

THE ANTI-DEFECTION PROVISION CONTAINED IN THE CONSTITUTION OF BANGLADESH, 1972, AND ITS ADVERSE IMPACT ON PARLIAMENTARY DEMOCRACY: A CASE FOR REFORM

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ABSTRACT

It is a fundamental feature of parliamentary democracies for parliament to act as a bulwark against executive power so as to ensure the maintenance of the rule of law. In order for parliament to perform its oversight functions, it is imperative that members of parliament (“MPs”) enjoy independence from the stranglehold of their political parties while scrutinizing the actions of the executive and deliberating the national issues facing the electorate. In Bangladesh, the founding fathers, in order to avoid the troubling experiences of unprincipled defections of MPs during the past union with Pakistan, which adversely affected the stability of governments, incorporated an anti-defection provision in Article 70 of the Constitution of Bangladesh, 1972. However, the anti-defection provision contained in the Constitution, in endeavoring to curb unprincipled defections, has adversely impacted the independence of MPs by compelling them to blindly comply with the directives of their parties in Parliament, thereby impeding the provision’s competence to act as a check on the powers of the executive. Consequently, the current government of Bangladesh Awami League, by dint of Article 70, has

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persuaded Parliament to incorporate far-reaching amendments in the Constitution, which in turn have enabled the regime to essentially substitute the rule of law with the rule of man, in violation of the guarantees contained in the Preamble of the Constitution. Thus, the presence of the anti-defection provision in the Constitution has impeded the institutionalization of Parliament. Accordingly, this Article puts forward concrete recommendations for liberalizing the anti-defection provision contained in Article 70 in order to maintain an appropriate balance between ensuring the stability of the political system against unprincipled defection and safeguarding the independence of MPs to enforce the accountability of the executive branch of government.

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INTRODUCTION

It is a common feature of the Westminster system of government for the party with the majority of the seats in parliament to form the government.³ The government's continuance in office, in turn, is

³ See *The Westminster System*, LEGIS. ASSEMBLY FOR THE AUSTRAL. CAP. TERR, <https://www.parliament.act.gov.au/visit-and-learn/resources/factsheets/the-westminster-system> (last visited May 18, 2020) [<https://perma.cc/8MWQ-39VU>].

contingent on its ability to command the confidence of parliament. The MPs, who are elected by the people at periodic general elections, perform the pivotal task of ensuring the accountability of the executive branch of government by scrutinizing, criticizing and, if necessary, advocating changes to policies and legislation put before them by the executive for approval. It should be stressed here that the power of the MPs to “investigate” acts “as a brake upon the power of the executive branch,”⁴ thereby institutionalizing the role of parliament. As John Stuart Mill observed:

The proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them.⁵

In order for parliament to perform the above supervisory functions effectively and efficiently, it is imperative that the two main constituent groups of parliamentarians (i.e., the majority members of the ruling party who are not part of government and the opposition members) are independent of the dictates of political parties which nominate them for election to parliament. Such independence enables MPs to scrutinize the functions of the executive without fear and to engage in intense and robust deliberation about national issues for safeguarding the interests of the electorate.⁶ Therefore, ensuring the independence of MPs contributes towards the development of a deliberative democracy.⁷ Accordingly, it is

⁴ ALAN BARTH, *GOVERNMENT BY INVESTIGATION* 13 (1955).

⁵ John Stuart Mill, *Considerations of Representative Government*, in CTR. FOR INT’L DEV., Note, LEGISLATIVE OVERSIGHT 3 (Chen Friedberg & Reuven Y. Hazan eds., 2012).

⁶ See D.L. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN* 460–61 (1948). Parliamentary democracies are based on certain conventions and traditions that are mostly derived from English traditions. The most common features across jurisdictions having parliamentary democracies are “supremacy of parliament” (parliamentary sovereignty) and “responsible government” (collective responsibility of executive to the parliament).

⁷ See Kartik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell for Parliamentary Dissent*, 5 NUJS L. REV. 103, 112 (2012); see also S.S. Visweswaraiah, *Deplorable Defections: In Search of a Panacea*, 39 J. INDIAN L. INST. 47, 48 (1997). The success of a democratic state rests in the understanding of individual rights and a complex balance of respect and irreverence of political authority. This platonic relationship in a democratic state is made stable through the sovereign body like parliament (or any other name as given by the respective Constitution) whose major function is to balance of aspirations of different communities represented in Parliament. For further reading on democracy see Lord Norton of Louth, *Strengthening Parliament's Role*, in

not uncommon in most Westminster parliaments for MPs to take the drastic step of refusing to vote along party lines and to cross the floor of the parliamentary chamber to “join the political opponents and vote with them” for upholding the interests of the electorate and for performing the task of acting as an effective check on the executive.⁸ For instance, Richard Crossman—a former British Labor MP—characterized “the mid-Victorian House of Commons” as an institution where “the private Member was genuinely . . . responsible to . . . his constituents and genuinely at liberty, within wide limits, to speak as he wished.”⁹ “It was this independence of the private member,” Crossman remarked, “that gave the Commons its collective character and made it the most important check on the executive.”¹⁰

However, the necessity to maintain the stability of political governments, which is *sine qua non* for ensuring good governance and economic development,¹¹ has seen the rise of strict party discipline in parliamentary democracies around the globe. This has in turn resulted in the executive usually being “guaranteed the allegiance of a parliamentary majority,” thereby undermining the competence of parliament to be a bulwark against executive power.¹² It is, therefore, evident that a fundamental tension exists in parliamentary democracies between ensuring stability of the government and effectively constraining the power of the executive so as to ensure the maintenance of the rule of law. But it should be stressed here that the stability of a government can only be threatened when MPs switch their allegiance to the opposition, for instance, due to the lure of office.¹³ Switching allegiance enables defecting MPs to potentially unseat a minority government, which does not

DEMOCRACY, PARLIAMENT AND ELECTORAL SYSTEMS 31 (M.A. Griffith-Traversy ed., 2002). See also LINCOLN A. MITCHELL, THE DEMOCRACY PROMOTION PARADOX 112–16 (2016).

⁸ PENGUIN AUSTRALIA, THE PENGUIN MACQUARIE DICTIONARY OF AUSTRALIAN POLITICS 100 (1988).

⁹ R.H.S. Crossman, *Prime Ministerial Government*, in THE BRITISH PRIME MINISTER 180–81 (Anthony King ed., 1985); see also DEIDRE MCKEOWN & ROB LUNDIE, DEP’T OF THE PARLIAMENTARY LIBRARY, FREE VOTES IN AUSTRALIAN AND SOME OVERSEAS PARLIAMENTS <https://www.aph.gov.au/binaries/library/pubs/cib/2002-03/03cib01.pdf> [<https://perma.cc/L6BD-PLND>].

¹⁰ Crossman, *supra* note 9, at 181; MCKEOWN & LUNDIE, *supra* note 9, at 11.

¹¹ See Comment, *Political Stability Vital for Governance and Development*, SUNDAY TIMES (SRI LANKA), Aug. 16, 2015.

¹² SARAH JOSEPH & MELISSA CASTAN, FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW 6 (2d ed. 2006).

¹³ Visweswaraiah, *supra* note 7, at 53 (“[D]efection . . . generally took place because political support is sold for money or promise of ministership or public office.”).

command the support of an absolute majority in parliament, by handing the opposition the majority of the parliamentary seats required to form government. This in turn sets in motion a vicious cycle whereby opposition political parties in parliament, which fail to form a government in their own rights, would aspire to ascend to power through the backdoor by inducing disgruntled MPs to defect from the ruling party. However, such political opportunism should be contrasted with crossing the floor to oppose an unreasonable policy or to prevent the passage of a bill that, if passed, would subvert the rule of law or violate the fundamental human rights of individuals. Such defection on the basis of ideological convictions is not aimed at bringing down a government, but rather to ensure the promotion and protection of the rule of law.

In this context, it is pertinent to note here that the international norms, such as the Latimer House Guidelines for the Commonwealth (1998), stress that parliaments should operate to “enforce the accountability of the executive.”¹⁴ In order for parliaments to enforce such accountability, the Guidelines, among other things, stipulate that MPs during their parliamentary term should not: (a) be expelled “from parliament as a penalty for leaving their parties (floor-crossing)” as such expulsion is tantamount to “infringement of members’ independence”¹⁵ or (b) lose their seat in the parliament due to “the cessation of membership of a political party.”¹⁶ While stressing on the importance of ensuring the independence of MPs, the Guidelines also recognize the necessity for enumerating anti-defection measures in nascent democracies to deter “corrupt practices” such as unprincipled defection, which undermines the stability of governments.¹⁷ However, the Guidelines maintain that anti-defection measures should strike a proper balance between deterring corrupt practices, such as defecting to fulfill the personal ambition of becoming a cabinet minister, and simultaneously securing the independence of the MPs.¹⁸ Maintaining such a balance is imperative for ensuring that parliamentarians are not reduced to mere numbers in

¹⁴ KAREN BREWER ET AL., *THE COMMONWEALTH LATIMER HOUSE PRINCIPLES: PRACTITIONER'S HANDBOOK* 42 (2017).

¹⁵ *Id.* at 64.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

parliament, who are expected to simply toe the party line for contributing towards an “elective dictatorship.”¹⁹

However, the ideal of maintaining such an appropriate balance has remained elusive in Bangladesh—a nation which gained its independence from Pakistan on December 16, 1971, following one of the most brutal wars of independence in modern history. It should be stressed here that during the union with Pakistan, the inhabitants of Bangladesh (erstwhile East Pakistan) had long aspired to be part of a participatory democracy but were frustrated at every step by the Punjab-dominated Western wing of Pakistan.²⁰ Accordingly, the founding fathers, in framing the Constitution of Bangladesh, which was enacted on November 4, 1972 and subsequently given effect on December 16, 1972²¹ “to commemorate the first anniversary of the Victory Day of Bangladesh,”²² consciously sought to give effect to this aspiration. To this end, the framers pledged in the preamble of the Constitution that the high ideal of democracy, among others, “which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be” one of “the fundamental principles of the Constitution.”²³ Furthermore, the Constitution recognizes the principle of democracy in Article 8(1) of the Constitution as one of the fundamental principles of state policy,²⁴ “which are a manifesto of aims of the State,”²⁵ and which are “fundamental to the governance of Bangladesh.”²⁶

¹⁹ See generally DAVID HAMER, DEP’T OF THE STATE, CAN RESPONSIBLE GOVERNMENT SURVIVE IN AUSTRALIA? 344–354 (2d ed. 2004), https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~link.aspx?_id=63769F3869114EF0BE84FCBC92DA813E&_z=z [<https://perma.cc/8H94-Z6NK>]; see also Roch Dunin-Wasowicz, *Elective Dictatorship? The Democratic Mandate Concept Has Become Dangerously Over-Extended*, LSE BREXIT (Apr. 3, 2017), <https://blogs.lse.ac.uk/brexit/2017/04/13/elective-dictatorship-the-democratic-mandate-concept-has-become-dangerously-over-extended/> [<https://perma.cc/GB5L-7SH5>].

²⁰ For details of these instances, see M. EHTESHAMUL BARI, STATES OF EMERGENCY AND THE LAW: THE EXPERIENCE OF BANGLADESH 6–7 (2018).

²¹ CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 153, § 1.

²² See BARI, *supra* note 20, at 7.

²³ BANGL. CONST. pmbl.

²⁴ *Id.* art. 8, § 1 (“The principles of . . . nationalism, socialism, democracy and secularism . . . , together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.”).

²⁵ M. Ehteshamul Bari, *The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy. Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal*, 28 TRANSNAT’L. L. & CONTEMP. PROBS. 27, 34 (2018).

²⁶ BANGL. CONST. art. 8, § 2.

Secondly, the framers incorporated in the Constitution several salient features of parliamentary democracy.²⁷ The framers modeled the nation's democratic governance structure on the Westminster system by making the President the nominal head of the nation and vesting the executive powers in the Prime Minister-led cabinet.²⁸ In order to ensure the accountability of the executive to the Parliament, the Constitution, among other things, mandates the collective responsibility of the cabinet to the Parliament.²⁹ However, in providing for a Parliamentary system of governance, the founding fathers also sought to ensure the stability of the system. This desire to provide a stable democratic system arose from the past experiences of political defections or floor crossings to make and break governments,³⁰ which became the hallmark of the fractious democratic system of Bangladesh (erstwhile East Pakistan) when it was a province of Pakistan.³¹

²⁷ See S.C. Sen, *The Constitution of Bangladesh and a Short Constitutional History*, 7 L. & POL. AFR. ASIA & LATIN AM. 257, 267 (1974); see also Abul Fazal Huq, *Constitution-Making in Bangladesh*, 46 PAC. AFF. 59, 59 (1973).

²⁸ The "Westminster system" is characterized by a centralized political system, independent bureaucracy, accountability of the executive to the Parliament, collective cabinet responsibility, and Parliamentary sovereignty. Katharine Dommett et al., *Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis*, 29 GOVERNANCE 535, 535–36 (2016). See also David Richards, *Sustaining the Westminster Model: A Case Study of the Transition in Power Between Political Parties in British Government* 62 PARLIAMENTARY AFF. 108 (2009). For further reading on the Westminster model, see Gerd Strohmeier, *Does Westminster (Still) Represent the Westminster Model? An Analysis of Changing Nature of UK's Political System*, 14 EUR. VIEW 303 (2015).

²⁹ BANGL. CONST. art. 55, § 3 ("The Cabinet shall be collectively responsible to Parliament.").

³⁰ In this Article, the terms "anti-defection" and "floor crossing" have been used synonymously. Strictly speaking, the meaning of the term "defection," according to the Concise Oxford Dictionary, is: "falling away from allegiance to leader, party, religion or duty; desertion; apostasy." In other words, when a member of a political party changes his allegiance and joins another political party, he is said to "defect" from his party. *Defection*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (7th ed. 1982). Another way of defection is "floor crossing," i.e., crossing the party lines to vote against the party or abstaining from the vote against the directive of the party inside the legislative body. The provisions concerning "anti-defection" or "floor crossing" have been inserted into the constitutions of democracies to stop unprincipled defection owing to greed for monetary benefits and political power. There are about forty countries which have adopted some form of anti-defection clause in their respective constitutions. Csaba Nikolenyi, *Keeping Parties Together? The Evolution of Israel's Anti-Defection Law*, 47 POLISH POL. SCI. YB. 188, 191 (2018). For further reading on defection, see Clemens Spieß & Malte Pehl, *Floor Crossing and Nascent Democracies — A Neglected Aspect of Electoral Systems? The Current South African Debate in the Light of the Indian Experience*, 37 L. & POL. AFR. ASIA & LATIN AM. 195 (2004). See also Pardeep Sachdeva, *Combating Political Corruption: A Critique of Anti-Defection Legislation*, 50 INDIAN J. POL. SCI. 157 (1989).

³¹ See ALLEN MCGRATH, *THE DESTRUCTION OF PAKISTAN'S DEMOCRACY* 134 (1996).

Accordingly, Article 70 of the Constitution requires an MP to vacate his parliamentary seat if he resigns from the party that nominated him for contesting the election or if he crossed the floor to vote against his party in the Parliament. The objective underlying the incorporation of Article 70 in the Constitution, as revealed during the Constituent Assembly Debate, was to obviate the possibility of unprincipled defection, corruption, self-interest, and horse-trading among the MPs by compelling them to continue their allegiance to their respective parties,³² thereby ensuring discipline among the members of political parties and safeguarding the stability of the political system and continuity in the government. Despite the apparent intention behind the incorporation of Article 70 in the Constitution, this provision has become a roadblock to the institutionalization of democracy in Bangladesh.³³ This provision has given rise to a brand of party politics, where MPs refrain from criticizing their party's policy so as to avoid the prospect of losing their seat in Parliament.³⁴

It is against this backdrop that this Article will critically examine the anti-defection provision contained in Article 70 of the Constitution of Bangladesh and its impact on parliamentary democracy in Bangladesh. To this end, this Article will first shed light on the events which necessitated the incorporation of the anti-defection provision in the Constitution and will, subsequently, trace its evolution in the last four decades. It will also compare and contrast the anti-defection provision contained in Article 70 of the Constitution with those enumerated in the Constitutions of India and Pakistan to explore its relative strengths and weaknesses. Subsequently, this Article will examine the impact of Article 70 on the independence of MPs to carry out their core responsibilities, such as holding the executive to account and safeguarding the interests of the electorate. This article will show that the existence of the anti-defection provision in the Constitution has resulted in the absence of democratic oversight in Bangladesh, thereby contributing towards the rise of an all-powerful executive and impeding in the process the institutionalization of the Parliament. The judicial response to the impact of the anti-defection provision will also be discussed. Finally, this Article will put forward a number of recommendations for liberalizing

³² See *Secretary v. Hossain*, (1999) 19 BLD (AD) 276 ¶ 11 (Bangl.).

³³ See generally Nizam Ahmed, *From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001)*, 76 PAC. AFF. 55, 61–62 (2003) [hereinafter Ahmed, *From Monopoly to Competition*].

³⁴ See DILARA CHOUDHURY, CONSTITUTIONAL DEVELOPMENT IN BANGLADESH: STRESSES AND STRAINS 146–47 (1995).

the provisions of Article 70 in order to ensure the maintenance of an appropriate balance between maintaining the stability of the political system against unprincipled defection and simultaneously safeguarding the independence of Parliamentarians to enforce the accountability of the executive branch of government.

I. THE EVENTS NECESSITATING THE INCORPORATION OF ARTICLE 70 AND ITS EVOLUTION

Prior to Bangladesh's emergence as a democratic and independent nation on December 16, 1971, it was in a union with Pakistan as its eastern province for twenty-four years.³⁵ From its very inception, this union exhibited incessant political instability which made the parliamentary system unworkable both at the center and the provinces.³⁶ MPs, once elected to the Federal and Provincial Assemblies, tended to cross the floors or to defy the directives of the party that nominated them for election and indulge in "factionalism" that not only resulted in dysfunctional parliaments but also unduly impacted the stability of political governments and their continuity in office.³⁷

The genesis of the dysfunctional parliamentary system in East Pakistan can be traced back to the provincial elections of March 1954,

³⁵ Pakistan had attained the status of an independent dominion on August 14, 1947, after the partitioning of British India. It was initially composed of two geographically distinct provinces, East and West Pakistan. BARI, *supra* note 20, at 6–7.

³⁶ Political instability in Pakistan originated with its colonial legacy (specifically, its ideas of religion, language, ethnicity, state authority, and territoriality) and the political class of Pakistan's reaction to it. Within these vexed political fights, which hindered the development of constitutional democracy in Pakistan, one constitutional trial was a catalyst in creating Pakistan's fractured democracy. The famous case of Maulvi Tamizuddin Khan v. The Federation of Pakistan, wherein the Governor General, Ghulam Muhammad, declared a state of emergency and dissolved the Constituent Assembly, was the first test for Pakistan to address the conflicts inherent in a democratic state. Unfortunately, the Federal Court of Pakistan chose to uphold the paramountcy of executive and limit the powers of legislature. *State v. Khan*, (1955) PLD (FC) 240, 310–11 (Pak.). With this judgment, the apex court laid the foundation for authoritarianism in Pakistan. This judgment also set the groundwork for the infamous *Dosso v. Federation of Pakistan* case, which opened the door to an era of undemocratic rule in Pakistan. *Dosso v. State*, (1958) PLD (SC) 533, 540 (Pak.); see also Om Prakash, *Challenges of State Building in Pakistan in Early Years: Executive – Judiciary Nexus*, 72 PROC. INDIAN HIST. CONGRESS 1064 (2011). For a detailed study of the history of Pakistan in its early years, see ABDUS SALAM KHURSHID, *HISTORY OF THE IDEA OF PAKISTAN* (1987). See also PAULA R. NEWBERG, *JUDGING THE STATE: COURT AND CONSTITUTIONAL POLITICS IN PAKISTAN* (1995) (for an explanation of the influence of Pakistani courts on the structure and development of Pakistan's constitution).

³⁷ For detailed study of the history of Pakistan in its early years, see SALAM KHURSHID, *supra* note 36; BARI, *supra* note 20, at 4, 25, 43.

which was a watershed moment in the political history of East Pakistan. A coalition of political parties under the banner of the United Front—a coalition of four political parties, namely, the Awami League, Krishak Sramik Party, Nizam-e-Islam, and Ganatantri Dal—and led by A.K. Fazlul Huq, secured an unprecedented victory over the Muslim League, which had been in power since independence from British rule.³⁸ However, this momentous triumph over the Muslim League was short-lived as the unity government—formed on April 3, 1954—was in complete disarray due to, among other things, political jostling among the coalition partners for power. This eventually resulted in the Governor-General dismissing the government within only fifty-six days of it assuming office.³⁹ The fall of the unity government marked the beginning of unstable and short-lived governments which further exacerbated the need for intervention by the central government.⁴⁰ In September 1956, two years after the fall of the unity government, the Awami League managed to form a government in

³⁸ See Sabbir Ahmed, *Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation*, 31 BANGL. INST. INT'L & STRATEGIC STUD. 1, 3 (2010) [hereinafter Ahmed, *Article 70 of the Constitution of Bangladesh*]. See also ABDUL HALIM, CONSTITUTION, CONSTITUTIONAL LAW AND POLITICS: BANGLADESH PERSPECTIVE: A COMPARATIVE STUDY OF CONSTITUTIONALISM IN BANGLADESH (2009); NAJMA CHOWDHURY, THE LEGISLATIVE PROCESS IN BANGLADESH: POLITICS AND FUNCTIONING OF THEN EAST BENGAL LEGISLATURE 1947-58 (1980). For further reading on the history of the political development of Pakistan in its early years, see KHALID BIN SAYEED, THE POLITICAL SYSTEM OF PAKISTAN (1967).

³⁹ The unity government fell in 1956 due to a withdrawal of support by the coalition parties led by the Awami League. After the fall of the United Front government led by Abu Hossain, the leader of the opposition party, Ataur Rahman Khan of the Awami League, was invited to form the new government in the East Pakistan province. Soon after, H.S. Suhrawardy became the prime minister of Pakistan, which meant the Awami League had come to power in both the central and provincial governments. However, due to sharp disagreement on issues ranging from foreign policy to provincial elections between H.S. Suhrawardy and other members of Awami League, a split occurred. A faction led by Moulana Abdul Hamid Khan Bhashani broke from the Awami League and formed a new party, the National Awami Party ("NAP"), which promptly withdrew its support from the Awami League-led government in East Pakistan. Because of this, the central government dismissed the government led by Ataur Rahman Khan in East Pakistan. See Ahmed, *Article 70 of the Constitution of Bangladesh*, *supra* note 38, at 4.

⁴⁰ The most distasteful political event engulfing the eastern province occurred in 1958, when an invite was extended to the leader of Awami League, Ataur Rahman Khan, to form a unity government in the eastern province of Pakistan. The East Pakistan Assembly was called into session on September 20, 1958, where it immediately faced a no-confidence motion against the appointment of Abdul Hakim as Speaker of the House. Ultimately, after removing the speaker from the office, the House reconvened on September 23, 1958, under the stewardship of Deputy Speaker Shahed Ali as acting Speaker. The opposition members immediately rejected the move and the chamber became unruly, leading to scuffling and fistfights among the lawmakers and ultimately resulting in the killing of the Deputy Speaker of the House. *Id.* at 4.

East Pakistan.⁴¹ However, it suffered the same fate as its predecessor when twenty-eight Members of the East Pakistan Provincial Assembly resigned from the Awami League and, in July 1957, joined the newly formed National Awami Party (“NAP”) under the leadership of Maulana Abdul Hamid Khan Bhashani, who himself resigned from the Awami League in March 1957 owing to disagreements with the central Awami League government’s foreign policy.⁴² Thus, it is evident that the primary reason for dysfunctional governments in the province was the prevalence of “political defection,” i.e., MPs frequently changing their allegiance to different political parties.⁴³

It should be stressed that MPs did not defect for ideological convictions but rather in pursuit of ministerial office, monetary benefits, and varied personal interests ranging from a lack of adequate courtesy shown by officials, the non-inclusion of their name in the local flood relief committee, and the refusal of the Chief Minister to assist an MP accused of being involved in black-market activities.⁴⁴ Consequently, the lack of respect among the MPs towards Parliament as a key democratic institution impeded the nascent nation’s journey towards democracy and contributed towards its distinct advance towards praetorianism, as is evident from the abrogation of the 1956 Constitution of Pakistan and the banning of all the political parties through the declaration of Martial Law on October 7, 1958.⁴⁵

The bitter experiences described above persuaded the political parties, particularly the Awami League, to commit to the idea of incorporating a provision in the Constitution of Pakistan for preventing

⁴¹ M.B. NAIR, *POLITICS IN BANGLADESH (A STUDY OF AWAMI LEAGUE)* 212 (1990).

⁴² M. Rashiduzzaman, *The Awami League in the Political Development of Pakistan*, 10 *ASIAN SURV.* 574, 577–78 (1970); ABID BAHAR, *SEARCHING FOR BHASHANI: CITIZEN OF THE WORLD* 168, 170–71 (2010); Ahmed, *Article 70 of the Constitution of Bangladesh*, *supra* note 38, at 4.

⁴³ Ahmed, *Article 70 of the Constitution of Bangladesh*, *supra* note 38, at 3.

⁴⁴ See CHOWDHURY, *supra* note 38, at 216; see also Ahmed, *Article 70 of the Constitution of Bangladesh*, *supra* note 38, at 4–5. See generally *Floor Crossing Law Under Bangladesh Constitution*, *LAWYERS & JURISTS*, http://www.lawyersjurists.com/article/floor-crossing-law-under-bangladesh-constitution/#_ftn6 (last visited Apr. 15, 2019) [<https://perma.cc/294W-9TU9>].

⁴⁵ On October 7, 1958, President of Pakistan Iskander Mirza abrogated the Constitution of Pakistan and declared martial law across the Eastern and Western Provinces, but on October 27, 1958, President Mirza was deposed by the Chief of the Pakistan Army, General Ayub Khan, in a bloodless coup d’état. See Khalid B. Sayeed, *Martial Law Administration in Pakistan*, 28 *FAR E. SURV.* 72, 75–76 (1959). For further reading on the role of the Pakistani Army in the governance of Pakistan, see Hamza Alvi, *Authoritarianism and Legitimation of State Power in Pakistan*, in *THE POST-COLONIAL STATE IN SOUTH ASIA* (Subrata Mitra ed., 1990).

defection. Accordingly, seven years after the restoration of the multi-party democratic system following the revocation of Martial Law through the incorporation of the second Constitution of Pakistan on March 1, 1962,⁴⁶ the Awami League proposed the incorporation of the following provision in the new Constitution:

If any person, having been elected to a legislature as a candidate or nominee of political party

- (i) withdraws himself from it; or
- (ii) is expelled by his political party for violation of the party's mandate in respect of any matter relating to his activities as a member of the legislature; or
- (iii) votes, or abstains from voting against the direction of such political party upon any legislative measure or any motion put to vote in the legislature,

he shall cease to be a member of the legislature for the unexpired period of his term unless such member is re-elected at a by-election occasioned by the vacancy created by such cessation of membership.⁴⁷

The proposed amendment to the Constitution of Pakistan was never adopted, as the country became embroiled in a bloody civil war which culminated in the birth of the independent nation of Bangladesh.⁴⁸ The independence of Bangladesh also brought with it a palpable fear among its general populace about their future government, as their memories were still rife with political instability and the resultant military rule. In an effort to avoid the troubling experiences of the past, the founding fathers, as pointed out in Part I, embarked on the journey of enacting a Constitution with the concept of democracy as its cornerstone.⁴⁹

However, even before the enactment of the permanent Constitution of Bangladesh, Sheikh Mujibur Rahman ("Mujib"), who was not only the head of the provisional government but also the head of the Awami League, issued the Provisional Constitution of Bangladesh Order on

⁴⁶ *Martial Law Under Field Marshal Ayub Khan*, STORY OF PAKISTAN, <https://storyofpakistan.com/martial-law-under-field-marshal-ayub-khan> (last visited Apr. 20, 2019) [<https://perma.cc/3XS4-5Q3K>].

⁴⁷ See HALIM, *supra* note 38, at 194.

⁴⁸ Rounaq Jahan, *Bangladesh in 1972: Nation Building in a New State*, 13 ASIAN SURV. 199, 199–201 (1973); see also Abul Fazal Huq, *Constitution-Making in Bangladesh*, 46 PAC. AFF. 59, 59 (1973).

⁴⁹ See Bari, *supra* note 25, at 34; see also Jahan, *supra* note 48, at 201.

January 11, 1972, to introduce parliamentary democracy in Bangladesh. The Order introduced parliamentary democracy in an effort to give effect to the “aspiration of the people,” which was manifested in the first general election held in Pakistan on December 7, 1970, by electing the Awami League to form a national government, and which was not honored by the Pakistani military junta.⁵⁰ Furthermore, the Bangladesh Constituent Assembly Members (Cessation of Membership) Order, 1972,⁵¹ which was issued by the President on March 23, 1972, stipulated that if a member of the Constituent Assembly—established with the mandate to draft a Constitution for Bangladesh—resigned or was expelled from the political party that had nominated him in the elections for the membership of the Assembly, his seat in the Assembly would become vacant.⁵² Since discipline among the political parties is crucial to the effective functioning of a parliamentary democracy, this provision was aimed at ensuring the stability of the newly introduced system.

However, it seems that the founding fathers were merely paying lip service to the idea of establishing a stable democratic system. The hidden objective underlying the introduction of this provision seems to have been to stifle the individual voices of the Members of the Assembly by compelling them to pledge their unconditional allegiance to the party that nominated them, namely the Awami League. This argument is bolstered by reference to the events leading up to the incorporation of the above provision in the Bangladesh Constituent Assembly Members (Cessation of Membership) Order in 1972. Although the Awami League enjoyed the overwhelming majority in the Constituent Assembly due to the latter being composed of those members of the party who were elected to the Pakistan National Assembly (from the province of East Pakistan)⁵³ and the East Pakistan Provincial Assembly⁵⁴ in the elections of 1970, Mujib seemed hostile to the idea of entertaining any questions raised in the Assembly about his policies or decisions. For instance, in early 1972, KM Obaidur Rahman—a Member of the Assembly from the Awami League—took the floor of the Assembly to inquire into the reasons why the legislative powers of the newly established state were vested in the

⁵⁰ BARI, *supra* note 20, at 175.

⁵¹ The Bangladesh Constituent Assembly Members (Cessation of Membership) Order, 1972, § 3.

⁵² *Id.*

⁵³ The general elections to the National Assembly of Pakistan were held on December 7, 1970. See BARI, *supra* note 20, at 175.

⁵⁴ Huq, *supra* note 48, at 60.

executive branch of the government and not in the Assembly.⁵⁵ This question raised by Rahman was, indeed, a pertinent one as the Constituent Assemblies constituted for both India and Pakistan following their independence from Britain were not only entrusted with the constituent powers of preparing a Constitution, but also with the power to enact laws for their respective nations.⁵⁶ However, a mere inquiry into the decision to depart from the constitutional arrangements followed elsewhere annoyed Mujib.⁵⁷ Consequently, Mujib, in his capacity as the Prime Minister, advised the President to issue the Order providing for the anti-defection clause discussed above.⁵⁸

Subsequently, the Constitution Drafting Committee, which was formed by the Constituent Assembly on April 1, 1972 and which was comprised of thirty-four members, incorporated an anti-defection provision in Article 70 of the Constitution of Bangladesh.⁵⁹ Article 70 of the Constitution,⁶⁰ commonly referred to as the anti-defection provision, provides that:

A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he

(a) resigns from that party; or

(b) votes in Parliament against that party;

but shall not thereby be disqualified for subsequent election as a member of Parliament.

A close perusal of the above constitutional provision reveals that it differs from the anti-defection provision contained in the Constituent Assembly Members (Cessation of Membership) Order with regard to one aspect. While Article 70 retains the incident of resignation of an MP from the political party that nominated him for contesting the election as one of

⁵⁵ Hasanuzzaman, *To Amend Article 70 or Not*, CTR. FOR POL'Y DIALOGUE (Apr. 22, 2011, 10:39 PM), http://cpd.org.bd/pub_attach/To%20Amend%20Article%2070%20or%20not.pdf [<https://perma.cc/K2RK-4RSS>].

⁵⁶ Hemant Singh, *The Constituent Assembly of India*, JAGRAN JOSH, <https://www.jagranjosh.com/general-knowledge/the-constituent-assembly-of-india-1434780545-1> (last visited Apr. 28, 2019) [<https://perma.cc/M7QQ-VX7M>].

⁵⁷ Hasanuzzaman, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ BANGL. CONST. art. 70.

⁶⁰ *Id.*

the two conditions compelling him to vacate his seat in the Parliament, it replaces the second condition prescribed by the Order, namely expulsion from political party, with the instance of an MP voting in the Parliament against his party. Thus, it is evident that the second condition prescribed by Article 70 prevents MPs from taking a stand on a parliamentary vote in defiance of the whims of political parties, thereby undermining the MPs' ability "to be independent of partisan political directives, regardless of their unreasonableness."⁶¹

Furthermore, the first condition stipulated by Article 70, namely the resignation of an MP from his political party, warranting the vacation of a parliamentary seat also unduly impacts the independence of MPs. It deprives MPs of the independence to resign from their political parties for valid reasons, including their party's substantial deviation from its foundational principles and their party's deviation from its election policy platform, and to, subsequently, retain their seats in the Parliament as independent MPs for effectively representing the interests of their electorate.⁶²

It is pertinent to note here, however, that the proposal to incorporate the provision concerning anti-defection in the Constitution was met with strong opposition from several members of the Drafting Committee, notwithstanding their affiliation with the Awami League.⁶³ As many as four members submitted notes of dissent against the proposal for incorporating Article 70 in the Constitution. These dissenting members, in emphasizing the necessity to ensure the independence of the Parliament from the stranglehold of political parties,⁶⁴ argued that the proposed Article 70 was contradicting the basic tenets of democracy. Article 70, in

⁶¹ Bari, *supra* note 25, at 81.

⁶² In this context, reference can be made, for instance, to the independence enjoyed by MPs in western democracies to retain their seats in the parliament notwithstanding their resignation from the nominating political parties. For instance, three Tory MPs in the UK very recently resigned from their party and moved to the crossbench citing that the Conservative Party "no longer reflects the values and beliefs" they "share with millions of people throughout the United Kingdom." Andrew Sparrow, *Tories Turning into Blukip': MPs Lay Out Reasons for Leaving Conservatives-as it Happened*, GUARDIAN (May 28, 2019), <https://www.theguardian.com/politics/live/2019/feb/20/joan-ryan-becomes-eighth-labour-mp-to-join-independent-group-politics-live?page=with:block-5c6d3910e4b01d34823c6b7a> [<https://perma.cc/376N-QSSC>].

⁶³ Huq, *supra* note 48, at 60–62 (Kamal Hossain, "All members . . . of the Committee [were from] the . . . Awami League, except Suranjit Sengupta, the lone opposition member from National Awami Party.").

⁶⁴ *See id.*

their estimation, sought to impose a tight rein on the MPs by stifling their individual voice.⁶⁵ However, the majority of the members of the drafting committee, on the ground of guaranteeing a stable democracy, did not pay heed to the concerns raised by the dissenting members. Therefore, it is evident that the desire to avoid the political instability of the past union with Pakistan, which was largely due to constant defections of MPs, provided the founding fathers sufficient pretext to incorporate an anti-defection clause in the Constitution.

It is noteworthy that Article 70 was the first constitutional provision concerning anti-defection in the Subcontinent. However, thirteen years, two months, and fifteen days after the Constitution of Bangladesh came into force, lawmakers in India on March 1, 1985, followed in the footsteps of the framers of the Constitution of Bangladesh by incorporating an anti-defection provision in the Constitution of India through the Constitution (Fifty-Second Amendment) Act, 1985.⁶⁶ The Indian Constitution, as amended in 1985, in the same manner as the Constitution of Bangladesh, disqualifies an MP if he or she: a) voluntarily gives up the membership of his party, which has been interpreted to mean both formal resignation and giving up of membership by means of conduct,⁶⁷ such as public expression of opposition to his party or of support for a rival party;⁶⁸ or b) defies the directives of the party on a vote in the Parliament.⁶⁹

The above provision was incorporated in the Constitution in order to effectively curb the phenomenon of political defection which had reached endemic levels in India and was undermining the sanctity of parliamentary democracy. For instance, in early 1967, a Member of the Haryana Legislative Assembly, Gaya Lal, changed his party affiliation twice in a day in an attempt to fulfill his ambition of being part of the newly formed government.⁷⁰ The disturbing phenomenon of defection for

⁶⁵ *See id.*

⁶⁶ INDIA CONST. art. 102, *amended by* The Constitution (Fifty-Second Amendment) Act, 1985; *id.* at art. 191.

⁶⁷ Naik v. India, AIR 1994 SCR 1558, ¶ 25 (India).

⁶⁸ Viswanathan v. Speaker, AIR 1996 SCR 1060, ¶ 7 (India); Rana v. Maurya, AIR 2007 SCR 1305, ¶ 17 (India); Chairman of Parliament, *Decision of the Chairman, Rajya Sabha on the Petition filed by Shri Ram Chandra Prasad Singh, Member Against Shri Sharad Yadav, Another Member Under the Tenth Schedule to the Constitution of India*, Bull. No. 57066 (2017).

⁶⁹ INDIA CONST. sched. 10(2)(b).

⁷⁰ Chitleen K. Sethi, *As Turncoats Grab Headlines, A Look Back at the Original 'Aaya Ram, Gaya Ram'*, PRINT (May 19, 2018, 1:00 PM), <https://theprint.in/politics/as-turncoats-grab-headlineslook-back-at-original-aaya-ram-gaya-ram/60324/> [<https://perma.cc/8L5X-ZECT>].

safeguarding parochial self-interests was aptly captured by Subhash C. Kashya, who was the Secretary-General of the Lower House of the Indian Parliament and its Secretariat, when he observed:

Between the fourth and fifth general election in 1967 and 1972 from among 4000 odd members of the Lok Sabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2000 cases of defection and counter-defection. By the end of March 1971 approximately 50% of the legislators had changed their party affiliations and several of them did so more than once . . . some of them as many as five times. One MLA [“Member of the Legislative Assembly”] was found to have defected five times to be a Minister for only five days. For some time, on an average almost one State Government was failing each month due to changes in party affiliations by members. In the case of State Assemblies alone, as much as 50.5 per cent [sic] of the total number of legislators changed their political affiliations at least once. The percentage would be even more alarming if such States were left out where Government happened to be more stable and changes of political affiliations or defections from parties remained very infrequent. That the lure of office played a dominant part in this ‘political horsetrading’ was obvious from the fact that out of 210 defecting legislators of the various States during the first year of ‘defection politics’, [sic] 116 were included in the Councils of Ministers in the Governments which they helped to form.⁷¹

In the same manner as the Indian Constitution, the 1973 Constitution of Pakistan, which is Pakistan’s final Constitution and which has been in force for nearly forty-five years, did not originally contain any provisions for preventing political defection. However, since the multiparty democratic system of Pakistan often produced hung parliaments, changing political affiliations due to the lure of political office became a common parlance. This tendency of politicians to indulge in frequent horse-trading undermined the stability of the democratic system and time and again provided the military with fertile ground to seize power through either declarations of martial law or emergency proclamations.⁷² Accordingly, in an effort “to prevent instability in

⁷¹ Anil Divan, *Anti-Defection Law in India*, in *THE PEOPLES’ REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION* 163, 164–65 (Graham Hassall & Cheryl Saunders eds., 1997) (citing SUBHASH C. KASHYA, *ANTI-DEFLECTION LAW AND PARLIAMENTARY PRIVILEGES* (1993)).

⁷² Hussain Zaidi, *The Law and Politics of Floor Crossing*, *DAWN* (March 13, 2011), <https://www.dawn.com/news/612849> [<https://perma.cc/S8US-QNAA>]; Bari, *supra* note 25, at 68; BARI, *supra* note 20, at 25, 26, 43, 48–50, 51–56.

relation to the formation and functioning of [the] Government,” the government of Nawaz Sharif persuaded the Parliament on July 1, 1997, to pass the Constitution (Fourteenth Amendment) Act, which incorporated an anti-defection provision in the Constitution of Pakistan, 1973.⁷³ This anti-defection provision contained in Article 63A in its current form, among other things, provides:

(1) If a member of a Parliamentary Party composed of a single political party in a House—

(a) resigns from membership of his political party or joins another Parliamentary Party; or

(b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to—

(i) election of the Prime Minister or the Chief Minister; or

(ii) a vote of confidence or a vote of no-confidence; or

(iii) a Money Bill or a Constitution (Amendment) Bill;

he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:

Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.⁷⁴

Thus, it is evident that unlike the Constitutions of Bangladesh and India, the Constitution of Pakistan stipulates both resignation from the nominating political party and joining “another political party” in the Parliament as grounds for disqualifying an MP on the ground of defection. Moreover, it does not impose a blanket ban on MPs from defying the directives of their party on a parliamentary vote. Rather, it envisages only three situations—namely, the election of the Prime Minister or the Chief Minister; a vote of confidence or no-confidence; and a money bill or a Constitution (Amendment) Bill—in which an MP is required to toe the party line in order to retain his membership in the Parliament, thereby

⁷³ Zaidi, *supra* note 72.

⁷⁴ PAK. CONST. art. 63A, § 1, cl. a.

providing significant leeway to an MP to follow his conscience in relation to an ordinary bill that may be deemed arbitrary.

Thus, unlike the Constitutions of Bangladesh and India, the Constitution of Pakistan seeks to strike a balance between preventing political defection that may cause instability and simultaneously ensuring the independence of MPs while discharging their responsibilities, such as scrutinizing the actions of the executive.

A. THE CHANGES INTRODUCED TO ARTICLE 70 BY THE REGIME OF MUJIB AND THE UNDERMINING OF THE CONCEPT OF DEMOCRACY

The argument that Mujib, under the veil of guaranteeing a stable democracy to the people of Bangladesh, favored a constitutional arrangement whereby the Parliament would be subservient to his wishes gained further momentum when he persuaded the Parliament to pass the Constitution (Fourth Amendment) Act to the Constitution on January 25, 1975—only two years, one month, and nine days after the Constitution had come into force.⁷⁵ This amendment, among other things, inserted an explanation to Article 70 of the Constitution to widen the scope of the words “votes in Parliament against [his] party” used in the provision.⁷⁶ In addition to the literal meaning of these words, the explanation appended to Article 70 further constrained the independence of MPs by providing that if an MP abstained from voting despite being present in the House or absented “himself from any sitting of Parliament” defying “the direction of the political party which nominated him at the election, he . . . [would] be deemed to have voted against that party.”⁷⁷ This explanation was complemented by the incorporation of the subsequent far-reaching changes in the Constitution by the Fourth Amendment.

The Fourth Amendment, in the first place, dispensed with parliamentary democracy in favor of a presidential system of government

⁷⁵ BANGL. CONST. amend. IV.

⁷⁶ Section 7 of the Fourth Amendment substituted Article 70 of the Constitution with the following: “A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party. Explanation. - If a member of Parliament- (a) being present in Parliament abstains from voting, or (b) absents himself from any sitting of Parliament, ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.” *Id.*

⁷⁷ *Id.*

modeled on the American pattern.⁷⁸ However, the newly introduced system rather conveniently did not stipulate the checks and balances underpinning the American form of presidential government.⁷⁹ Furthermore, although the amendment provided the procedure for electing the President, no such election was deemed necessary for Mujib. Rather he was proclaimed by the Fourth Amendment as having entered “upon the office of President of Bangladesh . . . as if elected to that office under the Constitution as amended by this Act [the Constitution (Fourth Amendment) Act].”⁸⁰ Secondly, the amendment empowered the President to declare Bangladesh a one-party state to give “full effect to any of the fundamental principles of state policy” of socialism, nationalism, secularism, and democracy “set out in Part II” of the Constitution.⁸¹ Consequently, Mujib in his capacity as the President issued an Order on February 4, 1975, proclaiming the Bangladesh *Krishak Sramik Awami League* (“BAKSAL”) (the Bangladesh Peasants and Workers National Party) to be the sole political party (“National Party”) of the nation, thereby declaring Bangladesh a one-party state.⁸²

Thirdly, the amendment also made it unusually difficult to impeach the President on the charge of violating the Constitution or of grave misconduct and to remove him on the ground of physical or mental incapacity. Any such motion to impeach or remove the President required the support of “not less than two-thirds of the total number of members of Parliament,”⁸³ and had to, subsequently, be passed “by the votes of not less than three-fourths of the total number of members of Parliament.”⁸⁴ Furthermore, upon the formation of the National Party—the BAKSAL—in February 1975, all other political parties stood dissolved.⁸⁵ Mujib, through the issuance of the Constitution of the BAKSAL on June 6, 1975, arrogated to himself the unfettered power to control all aspects of the party, including its membership.⁸⁶ No one could become an MP unless he was nominated as a candidate by the BAKSAL.⁸⁷ It is evident that the

⁷⁸ BARI, *supra* note 20, at 175.

⁷⁹ *Id.*

⁸⁰ BANGL. CONST. amend. IV, § 35.

⁸¹ *Id.* amend. IV, § 23.

⁸² BARI, *supra* note 20, at 176.

⁸³ BANGL. CONST. amend. IV, § 4 (amending BANGL. CONST. art. 54 contained in pt. IV).

⁸⁴ *Id.*

⁸⁵ BARI, *supra* note 20, at 176.

⁸⁶ *Id.*

⁸⁷ *Id.*

above changes, coupled with the mischief of Article 70, obviated any possibility of MPs attempting to impeach or remove Mujib.

The recognition of Mujib as the supreme leader of the nation by the Fourth Amendment, coupled with the structure of the BAKSAL, rendered the Parliament, which is considered the formal avenue for holding the executive accountable through deliberation and debate, a toothless body contrary to the democratic ideals pledged in the Preamble and other provisions of the Constitution discussed in Part 1 of this Article. Mujib's usurpation of parliamentary democracy in essence precluded the possibility of a democratic and peaceful change of government. Consequently, on August 15, 1975, Bangladesh not only witnessed the assassination of Mujib by a group of army officers, but also the imposition of martial law.⁸⁸ The martial law regime took measures to omit the adverse changes that were introduced to the Constitution by Mujib's regime, which included dispensation with the one-party system through the restoration of multi-party democracy in the country.⁸⁹

B. CHANGES INTRODUCED TO ARTICLE 70 FOLLOWING THE RE-INTRODUCTION OF PARLIAMENTARY DEMOCRACY IN BANGLADESH IN 1991

The declaration of martial law following Mujib's assassination marked the beginning of a turbulent period for the nation.⁹⁰ The declaration was followed by a series of coups and counter-coups owing to the power struggle within the ranks of the army.⁹¹ Although General Ziaur Rahman, who gradually ascended to the office of the President following the declaration of martial law, sought to restore much needed economic and political stability by implementing a nineteen-point economic program and commencing the electoral process, his efforts were thwarted when he was assassinated on May 30, 1981 by a disgruntled faction of the Army.⁹² Shortly after Rahman's assassination, General H.M. Ershad—the

⁸⁸ *Id.* at 177.

⁸⁹ *Id.* at 176–77; Bari, *supra* note 25, at 38.

⁹⁰ Bari, *supra* note 25, at 38–43 (“An additional assassination, a military coup, and sham elections marred the post-marital law period.”).

⁹¹ *Id.* at 38.

⁹² Bari, *supra* note 25, at 38–40; Emajuddin Ahmad, *The Military and Democracy in Bangladesh*, in *THE MILITARY AND DEMOCRACY IN ASIA AND THE PACIFIC* (R.J. May & Viberto Selochan eds., 2004); see also VERNON MARSTON HEWITT, *THE INTERNATIONAL POLITICS OF SOUTH ASIA* 129 (1992).

then-Chief of Army Staff—seized power by overthrowing the civilian government of the Bangladesh Nationalist Party (“BNP”)—the party that was formed by Rahman—in a bloodless coup on March 24, 1982, and subsequently, imposed martial law throughout the country.⁹³ Ershad, in order to perpetuate his grip on power, among other things: a) formed his own party, namely the Jatiya Party (“JP”); b) oversaw three sham elections, “two Parliamentary and one presidential”;⁹⁴ and c) oppressed his political adversaries.⁹⁵ However, these measures proved unsuccessful in yielding the desired result for Ershad.⁹⁶ In the face of a popular movement organized by the alliance of opposition political parties and participated in by people from all walks of life, Ershad was forced to resign on December 6, 1990, and to hand over power to a neutral caretaker government, which had the mandate to hold a free and fair general election.⁹⁷ Following the general election held on February 27, 1991, the newly elected Parliament in its first session unanimously passed the Constitution (Twelfth Amendment) Act, 1991, which restored parliamentary democracy in the country by entrusting the Prime Minister with the “executive power of the Republic”⁹⁸ while reducing the role of the head of the state—the President—to that of a largely ceremonial nature.⁹⁹

The Twelfth Amendment, in addition to reintroducing parliamentary democracy, also inserted an additional condition in Article 70 for broadening the scope of political defection.¹⁰⁰ This newly inserted condition stipulated that failure on the part of an MP to comply with the direction of his party leadership, which had been determined by the votes of the majority of members of that parliamentary party, would be construed as a vote against the party and, as such, would constitute

⁹³ BARI, *supra* note 20, at 180–82.

⁹⁴ Bari, *supra* note 25, at 40, 42.

⁹⁵ See BARI, *supra* note 20, 182–85; see also Ahmed, *From Monopoly to Competition*, *supra* note 33, at 60 (“Suffice it to note here that the main parliamentary parties in Bangladesh differ from each other in a number of respects. For example, the BAL and the JIB, which predate the others, owe their origins to civil society; in contrast, the BNP and the JP originated as sarkari parties – ‘parties of the state.’”).

⁹⁶ BARI, *supra* note 20, at 184–85.

⁹⁷ See *id.*; Bari, *supra* note 25, at 43–44.

⁹⁸ BANGL. CONST. art. 55, § 2; Bari, *supra* note 25, at 44–45.

⁹⁹ See BANGL. CONST. art. 48; BARI, *supra* note 20, at 184; Craig Baxter & Syedur Rahman, *Bangladesh Votes–1991: Building Democratic Institutions*, 31 ASIAN SURV. 683, 683 (1991) (providing context for the February 27, 1991 election).

¹⁰⁰ BANGL. CONST. amend. XII.

grounds for him to vacate his seat in the Parliament.¹⁰¹ It is evident that with the introduction of this stipulation in Article 70, MPs were further deprived of the opportunity to follow their conscience while voting on moral and social issues. Thus, the Twelfth Amendment merely paid lip service to the idea of restoring parliamentary democracy in the country. Instead of liberalizing anti-defection, which impedes the competence of Parliament to hold the executive accountable by depriving MPs of their independence, this amendment inserted an additional condition which further widened the scope of defection.

Article 70 was once again amended following the general election of 2008 when the government of the Bangladesh Awami League (“BAL”)-led Grand Alliance used its three-fourths majority in the Parliament to pass the Constitution (Fifteenth Amendment) Act, 2011.¹⁰² The Fifteenth Amendment, among other things, restored the original provisions of Article 70, thereby removing the explanation as had been inserted by the Fourth Amendment and deleting the stipulation appended by the Twelfth Amendment.¹⁰³ Consequently, Article 70, as it stands now, does not have an extended meaning and as such, must be “strictly construed.”¹⁰⁴

Having explored the events which necessitated the incorporation of the anti-defection provision in the Constitution and its evolution, an attempt will now be made to examine: a) the efficacy of Article 70 in curbing unprincipled defection; and b) the impact of this provision on the independence of MPs in discharging their responsibilities.

III. THE EFFECTIVENESS OF ARTICLE 70 IN CURBING UNPRINCIPLED DEFECTION

It may be recalled from the discussion in Part II of this Article that Article 70 was incorporated in the Constitution by the framers to apparently ensure the stability of democratically elected governments by preventing the sort of unprincipled defections that plagued governments during the days when Bangladesh was a province of Pakistan.¹⁰⁵ Since the reintroduction of parliamentary democracy in 1991, there have been a few instances where Article 70 has had this desired effect.

¹⁰¹ *Id.*

¹⁰² Bari, *supra* note 25, at 65, 71–72; BANGL. CONST. amend. XV.

¹⁰³ BANGL. CONST. amend. XV, § 25.

¹⁰⁴ Bangladesh v. Siddiqui, (2017) Civil Appeal No. 6 (AD).

¹⁰⁵ See Secretary v. Hossain, (1999) 19 BLD (AD) 276, ¶ 11 (Bangl.).

The first set of defections in Bangladesh following the restoration of parliamentary democracy took place in 1995 when three JP MPs, namely Mr. Ebadur Rahman Chowdhury, Major General Mahmudul Hasan, and Mr. Paritosh Chakroborty, joined the ruling BNP.¹⁰⁶ Consequently, the JP brought the defection of these MPs to the notice of then-Speaker—Sheikh Razzak Ali—for a ruling that the seats of these MPs should be vacated due to the terms of Article 70 of the Constitution.¹⁰⁷ The Speaker, subsequently, referred the dispute as to whether the three JP MPs should vacate their seats pursuant to Article 70, to the Election Commission (“EC”) for adjudication under Article 66(4) of the Constitution.¹⁰⁸ The EC declared that the actions of the three MPs had attracted the mischief of Article 70 because defecting to another political party was tantamount to resignation from the JP, which had nominated them for election to the Parliament.¹⁰⁹ Pursuant to the decision of the Commission, the Speaker declared the seats of these three MPs vacant.¹¹⁰ It is, therefore, noteworthy that the defection of the three JP MPs gave rise to the interpretation that joining another political party in the Parliament would be deemed “resignation” for the purposes of Article 70 and, accordingly, would warrant the expulsion of the concerned MP from the Parliament.

The second and a rather curious set of defections took place in February 1998—one year and eight months after the BAL had formed a “consensus government” following the general election held in June 1996—when two MPs, namely Md. Habibur Rahman Shawpon and Md. Alauddin, belonging to the BNP—the principal opposition party in the Parliament—were sworn in as cabinet ministers.¹¹¹ It is pertinent to stress here that these two BNP MPs in joining the “consensus government” had

¹⁰⁶ Hossain v. Speaker, (1998) 27 CLC (HCD) 3629, ¶ 9 (Bangl.).

¹⁰⁷ *Id.*

¹⁰⁸ BANGL. CONST. art. 66, § 4 (consolidated) (“If any dispute arises as to whether a member of Parliament . . . after his election . . . should vacate his seat pursuant to article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.”).

¹⁰⁹ Hossain, 27 CLC (HCD) at ¶ 9.

¹¹⁰ *Id.*

¹¹¹ Secretary v. Hossain, (1999) 27 CLC (AD) 3627, ¶ 2 (Bangl.); *Sheikh Hasina, 1996-2001*, GLOBAL SECURITY, <https://www.globalsecurity.org/military/world/bangladesh/pm-hasina-1996.htm> (last visited May 26, 2019) [<https://perma.cc/CN7P-GN7S>] (Sheikh Hasina characterized her government as a “consensus government” because it included one minister from the JP and another from the Jatiyo Samajtantrik Dal—a leftist political party. However, neither of these parties entered into a formal coalition arrangement with the BAL.).

neither resigned from the BNP in order to formally join the BAL, nor voted against the directives of the BNP in Parliament.¹¹² Accordingly, the ruling BAL claimed that the defection clause contained in Article 70 would not come into play to vacate the seats of these two MPs. Notwithstanding this claim, the BNP maintained that the concerned MPs were fully aware that joining the “consensus government” would be a violation of the party discipline as the BNP was not only the principal opposition party but also “opposed to the idea” of such a government.¹¹³ Therefore, the BNP claimed that the act of joining the government of BAL amounted to resignation for the purposes of Article 70 of the Constitution.¹¹⁴ Consequently, it requested the Speaker to publish notification declaring the seats of the offending MPs vacant.¹¹⁵ However, the Speaker—Humayun Rashid Chowdhury—reached the conclusion that a dispute had not arisen under Article 70 of the Constitution as the concerned MPs “neither resigned nor voted in the Parliament against their party (BNP).”¹¹⁶ Thus, it is evident that the Speaker favored a narrow interpretation of Article 70, which was very much consistent with the official explanation put forward by the ruling BAL regarding the defection of the two BNP MPs. It should be further stressed here that the Speaker, in deciding that there was no dispute under Article 70 of the Constitution, had usurped the power of the EC. For the Constitution, as pointed out above in Article 66(4), entrusts the EC with the authority to decide whether an MP should vacate his seat for falling foul of Article 70.

Accordingly, the BNP challenged the decision of the Speaker before the Supreme Court of Bangladesh.¹¹⁷ Both Divisions of the Supreme Court, namely the High Court Division (“HCD”) and the Appellate Division (“AD”), were unanimous in their decision to hold that it was inappropriate for the Speaker to put “his own interpretation on the word ‘resignation’”¹¹⁸ and to deprive the EC of its constitutionally designated function to determine the “question of resignation” under Article 70.¹¹⁹ Thus, both Divisions held that the Speaker was

¹¹² Hossain, 27 CLC (HCD) at ¶¶ 2–3.

¹¹³ Hossain, (1998) 27 CLC (HCD) at ¶ 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Hossain, (1999) 27 CLC (AD) at ¶ 4.

¹¹⁷ See Hossain, (1998) 27 CLC (HCD) at ¶¶ 63–64.

¹¹⁸ Hossain, (1999) 27 CLC (AD) at ¶ 28.

¹¹⁹ *Id.* ¶ 22.

Constitutionally obligated to refer the matter regarding the defection of the two BNP MPs to the EC for its decision under Article 66(4).¹²⁰ Pursuant to the decision of the Supreme Court, the Speaker referred the matter to the EC which declared that joining the ministry of a political party which is neither in alliance with the MPs' party nor supported by it, will trigger Article 70 of the Constitution.¹²¹

IV. IMPACT OF ARTICLE 70 ON THE INDEPENDENCE OF MPS

Notwithstanding the effectiveness of Article 70 in curbing unprincipled defection, this provision has had an adverse effect on the independence of the MPs to participate in the proceedings of the House to: a) efficiently represent their electorate; and b) hold the executive accountable for its action. In this context, reference can first be made to the instance of Major (Retired) Md. Akhtaruzzaman, who won a parliamentary seat in the 1996 general election on a BNP ticket only to lose it due to the terms of Article 70.¹²² After the BAL had formed a government by winning a majority of the seats in the 1996 election, the BNP boycotted numerous sessions of the House due to reasons ranging from the Speaker's apparent bias against it, the government's crackdown on its activists, and the refusal of the government to release the incarcerated opposition leaders.¹²³ However, Aktaruzzaman, in defiance of the decision of his party, joined the 19th session of the Parliament on September 10, 2000, to raise issues facing the electorate in his

¹²⁰ *Id.* ¶ 28.

¹²¹ See Hossain, (1998) 27 CLC (HCD) at ¶ 62; Rashed Chowdhury, *Hasina's Cabinet Sets a Record*, GULF NEWS (June 23, 2001, 12:00 AM), <https://gulfnnews.com/uae/hasinas-cabinet-sets-a-record-1.419613> [<https://perma.cc/5YB8-6HBM>].

¹²² Hossain v. Akhtaruzzaman, (2000) Civil Appeal No. 1 (Bangl.). See Hossain, (1998) 27 CLC (HCD) at ¶ 10; *Awami League asks Election Commission to Cancel Siddique's Membership in Parliament*, BDNEWS24.COM (Aug. 2, 2015, 8:32 PM), [HTTPS://BDNEWS24.COM/POLITICS/2015/08/02/AWAMI-LEAGUE-ASKS-ELECTION-COMMISSION-TO-CANCEL-LATIF-SIDDIQUES-MEMBERSHIP-IN-PARLIAMENT](https://bdnews24.com/politics/2015/08/02/awami-league-asks-election-commission-to-cancel-latif-siddiques-membership-in-parliament) [<https://perma.cc/CP7H-4MS9>]; *Bangladesh: Country Reports on Human Rights Practices Bureau of Democracy, Human Rights and Labor 2001*, U.S. DEP'T OF STATE (Mar. 4, 2002), <https://2009-2017.state.gov/j/drl/rls/hrrpt/2001/sa/8224.htm> [hereinafter *Bangladesh: Country Reports on Human Rights Practices*] [<https://perma.cc/F939-WXML>]; *Abu Hena Not to Lose Parliament Membership*, BDNEWS24.COM (Nov. 23, 2005, 6:00 PM), <https://bdnews24.com/politics/2005/11/23/abu-hena-not-to-lose-parliament-membership-speaker> [hereinafter *Abu Hena*] [<https://perma.cc/YBJ3-SWRK>].

¹²³ See Ahmed, *From Monopoly to Competition*, *supra* note 33, at 70.

constituency.¹²⁴ However, such defiance on the part of Akhtaruzzaman was deemed resignation “by conduct or otherwise against the . . . discipline and dictates”¹²⁵ of the BNP for the purposes of Article 70 of the Constitution and, as such, he lost his seat in the Parliament.¹²⁶ This case demonstrates the manner in which Article 70 strips MPs of their independence to perform even their core functions, such as participating in parliamentary sessions to effectively represent their electorate, if such functions were deemed as being violative of the directives of their political parties.

Secondly, Article 70, by compelling MPs to abide by the directions of their political parties, has particularly impeded the ability of the backbenchers of the ruling party to work with opposition MPs to effectively scrutinize the actions of the executive branch of the government. In fact, the ruling party backbenchers, due to the presence of Article 70, cannot muster the courage to criticize or oppose legislation and policies proposed by the executive notwithstanding their arbitrariness. According to one study, which calculated the average number of amendments moved by MPs to bills put forward by the executive, ruling party backbenchers have been unwilling to propose even amendments to bills,¹²⁷ thereby demonstrating the redundant nature of their activism and participation inside the Parliament. The exclusionary role played by ruling party MPs in law-making is further manifested by several instances of enactment of bills into laws within a few minutes of their tabling in the House without any robust debate or deliberation.¹²⁸ In this context, reference can be made to the passage of the Local Government (City Corporation) Amendment Bill, 2011, into law, which split the Dhaka City Corporation into two separate entities, notwithstanding widespread

¹²⁴ Hossain, Civil Appeal No. 1; *Bangladesh: Country Reports on Human Rights Practices*, *supra* note 122.

¹²⁵ See Hossain, (1998) 27 CLC (HCD) at ¶ 41; *Bangladesh: Country Reports on Human Rights Practices*, *supra* note 122; *Abu Hena*, *supra* note 122.

¹²⁶ *Bangladesh: Country Reports on Human Rights Practices*, *supra* note 122; *Abu Hena*, *supra* note 122; *Shawkhawati Liton, Democracy Pays Heavily for Article 70*, THE DAILY STAR (May 11, 2016, 11:56 AM), <https://www.thedailystar.net/op-ed/politics/democracy-pays-heavily-article-70-1221643> [<https://perma.cc/KS6Y-NN92>].

¹²⁷ Ahmed, *From Monopoly to Competition*, *supra* note 33, at 65. The report shows a minuscule amount of amendments moved by ruling party MPs regarding bills proposed by the executive, i.e., on an average the total number of amendments per bill varies from 0.5 (first parliament) to 4.0 (fifth parliament) and 2.0 (seventh parliament).

¹²⁸ See generally Ahmed, *From Monopoly to Competition*, *supra* note 33.

opposition by civil society groups and opposition political parties.¹²⁹ The Parliament passed the bill “within four minutes” of its tabling in the House due to the allegiance and undivided loyalty of the majority MPs to the ruling BAL.¹³⁰

However, the above issues have further been exacerbated following recent general elections. For these elections have produced subservient parliaments devoid of any actual opposition,¹³¹ which would sustain the “struggle” for the promotion of the rule of law by stimulating, among other things, “responsible and reasoned debate.”¹³² Consequently, the executive, by virtue of Article 70, has been guaranteed the absolute support of the MPs to pass laws for substituting the rule of law with the rule of man in contravention of one of the democratic virtues on which the nation was founded, as is evident from the third preamble of the Constitution:

[I]t shall be a fundamental aim of the State to realize through the democratic process a . . . society . . . free from exploitation a society in which the rule of law . . . will be secured for all citizens.¹³³

In this context, it is apposite to discuss the enactment of two far-reaching constitutional amendments; namely, the Constitution (Fifteenth Amendment) Act, 2011¹³⁴ and the Constitution (Sixteenth Amendment) Act, 2014.¹³⁵ These constitutional amendments not only made the parliament and the judiciary subservient to the executive, but also reinforced the detrimental effects of the anti-defection clause, wherein the MPs meekly submit to the directions of the political party in power.

A. THE ENACTMENT OF THE CONSTITUTION (FIFTEENTH AMENDMENT) ACT, 2011

Before discussing the enactment of the Constitution (Fifteenth Amendment) Act, 2011, it is necessary to briefly shed some light on the

¹²⁹ Shakawat Liton & Rashidul Hasan, *JS Splits DCC in 4 Minutes*, THE DAILY STAR (Nov. 30, 2011, 12:00 AM), <https://www.thedailystar.net/news-detail-212277> [<https://perma.cc/8X78-Y4N9>].

¹³⁰ Bari, *supra* note 25, at 65.

¹³¹ *Id.* at 77.

¹³² Julius Kiiza, Paper Presented at the Regional Conference on Political Parties and Democratisation in East Africa: The Role of Opposition Parties in a Democracy (Aug. 8, 2005).

¹³³ BANGL. CONST. pmbl.

¹³⁴ *See generally id.* amend. XV.

¹³⁵ *See generally id.* amend. XVI.

troubling electoral history of Bangladesh. Since independence, successive governments have resorted to widespread electoral malpractices, such as stuffing of ballot papers in ballot boxes, voter intimidation, and the capturing of polling booths to influence the outcome of general elections in their favor to cling on to power indefinitely.¹³⁶ Consequently, the citizens of the nation have time and again been deprived of the opportunity to exercise “their democratic right to vote in free, fair and impartial general elections”¹³⁷ and to subsequently elect a government of their choice. The issues surrounding the supervision of free and fair general elections ultimately led the politicians of the nation to broker a political solution, i.e., the incorporation of the system of Non-Party Care-taker Government (“NPCG”) in the Constitution through the Constitution (Thirteenth Amendment) Act in 1996. The Constitution, as amended by the Thirteenth Amendment, stipulated that a NPCG, headed by the last retired Chief Justice of the country and composed of ten additional advisers appointed among eminent citizens who were not members of any political party, would be formed on the dissolution of the Parliament “with the principal mandate of assisting” the Election Commission to hold the general election “in a free, fair and impartial manner within 90-days of the dissolution of the Parliament.”¹³⁸ The idea underlying this system was that the NPCG would have no motivation to influence the outcome of general elections due to its neutral character.¹³⁹ Accordingly, the NPCG was successful in supervising three free and fair general elections in 1996, 2001, and 2008 respectively.

However, notwithstanding the success of the system of NPCG in facilitating the enjoyment of peoples’ right to vote in free, fair, and credible general elections and to, subsequently, elect governments truly representative of their will, the BAL, upon returning to power following the general election of 2008, began to take concrete steps for repealing the system from the Constitution so as to hold the general election of 2014 under its supervision and to, consequently, perpetuate its grip on power. To this end, on September 26, 2010, the government of the BAL-led Grand Alliance appointed Justice A.B.M. Khairul Haque as the Chief Justice of the nation, in violation of the convention of seniority, which had

¹³⁶ See Bari, *supra* note 25, at 45, 76.

¹³⁷ See *id.* at 24, 57.

¹³⁸ Bari, *supra* note 25, at 31, 50.

¹³⁹ *Id.* at 50–51.

previously been followed in appointing the Chief Justice among the judges of the AD, albeit with a few exceptions.¹⁴⁰ This appointment of Justice Haque in supersession of senior judges of the AD was made with the expectation that he would declare the Thirteenth Amendment, which incorporated the constitutional provisions concerning the NPCG, as being *ultra vires* the Constitution, thereby ensuring that the general election scheduled for January 2014 would be held under the supervision of the BAL. Justice Haque executed this plan on May 10, 2011—within seven months and fourteen days of his appointment—while delivering the majority judgment in the case of *Abdul Mannan Khan v. Bangladesh (Thirteenth Amendment Case)*,¹⁴¹ which was an appeal against the decision of the HCD affirming the constitutionality of the provisions concerning the NPCG. In his judgment, he prospectively declared the Thirteenth Amendment unconstitutional.¹⁴² Strikingly, Justice Haque did not issue a full judgment; rather, he issued merely a one-page long “short-order,”¹⁴³ which was devoid of any reference to the “precise reasoning” for declaring the Thirteenth Amendment concerning the NPCG unconstitutional.¹⁴⁴ Furthermore, Justice Haque, contrary to his decision of invalidating the system of NPCG, recommended in his “short order” that the general elections scheduled for 2014 and 2019 should be held under the supervision of the NPCG.¹⁴⁵ He sought to justify such an incongruous recommendation on the basis of the “old age principles,” namely, *quod alias non est licitum, necessitas licitum facit* (“necessity makes lawful what is otherwise considered unlawful”) and *salus populi suprema lex* (“the safety of the people is considered the supreme law”).¹⁴⁶

The BAL government, which commanded the support of three-fourths of the total number of MPs, wasted no time in exploiting the declaration of unconstitutionality of the NPCG as contained in the “short-

¹⁴⁰ See generally M. Ehteshamul Bari, *Supersession of the Senior-Most Judges in Bangladesh in Appointing the Chief Justice and the Other Judges of the Appellate Division of the Supreme Court: A Convenient Means to a Politicized Bench*, 18 SAN DIEGO INT’L L.J. 33, 43–51 (2016); see also Bari, *supra* note 25, at 74.

¹⁴¹ *Khan v. Bangladesh*, (2003) 55 DLR (AD).

¹⁴² *SC Sets Aside Caretaker Govt System*, BANGL. L. HOUSE (June 10, 2011), <https://bdlawhouse.blogspot.com/2011/06/sc-sets-aside-caretaker-govt-system.html> [https://perma.cc/SA92-QEXU].

¹⁴³ *Id.*

¹⁴⁴ Bari, *supra* note 25, at 71.

¹⁴⁵ *Id.*

¹⁴⁶ *SC Sets Aside Caretaker Govt System*, *supra* note 142.

order” issued by Justice Haque. Within fifty-three days of the issuance of the order, on July 3, 2011, the regime used its overwhelming parliamentary majority to pass the Constitution (Fifteenth Amendment) Act repealing the system of NPCG from the Constitution.¹⁴⁷ It is striking that not a single backbencher belonging to the BAL took the parliamentary floor to: a) stress the necessity of postponing any attempt to repeal the system of NPCG until after the issuance of the full judgment of the Court in order to vigorously deliberate on the merits of the reasoning advanced by the Court for declaring the system as being *ultra vires* the Constitution; b) point out the efficacy of the system of NPCG in facilitating the holding of free, fair, and credible general elections where people could exercise their democratic rights without any fear or intimidation; c) underscore the fact that the election manifesto of the BAL, which was published prior to the 2008 general election, did not contain any reference to the proposal of omitting the system of NPCG from the Constitution, and as such, the citizens of the nation were not afforded any meaningful opportunity to express their opinion on such a pivotal issue; or d) draw attention to the fact that notwithstanding the declaration of unconstitutionality of the system of NPCG, the “short-order” also recommended the necessity to retain the system for conducting the general elections of 2014 and 2019.¹⁴⁸

It is, therefore, evident that due to the presence of Article 70, the BAL backbenchers merely carried out the wishes of the party high command to repeal the system of NPCG in dereliction of their responsibilities as lawmakers, thereby cementing one-party rule in Bangladesh.

B. THE ENACTMENT OF THE CONSTITUTION (SIXTEENTH AMENDMENT) ACT, 2014

The enactment of the Fifteenth Amendment had a devastating impact on the future of participatory democracy in Bangladesh. For it enabled the BAL government to conduct a questionable general election in January 2014, which was not only boycotted by all the major opposition political parties, including the BNP and its allies, but also an overwhelming majority of the voters due to the apprehension that in the

¹⁴⁷ See BANGL. CONST. amend XV, § 21. (“In the Constitution, ‘CHAPTER IIA- NON-PARTY CARETAKER GOVERNMENT’ shall be omitted.”).

¹⁴⁸ Bari, *supra* note 25, at 74.

absence of a neutral system conducting the electoral process, the outcome of the election would be manipulated in favor of the incumbent.¹⁴⁹ Owing to the opposition boycott, the BAL and its allies won 154 out of the 300 parliamentary seats unopposed.¹⁵⁰ Thus, the BAL won the right to form government even before a single vote was cast. The elections for the remaining 146 parliamentary seats were held in January 2014. However, not only was the turnout strikingly low in these electorates, which is evident from the fact that “only 20 percent” of the registered voters turned out to vote,¹⁵¹ but the regime also resorted to “widespread electoral malpractices such as stamping and stuffing of ballot papers in ballot boxes with the aid of presiding officers”¹⁵² in its efforts to exaggerate the voter turnout numbers.¹⁵³

By supervising the one-sided and virtually voter-less general election, the BAL had secured 234 seats in the Parliament on its own.¹⁵⁴ Since no opposition political parties, as pointed out above, had participated in the polls, the BAL persuaded its principal ally in the Grand Alliance—the JP—to act as the “domestic puppet opposition” in the Parliament.¹⁵⁵ The competence of the JP to act as an effective opposition in the Parliament was further undermined by the appointment of: a) three JP MPs as ministers in the BAL Government; and b) Ershad—the former autocratic ruler and the Chairman of the JP—as the special envoy to the Prime Minister with the rank and status of a minister. Thus, the Parliament resultant of the 2014 general election emerged as the first and only

¹⁴⁹ See *id.* at 72, 75–76; Antonio Savio & M. Niaz Asadullah, *Bangladesh is Booming, but Slide Towards Authoritarianism Could Burst the Bubble*, THE CONVERSATION (Feb. 28, 2019, 4:29 AM), <https://theconversation.com/bangladesh-is-booming-but-slide-towards-authoritarianism-could-burst-the-bubble-112632> [<https://perma.cc/MX2U-VEV3>]. See also *Biased Institutions Usher Bangladesh's Ruling Party to a Third Term*, THE ECONOMIST (Jan. 5, 2019) <https://www.economist.com/asia/2019/01/05/biased-institutions-usher-bangladeshs-ruling-party-to-a-third-term> [<https://perma.cc/HPX8-TN7A>].

¹⁵⁰ Bari, *supra* note 25, at 76.

¹⁵¹ Ali Riaz, *Bangladesh*, in AN INTRODUCTION TO SOUTH ASIAN POLITICS 58, 68 (Neil DeVotta ed., 2015).

¹⁵² Bari, *supra* note 25, at 76.

¹⁵³ See Syed Tashfin Chowdhury, *Violent Bangladesh Poll 'Not Credible'*, AL JAZEERA (Jan. 7, 2014), <https://www.aljazeera.com/indepth/features/2014/01/violent-bangladesh-poll-not-credible-201417153340105129.html> [<https://perma.cc/5AVH-7R33>].

¹⁵⁴ See Sumit Ganguly, *The World Should Be Watching Bangladesh's Election Debacle*, FOREIGN POLICY (Jan. 7, 2019 5:18 PM), <https://foreignpolicy.com/2019/01/07/the-world-should-be-watching-bangladeshs-election-debacle-sheikh-hasina/> [<https://perma.cc/HDU6-RQ59>].

¹⁵⁵ Bari, *supra* note 25, at 77.

Parliament in the world where opposition MPs were also made members of the executive branch of government.¹⁵⁶

After ensuring the subservience of the Parliament, the BAL regime turned its focus to the third arm of the government; namely, the judiciary, which is entrusted with the responsibility of maintaining the rule of law by scrutinizing the actions of the executive in light of the Constitution. To this end, it passed the Constitution (Sixteenth Amendment) Act on September 17, 2014—only seven months after retaining power through the voter-less general election—diminishing the independence of the judiciary, which is guaranteed by Articles 22, 88(b), 89(1), and 94(4) of the Constitution of Bangladesh,¹⁵⁷ and is also recognized as one of the basic structures of the Constitution.¹⁵⁸

It is apposite to mention here that since security of tenure, which is one of the fundamental guarantees concerning judicial independence, shields judges from the improper influences of the political branches of government while deciding cases, the Constitution of Bangladesh, prior to the enactment of the Sixteenth Amendment, explicitly contained this guarantee, which had been inserted by the martial law regime of Rahman through the Proclamations (Tenth Amendment) Order, 1977, and later ratified by the Constitution (Fifth Amendment) Act, 1979.¹⁵⁹ The Constitution provided that a judge of the Supreme Court could not be removed from office by the President unless on the recommendation of the Supreme Judicial Council (“SJC”)—comprised of the Chief Justice and the two next senior judges of the AD—after an investigation to ascertain whether the judge had become incapable of properly discharging the duties

¹⁵⁶ Three lawmakers of Jatiya Party (“JP”), which was led by former President H.M. Ershad, were inducted into the cabinet by the BAL regime. It is worth mentioning that JP had participated in the election as an opposition party. *See id.* at 52; *see also* Palash Kamruzzaman, *Bangladesh's Painful Journey to Democracy is Still Far from Over*, THE CONVERSATION (Aug. 11, 2017 4:46 AM), <https://theconversation.com/bangladeshs-painful-journey-to-democracy-is-still-far-from-over-80498> [<https://perma.cc/EKJ5-8FE3>].

¹⁵⁷ BANGL. CONST. art. 22 (“The State shall ensure the separation of the judiciary from the executive organs of the State.”); *id.* at art. 88, § b, cl. ii (“The following expenditure shall be charged upon the Consolidated Fund . . . the remuneration payable to . . . the Judges of the Supreme Court.”); *id.* at art. 89, § 1 (“So much of the annual financial statement as relates to expenditure charged upon the Consolidated Fund may be discussed in, but shall not be submitted to the vote of, Parliament.”); *id.* at art. 94, § 4 (“Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.”).

¹⁵⁸ *Chowdhury v. Bangladesh*, (1989) 18 CLC (AD) 416 (identifying the independence of the judiciary, among other things, as one of the basic structures of the Constitution which cannot be changed by means of an amendment); Bari, *supra* note 25, at 82.

¹⁵⁹ Bari, *supra* note 25, at 80.

of his office due to “physical or mental incapacity” or had been “guilty of gross misconduct.”¹⁶⁰

It is noteworthy that the Constitution invested a body of judicial standing with the pivotal task of investigating allegations brought against a judge of the Supreme Court. Furthermore, the Constitution did not allow for representation of the executive branch in the SJC by confining its membership solely to the Chief Justice and the senior-most Justices of the AD, thereby insulating the SJC from political pressures and maintaining the integrity of the process. This process, stipulated by the Constitution for removing the judges of the Supreme Court, was also consistent with the international norms on judicial independence, such as the Latimer House Guidelines for the Commonwealth, 1998, which stipulate that “[i]n cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence [sic] and to be judged by an independent and impartial tribunal.”¹⁶¹

However, the BAL government through the enactment of the Sixteenth Amendment repealed the above procedure for removing judges of the apex court of the nation and instead invested the Parliament with this pivotal task.¹⁶² It can be strongly argued that the objective underlying this amendment was to subject the judiciary to the whims of an all-powerful executive. For the Parliament resultant of the 2014 election, as mentioned earlier, was devoid of any real opposition and was subservient to the wishes of the executive branch of government. These issues are compounded by the constraints imposed by Article 70 of the Constitution on MPs, which made it a well-nigh impossibility for them to be independent of party directives, notwithstanding their arbitrariness, while exercising the potential power of removing a judge of the Supreme Court.

The fact that Article 70 played a role in compelling MPs to blindly comply with the wishes of the BAL during the parliamentary vote on the Sixteenth Amendment is reinforced by the fact that the Amendment was passed unanimously “with a 327-0 vote.”¹⁶³ Neither backbenchers

¹⁶⁰ BANGL. CONST. art. 96, §§ 3, 5, 6.

¹⁶¹ J. VAN ZYL SMIT, *THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES: A COMPENDIUM AND ANALYSIS OF BEST PRACTICE* 88 (2015) (citing the *Latimer House Guidelines*).

¹⁶² BANGL. CONST. amend. XVI; Bari, *supra* note 25, at 80–81.

¹⁶³ Shameema Rahman, *Bangladesh: Sixteenth Amendment to Constitution Empowers Parliament to Impeach Justices*, LIBRARY OF CONGRESS: GLOB. LEGAL MONITOR (Nov. 10, 2014), <https://www.loc.gov/law/foreign-news/article/bangladesh-sixteenth-amendment-to-constitution-empowers-parliament-to-impeach-justices/> [https://perma.cc/NP2N-444D].

belonging to the BAL nor MPs belonging to the puppet opposition voiced their opposition to the Amendment for eroding the separation of powers among the three organs of the state and for diminishing the independence of the judiciary by dispensing with a transparent method for removing judges. They did not take the floor to point out that:

- a) the electorate in their constituencies deem the superior judiciary as the last hope, particularly when aggrieved or adversely affected by actions of the government of the day, and
- b) the Sixteenth Amendment by undermining the independence of the judiciary, frustrated the legitimate expectation of the litigants to have those disputes, where the government is a party, to be adjudicated in an impartial manner.¹⁶⁴

It is evident that the BAL government, through the above constitutional amendments, secured its omnipotence over institutions which are meant to act as checks on its powers for ensuring the maintenance of the rule of law. In both of these cases, the amendments were passed without any deliberation or opposition from MPs. Such timidity on the part of MPs can arguably be attributed to Article 70, which is akin to an albatross around their necks. Thus, Article 70 has contributed towards the BAL government's attempt to become, in the words of Harold Laski, "the unlimited master of the state."¹⁶⁵

V. THE JUDICIAL RESPONSE TO THE ADVERSE EFFECTS OF ARTICLE 70

The superior judiciary of Bangladesh was first presented with the opportunity to discuss the adverse effects of Article 70 in the 1998 case of *Khondker Delwar Hossain v. The Speaker, Bangladesh Jatiyo Shangshad (Parliament)*¹⁶⁶ when two BNP MPs, as pointed out earlier in Part III, defected to join the "consensus government" of BAL. However, the HCD of the Supreme Court, in determining the issue of whether the defection of the BNP MPs gave rise to a dispute for the purposes of Article 70 of the Constitution requiring the EC's adjudication under Article 66(4), refrained from critically examining the impact of Article 70 on the independence of parliamentarians.

¹⁶⁴ See generally Bari, *supra* note 25, at 35.

¹⁶⁵ HAROLD J. LASKI, A GRAMMAR OF POLITICS 542 (1930).

¹⁶⁶ *Hossain v. Speaker*, (1998) 27 CLC (HCD) 3629, ¶ 3 (Bangl.).

By way of contrast, on appeal, Chief Justice Mustafa Kamal in *Secretary, Parliamentary Secretariat v. Khondker Delwar Hossain*,¹⁶⁷ engaged in an academic discussion about the concept of the independence of parliamentarians. To this end, Justice Kamal made reference to the Latimer House Guidelines for the Commonwealth of 1998, which, as noted in Part I, *inter alia*, stipulate that expulsion of MPs from parliament for defection or floor-crossing “should be viewed as a possible infringement” of their independence.¹⁶⁸ The learned judge stopped short of terming the anti-defection provision as being fundamentally inconsistent with the concept of the independence of parliamentarians, taking into account the nascent nature of the country’s democracy. However, he expressed optimism that Article 70 would be deemed redundant once the nation’s democracy evolved into a mature one devoid of horse-trading, poaching of MPs, and defection for fulfilment of parochial personal ambitions of becoming cabinet ministers. As Justice Kamal observed:

[T]he . . . provisions [of the Latimer House Guidelines] are . . . goals to be achieved by stages. If at any time our country, because of maturity in Parliamentary practices, achieves a position which renders the application of Article 70 unnecessary or rare, then perhaps the guidelines given above can even be applied to the interpretation of our Constitution.¹⁶⁹

It was only when determining the constitutionality of the Sixteenth Amendment, which diminished the independence of the judiciary by investing the subservient Parliament with the power to remove the judges of the Supreme Court, that both the divisions of the Supreme Court openly grappled with the adverse effects of the anti-defection provision contained in Article 70. The constitutionality of the said amendment was challenged before a three-member bench of the HCD within a few months of its enactment in the case of *Advocate Asaduzzaman Siddiqui v. Bangladesh* (“Sixteenth Amendment Case”).¹⁷⁰ Justice Moyeenul Islam Chowdhury, in delivering the majority judgment of the Court, struck down the amendment as being “colourable, void and ultra vires the Constitution.”¹⁷¹ Justice Chowdhury reached such a conclusion due to, *inter alia*, the manner in which the anti-defection provision

¹⁶⁷ *Secretary v. Hossain*, (1999) 27 CLC (AD) 3627, ¶¶ 29, 31 (Bangl.).

¹⁶⁸ See BREWER ET AL., *supra* note 14, at 64.

¹⁶⁹ See *Hossain*, (1999) 27 CLC (AD) at ¶ 30.

¹⁷⁰ *Siddiqui v. Bangladesh*, (2014) Writ Petition No. 9989 (HCD) 1, 2.

¹⁷¹ *Id.* at 165.

contained in Article 70 of the Constitution constrains the competence of MPs to be independent of partisan political directives in carrying out their varied responsibilities in the Parliament, including law-making, holding the executive accountable for its actions and raising the issues of their electorate.¹⁷² In this context, the observations of the learned judge regarding Article 70 are noteworthy:

Article 70 of the Constitution of Bangladesh . . . has fettered the Members of Parliament unreasonably and shockingly. It has imposed a tight rein on them. Members of Parliament can not [sic] go against their partyline [sic] or position on any issue in the Parliament. They have no freedom to question their party's stance in the Parliament, even if it is incorrect and flawed. They can not [sic] vote against their party's decision. They are, indeed, hostages in the hands of their party high command.

Because of Article 70 of the Constitution, a Member of Parliament effectively loses his character as an agent of the people and becomes the nominee of his party. What is dictated by the cabinet of the ruling party or the shadow cabinet of the opposition, Members of Parliament must follow them meekly ignoring the will and desire of the electorate of their constituencies. There starts a process of distance and apathy between the Members of Parliament and their electors. Such Members are dummies in Parliament. Having a solid grip over the majority of the Members of Parliament, the party-in-power moves to influence the executive, judiciary and other instrumentalities. It eventually results in what we say, 'daleokaran'- the political terminology to indicate a 'group oriented society'.¹⁷³

In light of this, the learned judge held that the Sixteenth Amendment when considered in conjunction with Article 70 of the Constitution whittled down the independence of the judiciary by leaving the judges of the Supreme Court "at the mercy of the party" in power.¹⁷⁴

The BAL government, eight months after the pronouncement of the judgment of the HCD invalidating the Sixteenth Amendment, appealed the decision of the HCD. The AD, led by the Chief Justice of the nation—S.K. Sinha—unanimously affirmed the decision of the HCD, thereby reinstating the constitutional provisions which entrusted the Chief Justice-led SJC with the authority to investigate allegations brought against a judge of the Supreme Court and to, subsequently, recommend whether or not that judge should be removed from office. Justice Sinha,

¹⁷² *Id.* at 123–24.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 6, 124.

while delivering the judgment of the court on August 1, 2017, fully endorsed the “views taken by the” HCD regarding the undue constraints imposed by Article 70 on the independence of MPs when carrying out their responsibilities, including exercising the potential power to remove Judges of the Supreme Court by virtue of the Sixteenth Amendment.¹⁷⁵ The learned judge observed:

[I]t is difficult for a member of Parliament [by reason of Article 70] to form an opinion independently ignoring the directions given by the party high command of the political party in power . . . [This] leads to the . . . conclusion that . . . [the] new mechanism [for removing judges] cannot be expected to function independently and neutrally if a Judge attracts displeasure from the political party in power, he may be subjected to removal by the Parliament. There can be little argument that the function of judicial review by Judges involve dealing with views in respect of which political parties in the government and opposition could have opposing views with which the Judges may not reflect or agree in their judgment. Without a political tradition in which members of Parliament could clearly demonstrate that they can act neutrally and impartially if they are given the power of removal and will not be affected by the party’s views under article 70, the purported process of impeachment introduced by Sixteenth Amendment would clearly undermine the independence of judiciary and will definitely alter the basic structure of the constitution.¹⁷⁶

It is evident from the above observations of both the Divisions of the Supreme Court that parliamentary activity in Bangladesh, by dint of Article 70, has been concentrated on fulfilling the wishes of the ruling party. It is noteworthy that Justice Sinha, in addition to his observations about the ill-effects of Article 70, shed light on the executive’s hunger for power, which contributed towards its efforts to exert supremacy over the other branches of government. Justice Sinha observed:

The greed for power is like a plague, once set in motion it will try to devour everything. Needless to say, this WAS NOT at all the aims and vision of our liberation struggle. Our Forefathers fought to establish a democratic State, not to produce any power-monster.

The human rights are at stake, corruption is rampant, Parliament is dysfunctional, crores of people are deprived of basic health care, mismanagement in the administration is acute, with the pace of the developed technology, the crimes dimension is changing rapidly, the life and security of the citizens are becoming utterly unsecured, the law enforcing agencies are unable to tackle the situation and the combined

¹⁷⁵ Bangladesh v. Siddiqui, (2017) Civil Appeal No. 6 (AD) 82.

¹⁷⁶ *Id.* at 284, 292–93.

result of all this is a crippled society, a society where good man [sic] does not dream of good things at all; but the bad man is all the more restless to grab a few more of bounty. In such a situation, the Executive becomes arrogant and uncontrolled . . .

Even in this endless challenge, the judiciary is the only relatively independent organ of the State which is striving to keep its nose above the water though sinking. But judiciary too, cannot survive long in this situation . . . [However] [i]nstead of strengthening the judiciary, the Executive is now trying to cripple it and if it happens, there could be disastrous consequences.¹⁷⁷

The outspoken remarks of the learned judge about the state of affairs in Bangladesh drew the ire of the ruling BAL. Prime Minister Hasina and her parliamentary colleagues began making contemptuous remarks about Justice Sinha's integrity and propriety.¹⁷⁸ Subsequently, on October 13, 2017—less than two months after the pronouncement of the above judgment—the regime persuaded the learned judge to go overseas on a month's leave.¹⁷⁹ Within hours of Justice Sinha leaving the country, the BAL regime filed eleven charges, including “money laundering, financial irregularities, corruption, [and] moral turpitude” against him.¹⁸⁰ It was manifestly evident from these sets of events that Justice Sinha was being victimized for holding the government accountable for its undue attempt to curb, among other things, the independence of the judiciary. Justice Sinha ultimately resigned from his high office on November 11, 2017.¹⁸¹

The above treatment of the head of the judiciary had a profoundly adverse impact on the independence of the judiciary while adjudicating

¹⁷⁷ *Id.* at 228–29.

¹⁷⁸ Bari, *supra* note 25, at 83 n.338; *Leave Bangladesh or Get Treated for Mental Problem: Minister Matia to Chief Justice*, BDNEWS24 (Aug. 27, 2017, 11:32 PM), <https://bdnews24.com/politics/017/08/27/leave-bangladesh-or-get-treated-for-mental-problem-minister-matia-to-chief-justice> [<https://perma.cc/F4KH-WAG9>].

¹⁷⁹ *Bangladesh's First Hindu Chief Justice Surendra Kumar Sinha Forced to Go on Leave Amid Row with Sheikh Hasina-Government*, FINANCIAL EXPRESS (Oct. 14, 2017, 2:45 PM), <https://www.financialexpress.com/world-news/bangladeshs-first-hindu-chief-justice-surendra-kumar-sinha-forced-to-go-on-leave-amid-row-with-sheikh-hasina-government/894299/> [<https://perma.cc/7KM9-GCH4>].

¹⁸⁰ *11 'Charges' Against CJ*, THE DAILY STAR (Nov. 11, 2017, 11:32 PM), <https://www.thedailystar.net/frontpage/11-charges-against-cj-1476448> [<https://perma.cc/RVU3-ZUKL>].

¹⁸¹ *SK Sinha Resigns from Chief Justice Post, Says President's Press Secretary*, THE DAILY STAR (Nov. 11, 2017, 2:25 PM), <http://www.thedailystar.net/politics/chief-justice-cj-surendra-kumar-sinharesigns-1489639> [<https://perma.cc/TBE3-ZBB6>].

constitutional issues pending before it. This is evident from the recent decision of Justice Abu Taher of the HCD summarily rejecting a writ petition, which challenged the constitutionality of the anti-defection provision in Article 70 of the Constitution for being violative, among other things, of the concept of democracy. It is noteworthy that Justice Taher, in rejecting the petition, completely overlooked the same court's observations in the *Sixteenth Amendment Case* regarding the detrimental impact of Article 70 on the nation's parliamentary democracy which was, as discussed above, upheld by the AD only nine months and twenty-five days before.¹⁸²

Justice Taher justified such departure from the observations of both the HCD and AD regarding Article 70 in the Sixteenth Amendment Case by holding that these observations were made "incidentally or collaterally" and as such, were merely of persuasive authority.¹⁸³ It should be stressed here that the reasoning advanced by Justice Taher for justifying the departure from the observations of the HCD and the AD is flawed. Both the HCD and AD in the Sixteenth Amendment Case based their decision to invalidate the Sixteenth Amendment taking into account, among other things, the adverse impact of Article 70 on the competence of MPs to be independent of partisan directives in discharging their responsibilities.¹⁸⁴ Therefore, the observations of the HCD and the AD in the Sixteenth Amendment Case regarding Article 70 cannot under any circumstances be downplayed as obiter dictum.

In light of the above discussion, it can be strongly argued that the Supreme Court's observations about the adverse consequences of Article 70 in the Sixteenth Amendment Case are sound. For they accurately capture the manner in which the anti-defection provision in the Constitution has impeded the institutionalization of Parliament in the country.

VI. CONCLUSION AND RECOMMENDATIONS

The foregoing discussion reveals that the framers of the Constitution of Bangladesh justified the incorporation of an anti-defection

¹⁸² *Compare* Siddiqui v. Bangladesh, (2014) Writ Petition No. 9989 (HCD) 1, 123–24, with Siddiqui, Civil Appeal No. 6, 82, 284, 292–93.

¹⁸³ *Article 70 of Constitution: It's a Safeguard of Democracy*, THE DAILY STAR (May 26, 2018, 3:59 PM), <https://www.thedailystar.net/backpage/article-70-constitution-its-safeguard-democracy-1581670> [<https://perma.cc/7VEL-UJ6G>].

¹⁸⁴ Siddiqui, Writ Petition No. 9989, 123–24; Siddiqui, Civil Appeal No. 6, 82, 284, 292–93.

provision in Article 70 in light of the bitter experiences of unprincipled defections of MPs that affected the stability of democratically elected governments during the past union with Pakistan. However, unlike the anti-defection provision contained in the 1973 Constitution of Pakistan, the framers of the Constitution of Bangladesh, in their endeavor to ensure the stability of the democratic system, overlooked the necessity to incorporate an anti-defection provision which would ensure the maintenance of an appropriate balance between curbing political defection that causes instability and at the same time would guarantee the independence of MPs when discharging their core responsibilities. In other words, Article 70 does not differentiate between unprincipled defection, such as MPs switching political parties for realizing personal aspirations of becoming cabinet ministers or for monetary benefits, and principled defection, such as defection for opposing unjust policies or laws. Rather, Article 70 blanketly prohibits all forms of defection. It compels MPs to blindly defer to the directives of the political parties that nominated them to be elected.

Any deviation on the part of MPs from the directives of their nominating parties results in expulsion from Parliament, due to the terms of Article 70. Accordingly, Article 70 has adversely impacted the independence of MPs to critically examine the actions of the executive, including the enactment of laws that may be deemed arbitrary. These issues have been exacerbated by the BAL's recent consolidation of power through dubious general elections. The parliaments resultant of these elections have been devoid of any actual opposition. Consequently, the ruling BAL, by dint of Article 70, has been guaranteed the absolute support of the MPs in the Parliament for incorporating amendments in the Constitution, which have enabled it to essentially substitute the rule of law with rule of man in violation of the guarantees contained in the Preamble of the Constitution. Thus, it is manifestly evident that Article 70 has contributed towards reducing the Parliament to a mere rubberstamp body.

Since the anti-defection provision contained in Article 70 has impeded the institutionalization of Parliament and as such, stalled the growth of parliamentary democracy in Bangladesh, it is necessary to liberalize the provisions of this Article. First, the ground of resignation of an MP from his political party, as prescribed by clause (a) of Article 70, warranting such MP to vacate his seat in the Parliament should be replaced with the ground of joining another political party in the Parliament. The introduction of this change in clause (a) of Article 70 would have a twofold effect: a) it would ensure the independence of MPs to resign from their

party on the ground that it has deviated from its founding principles without losing their seat in the Parliament, thereby enabling them to continue to serve the interests of their electorate; and b) it would curb political defections, thereby realizing the goal of the founding fathers of ensuring a stable political system for Bangladeshis.

Second, clause (b) of Article 70 should be amended to limit the circumstances in which an MP's disobedience of the directives of his political party in the Parliament would lead to the cancellation of membership in the Parliament. Rather than compelling MPs to toe the party line at all times, clause (b) should stipulate that MPs would be free to follow their conscience or ideological convictions when performing their responsibilities except in relation to the directive of their nominating parliamentary parties during: i) the election of the Prime Minister; ii) a parliamentary vote of confidence or no-confidence; and iii) a parliamentary vote on a money bill—the passage of which is imperative for guaranteeing supply and thereby ensuring the smooth functioning of the government. The incorporation of these reforms in clause (b) of Article 70 would guarantee the independence of MPs to perform their oversight responsibilities without attracting the wrath of their nominating political parties.

In light of the above discussion, it can be strongly argued that liberalizing the anti-defection provision contained in Article 70 of the Constitution along above lines has the merit of not only curbing unprincipled defection of MPs but also safeguarding the independence of MPs to act as an effective check on the power of the executive. Thus, such liberalization of the anti-defection provision would contribute towards the institutionalization of the Parliament, thereby ensuring the realization of the high ideal of democracy which, according to the Constitution, inspired people “to sacrifice their lives in . . . the war for national independence.”¹⁸⁵

¹⁸⁵ BANGL. CONST. pmb. ¶ 2.