is not lawful.

Bangladesh has ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). However, there is as yet no law that prohibits and criminalises the practice, as well as no means to lodge a complaint. The Bangladesh Government at the time of ratification assured that it would apply article 14(1) of the UN Convention — stipulating the right to redress, compensation and rehabilitation for victims — in accordance with existing laws. However, no step was ever taken to pass laws for redress, compensation and rehabilitation. The practice of torture and custodial deaths has never been specifically criminalised. Above all, the government has always protected the perpetrators by granting immunity from future prosecution. Thus it seems that torture and extrajudicial killings are deliberate government policy in Bangladesh, in spite of Bangladesh being a member of the UN Human Rights Council as well as a party to key international human rights covenants such as the CAT. Bangladesh is also in breach of its international law obligation in failing to submit any periodic reports to the CAT Committee.

VII. CONCLUSIONS AND SUGGESTIONS

In Bangladesh, an emergency was declared after the elected 2001-06 government resigned at the end of its tenure and the parliament was also dissolved to pave the way for an election to be held within 90 days from the day the caretaker government entered into office. The election was scheduled to be held on 18 December 2008.⁶¹ The Election Commission has already prepared a voter list with photo identification and brought some electoral reforms. However, the Speaker of the Parliament termed this government an irregular one.⁶² Some consider the government unconstitutional given that the constitution requires the caretaker government to hold the election within 90 days.⁶³ However, the government can always find lawyers to provide legal justification for its actions. Legal arguments for and against the constitutional legality of the government will only confuse the general public. They are more likely to be impressed by the arguments in favour of the government given its control over the media. In the absence of the parliament, and with the government being unelected, the question of legitimacy remains a fundamental one. In such a situation the normal checks and balances envisaged in the constitution are totally absent. The imposition of restrictions on the media and the suspension of certain

60 For example, section 5(1) of the *Emergency Powers Ordinance 2007* declares that 'No question should be raised before any court regarding the orders passed on the basis of this ordinance or by the authority of this ordinance'. Furthermore, section 5(2) declares, 'If it is deemed that any order has been passed or signed by any authority according to the power delegated under this ordinance, that order, passed or signed by that authority, shall be deemed admissible under the definition in the *Evidence Act-1872 (Act X of 1872)* in the courts.'

61 The Election Commission declared the schedule of the election on 2 November 2008. M Abul Kalam Azad, 'EC declares polls fixture', *Daily Star* (Dhaka), 3 November 2008, <http://thedailystar.net/story.php?nid=61622> at 27 November, 2008.

62 The Speaker was quoted as saying that 'The Caretaker Government (CG) is a creation of the Constitution. The priority of this Government is to do routine works and assist the Election Commission (EC) for holding a general election within 90 days.' See 'Present govt irregular, but not illegal, says Speaker', *New Nation* (Dhaka) 17 March 2008. <<http://nation.ittefaq.com/issues/2008/03/17/news0309.htm>> at 27 November, 2008.

63 Ruling on a writ petition, the High Court bench of Justice Mohammad Abdur Rashid and Justice Mohammad Ashfaul Islam ruled that, 'As per article 123(3) of the constitution, the Election Commission is bound to hold the election within 90 days after parliament is dissolved. The constitutional provisions are self-executing, and the commission has no right to avoid or violate those.' The ruling further made it clear that 'The Election Commission has no discretion to extend the time beyond 90 days.' See 'EC violated constitution', *The Daily Star* (Dhaka), 23 May 2008, <http://thedailystar.net/story.php?nid=37802> at 27 November 2008.

fundamental rights, especially political rights, run contrary to the principles of public accountability and contrary to any democratic norms.

The situation gives rise to a number of questions about the capacity of the current provisions concerning emergency to protect civil liberties while also responding to the circumstances of an emergency. When the emergency comes to an end, the constitution should require a legislative post-mortem, involving parliamentarians, judges and representatives of wider civil society, on the administration of the entire emergency. A public report with formal recommendations should then be widely debated and discussed to enhance public awareness and to achieve some sort of consensus and, consequently, legitimation and wider acceptability. The inquiry should be a meaningful one and not just a witch-hunt, and the people in violation of the constitution should be brought to justice so that it becomes a lesson for the future. This broader inquiry should also look into the conduct of the higher judiciary so as to restore confidence in the judiciary.

The post-mortem should look into whether the political constitution has been effective in regulating the way in which an emergency has been met. The new parliament, after the promised general election on 18 December 2008, must consider a doctrine that allows short-term emergency measures but draws the line against prolonging restrictions. Though the *Bangladesh Constitution* allows for a declaration of emergency by the president, it sets a number of procedural limitations.⁶⁴ The exercise of the power of the president in a parliamentary system of government, like in Bangladesh, is contingent upon the advice of the prime minister. Upon promulgation, it has to be presented to the parliament for approval. If the parliament is not in session, then the president is required to present emergency measures before the new parliament in its first session and must obtain approval within the first 30 days. Failure to comply with these conditions would make the proclamation of an emergency unconstitutional. The president, being the nominee of the party in government, has no popular accountability. Consequently, in exercising the power, the president is required to do so in a manner that would be acceptable to the elected prime minister and parliament, had they been functioning.

Above all, people in power must be prevented from exploiting situations or creating themselves emergency-like situations to impose long-lasting limitations on liberty. The post-mortem should also consider ways to control/guide the executive government in continuing the emergency beyond agreed time frameworks. Each renewal must make it harder and harder for the continuation of emergency rule. The Constitution must make it difficult for emergency actions to destroy the framework of the government that they were supposed to protect. The overriding constitutional aim is to create an emergency regime that remains subordinate — both in symbol and in actual fact — to the principles of liberal democracy.

In light of the above discussion, the fundamental question is what should proper emergency constitution contain? Professor Bruce Ackerman⁶⁵ presents some suggestions for the redesign of constitutions in order to increase a government's ability to deal with future emergencies and, at the same time, protect individual freedom. He takes a three-dimensional approach. The first dimension focuses on an innovative system of political checks and balances and he makes specific suggestions with regard to constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures. His second dimension integrates economic incentives and compensation payments into the systems. In his third dimension, he proposes a framework that permits courts to intervene effectively to restrain predictable abuses.

Judges can play very important roles during emergency in protecting the detainees' core rights to decent treatment. 'Decency, not innocence, should be their overriding concern,'

⁶⁴ *Bangladesh Constitution* art 141A(1) and 141C.

⁶⁵ Ackerman, above n 2, 1031. Ackerman's suggestions are specific to the US. Nonetheless, it seems to have some merit worth exploring in other countries as well.

writes Ackerman.⁶⁶ Judges should enforce it rigorously in cases involving torture against detainees. The fact that many of the detainees are almost certainly innocent makes the ban more pressing. Mass preventive detention during emergency has violated the rights of thousands of innocent people and, in the name of emergency, they have been deprived of enjoying the rights guaranteed to the normal criminal defendant. It is impossible for them to get any legal relief or to gain quick release by establishing their innocence. Arbitrary arrest on mere suspicion, especially when it is followed by months and years of detention, is a very traumatic experience, especially when the person is innocent. Though nothing can compensate for the loss of freedom and the traumatic experience of victims and their families, a financial payment is the least the state should do to minimise the harmful effects. Awarding compensation to people wrongly detained would discourage future abuse of power. So it is not only simple justice that requires compensation, but bureaucratic efficiency as well. Given the dependence of most developing countries, including Bangladesh, upon other developed countries and donor agencies controlled by them, an international consensus must also be developed so that, irrespective of the nature and extent of an emergency, certain universal standards are maintained.

⁶⁶ Ibid.