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**Critical Reflections on Law and Public  
Enterprises in Bangladesh**

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To my father,  
who's life was the triumph  
of determination to carry on  
amidst all sorts of odds.



## Abstract

This thesis analyses the use of law in the emergence and functioning of public enterprises in Bangladesh, which are viewed as a politico-economic and legal institution devised to implement public policy. According to a meeting of experts at Tangier (Morocco) from the 15-19 December 1980 on the *"Concept, definition and classification of public enterprises"*, a public enterprise is an organisation which is:

- owned by public authorities including central, state or local authorities, to the extent of fifty percent or more,
- is under the top managerial control of the owning public authorities, such public control including, inter alia, the right to appoint management and to formulate critical policy decisions,
- is established for the achievement of a defined set of public purposes, which may be multidimensional in character
- and is consequently placed under a system of public accountability
- is engaged in activities of a business character
- involves the basic idea of investment and returns
- and which markets its outputs in the shape of goods and services.<sup>1</sup>

Thus, public enterprises would include any commercial, financial, industrial, agricultural or promotional undertaking owned by a public authority, either wholly or through majority share holding which is engaged in the production and sale of goods and services and whose affairs are capable of being recorded in the balance sheets and profit and loss accounts.

In spite of the fact that many of the problems of public enterprises are a direct concern of lawyers, this thesis is the first attempt by a lawyer to study legal aspects of public enterprises in the context of Bangladesh. It aims to make an original contribution to the growing body of scholarship establishing links between public law and politics. It was undertaken at a time when the idea of privatisation is sweeping all over the world, necessitating a fresh discussion on the role of public enterprises and the practicality of significant privatisation in a poor country like Bangladesh.

By its very nature, the thesis can only be both analytical as well as descriptive. The scheme of analysis involves reference to historical, political, social and economic factors that have contributed to the emergence of public enterprises in Bangladesh and the later privatisation of some of them.

The thesis is influenced by the recognition of the importance of contextual non-legal factors that have influenced the development process in Bangladesh. Like in many other developing countries, in Bangladesh the role of law in achieving developmental objectives has been over-emphasised. Of course problems of development have clearly influenced the perception of the predominant role of legislation. But law is only one factor interwoven with other factors in a wider social and economic fabric. This is not to de-emphasise the importance of formal legal provisions, but they should be seen as symbols of attempts to implement the law's underlying tasks, and, in the course of this, as providing political resources which individuals and groups can utilise to gain their ends. It is, therefore, important not to confuse the instruments of implementation with the underlying purposes themselves. Thus this thesis, instead of focusing only on the different kinds of legal rules, looks at the underlying power relationships in Bangladesh and the interests for which state power is being used which, in turn, influence the actual functioning of the public enterprises. The roles of the state and the bureaucracy in the functioning of public enterprises are included in this discussion. It explains the behaviour,

<sup>1</sup> Report of the Expert Group Meeting at Tangier, in P. Faruq and P. Siebert (ed), *Studying the Personality of Public Enterprises: An Enquiry into the Concept, Definition and Classification of Public Enterprises*, 1981, p.24

performance and development of public enterprises in Bangladesh. It also, examines the political and socio-economic context in which public enterprises are embedded. The central hypothesis of the thesis is that the creation and operation of public enterprises are mostly determined by the character of the political coalition in power, and that political changes are reflected in intra-organisational dimensions. It recognizes that even though public enterprises are powerful socio-economic and legal entities, to understand their functioning it is necessary to analyse their external environment.

Indeed, an adequate approach to public law should be to investigate public policy, and ask what demands government makes of the constitutional and legal systems in seeking to achieve its objectives, how those systems respond to those expectations, and the problems created by those responses for the government. Thus public law is a tool used to achieve public ends. The use of public law may occur directly either through the moulding of social processes by regulatory rules or through the establishment and definition of institutions. Thus the version of public law adopted in the thesis has for its main focus of interest the design of institutions through which public policy is implemented along with the relationship between those institutions and other parts of the constitutional structure.

Therefore, a particular concern of this thesis will be institutional design for the operation of public enterprises in Bangladesh. Operational aspects include both organisation and management. Organisation is viewed as the structure of hierarchy in the functioning of public enterprises and management can be defined as the processes by which the work is accomplished including planning, financing, staffing, controlling various activities and ensuring accountability.

The thesis concludes that, the legal forms and the law including measures of privatisation have not achieved what they had intended to. The benefit of the legal form can be achieved only when there is a full understanding and acceptance by the concerned parties viz., government, management and workers of what a legal form entails. Until public enterprise culture becomes more business-like, the changes in the legal form will be of little relevance. In order to improve the performance of public enterprises it is necessary to ensure true accountability of the government to the people. Without establishing real democracy in Bangladesh, which was mostly governed by martial law, framing rules and regulations to improve performance of public enterprises will largely be an exercise that will not ensure practical benefits to the country.

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Whenever I was exhausted, with my work and wanted a break; or whenever my family was very bored, our social interaction with the local Bangladeshi community took away much of the pressure of isolation. We never felt that we are away from Bangladesh. As such we never suffered from home sickness. I am especially grateful to Mr. Aziruddin, A.H.S. Choudhury and Mumin Khan for making our stay in Coventry much easier and problem free.

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Above all, I am grateful to my wife, Shila, for her support and encouragement. It was her idea that made me come to Britain for a Ph.D. Without her full cooperation and understanding, the work simply could not have been written. I could not give her any time or hand in the management of the household affairs. I also owe an apology to my daughters Ishika and Parija, whom I could not give proper time and attention. The scholarship ended in June and the victims of extreme financial squeeze was them. They had to leave Britain because of financial reasons. In spite of all these, Shila and Ishika remained as ever supportive and uncomplaining. I know, I will only have to live with this debt to them. No words of gratitude will ever be enough for them.

Although, the above mentioned people and institutions deserve a share of credit, it must, however, be pointed that I alone remain responsible for the thesis and for any errors or omissions.

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## CONTENTS

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	PAGE
<b>Abstract</b>	iii
<b>Acknowledgements</b>	v
<b>ABBREVIATIONS</b>	ix
<b>LIST OF TABLES</b>	x
<b>TABLE OF CASES</b>	xi
<b>INTRODUCTION</b>	1
i. Theoretical Settings	1
ii. The Background	13
iii. Research Methodology	18
<b>CHAPTER I: STATE, LAW AND THE EMERGENCE OF PUBLIC ENTERPRISES IN BANGLADESH</b>	<b>20-68</b>
1.1. Introduction	20
1.2. The Rise and Fall of Public Enterprises	21
1.3. Public Enterprises before the Independence of Bangladesh and the Role of the State	28
1.4. The Liberation War and its Impact on Public Enterprises	35
1.5. Public Enterprises after Independence	41
1.6. The Change of Government Policies: The Beginning of the Rise of Private Sector	50
1.7. Declaration of Martial Law: The Acceleration of Bureaucratic Predominance and the Decline of Public Enterprises	56
1.8. General Ershad's Regime: Further Consolidation of Bureaucratic Predominance and Decrease in Public Enterprises	61
<b>CHAPTER 2: LEGAL FOUNDATIONS OF PUBLIC ENTERPRISES IN BANGLADESH</b>	<b>69-108</b>
2.1. Introduction	69
2.2. The Colonial State and the Growth of Capitalism	71
2.3. The Nature of the Bangladeshi State	81
2.4. Public Enterprises and the Legal System in Bangladesh	90
2.5. The Constitution of Bangladesh and Public Enterprises	94
2.6. The Nationalisation Order (P.O. 27) of 1972	100

<b>CHAPTER 3: INSTITUTIONALISING PUBLIC ENTERPRISES</b>	<b>109-135</b>
3.1. Introduction	109
3.2. Public Corporations in Bangladesh	113
3.3. Legal Status of Public Corporations and State Immunity in Bangladesh	118
3.4. Functions of the Corporation	124
3.5. Organisation and Management of Corporations	126
3.6. Organisations and Management of Enterprises	129
<b>CHAPTER 4: RELATIONS BETWEEN THE GOVERNMENT AND PUBLIC ENTERPRISES IN BANGLADESH</b>	<b>136-190</b>
4.1. Introduction	136
4.2. Executive Control over Public Enterprises	140
4.2.1. The Need for Executive Control	141
4.2.2. Instruments of Executive Control over Public Enterprises in Bangladesh	143
4.2.3. Areas of Control	150
4.3. Accountability of Public Enterprises in Bangladesh	171
4.4. Performance Evaluation	173
4.5. Parliamentary Control over Public Enterprises	181
4.6. Structure of Control	183
4.7. Co-ordination of Public Corporations in Bangladesh	185
4.8. CONCOPE and its role	188
<b>CHAPTER 5: PRIVATISATION IN BANGLADESH</b>	<b>191-228</b>
5.1. Introduction	191
5.2. Rationale for Privatisation in Bangladesh	194
5.3. Background for Privatisation in Bangladesh	197
5.4. Techniques used in Bangladesh for Privatisation	202
5.5. The Introduction of Holding Company in Bangladesh	208
5.5.1. Holding Company - Defined	210
5.5.2. The Tripartite relationship: Some Problems of Centralisation and Autonomy	213
5.5.3. Functioning of Holding Companies in Bangladesh	216
5.6. Privatisation in Bangladesh - Evaluated	224
<b>CONCLUSIONS</b>	<b>229</b>
<b>BIBLIOGRAPHY</b>	<b>242</b>
<b>APPENDICES</b>	<b>263</b>

## ABBREVIATIONS

<b>A.C.</b>	Appeal Cases
<b>A.I.R.</b>	All India Reporter
<b>A.L.R.S.L.</b>	African Law Reports Sierra Leone
<b>BCIC</b>	Bangladesh Chemical Industries Corporation
<b>BFIDC</b>	Bangladesh Forest Industries Development Corporation
<b>BJMC</b>	Bangladesh Jute Mills Corporation
<b>BLD</b>	Bangladesh Legal Decisions
<b>BNP</b>	Bangladesh Nationalist Party
<b>BOM.H.C.R.</b>	Bombay High Court Reporter
<b>BSCR</b>	Bangladesh Supreme Court Reporter
<b>BSFIC</b>	Bangladesh Sugar & Food Industries Corporation
<b>BSEC</b>	Bangladesh Steel & Engineering Corporation
<b>BTMC</b>	Bangladesh Textile Mills Corporation
<b>CONCOPE</b>	Consultative Committee of Public Enterprises
<b>CPC</b>	Council for Public Corporations
<b>CSM</b>	Chittagong Steel Mills
<b>DLR</b>	Dhaka Law Reports
<b>EPIDC</b>	East Pakistan Industrial Development Corporation
<b>H.C.</b>	High Court
<b>ICB</b>	Investment Corporation of Bangladesh
<b>JP</b>	Jatiyo Party
<b>K.B.</b>	King's Bench
<b>MIS</b>	Management Information System
<b>MOI</b>	Ministry of Industries
<b>NIP</b>	New Industrial Policy
<b>NRP</b>	National Reserve Price
<b>FLD</b>	Pakistan Legal Decisions
<b>Q.B.</b>	Queen's Bench
<b>RIP</b>	Revised Industrial Policy
<b>ROR</b>	Right of Refusal
<b>SABRE</b>	stem for Autonomous Bodies Reporting and Evaluation
<b>SBA</b>	Ship Breakers Association
<b>S.C.</b>	Supreme Court
<b>SCR</b>	Supreme Court Reporter
<b>W.L.R.</b>	Weekly Law Reports

## LIST OF TABLES

Table	Title	Page
1	Exchange rate of Taka per £ sterling since Independence	6
2	Allocations of Development Expenditure in East Pakistan	29
3	Sector Corporations with Number of Enterprises Placed under them as in December 1972	115
4	Reconstituted Sector Corporations with Number of Enterprises under them as in December 1976	117
5	Variations in the size of the different Public Corporations	118
6	Divisions of BSEC	128
7	Financial Powers for Procurement for Public Enterprises	162
8	Performance Evaluation Grid of BTMC	180
9	Performance Evaluation of BTMC	181
10	Sanctions for Private Industrial Sector investment since 1973	198
11	Number of Enterprises (Corporation wise) listed for Privatisation in 1977	199
12	Number of Enterprises Privatised (before and after 1982)	201
13	Total Number of Disinvestment in Bangladesh	207

TABLE OF CASES	Page
<i>A.K.M. Ayub Ali v. Eastern Refinery Ltd. &amp; Others</i> 32 DLR (1980) 33.	105
<i>Akar v. Attorney-General</i> (1966-67) A.L.R. S.L. 283.	54
<i>Aminul Islam v. Bangladesh Biman</i> 1984 BLD HC 9.	97
<i>Anwar Hossain Chowdhury v. Bangladesh</i> 1989 BLD (Spl) 1.	54,56
<i>Bangladesh Chemical Industries Corporation v. Sk. Abdur Rashid</i> BSCR 1980 SC 27.	119
<i>Bangladesh v. Mrs. Winifred Rubie &amp; Others</i> 1982 BLD AD 37.	96
<i>Chairman, Bangladesh Steel Mills Corporation v. Md. Masood Raza and Others</i> BSCR 1978 SC 70.	120,121
<i>Chandra Bhavan Boarding and Lodging Bangalore v. State of Mysore &amp; Others</i> 1970 2 SCR 612.	97
<i>Hamidul Huq Chowdhury v. Bangladesh</i> 33 DLR (1981) 394.	44,54,56.
<i>Kh. Ehteshamuddin Ahmed v. Bangladesh &amp; Others</i> 1981 BLD (AD) 107.	93
<i>Minerva Mills Ltd. v. Union of India</i> AIR (1980) SC 1795.	54,96,97
<i>M.C. Mehta v. Union of India</i> AIR (1987) SC 1097	
<i>M.H. Chowdhury v. General Manager, Titas Gas</i> BSCR 1980 (AD) 373.	91,119
<i>Mobarakganj Sugar Mills Ltd. v. A.B.M. Kazi Nazrul Islam</i> 1987 BLD (AD) 182.	120
<i>Motahar Hossain Khan v. Bangladesh Jute Mills Corporation</i> 36 DLR (1984) AD 282.	119
<i>New Dhaka Industries Ltd. v. Quamrul Huda and others</i> 31 DLR (1979) AD 234.	119
<i>Nishat Jute Mills v. Md. Sanaullah</i> 40 DLR (1988) AD 298	119
<i>Niranjan Lal Dalmia v. Union of India</i> AIR (1976) Delhi 154	123
<i>P &amp; O Steam Navigation Co. v. Secretary of India</i> 5 BOM. H.C.R. App. 1	122

<i>Sajjan Singh v. State of Rajasthan</i> AIR (1967) SC 861.	97
<i>Salomon v. A Salomon Co Ltd.</i> [1897] AC 22 (House of Lords)	111
<i>Senior Manager, MIS Dast Textile Mills Ltd. and another v. Sudhansu Bikash Nath</i> 1988 BLD (AD) 67.	119

## Introduction

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### I. Theoretical Settings

In Bangladesh, the public sector came into being through the following legal processes:-

First, public enterprises functioning in Bangladesh before independence became the property of the Republic of Bangladesh through the mechanism of state succession. In the field of industries, Bangladesh Industrial Development Corporation was established for the purpose of taking over the enterprises and other assets of East Pakistan Industrial Corporation.<sup>1</sup> Second, the state took over the control and management of enterprises of non-Bengalis who either left the country or were not available to control and manage the enterprises.<sup>2</sup> Third, the government also took over management and control of some enterprises whose former owners or directors could not be allowed to control or manage them "in the public interest".<sup>3</sup> In other words, the state confiscated<sup>4</sup> certain properties. Fourth, the government nationalised jute, textiles and sugar industries through P.O.27.

There are 50 public corporations, of which 13 deal with industrial enterprises, 11 belong to the financial and insurance sector, 9 work for transport and tourism, 7 for agriculture and water resources, 4 dealing with the energy sector, 4 for area development and spatial planning and 2 for trading.<sup>5</sup> Thus, it is noticed that these corporations vary in their nature and purpose. Some are natural monopolies e.g., the energy sector, public utilities (area development and spatial planning), while others are commercial in nature.

<sup>1</sup> See article 4 of *The Bangladesh Industrial Development Corporation Order, 1972, P.O. 39 of 1972*.

<sup>2</sup> See article 2, *The Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, being A.P.O.1 of 1972*.

<sup>3</sup> *Ibid.*: it although did not make it clear what constituted public interest but in fact the state took over properties of those who collaborated with the Pakistan army in the genocide. *The Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order 1972 (A.P.O. 1 of 1972)* empowered the government to take over their "control and management, or appoint a Management Board or Administrator, or direct any autonomous or semi-autonomous body or any other authority, to take over... control and management." Article 2(1) of the *Acting President's Order No.1 of 1972*.

<sup>4</sup> Here confiscation is used in the sense of an administrative positive measure. Through it ownership is transferred to the state by a unilateral act of the latter without compensation.

<sup>5</sup> The list of public sector corporations in Bangladesh is provided in appendix 2.

Apart from the above mentioned public corporations, some public enterprises are organised as departmental undertakings e.g. public health and hospitals, railways, posts, telephone and telegraph etc.

The thesis will mainly study the public corporations under the Ministry of Industry.<sup>6</sup> One reason for choosing this group is that it alone has raised much debate in the country because many of the enterprises came into the public sector through nationalisation, which was equated by the government as a step towards socialism.

It will be an error to take nationalisation by itself as a socialist policy without analysing who nationalised and for what ends. Nationalisation had also created much confusion; the Dhaka Chamber of Commerce always blamed nationalisation for dampening the environment of investment, though, as will be seen later, there is practically no evidence to support its assertion. Since only manufacturing industries, banks and insurance companies were nationalised - i.e. taken over by the state from the private sector with compensation, there is a better prospect for them to attract private capital in case of privatisation because these were once in private hands. Furthermore, other public enterprises, irrespective of the ideological bias of the government, are likely to remain in the public sector for a long time to come because they are either too capital intensive, or strategic or service oriented or the private sector is not interested in them. Indeed, those enterprises were under the public sector even when Bangladesh was still a part of Pakistan.

Many of the problems connected with the functioning of public enterprises are legal in character, e.g. institutional structures, the relationships between institutions, the balance between autonomy and control. The subject of public enterprises and their role and management has taken on a much heightened significance in public policy discussions

<sup>6</sup> The jurisdiction of the Ministry of Industry is limited to Bangladesh Chemical Industries Corporation (BCIC), Bangladesh Steel Engineering Corporation (BSEC) and Bangladesh Sugar and Food Industries Corporation (BSFIC). The discussion will not include the period after the fall of General Ershad's regime in late 1990's because since then the country is plunging through an intense uncertainty and instability. Moreover, the country is still recovering from the recent political upheavals resulting in the resignation of General Ershad and the devastating cyclone killing about half a million people and destroying property worth 5.6 billion US \$ (The Bangladesh Times, 15.5.91). A neo-elected government has sworn in April 1991.

around the world because of the electoral victories of supporters of market economy in Britain, USA, Canada and Germany during the 1980s. The recent changes in Eastern European countries, resulting in the shift of the policy towards privatisation of public enterprises, have also contributed to a fresh discussion on the subject.

In spite of their great importance in the economy of Bangladesh, there has been very little research on public enterprises. In the past, what little research was made was done by economists, management and financial experts who studied public enterprises from their respective points of view. But surprisingly, in spite of being a legal category, not a single study has been done by lawyers. This thesis is the first attempt by a lawyer to study public enterprises in Bangladesh. It is not only public enterprises but indeed, research in law in general has been very little compared to other social science disciplines in Bangladesh. Whatever little legal research was done in Bangladesh, has been positivist in nature. These studies recognise the instrumental functions of the lawyers only. Such studies only examine the world of legal rules, trying merely to harmonise and elucidate them so that in the words of Seidman, "they [can] form a gapless web."<sup>7</sup> But is it not becoming more and more clear that law has a social engineering function which cut-across the boundary of conflict amelioration to become a means through which social policies become social actions?

Public enterprises are embarked upon to perform various functions. The diversity of functions has the consequences of a mixed character, reflected in the existing legislation. They function in an environment of constitutional, administrative, civil and company laws whose interpretation and conciliation are not always obvious. They are public agencies and yet often operate through private law.<sup>8</sup> They work in a very complex institutional environment and transcend traditional legal categories. Their insertion in a hierarchical system (the economic organisation of the state or the system of direction of

<sup>7</sup> R B Seidman, *The State, Law and Development*, 1978, p. 45.

<sup>8</sup> Many academics have shown the high degree of convergence between public and private law and illustrated the complexity of discovering the dividing line between public and private law. See for example, G Poggi, *The Development of the Modern State*, (especially chapter 9), 1978.

the economy) influences the efficiency of the decision-making and thus the performance of the enterprises. The public enterprises have to deal with demand not only related to the quantity or quality of its products but also to the demands of the public administration, government and citizens in terms of the execution of policies. This means they are partly commercial organisations and partly a component of the bureaucracy.

As will be seen, public enterprises are a device capable of different uses, and its uses are determined by various factors. The key factors include the mode and the relations of production, the nature and alliances of the ruling groups, and the access to and control over the state apparatus. Ultimately the functions of the public enterprises must depend on the nature of the state. Indeed, public enterprises are an emanation and extension of the state, and their dynamics can scarcely be understood without some appreciation of the role of the state and social groups who control its apparatus. Thus, research on them needs to be undertaken in a broad framework that goes beyond law if a genuine understanding of their dynamics are to be understood.

Public enterprises are an emanation and extension of the state. A small class, however has control of the state apparatus. At the time of independence the local bourgeoisie was very weak because of the colonial past and the discriminatory policy of the Pakistani government. But within the framework of Pakistan a group of petty-bourgeoisie developed. This group gave leadership during the war of independence. In the absence of a strong group of local bourgeoisie the government had no alternative but to take control of management of the enterprises. Thus nationalisation in Bangladesh was more a reflexive attitude of the government necessitated by the objective need of the time to cope with the vacuum created by the independence of Bangladesh rather than a long-term economic policy.

Thus, the law on nationalisation responded to the problems arising from the economic situation prevailing in the country. There was an objective need for nationalisation to which the law was a response, more in an attempt to discourage the

economic destabilization than to allow an offensive against private enterprises. The law was thus a variable determined by the external and internal factors. Public enterprises were set up as instruments of national economic policy and economic levers with which planning objectives are to be realised. The compulsion for creating public enterprises seems to have come primarily from the realisation that state should gain control over economic resources and also that the state should rescue operation of the private sector.

The task perceived by the government, which was led by the petty-bourgeoisie was to allow the latter to develop itself into the national bourgeoisie that would eventually take responsibility of the enterprises from the government. Thus when the class of petty-bourgeoisie obtained access to state power it started appropriating the surpluses hitherto consumed by the Pakistani colonial and Bengali comprador bourgeoisie both in urban and rural areas. The government machinery and the public enterprises were used to nurture this class. But the leadership was under pressure from more radicals within the party. Thus, although the party in power incorporated socialism as one of the state policies in the Constitution of the country, in practice, as will be seen, it was not serious about it. This was time-buying rhetoric, giving sufficient time and opportunity to the petty-bourgeoisie to strengthen itself. This is evident from the policies and practice of the Awami League government. First the ceiling on private investment was fixed at Taka 2.5 million<sup>9</sup>,

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<sup>9</sup> The exchange rate of British £ in Bangladesh Taka since independence is shown in the following table:

thereupon raised to 30 million and 100 million in 1975. This general increase was done to accommodate the increasing capability of the trading bourgeoisie. The government did not bring any change in the private property oriented economy and agricultural reforms were not introduced in order to elevate the conditions of the masses.

The thesis (Chapter 1) will examine the interaction of law with political and societal factors in order to help towards a better understanding of the social role of law. Such study is necessary because a close textual analysis of law does not clarify a great deal the effectiveness of the law or its ability to solve pressing social and economic problems. The traditional legal study, which deals mainly with forms and structures, would be insufficient to illuminate how the enterprises in Bangladesh function in reality.

The thesis will show that public enterprises are not neutral institutions through which the government can achieve development disinterestedly. They exist in a neo-colonial political economy and serve definite class interests.<sup>10</sup> In Bangladesh, the material weakness of the bourgeoisie and the heterogeneity of the dominant class enables the bureaucracy to occupy a dominating position. But the bureaucracy and the bourgeoisie

Table I  
Exchange rate of Taka per Pound Sterling

Year	Official Rate	Wage Farmer's Rate
1972-73	18.8001	
1973-74	18.8001	
1974-75	20.8064	
1975-76	29.3600	
1976-77	26.5077	
1977-78	27.6126	36.12
1978-79	30.5002	38.54
1979-80	34.4975	42.47
1980-81	37.2535	45.69
1981-82	36.7613	41.86
1982-83	38.2688	38.83
1983-84	36.2302	39.32
1984-85	31.7647	35.97
1985-86	43.0297	47.10
1986-87	46.7059	50.42
1987-88	54.7077	57.73
1988-89	55.0685	56.43
1989-90	55.5208	59.03
1990-91	65.8102	67.13

\* Nil [Source: Bangladesh Bank]

10. Here, state representing 'class interest' is not used in a reductionist sense but used to mean state siding dominant groups in the exercise of domination over the rest of society.

have an identity of interests emanating from their common social base. The economic base of the bourgeoisie, engaged mostly in trading, is weak, primarily non-entrepreneurial, largely parasitic and thus dependent upon the bureaucracy for its own development and yet enjoys state power.<sup>11</sup> The access and proximity to power allows it to control the economy including the public enterprises. Both bureaucracy and bourgeoisie thus depend on the public sector- and particularly on its system of patronage<sup>12</sup> like distribution of import-export licences, quotas, public works orders, granting of bank loans for even non-feasible/fictitious enterprises which were never established.<sup>13</sup> Capital formation was encouraged with abundant government finance involving mostly public enterprises, low interest rates and over-valued exchange rate resulting in the increase of corruption.

It is thus evident that public enterprises have been extensively used as a form of patronage, a device to channel resources to the ruling political party. This patrimonial use of public enterprises is bound to affect the efficiency, competitions and profitability of enterprises.

Analyses of the class character of the Bangladeshi state have focused on ways in which the ruling groups have attempted to control the economy through the political means at its disposal by the creation and extension of state ownership, through providing capital as well as satisfying the political and ideological conditions of their own authority and legitimacy. This situation lends itself to an analysis of the causes of contradiction within the state while describing such apparently resulting malfunctions of state policy as corruption, bureaucratic control, lack of commitment amongst political leaders.

<sup>11</sup> M M Haq 'Towards Understanding Relationship between the Government and Public Enterprise in Bangladesh', with emphasis on Public Corporations', unpublished paper presented at a seminar on Public Enterprises in Bangladesh, organised by BPATC, 16-17 March 1980, p.6.

<sup>12</sup> R Sobhan and M Ahmad, *Public Enterprise in an Intermediate Regime: A Study in the Political Economy of Bangladesh*, 1980, also N Islam, *Development Planning in Bangladesh: A Study in Political Economy*, 1977.

This point has been underscored by several authors studying public enterprises in the developing countries, see Y. P. Ghai, 'Control and Management of the Economy: Research Perspective on Public Enterprises' in Ghai (ed), *Law in the Political Economy of Public Enterprises*, 1977; I.G. Shrivastava, *Class Struggles in Tanzania*, 1976; C. Lays, *Underdevelopment in Kenya: The Political Economy of Neo-colonialism*, 1975.

<sup>13</sup> Taken from interviews and news paper reports from time to time.

Nationalisation of industries took place by an ordinance of the President known as the *Bangladesh Industrial Enterprises (Nationalisation) Order, 1972*. Public enterprises in the industrial sector are controlled and managed in accordance with this Order and this Order brought many private industrial enterprises under public ownership.

The thesis will, thus, examine this Order in the light of the socio-economic realities of Bangladesh in organising public industrial enterprises. It aims to show that the government that nationalised some industries, including banking and insurance, in the name of establishing socialism was in fact guided by pragmatism rather than by any ideology, and that socialism was used only as a convenient rhetoric. The thesis will also discuss the Constitutional provisions relating to public enterprises, the nature of Bangladeshi state and the legal system of Bangladesh.

The presence of a large number of public enterprises also required an effective coordination amongst themselves as well as the clarification of their relationship with governmental institutions. Most of these issues are ultimately related to the organisation and structure of public enterprises. The role of the public lawyer here will be to 'map the state' by investigating the mutual relations of institutions and their interactions with the private sphere. A particular concern in this thesis thus, will be the institutional form adopted in Bangladesh. The thesis will concentrate (chapter 3) on this issue by considering how successfully the institution of public ownership of industry was designed and how implementation took place.

But the institutions cannot be analysed in isolation from each other and from other elements of social structure because they form a system. This produces a further legal concern - the constitutional dimensions in which the limits and interrelationships of institutions are examined. The thesis, therefore, will analyse the complex pattern of influence and regulations between government and the enterprises, and the relations with Parliament.

In preference to departmental form, the public corporation form of legal organisation in the industrial sector has been adopted in Bangladesh. One of the crucial problems of this form is to find a balance between autonomy granted to the enterprises and the ensuring of accountability. This balancing between autonomy and control constitutes the very essence of the relationship between the government and public corporations.

Chapter-4 therefore, will critically analyse contradictory pressures for, on the one hand, autonomy for the enterprises and on the other, political control. The thesis will show that this balancing is not possible in Bangladesh because the group that shapes the nature of state administration and the role played by public enterprises in the development of the new rich class do not normally allow such a balance. On the contrary, the tendency is always to create an imbalance in favour of the executive government because of the absence/ineffectiveness of democratic institutions like the Parliament or a free press. True accountability becomes antithetical to the interests of both bureaucracy and bourgeoisie. Therefore, although the Nationalisation Order of 1972, other government instructions and policy declarations stress the need to allow more autonomy to the public enterprises but in reality they are not properly implemented. In this thesis, I am going to show that legal forms in themselves have relatively little significance. It is the way they are employed and manipulated that really matters.

Referring to the situation in the developing countries, Ghai writes:

....in the economic and political context of most developing countries the relevance of the legal and organisational forms of public enterprises for the conduct and performance of these enterprises has long been in dispute, specially since it was not to be expected that the governments of these countries would restrict themselves to their legally assigned roles. For a variety of reasons, many of which are connected with the maintenance of the existing power structure, the public sector is subject to improper political pressures. Many of the existing legal forms of public enterprises, whether they be statutory corporations or registered companies, are designed to ensure commercial and operational autonomy for the enterprise. Yet these forms have not secured this autonomy.<sup>14</sup>

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<sup>14</sup> Y.P. Ghai and A. Bohm, 'Editorial Introduction', *Public Enterprise*, vol. 10, No.1, 1990, p.10.

The situation in Bangladesh is not different from Ghai's remark on the limitations of the legal forms in the situation of developing countries. In spite of the absence of required autonomy, as inherent in the constitutional theory of public corporation form, with the careful designing of institutions and allocations of responsibilities between different tiers of the managerial hierarchy the legal form can be more successful.<sup>15</sup>

After only three and half years of independence, however the government was overthrown through a military coup. There has since been a reversal of the policy. The period since 1982, especially, has witnessed total denationalisation i.e., the transfer of nationalised units to private sector. Apart from denationalisation there have been divestment of many public enterprises.<sup>16</sup> Chapter 5 deals with the extent and process of privatisation<sup>17</sup>, its impact on the economy, procedures followed for privatisation and the introduction of holding companies in Bangladesh.

In principle, privatisation may be a highly desirable objective<sup>18</sup>, and indeed, it has been increasingly pressed by international financial institutions, like the World Bank and IMF, on all debt ridden countries. However desirable it might seem to be in developed industrialised countries, as will be seen, in most developing countries including Bangladesh, given economic and political realities, extensive privatisation is unlikely to take place.<sup>19</sup> Because of the size of the public sector and because of the political and economic difficulties associated with privatisation, it is likely that a large number of

<sup>15</sup> Prof. Ghai also thinks that the form can become important because it can affect the behaviour of the government as well as that of the enterprise management. *Ibid.* In another article Ghai writes, "the form is not merely an empty shell; it is a device for an aggregation of resources, creation of bureaucracies; the pursuit of goals and a vehicle for entering into relationships with other groups." Y.P. Ghai, "Control and Management of Economy: Research Perspectives on Public Enterprises in Ghai (ed), op. cit. p. 33.

<sup>16</sup> Denationalisation means return of state-owned enterprises to their former proprietors. While divestment means transfer of public enterprises to new private owners, in fact both denationalisation and divestment are simply different techniques of privatisation.

<sup>17</sup> Privatisation generally speaking denotes changing public ownership into private ownership. The concept of privatisation is, in fact, much wider. It is to be understood, not merely in the structural sense of who owns an enterprise, but in the substantive sense of how far the operations of an enterprise are brought within the discipline of market forces. An elaborate discussion of privatisation can be found in Chapter 5.

<sup>18</sup> The rationale for privatisation is discussed in chapter 5.

<sup>19</sup> It may be mentioned here that in the developed countries there exist strong private sector and financial markets capable of mobilising resources to take advantage of divestiture programmes. Although in the developing countries, too, the winds of political rhetoric are gusting strongly against public enterprises as instruments of economic activity and even as forms of governmental structure, the situations in these countries are altogether different. In the absence of a developed market and of

public enterprises will continue to operate in Bangladesh. Moreover, in Bangladesh, private sector exists on the fringe and often on the strength of costly government support programmes.<sup>20</sup> The private sector is actively encouraged to set up industrial units through provision of substantial credit by public enterprise such as the Shilpa Bank (BSB) and Shilpa Rin Shangstha (BSRS).

Despite the current emphasis on private sector development and the privatisation, in its structural sense, of many current public functions, it will be evident that public enterprises in one form or another will be around for a long time. Indeed, in spite of the commitment of the government of Bangladesh for a market oriented economy, the *Third Five Year Plan (TFYP) 1985-90* realised the absurdity of total privatisation. Even after substantive denationalisation and divestment of many public enterprises during the *Second Five Year Plan 1980-85*, the TFYP 1985-90 mentioned that public sector corporations and their enterprises still "occupy a critical place in the economy as they control the commanding heights of the economy from public utilities to some of the major industries."<sup>21</sup> Even the World Bank, a prescriber of privatisation, acknowledged that "greater reliance on private investment and market forces in determining industrial efficiency alone will not be sufficient to transform the industrial sector in Bangladesh."<sup>22</sup> Thus a degree of public enterprise is imperative, irrespective of the ideological bias of the present government.

In Bangladesh, privatisation has not yet achieved the intended results like greater efficiency. At the same time, most public enterprises are, also, inefficient. But the issues surrounding the role of public enterprises were never discussed without any ideological bias. This resulted in the hasty adoption of privatisation without considering proper

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adequate capital in private hands public enterprises will continue to play a significant role in the economy of developing countries.

20 A. H. M. N. Chowdhury, 'Small and Medium Industries in Asian Developing Countries', *Asian Development Review*, vol. 8, no. 2, 1990, p. 28.

21 Government of Bangladesh, *The Third Five Year Plan 1985-90*, 1985, p. 36, (emphasis added).

22 IBRD, *Industrial Sector in Bangladesh*, 1989, p. 59.

implications, resulting in the failure of privatisation policy.<sup>23</sup> It should be mentioned here that public enterprise or privatisation are means to an end, the end being national well being; they are not ends by themselves. The achievement of end is more important than the means and hence, means should be suitably revised in the interest of accomplishing the end.

Since total privatisation is impossible, over-enthusiasm for privatisation must not direct the attention of policy makers from the more important task of instituting necessary structural, policy, and management reforms so that public enterprises in Bangladesh can operate with efficiency, productivity and financial gain.

The thesis is intended to show that privatisation should not denote mere transfer of ownership from the state to private sector but the introduction of greater reliance on market mechanisms, like allowing the management of the public enterprises to borrow from the financial market and not the injection from the treasury, to fix prices of its products, to give more autonomy to the enterprise management to be guided by provisions of the company law and its own memorandum of articles, etc. The thesis raises doubts about the efficacy and efficiency likely to be accrued by simply transferring the ownership to the private sector depending on state patronage and without introducing institutions and means to control the growth of monopoly, standard and quality of services provided to the consumers, which are at the moment absent. The social and economic cost of such privatisation is too enormous to be borne by a country with more than 80% population living below the subsistence level. Moreover, since massive privatisation is impossible, is it not the time to give public enterprises an opportunity to operate without interference from the government in their day to day functioning and allow them to be guided, as far as possible, by the market forces rather than the present, detailed albeit informal, guidance

23 The general remark of Wendell O. Schaffer, President of the Brussels based IASIA (International Association of Schools and Institutes of Administration) referring to the situation in the developing countries fully fits the Bangladesh situation. He remarked, "Unfortunately, the issues surrounding the role of public enterprises often are not being discussed or studied in as important an scientific manner. We live in a political world, and ideology and politics make certain stages wherever matters of such importance are being debated. The result is that international banking, lending and assistance institutions, as well as the political leadership in many countries, are all too ready to urge willy nilly upon decision makers their current passions for economic life, often to the detriment of particular institutions and even of the economy as a whole." W.G. Schaffer, 'Foreword' to R. Wirtzke and C.O. Neelam (eds.), *Getting Together in Public Enterprise*, 1987, p.v.

from the treasury or the parent ministry? Therefore the problem of devising more satisfactory means for public ownership needs urgent attention by public lawyers. This should be based partly on a democratic concern with the design of the instruments to achieve legitimacy through participation and proper accountability. Unfortunately, in the expectation that one day public enterprises will be privatised, far less attention than necessary has been paid to devising appropriate institutional design or the genuine implementation of reforms. Indeed, privatisation cannot avoid the central problem of relations between government and industry. Therefore the need for effective public law institution building in regulation and on the relations between government and industry remains as pressing as ever.

## **II. The Background**

Bangladesh became a sovereign independent state on the 16th of December 1971 as a result of a successful war of independence. Before 1947, Bangladesh was a part of British India. In August 1947, when British India was partitioned into two states, namely India and Pakistan, the area now comprising Bangladesh (at that time East Bengal, a part of the province of Bengal) fell to the share of Pakistan. After 1947 till independence in 1971, it was a province of Pakistan and was known as East Pakistan.

Eighty percent of the population of East Bengal (now Bangladesh) were Muslims but during British rule, the Bengali Hindu community held control of land, business, commerce, industries, money lending, civil service, education, legal and other professions. After partition in 1947 the Hindu community, especially industrialists, businessmen, landed aristocracy, professionals, gradually migrated to India. Moreover, during British rule, almost all industrial development in this region took place in and around Calcutta, which was the capital of British India until 1911. As a result, industries, capital, wealth and entrepreneurship tended to be concentrated in Calcutta which, at independence

became part of India.<sup>24</sup> Thus since independence in 1947 the state had to take direct responsibility for industrialisation by creating public enterprises.

As it transpired later by experience, within the framework of Pakistan, East Pakistan found itself in the situation of colony of West Pakistan (now Pakistan). The East Pakistanis had to fight the West Pakistanis who wanted to rule by force. In reply to East Pakistan's demand for provincial autonomy, its fair share of economic development and the transfer of power to the elected representatives of the people the West Pakistani army started genocide on the 25th of March 1971. Under the circumstances East Pakistan declared its independence as the Peoples Republic of Bangladesh on the 26th March 1971 resulting in a bloody civil war<sup>25</sup>. The war ended with the unconditional surrender of all Pakistani forces on the 16th of December 1971. After the war Bangladesh once again had to start afresh.

Bangladesh is one of the poorest countries in the world, surviving on foreign aid. It has a population of 120 million with a comparatively small area of 55,598 sq. miles. It is the most densely populated country in the world, with a density of 1350 persons per sq. mile, and the number is on the rise. The dynamics of population growth, with inadequate compensatory growth in non-agricultural sectors, have led to massive landlessness, illiteracy and poverty. 80% of the population depend on agriculture. The balance of payment is dangerously in deficit. The export earning can cover only 30% of the import bill. Economic development was thus impossible without direct participation of the state because of the lack of capital and entrepreneurial ability of the moneyed section of society. Even when there was capital, private entrepreneurs were uninterested in investing where risks were high and chances of profit small. Thus, the state had to take the main

<sup>24</sup> During British rule the area now comprising Bangladesh was relegated to a position of a hinterland via a *via ceteris* other parts of British India. As a result no major industries were set up in Bangladesh during the British period although it had natural advantages in jute, tea, tobacco, paper and leather. Bangladesh had a monopoly in the production of jute in the world but none of the 100 jute mills in British India was situated in present Bangladesh. All the jute fibres grown in the region used to find the best mills at West Bengal (now a province of India) or exported to Ahmed. *An Economic Geography of East Pakistan*, 1968, p.222. The industrial backwardness of the region can be understood from the fact that there were 1500 industrial enterprises with 20 or more workers in each factory in West Bengal against 83 in East Bengal (present Bangladesh) in 1947 [F.H.Ymer, *Development of Industries in Bangladesh*, 1962, p.47].

<sup>25</sup> There exists a vast literature on the independence of Bangladesh, the breakup of Pakistan and description of the genocide committed by Pakistan army. Some of them are mentioned in chapter 1.

responsibility for industrialisation by directly establishing and operating industries. The state was seen as a crucial stimulant and organiser of socio-economic progress. The government had conceived public enterprises as an instrument of development strategy and resorted to it whenever private investments were likely to be inadequate. Thus the ideology of 'developmentalism' and the idea of the interventionist state some what overlap.<sup>26</sup>

The bulk of the development budget of Bangladesh<sup>27</sup> come from developed countries and its public enterprises mostly utilise those funds. As such public enterprises of Bangladesh are part and parcel of the wider international capital. As a result even the form of organisation of public enterprises of the developed countries are replicated without taking into consideration the politico-economic situation of the country. This is also evident from the fact that now the developed countries are privatising many public enterprises so is Bangladesh.

Before independence in 1971, the industrial sector was dominated by West Pakistani entrepreneurs, although there were many manufacturing public enterprises, too. Moreover, West Pakistan was the principal market for many of the industries. At independence both these factors changed. During the war, the Pakistani entrepreneurs left the country leaving their enterprises, and immediately after the war the Pakistani market was closed. The abandoned industries of the departing Pakistani industrialists were taken over by the state. Apart from it, the state nationalized jute, textiles and sugar industries. About 85% of the assets of medium and large scale industries comprised the public enterprises. Thus the government undertook the task of not only controlling but operating the industrial sector which has been drained of its managers and deprived of its principal markets. The new government also changed the structure of ownership.

<sup>26</sup> The same view is expressed by White, G. White, 'The Developmental State' in Y.P. Ghai, R. Lachman and F. Snyder (ed), *The Political Economy of Law, A Third World Reader*, 1987, p. 413

<sup>27</sup> 80% of the development budget of Bangladesh comes from foreign aid or loans. See the budget speech of Finance Minister Saifur Rahman in the Jatiyo Sangsad (name of the Parliament) on 3.6.91, reported in all *Bangladesh dailies* on 4.6.91.

Thus, in Bangladesh, the existence of a number of public enterprises had become not merely important, but indispensable. A sizable public sector existed at the time of her emergence as an independent state on December 16, 1971. Within three months of independence, a decision was taken to nationalise<sup>28</sup> banking, insurance companies and some industries. This was explained in part as a fulfilment of the election promises of the ruling party to establish a socialist economic system.<sup>29</sup> Socialism was declared as one of the four pillars<sup>30</sup> of the new State and was incorporated in the Constitution of the country. State ownership through the creation of a "nationalised public sector embracing the key sectors of the economy"; "planned economic growth" were also envisaged in the Constitution.<sup>31</sup>

In Bangladesh today the government directly owns and manages public utilities and many enterprises in the field of manufacture, finance and agricultural developments that affect the nation's economic well-being as a whole. In spite of its commitment towards introducing market mechanisms in the economy, it plans and helps industrialisation through the development of important industries under private ownership. The practice of planning economic development contradicts the policy of leaving the course of events to be determined by the price mechanism as it operates under the influence of market forces. The government has at various times served as custodian of private enterprises, founder of new enterprises, supplier of raw materials and buyer of finished goods. To this end various public enterprises have been created. The government has conceived public enterprises as an instrument of development strategy and has resorted to it whenever private investments would not likely to adequately help in accomplishing that strategy. The multiple objectives of development plans have also

<sup>28</sup> The concept of nationalisation and the actual process of nationalisation in Bangladesh is discussed in Chapter 2.

<sup>29</sup> For a general discussion on the nationalisation of public enterprises in different countries, see V.V.Ramaswathan, *The Economics of Public Enterprises*, 1961, pp.5-36.

<sup>30</sup> The other three pillars were democracy, secularism and nationalism. However, in 1978, the military government through promulgation of Martial Law Ordinances amended many provisions of the Constitution. Secularism has been amended by faith in Islam and socialism, though retained, but was given a new meaning. Chapter 1 discusses these amendments more elaborately.

<sup>31</sup> See Article 8(i), 13(e) and 15 of the *Constitution of the People's Republic of Bangladesh*.

applied to public enterprises. These, beside political considerations, have complicated their purpose. Although, public enterprise is one of the paths to greater control over the economy but has not been hostile towards private enterprise.

Public enterprises in Bangladesh transcend a single sector. In some sectors public enterprises enjoy absolute monopoly. The public enterprises in Bangladesh accounts for a high proportion of capital formation, foreign exchange earnings, and employment. The First Five Year Plan (FFYP) 1973-78 sought to expand the relative role of public enterprise by locating 80% of the plan expenditure in the public sector.<sup>32</sup>

Indeed, the existence and operations of public enterprises as public institutions are matters of great consequence to the economy<sup>33</sup> accounting for nearly 90% of the aggregate fixed assets in the major industrial groups in 1973. Because of the taking over of the ownership of industries through nationalisation there has been a shift of focus of a large number of economic decisions from private entrepreneurs to government administrators. In view of the great importance of public enterprises the country is searching for better policies and their implementation in the public economic sector.

32. Government of Bangladesh, Ministry of Finance, *The First Five Year Plan 1973-78*, 1973, p.96. The FFYP also considered the public enterprise as "a potent tool for generating surplus and mobilisation of expansion of investment for development". The same plan, also, viewed public enterprises "as effective additional tool in the hands of the government". See *Ibid*.

33. Government of Bangladesh, *Bangladesh Statistical Year Book*, 1978, p.260. Aggregate annual expenditure of the nationalised industries was estimated at about 64% of the total expenditure incurred by all public sector institutions in the country [Government of Bangladesh, Ministry of Finance, *Budget Statement of Autonomous Bodies 1973-76*, 1973, p.7] and their annual average budget expenditure was equivalent to nearly 78% of the average aggregate amount of government revenue and capital expenditure during the First Five Year Plan (FFYP) period [Government of Bangladesh, Ministry of Finance, *FFYP*, 1973, p.216]. They accounted for 80% of total FFYP allocations for the industrial sector. [*Ibid*]. Nearly 43% of financial resources provided by the commercial banks went to the manufacturing sector. [IBRD, *Bangladesh Current Economic Trends*, vol.1, 1978, p.58.] Exports of the products of the nationalised industries fetched 59% of the total foreign exchange earnings. [*Ibid*]. The value of the products of the public sector institutions was about 52% of the total gross value of the national industrial production. [*Ibid*]. The industrial sector in general contributes only 10% of the GDP and of this public sector manufacturing sector contributes about a half [Government of Bangladesh, *Bangladesh Statistical Year Book*, *op. cit.*]. The public sector industries were employing about 31% of the total industrial labour force [*Ibid*]. Though the industrial sector contributes only 10% of GDP of Bangladesh the sector performs a very significant supportive role in the development of agricultural and infra structural growth of the country. This modern industrial base accounts for about 70% of the foreign exchange earning. [A.K.M.B. Hossain, "Interdependence of Public and Private sector in a Developing Country", *Journal of ECONOMIC*, vol.2, no.2, 1987, p.13].

### iii. Research Methodology.

The main sources of this study comprises of:

i) use of primary materials. This involved a study of statutes, official documents such as development plans, industrial policy statements, annual reports of the public corporations and their enterprises, reports of the official investigation and inquiries, parliamentary debates and proceedings, reports of the UN, World Bank (IBRD), International Monetary Fund (IMF) and Asian Development Bank (ADB);

ii) research in secondary sources such as published books, articles in journals, unpublished dissertations, monographs.

iii) The field study gave access to some internal management documents and original data from the ministries, corporations and enterprises. Personal observations, interviews and discussions with the relevant Ministers, officials of the Ministry, Corporation and enterprises under them, member of the Public Accounts Committee, politicians, trade union leaders, journalists and representatives of the Chamber of Commerce and Industries gave some insight into the problems and issues concerning the study. Many of these observations and interviews are critically analysed while others are not reflected in the body of the thesis but their assistance in helping me to understand the subject and the workings of the public enterprises in Bangladesh is invaluable.

Chapters 3 and 4 are based mostly on empirical research in Bangladesh; field work was under taken for this purpose. During field work a questionnaire was considered, but the writer soon realised that handing over the questionnaires to the relevant persons would not serve any purpose. The response was poor, many did not bother to answer them and even if someone did take the trouble in going through them, the answers were too formal and precise. Thus the writer was forced to discuss the issues informally instead.

Amongst the difficulties faced during research were the dearth of published materials. Empirical research was bound to be hampered due to paucity of statistical data. It was not only the problem of nonavailability of sufficient data but also their frequent

unreliability, contradictions and even inconsistencies that created problems. Indeed, at times they appeared irreconcilable. Published figures varied not only between different agencies but also by the same organisations at different points of time.

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**State, Law and the Emergence of  
Public Enterprises in Bangladesh**

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**1.1. Introduction.**

The state has always, in one way or another, intervened in the economy in order to control and regulate it with a view to guiding its course through carefully designed sets of control. The intervention is sometimes direct and sometimes indirect. By direct intervention is meant a situation where the state owns an enterprise or a group of it; by indirect intervention is meant that the state employs regulatory controls. In case of direct intervention the state actually enters into production and involves itself in both control and management, i.e. the use of public enterprises. The need for direct control or operational controls<sup>1</sup> arise mainly from the desire to control the development of the economy, or from the general weakness of the market mechanism or even the absence of market mechanism, scarcity of raw materials, foreign exchange, etc.

The indirect model of controls obtains where the state does not itself own any sector of the economy, but tries to influence the conduct of the economic actors, who are private parties, through a variety of regulatory and other mechanisms administered by the government or its agencies. They include various licensing procedures, imposition of taxes, tariff regulations, foreign exchange regulations and other prohibitory public laws. It

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<sup>1</sup> Chai uses different terminology. He mentions two types of control, the operational model meaning direct control is the use of public enterprises and the regulatory model meaning indirect control. See Y.P.Chai, 'Control and Management of the Economy: Research Perspective on Public Enterprise' in Y.P.Chai (ed), *Law in the Political Economy of Public Enterprises*, 1977, pp 17-22.

is more a characteristic of market economies, although this model can also be used in socialist countries.<sup>2</sup>

It is to be noted that whether the model of control is direct or indirect, in each case, the aim is not to allow things to take their own course, but to influence or control the process of economic development. From a legal point of view, the difference between direct and indirect control is that the second model is a method of control without ownership, and the first of management through ownership.

Generally a state uses both the forms of intervention but with a bias towards one of them. The forms of intervention and control differs from country to country and even from time to time in a given country. But from the late 18th century until a century ago the prevalent doctrine was the non-interference of the state directly in industrial management except insofar as it was necessary to break up private monopoly.

## 1.2. The Rise and Fall of Public Enterprises

Before the rise of capitalism, starting the 16th century, government's main motivation and rationalisation for its policies of subordination of economic affairs to the will of the state was for promoting merchant profits.<sup>3</sup> From the middle of the seventeenth century, "almost all mercantilist writers condemned state granted monopolies and other forms of protection and favoritism in the internal economy as opposed to international commerce."<sup>4</sup> But earlier in the seventeenth century, the belief that restrictions on production and trade within a nation were harmful to the interests of every one concerned was increasingly widespread<sup>5</sup>. These writers believed that all men were motivated primarily by self interest

2. *Ibid.*

3. For more details of Mercantilist period and the periods preceding it, see E.K. Jess, *History of Economic Thought: A Critical Perspective*, 1979, pp. 1-30.

4. *Ibid.*, p.27.

5. "Numerous statements of this view can be found in the works of such writers as Malthus, Paine, North, Law and Child." *Ibid.*

and should be left alone to compete in a free market if the public welfare was to be maximized. The Physiocrats<sup>6</sup> regarded this theory as objectively scientific<sup>7</sup>. Their intellectual leader, Francois Quesnay, developed a model of how a society should be structured in order to reflect natural law. On the basis of this model the Physiocrats advocated political reform, namely, the abolition of guilds and the removal of all tariffs, taxes, subsidies, restrictions and regulations prevalent at that time in France. All these doctrines were summed up in the slogan, "*Laissez faire et laissez passer, le monde va de lui-m<sup>e</sup>me*".<sup>8</sup>

Physiocratic influence was short lived and was primarily intellectual, not political.<sup>9</sup> But the Physiocrats are notable for their invention of the term and policy of *laissez faire*,<sup>10</sup> which has lingered as a subject of economic discussion ever since and characterizes the doctrine of the classical economists<sup>11</sup> who followed.<sup>12</sup>

The classical economists took up the theme from Adam Smith, who in his famous *An Inquiry into the Nature and Causes of the Wealth of Nations*, (generally referred to as the *Wealth of Nations*) in 1776, propounded the view that welfare could be maximised by the introduction of a *laissez faire* policy by the government, i.e., allowing the forces of competition and the free interplay of supply and demand to regulate the economy, which would be almost entirely unhindered by government restrictions or interventions.<sup>13</sup>

<sup>6</sup> The Physiocrats were a group of French social reformers who were intellectual disciples of Francois Quesnay (1694-1774). Most of their ideas came directly or indirectly from Quesnay's *Tableau Economique*, presented first privately in Versailles in 1758. See Hunt, *op. cit.*, p.30.

<sup>7</sup> *Ibid.*, p.33.

<sup>8</sup> It means "Don't interfere, the world will take care of itself" see G.Scule, *Ideas of Great Economists*, 1955, p.36.

<sup>9</sup> E.Hunt, *op. cit.*, p.31.

<sup>10</sup> The term *laissez faire*, is commonly attributed to Germany (1712-1791), who was a Physiocrat. Translated literally, it means "let it do", i.e. leave alone, signifying that the government should leave individuals alone in their economic activities. See E.Whittaker, *A History of Economic Ideas*, 1947, p.41.

<sup>11</sup> The classical period of economics ranges from Adam Smith's *Wealth of Nations*: 1776 to J.S. Mill's *Principles of Political Economy*, 1848. See Whittaker, *op. cit.*, p.60.

<sup>12</sup> G.Scule, *op.cit.*, p.34.

<sup>13</sup> E.K Hunt, *op.cit.*, p.51.

The classical economists believed that the function of the government should be limited to certain policy functions, mainly in the field of defence, foreign affairs, police and justice; and the business of the industry was to produce goods as cheaply as possible. Therefore, interference by industry in politics was fatal to good government, and interference by the state in industry was fatal to efficient production. The wisest course for a government was to abstain from a blundering intervention and leave industry to its own devices.<sup>14</sup>

As a result of the acceptance of the doctrine of "laissez-faire", a great liberalisation of economic activity took place especially in developed European countries and in the United States, although at the same time in the next one hundred forty years, the state continued to intervene in order to protect individuals, encourage some collective action and even provide services itself.<sup>15</sup>

The two world wars changed all this. The period from 1914 to 1945 was a period of continuous war or preparation for war.<sup>16</sup> During this period all productive activities were mobilised for defence. Every industry gave up production for peacetime and concentrated on war materials. Foreign trade was confined to essential commodities. In this situation the state undertook the tasks previously left in the hands of private individuals. Production and distribution became one of the functions of the state. Politicians and economists, who favoured an extension of the economic function of the state, continuously grew in number.

In 1919, A.C. Pigou, in his *Economics of Welfare*, put forward arguments in favour of state intervention in industries of a monopolistic character. He discussed at length the

14. According to Adam Smith the state ought to be given only three duties: "first, the duty of protecting the society from violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and thirdly, the duty of erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain, because the profit would never repay the expense to any individual or small number of individuals, whom it may frequently do much more than repay it to a great society." A. Smith, op. cit. p. 651; quoted from Khan, op. cit., p. 55

15. A. Khan, *Government, Economics and Industrial Policy*, 1973, p. 10.

16. R. K. Sinha, *Economics of Public Enterprises*, 1983, p. 16.

inherent disadvantages of traditional political institutions (i.e. municipal and national representative assemblies) as instruments for the control or the operation of monopolistic business enterprises, and indicated that these bodies were primarily created for purposes other than that of intervention in industry. Pigou concluded that modern developments in the structure and methods of governmental agencies have fitted these agencies for a degree of beneficial intervention in industry which would not have been justified in earlier times.<sup>17</sup>

In Russia, the Bolsheviks came to power in 1917 with Marxist ideology. Common ownership of the means of production was a cardinal aim of the new government which insisted on the evils of capitalist ownership over the means of production and replacing capitalist ownership by public ownership through a series of nationalization programmes. Socialism was taken to be a rival system to capitalism for the organization of economic affairs.

Marxism saw the private ownership of the means of production - capital - as a means by which one class in the economy exploited another. Taking capital into public ownership was seen as a means by which this exploitation could be ended and an egalitarian society developed. Politically it meant more than the substitution of common ownership for private ownership. The form of ownership has been associated with the general emancipation of the working class and emphasized the need for greater equality in economic and social matters. Taking over private ownership by the state, i.e. nationalization, had, therefore, been an important element in the programmes of the socialist and other social-democratic parties. Indeed, in some countries, particularly in the U.K and France, the major acts of nationalisation were carried out by these parties.<sup>18</sup> However, to assume that public enterprises have been only created by the socialist governments would be an inaccurate reflection of history.

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<sup>17</sup> A.C.Pigou, *Economics of Welfare*, 1919, p.299.

<sup>18</sup> R.Rees, *Public Enterprise Economics*, 1984, p.5.

In 1926, J.M. Keynes supported government interference in those services which were social in nature, particularly for the control of savings and investment, the business cycle, and the development of a national population policy.<sup>19</sup> In recent times, Galbraith expressed the opinion that certain industries are of peculiar importance not only for comfort, well-being, tranquillity and happiness but also for continued existence. They provide shelter, health services and local transportation of people. Housing, particularly in a cold climate, medical attention and the means of reaching one's place of employment are not frivolous needs. He maintained that these industries could not function in the market system. The only solution he found for these industries was organisation under public ownership. He also pointed out that with the rise of the market and the planning systems, and the consequent inequality in development, the case for public ownership becomes much more general.<sup>20</sup>

There is considerable substance in the argument that, left to itself, the private sector is unlikely to invest in the development of public utilities as the government would. Thus, development of these utilities has to be initiated by the government. Even in a country like the United States of America, the seat of market economy, during the depression of the 1930's, Roosevelt era of the "New Deal", created a massive body of social welfare legislation both at Federal and state level providing for minimum welfare to the citizens. The need for an active role of the state in guiding and regulating the employment and business was acknowledged.<sup>21</sup>

In fact, no state has ever allowed the economy to go on its own way by remaining a silent spectator. Far from being a passive<sup>22</sup> observer of the economic process, the state

<sup>19</sup> J.M. Keynes, *The End of Laissez-faire*, 1926, p.46.

<sup>20</sup> J.K. Galbraith, *Economics and the Public Purpose*, 1974, pp.279-81.

<sup>21</sup> W. Friedmann, *The State and the Role of Law in a Mixed Economy*, 1971, p.13.

<sup>22</sup> Even in Smith's description of the state functions [see, footnote 14], *laissez faire* does not mean passivity. O. Thorburn writes that "the principle of laissez faire from the very beginning means not only passivity but, generally, acceptance of the economic laws of capitalism" and that "there is a fundamental continuity in the political interpretation of economic theory. From the classics to Keynes, the amount of state intervention considered necessary for the reproduction of capitalism has continually increased considerably. That such intervention... was necessary and useful, was a part of the theoretical corpus of classicism as well as of neo-classicism" and "such a perspective (the classical) on the state is not essentially different in Keynes, though the terms he looked on he said to be much less short-sighted." See O. Thorburn, *Science, Class and Society*, 1982, p.176.

today has emerged as an active participant, taking upon itself the "role of protector, controller and guardian of the citizen and of entrepreneur at the same time."<sup>23</sup> Practically there is hardly any sphere of human activity which is not, in some way or other, controlled and regulated by the all powerful, all embracing machine, which is the modern state. It is evident that increasing state intervention in the economic life of the people has become a characteristic feature of the twentieth century.

But with the political ascendancy of conservative governments in the United States and Great Britain, as well as Canada and Germany in the 1980s there has been a reversal of economic ideas and policy. The rise of conservatism brought with it a neo-classical, free market counter revolution in economic theory and policy. It seems the ideas of *laissez faire* are increasingly gaining ground again. The central theme of this counter revolution is that too much state intervention in the economy effectively slows down the pace of economic growth. It believes that both economic efficiency and growth will be stimulated by permitting free markets to flourish, privatising public enterprises, promoting free trade and eliminating the plethora of government regulations and price distortions. Now more and more public enterprises are being privatised not only in these countries but else where in the world. The dramatic changes in the Eastern European countries in recent years following largely from the policies of "*perestroika*" and "*glasnost*" in the Soviet Union, have seen a shift of policy towards allowing more role to the private sector. This economic ideology has been augmented and formidably thrust upon the developing countries by World Bank and the IMF. Thus we observe a full circle in the evolution of economic thought.

Be these as they may, it remains a fact that until now public enterprises are being used by all countries, in varying degrees and numbers, whether developed or underdeveloped. Of course public enterprises have acquired greater importance in the developing countries.

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<sup>23</sup> B. K. Sinha, *op. cit.*, p. 16

In spite of their universality, the growth of public enterprises and the degree of government control in the economic and industrial management differ from nation to nation and from government to government, e.g. in countries such as China and Cuba, the government owns and controls almost all productive resources. This was of course, true in the former USSR. Even in the industrialised countries such as the UK, Sweden, France, Germany, Japan and Italy, both public and private enterprises coexist not as rivals but as complementing each other, although in the US and Switzerland public enterprises are relatively less in use.

Although the ownership of public enterprises in theory lies with the state, in practice the real control lies with one or more groups working through a political party, a bureaucracy and a technocracy. The contention of competing social forces not only manifests themselves in the ownership control-operation nexus, but also extends into strategy, management and result.<sup>24</sup> Thus, what are ultimately important are the interactive systems relating to social forces, political power and economic policy.

Thus, it is necessary to study public enterprises in the wider context of the state, because the state is seldom neutral or impartial, and its policies affect the structure of society. It is also important to understand the relationship between dominant groups and the administrative process, including the way public enterprises actually function.<sup>25</sup> To analyze the public enterprises separated from the politico-economic context where they are embedded would give an oversimplified and distorted view of their character and would make it almost impossible to understand their unique qualities.

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<sup>24</sup> R. Sebban, *The Political Economy of Public Enterprises in Asia*, (mimeo), 1978.

<sup>25</sup> J. A. Alairola, 'Towards a Theory of State Enterprises in Less Developed Countries' in *Public Enterprises*, vol. 8, No. 2, 1988, p.147.

### 1.3. Public Enterprises before the Independence of Bangladesh and the Role of the State.

Public enterprises in British India had largely been confined to providing social goods in the form of communications, broadcasting, posts, telegraph and telephone, roads and railways, transportation, and limited banking facilities and certain defence establishments.<sup>26</sup>

Pakistan's involvement in public enterprises started with a framework and outlook inherited from colonial times. Thus in the early years, public enterprises covered the communications network, power, irrigation, social service facilities in education, health, housing and defence.<sup>27</sup> After independence in 1947 the role and function of the government changed. The Industrial Policy announced in 1948 limited public ownership to the manufacture of arms and ammunition, the manufacture and operation of railways, telephones, telegraph and wireless and the generation of hydroelectric power.<sup>28</sup> This policy of limiting public enterprises contributed to the industrial backwardness of East Pakistan (now Bangladesh) because East Pakistan lacked an indigenous entrepreneurial class<sup>29</sup> and massive state interference was required for the industrial development of the province.

A few years later, The Economic Appraisal Committee emphasised the role of the government as "regulator", "general administrator", "promoter" and "facilitator"<sup>30</sup>. In spite of this, the committee noted the need for expanded state involvement in agriculture,

26. For a discussion on public enterprises during British rule, see: R. Dutt, *Economic History of India*, 2 volumes, 1950 also D.R. Gadgil, *The Industrial Evolution of India in Recent Times 1860-1930*, 1971 (5th edition).

27. For details see R.J. Andrus and A.F. Mohammad, *The Economy of Pakistan*, 1958.

28. Government of Pakistan, *Statement on Industrial Policy*, 1948.

29. For the reasons for the absence of entrepreneurial class in East Pakistan see F.H. Yusuf, *Natikanishan of Industries in Bangladesh*, 1985, pp.53-60.

30. Government of Pakistan, *Report of the Economic Appraisal Committee*, 1952.

finance, transport and social sectors.<sup>31</sup> The efforts of the public sector were to supplement the private sector and to actively promote the growth of individual entrepreneurship.

In spite of the above policy recommendations, the following table illustrates the dominant role of the public sector in the industrial development of East Pakistan (now Bangladesh).

Table-2  
*DEVELOPMENT EXPENDITURE IN E. PAKISTAN (NOW BANGLADESH)*  
 IN MILLION RUPEES.<sup>32</sup>

PERIOD	PUBLIC	PRIVATE	TOTAL	% OF PUBLIC
	(1)	(2)	(3)	(1 as % of 3)
1954-55	700	300	1000	70
1959-60	1970	730	2700	73
1964-65	6700	3000	9700	69
1969-70	11060	5500	16560	67

[Source: Government of Pakistan, Report of the Panel of Economists on the Fourth Five Year Plan, 1970.]

In pursuance of the policy of promoting private entrepreneurs rather than direct state participation in industrial management as far as possible, many public agencies, which were promotional in nature, like the Pakistan Industrial Development Corporation PIDC (later bifurcated as West Pakistan [WPIDC] and the East Pakistan Industrial Development Corporation [EPIDC]), Water and Power Development Authority (WAPDA), Pakistan International Airlines (PIA), Pakistan Shipping Corporation (PSC), Chittagong Port Trust (CPT), Dhaka Improvement Trust (DIT) etc. were created. Similar organisations were created in financial, trading, service and promotional sectors, viz, the

<sup>31</sup> *Ibid.*

<sup>32</sup> Rupee is the name of the Pakistan currency whose exchange value in 1969 was 1 £. Rs. 10.50

central bank of the country (the State Bank of Pakistan), Industrial Finance Corporation (IFCP), National Bank of Pakistan, Agricultural Development Bank (ADBP), Small Industries Corporation (PSIC), Pakistan Industrial Development Bank (IDBP), Pakistan Industrial Credit and Investment Corporation (PICIC), House Building Finance Corporation (HBFC), Trading Corporation of Pakistan (TCP) etc.

The PIDC/EPIDC, PSIC and other financial institutions were instrumental in promoting many manufacturing units, through their joint ventures, initiative, planning, provision of resources, risk taking etc. The public enterprise institutions, which were confined to high risk, low profile areas, came to play a significant role in creating the institutional infrastructure for helping private enterprise to utilize public resources. Many industrial enterprises were established with the aim of transferring them later to the private sector. Thus it is clear that the government created certain public enterprises to promote private industrial sector and EPIDC established many industrial enterprises which were run by it.

The policy of industrialisation through government support was pursued through a set of positive and negative controls manifested in tariff protection, tax concessions, exchange rate manipulation as well as direct and indirect subsidies.<sup>33</sup> PIDC/EPIDC and the financial institutions played a pivotal role in the process of industrialisation in both the private and public sectors.<sup>34</sup> It is doubtful whether without planned government measures in the shape of providing capital from the national exchequer, and the fiscal and infrastructural facilities made available by public corporations, the present heavy industries, like diesel plant, machine tools, ship-building, fertilizer, chemicals, heavy engineering, steel mills, sugar mills etc. would have come into existence.

From its inception in 1952 up to the liberation of Bangladesh in 1971 PIDC/EPIDC set up 74 different manufacturing units in various fields either by itself or in

<sup>33</sup> For a detailed study of the public enterprises in Pakistan, see R. Sobhan and M. Ahmad, *Public Enterprise in an Intermediate Regime: A Study in the Political Economy of Bangladesh*, 1983, pp. 33-77.

<sup>34</sup> For a detail growth of EPIDC and its role in promoting industrialisation, see T. Huxner, *EPIDC: A Conglomerate in Pakistan*, 1966.

collaboration with private sector.<sup>35</sup> The industrial policies of the government of Pakistan and the charter of PIDC/EPIDC committed it to set up industries, run them for some time and then transfer them to enterprising private industrialists, when these had grown up, as on-going and profit earning concerns.<sup>36</sup>

The non-Bengali (i.e. Pakistani) entrepreneurs gained much from this policy.<sup>37</sup> The central capital,<sup>38</sup> the principal sea and air ports and the centre of import and export trade were also situated in the capital city. This great geographical incongruity was by itself a sufficient disincentive for an aspiring Bengali investor to come all the way to the central capital to complete the necessary legal and administrative formalities to establish a new enterprise or to extend an existing one. It may be mentioned here that under the *Government of India Act 1935* i.e. the Constitution of British India, industrial development was a provincial subject but by enacting the *Development of Industries Federal Control Act 1949*, the government of Pakistan transferred industries to federal control. The West Pakistani entrepreneurs gained much because their proximity to the capital city enabled them to cultivate personal contacts with the bureaucracy. The device of import licensing regulated the import trade and only a limited number of licenses were issued so that license holders were assured of an economic volume of business. The renewal of licenses among importers were decided in reference to their performance in trade and their financial position. Established import houses continued to grow in size, leaving almost no room for newcomers. The Pakistani ruling elite employed direct and indirect devices to transfer resources from Bangladesh to (West) Pakistan to the amount of US\$ 6 billion.<sup>39</sup> The objectives of the successive industrial policies followed by the government of Pakistan were to facilitate the growth of the West Pakistani industrialists and men in

<sup>35</sup> BIDC, Public Relations Department, *B.I.D.C. in Figures, 1972*, (soon after independence EPIDC came to be known as Bangladesh Industrial Development Corporation (BIDC)).

<sup>36</sup> See Government of Pakistan, *The Charter of EPIDC, 1962*.

<sup>37</sup> See H Pappas, *Entrepreneurs in East Pakistan, 1969*.

<sup>38</sup> At partition Karachi became the capital of Pakistan and later Islamabad became the capital. Both these cities are situated in West Pakistan (now Pakistan) and are more than 1000 miles away from Bangladesh, Indian territory being in between.

<sup>39</sup> J Faizel and J R Parkinson, *Bangladesh the Test Case for Development, 1976*, p.18, the authors used the expressions "subtle" and "powerful" devices.

commerce to exploit the resources of Bangladesh, keep it perpetually dependent on Pakistani manufacturers and to create a viable market for their products.<sup>40</sup>

During the Third Five Year Plan (1965-70 period), the dominant political theme was not to challenge the growth of the Pakistani bourgeois class but to support the growth of a group of East Pakistani (now Bangladeshi), to be later transformed into local bourgeois class,<sup>41</sup> in an attempt to bring some sort of economic parity.

The ruling elite was also eager to find a sympathetic counter group in East Pakistan. East Pakistan started experiencing the growth of Bengali industrialists through a system of sponsored capitalism,<sup>42</sup> supported by political patronage, on the one hand, and reinforced, on the other hand, by the political opposition's demand for parity in developmental allocation between the two parts of Pakistan.<sup>43</sup> The Bengali (East Pakistani) bourgeoisie demonstrated their dependent character by continually looking to government to undertake modernizing activities with them and for the benefit of their class. The result was the creation of a class of Bengali bourgeoisie providing support to a regime, similar to the previous British colonial one. This developed to such an extent that even the draft Fourth Five Year Plan 1970-75 itself recognized that the policy of encouraging private enterprise through direct and indirect concessions created "inequality, inequity and consequent social tension."<sup>44</sup>

40 S Islam, *Public Corporations in Bangladesh*, 1975, p.28

41 Moneyed class denotes the people having surplus investible funds and bourgeoisie are those who own manufacturing industries. The Moneyed class is wider in its meaning and includes traders, bourgeoisie, farmers with surplus in Bangladesh, then extends no far as it is understood in developed countries. Farmers with surplus means those land owners who have surplus after maintaining his family from the income derived from land.

42 For an analysis of the growth of Bengali bourgeoisie, see K. Ahmed, *The Socio-political History of Bengal*, 1975; H Brownfield, *Elite Conflict in a Plural Society: Bengal in the Twentieth Century*, 1968 also U Hassan, op. cit.

43 There is a wide range of literature on disparity between the two wings of Pakistan and its wider implications. The literature includes government publications such as the *Report of the Panel of Economists on the Fourth Five Year Plan*, op. cit., A Rahman, *East and West Pakistan, A Problem in the Political Economy of Regional Planning*, 1968; R Jakes, *Pakistan: Failure in National Integration*, 1972; K U Ahmed, *Break up of Pakistan: Background and Prospects of Bangladesh*, 1972; A S Chatter, *Regional Disparity and Economic Development in Pakistan* in V.K.R.V. Rao (ed), *Bangladesh Economy: Problems and Prospects*, 1974; R Natana, "The Economic Structure of Pakistan and Bangladesh" in R Fleckborn (ed), *Economies in the Subcontinent*, 1975.

44 Government of Pakistan, *Draft Fourth Five Year Plan 1970-75*, 1970, p.12.

EPIDC was a major instrument of government policy to create a class of bourgeoisie from amongst the Bengali traders.<sup>45</sup> But the task was a difficult one because of the very limited number of members of Bengali traders with sufficient business experience or capital. As a result, EPIDC had to act in conjunction with other public enterprises in the field of finance. Thus the Industrial Development Bank of Pakistan (IDBP) and the Pakistan Industrial Credit and Investment Corporation (PICIC) had to give financial and other technical support in building up a Bengali capitalist class. EPIDC provided the plans and design, helped in selecting the right machinery and assisted in the construction and commissioning of the enterprise. Material help was given by providing a capital structure with a minimum debt-equity ratio of 70:30. The financial institutions covered the debt by a foreign exchange loan to the project from the financial institutions to finance the cost of imported machinery. The EPIDC was committed to provide 50% of the equity, but in most cases it went up because of the escalation of construction costs.<sup>46</sup>

Sobhan and Ahmad carried out an interesting study<sup>47</sup> which shows that in some cases the equity share of the private party was below 7.5% of the total investment. Even this component did not always require any immediate cash outlay. The owner usually over-invoiced the machinery purchased by 10-20% and kept this amount of foreign currency in his own account.<sup>48</sup> The owner could then convert 50% of the foreign exchange earned at black market rates at a time when the rupee was over-valued to the extent of 80-100% and this provided his working capital. Sobhan and Ahmad<sup>49</sup> illustrate the whole transaction numerically on the basis of specific information about equity structure of 10

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45 T. Hussain, *op. cit.*

46 *Ibid.*

47 R. Sobhan and M. Ahmad, *op. cit.*

48 For full detail of this transaction, see Sobhan and Ahmad, *op. cit.*, p.41.

49 *Ibid.*

jute mills but only added the financial implications of the black market in foreign currency in the following way:<sup>50</sup>

1. Cost of project	Rs.20 mill.
2. Financial institution's loan at 75% of project cost	Rs.15 mill.
3. EPIDC investment at 50% equity	Rs.2.5 mill.
4. Bengali owner's equity shares	Rs.2.5 mill.
5. Black marketing value of converting 7.5% of over invoicing of machinery cost at 100% premium on official rate	Rs.2.05 mill.

Thus by over-valuing by just 7.5%, the owner was able to meet most of his share of his equity and acquired substantial control of the project of Rs. 20 million, paying only a negligible amount. In fact many did much better by a higher rate of invoicing and built their own foreign exchange reserve abroad while bringing back some amount to meet the running cost of the mill.<sup>51</sup>

EPIDC's selection of the chosen few (mostly of Bengali origin) was in most cases not related to past business experience, or even high liquidity. The main entrepreneurial skill required was measured in terms of the candidate's access to the political power structure or his capability to influence the top management of EPIDC and financial institutions and the decision makers in the government.<sup>52</sup>

The policy of patronizing the Bengali entrepreneurs worked well enough until the demand for partnership in the political power of the state received momentum in the last years of the 1960s. Naturally the people of Bangladesh began to protest against the government policy. By 1970, a nucleus had formed of aspirant Bengali industrialists who thought that the departure of non-Bengalis would automatically widen their scope for the extraction of surplus.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> R.Sobhan, 'The Social Basis of Bengali Nationalism' in *Forum*, vol. 1, No. 1, 1969.

Public enterprises accelerated the growth of capitalism in East Pakistan and had a disruptive effect on the prevailing Asiatic mode of production.<sup>53</sup> With the extension of state activities promoting capitalism the number and role of bureaucracy increased. The growth of capitalism resulted in the growth of a group of industrialists, traders and workers. The social system showed the configuration of interest groups which interact with each other in order to gain or retain control of productive resources. While the economic system had the function of actualisation of goals through the production of goods and services.<sup>54</sup> The group, namely the bureaucracy (both civil and military), had the privilege of making decisions by virtue of its control over productive resources through control of political system.<sup>55</sup>

#### 1.4. The Liberation War and its Impact on Public Enterprises.

In 1970, for the first time in the history of Pakistan a genuine free election based on universal adult suffrage was held. But after the election<sup>56</sup>, the military junta, backed by the (West) Pakistani bourgeoisie, refused to hand over power to the newly elected people's representatives or to convene the National Assembly. Instead the Pakistan army started committing genocide in East Pakistan to force the Bengalis to give up their right to self government.<sup>57</sup> The Bengalis had no alternative but to fight the army with all that they could gather. In response to the brutal genocide of the army beginning from the night of 25th March 1971, the leaders of the the Awami League, obtaining a majority in the

53. For a discussion of the Asiatic mode of production, see chapter 2.

54. M. Ahmad, *State and Development: Essays on Public Enterprise*, 1987, p.3.

55. *Ibid.*

56. Amongst a large number of books and articles written on the implications of the 1970 election results and the sequence of events leading to the declaration of independence of Bangladesh, see B. Jackson, *South Asian Crisis*, 1973 also H. Feldman, *The End of the Beginning, Pakistan 1966-71*, 1975.

57. For description of the army crackdown, amongst many works special mention may be made of Government of India, *Bangladesh Documents*, 1971; H. Jackson, *op. cit.*; A. Manuvelhan, *The Rape of Bangladesh*, 1974 and D. Lohok, *Pakistan Crisis*, 1972.

general election<sup>58</sup>, were compelled to declare the independence of East Pakistan as the Peoples Republic of Bangladesh on the 26th of March 1971.<sup>59</sup> The war of independence lasted for 9 months. With the unconditional surrender of Pakistani forces on the 16th of December 1971, independent Bangladesh became a reality.

The Awami League<sup>60</sup> gave leadership during the liberation war against Pakistan. This party was a splinter group of the Muslim League which fought for the division of India and creation of Pakistan on the basis of religion. As a reaction against the non-secular communal bias of the Muslim League, it adopted secularism as one of the planks of its platform. The Awami League was basically a middle class petty-bourgeois party in terms of the composition of the economic interest groups which provided its main support in the country.<sup>61</sup> They were the farmers with surplus, the trading and marketing intermediaries (mercantile class) engaged in domestic and foreign trade, and small scale entrepreneurs who were aspiring to develop into medium and large-scale industrialists. The number of traders and industrialists in the former East Pakistan was small and they suffered from comparative disadvantages from their counterparts of West Pakistani origin.<sup>62</sup> These groups of petty-bourgeoisie played a pre-eminent role in the economic life of the country but could not influence the political process in Pakistan as it was in the hands of the West Pakistanis. These were the main economic groups from which were also drawn the members of the public service (the bureaucracy), the army, the professionals and the intelligentsia. The party fought for a larger share of the benefits of economic progress and a larger share of resources for the development of East Pakistan. It also wanted greater participation of the province in the process of political and economic decision making. By the mid 1960's its main platform was the demand for autonomy in the

<sup>58</sup> The Awami League won 160 of 300 National Assembly seats and 288 of 300 East Pakistan Provincial Assembly seats.

<sup>59</sup> For the text of the declaration of independence, see *Bangladesh Document*, op. cit., pp.315-17.

<sup>60</sup> For a discussion on the Awami League, see M. Rasheduzzaman, 'The Awami League in the Political Development of Pakistan' in *Asian Survey*, vol. 10, 1970, pp. 574-87.

<sup>61</sup> T. Ali, 'Pakistan and Bangladesh: Results and Prospects' in R. Blackburn, op. cit., pp. 295-301 also N. Islam, *Development Planning in Bangladesh: A Study in Politics and Economy*, 1977, pp. 21-24.

<sup>62</sup> N. Islam, op. cit., p. 15.

management of the financial and foreign exchange resources of East Pakistan on the basis of what came to be popularly known as the "six-point programme" of autonomy.<sup>63</sup> In other words, the party was primarily promoting Bengali nationalism within the framework of Pakistan.

The Awami League increasingly gained support in the upper echelons of the urban elite, the intellectuals and professionals. They became the strongest spokesmen in the fight within Pakistan for greater participation in economic opportunities. These were the groups disadvantaged by the state but who had the aspiration of controlling state power to maximize their economic interest.

In the urban areas, the party drew considerable support from the labour unions in the large-scale industries. These industries were predominantly owned by (West) Pakistanis. Therefore, the organization of the workers in such industries against the Pakistani owners was a part of the nationalist struggle. By supporting and organising workers in their fight for higher wages and better working conditions, the Awami League obtained a powerful ally which was very useful in organising mass meetings and in mobilising popular support. The workers though numbering only 350,000, were an influential pressure group in view of their concentration in large towns and their ability to organize industrial action to dislocate the economic and administrative machineries in urban areas.<sup>64</sup> Moreover, the workers had profound influence in shaping the public opinion and political consciousness of the rural masses. They could do so because the rate of literacy was very low combined with lack of communication and ineffectiveness of the formal mass media instruments, like news papers and radio, which resulted in the dependence and reliance of the population on the first hand information supplied by the workers returning to their villages for various reasons. In other words, the workers were the main liaison between the urban and rural population. Because of economic instability,

<sup>63</sup> Sheikh Mujibur Rahman, *Charter for Survival: Six Point Programme, 1966*; reprinted in *Bangladesh Document*, at *Six Point Formula - Our Right to Live*, op. cit., pp.23-33.

<sup>64</sup> For the role of the workers in the movement against Pakistan, see T. Maniuzzaman, *Radical Politics and the Emergence of Bangladesh* in P. R. Brzezinski and M. Franda (ed), *Radical Politics in South Asia*, 1973.

intense competition for jobs, seasonal variations in the supply of job and the continuing reliance of workers on agriculture, the workers periodically returns to his village.

During the period between 1958-70, when Pakistan was directly or indirectly ruled by the military in coalition with the bureaucracy, political parties were either banned from time to time or occasionally revived for short intervals. The top leadership of the Awami League was in prison for most of the time with the result that the movement for autonomy and restoration of democracy was largely carried forward by student activists. It was during the same period that the radical elements gained influence in both the student and labour wings of the Awami League. By 1968-69 unity was forged between the Awami League student organization (Student League) and the left wing student organization (Student Union), linked with various Marxist and left oriented political parties, to carry forward the movement for autonomy and democracy on the basis of "Eleven Points Programme"<sup>65</sup>, which absorbed the six point autonomy demand and included such measures as a) nationalisation of banks, insurance companies and large industrial units, b) reduction of taxes on agriculturists, c) payment of proper wages to the labourers etc.<sup>66</sup>

The war of independence during 1971 was the last important factor in increasing the strength of radical elements in Bangladesh politics. The liberation fighters were drawn from young men of all political affiliations as well as from the Bengali personnel of the Pakistan armed forces, including the police. Young peasants and students, both rural and urban, were a very important component of the force. There was a large contingent of radical elements among the freedom fighters, especially among the students. During and after the war, the leftist parties gained much strength with the acquisition of arms during the war.<sup>67</sup>

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<sup>65</sup> For details of 'Eleven Points Demands' of the East Pakistan Student's All Party Committee of Action, see Sobhan and Ahmad, *op. cit.*, p. 96

<sup>66</sup> *Ibid.*

<sup>67</sup> The discussions of the above three paragraphs are mainly based on the information of various studies of the mentioned period, see for example, N Islam, *op. cit.*, Sobhan and Ahmad, *op. cit.*

It is with this background that Bangladesh became independent. At the time of independence, public enterprises in Bangladesh functioned in respect of central banking, commercial banking, industrial financing, house building loans, agricultural credit, insurance, railway, road transport, airlines, inland and marine shipping, post, telephone and telegraph, radio and television broadcasting, health, jute marketing, foreign trade etc. There were public enterprises in such diverse fields as agricultural development and extension services, fisheries development, regulation of inland water transport, aviation, water and sewerage services in major cities, power generation, flood control and irrigation, city improvement, regulation of tea plantation and processing, promotion of tourism to film industry development. Public enterprises also covered fields like atomic energy research, rural development, industrial and scientific research etc. The universities were totally dependent on government grants and were effectively public sector organisations.

At the time of independence, 47% of the fixed assets of the modern industrial sector,<sup>68</sup> were controlled by non-Bengali entrepreneurs. Many of these were themselves part of large business houses with their headquarters in Pakistan, so the policy making and records were located in Pakistan. An estimated 41% of the total fixed assets in the modern industrial sector in Bangladesh were controlled by these big business conglomerates. Among the non-conglomerate enterprises many were one unit ventures where the assets, management and policy making were all located in Bangladesh even though the proprietors were Pakistani. 70% of the bank deposits were in banks owned and based in Pakistan. In the same way, trade (both foreign and domestic), had been dominated by non-Bengalis. The bulk of inter-wing trade, which accounted for 48% of Bangladesh's foreign trade in 1969-70, was in non-Bengali hands.

As the war of independence went on and the emergence of Bangladesh became more and more imminent, thousands of villages and market places were burnt and devastated. Railways, roads and waterways were damaged and crippled. About a thousand

<sup>68</sup> The figures quoted here are cited from F.H.Yusuf, *Nationalisation of Industries in Bangladesh*, 1985.

bridges were blown up. Industrial plants were shifted to (West) Pakistan and a few were damaged. The economy was devastated, communications disrupted and supply lines were cut off. Above all 3 million people were killed.<sup>69</sup>

During the war, non-Bengali businessmen began pulling out of Bangladesh for fear of possible massacre. As a result, only a handful of entrepreneurs were left in Bangladesh after the war and they too, kept away from their factories and offices.<sup>70</sup> In this exodus, top management were joined by middle managers, foremen and even skilled workmen. As a result, a major segment of the private sector in Bangladesh came to a standstill at liberation, most notably industrial enterprises owned by non-Bengalis. The impact of non-Bengali emigration was more critically felt in finance and commerce. In the field of trade only physical assets and bank liabilities remained. The bulk of capital tied up in the knowledge and experience of the entrepreneurs disappeared. This was accompanied by the physical break with Pakistan, where much of the trading expertise was connected. For example 100% of imported cotton and textiles came from Pakistan. Apart from trade knowledge, completely new sources of supply had to be found to make up for traditional imports from Pakistan such as cotton and textiles, oil seeds, fine rice and cement. Above all, this demanded not only a knowledge of trading procedures, but also of international markets. It demanded financial resources and skilled manpower. Bangladesh lacked both.<sup>71</sup> Moreover, many countries did not recognise the new state soon after independence. The ports were inoperative due to the laying of mines by the Pakistan navy during the war and it took quite some time to make them operative.

Apart from the non-Bengali enterprises, most of the Bengali owned private enterprises were closed because their owners had collaborated with the Pakistan government either directly or by way of keeping their enterprises open in defiance of the

<sup>69</sup> For a full description of damage due to the war, see different reports of the UN, for example *Report on the Reconstruction of the Bangladesh Economy, 1972* and also A. Mousavizadeh, *op. cit.* and D. Lambik, *op. cit.*

<sup>70</sup> For the impact of non-Bengali emigration, see World Bank report, *Reconstructing the Economy of Bangladesh*, vol. 2, 1972, also UN Report on the *Reconstruction of the Bangladesh Economy, 1972*.

<sup>71</sup> Sobhan and Akmal, *op. cit.*, p. 92.

call by the Bangladesh government in exile. Many workers of these enterprises had joined the guerilla force and many deliberately abstained from their work. This was partly due to their fear of insecurity in the urban areas where repression was high and partly in response to the call of the government in exile asking not to contribute to the war economy of the Pakistanis. All absentee workers lost their jobs during the war. Thus after the war, the Bengali entrepreneurs incurred the wrath of the employees who were armed and were not only asking for reinstatement but also their full back wages. The Bengali entrepreneurs, in fear of retaliation and danger against their lives by the militant workers or because of inability to pay the claims of the workers, also abandoned their enterprises.<sup>72</sup>

#### **1.5. Public Enterprises after Independence.**

In view of the above circumstances and the deteriorating condition of the economy, the immediate task in the industrial sector was to resume production, provide employment and income to the workers, supply goods and services to the consumers and find access to foreign exchange to meet the import bills through exports of accumulated stock at the enterprises. The general index of industrial production (manufacturing) fell to 80.87 in 1972-73 as against 100 in the base year 1969-70. The foreign exchange reserves were nil up to January 1972.<sup>73</sup> The preamble of the Industrial Investment Policy for 1972-73 aptly describes the situation. It says:

Among the most formidable challenges which the Government was confronted with upon liberation was that presented by the situation in the industrial sector. Being a product of a colonial capitalist system,.... it manifested large areas which had been totally neglected and deprived of the resources necessary for development,.... as an immediate and direct result of the liberation war, the predatory Pakistani industrialists had abandoned their industries in Bangladesh but only after taking with them every thing they could, including in some cases, the provident fund money of the employees. They left behind only such plant and

<sup>72</sup> For more details see N Islam, *op. cit.*; Sobhan and Ahmed, *op. cit.*; also M.M.Akash, *The Economy and Politics in Bangladesh: Recent Trends*, (in Bengali), 1967

<sup>73</sup> Government of Bangladesh, Ministry of Finance, *Statistical Year Book, 1974*, p.237 and p.317.

machinery which they could not remove and also left behind huge liabilities.

In this situation the government was faced with the immediate task of restoring the existing industries. This meant the assumption by the government of the enormous responsibility of replacing the entrepreneurs and managers for efficient and effective management...<sup>74</sup>

Amongst the Bengali bourgeoisie there were few prospective buyers to buy the large "abandoned" industrial units. In the event of transfer to private sector, these individuals would have needed large-scale financial and other assistance from the state. Furthermore, the abandoned industrial units suffered from severe depletion of assets, working capital and inventories in the aftermath of war, not to speak of financial liabilities left by the Pakistanis. Private investors would only have been persuaded to purchase them if the government was ready to compensate them for losses and to contribute to their rehabilitation. Given the need for massive help from and intervention by the government to put them in working condition, this help would have raised serious questions in the minds of the people as these were precisely the kinds of policies pursued during the Pakistani rule. In many of the abandoned enterprises, militant workers took over control and management; in a few cases they firmly resisted transfer to private investors.<sup>75</sup> Moreover, after liberation, the idea of transfer or sale of abandoned enterprises to the prospective Bengali buyers was resented and vehemently opposed by trade union leaders, students and all political parties participating in the liberation war.<sup>76</sup>

There was also a general sense of insecurity among the moneyed class caused by widespread possession of arms, which dampened the investment climate and created uncertainty in the minds of the potential investors about the security of private capital. The lack of interest in taking over the large industrial units is subsequently confirmed by the

<sup>74</sup> Bangladesh Gazette Extraordinary, *Industrial Investment Policy for 1972-73*. (Emphasis added)

<sup>75</sup> Sabhan and Ahmad, *op. cit.* p.45

<sup>76</sup> The General Secretary of pro-government trade union "Swamik League" (Workers League) declared, "A section of Bengali capitalist class is conspiring to buy the factories left by their original owners at nominal prices... We do not believe in private property and we are determined to prevent any hoarding capitalist in the land." Extract from the speech of Mr A.Mannan, General Secretary, Jukyo Swamik League on 1.1.72. *The Bangladesh Observer*, 2.1.72.

Another labour leader declared that sacrifice in blood during the Liberation War was made not to create another Bengali capitalist class but for the establishment of exploitation free society. See the *Daily Infaq* (Bengali), 20.3.72.

lack of interest for taking over disinvested industrial units with less than Tk. 1.5 million in assets. The pace of disinvestment of such small enterprises was slow in spite of the fact that the intending purchasers could pay in instalments, and in some cases by bank borrowing.<sup>77</sup>

Above all, people with surplus funds, legally or illegally earned, did not have entrepreneurial ability or interests; they were interested in quick turnover and prospect of high profits and, therefore, remained mainly in trading and speculation ventures. Immediately after independence, the private vested interests and the nascent industrialists were few in number, ill organised and mostly on the defensive, given their negative (or at best passive) role in the Liberation War.<sup>78</sup>

Last but not least, the party was duty bound to embark on the policy of nationalisation of jute (both trade and industries), bank and insurance companies as an election promise.<sup>79</sup>

The demand for nationalisation was so overwhelming that the leaders of the party had to repeatedly assure the people as to their intentions of establishing a socialist society.<sup>80</sup>

77 N Islam, *op.cit.*, p.21.

78 The description in this paragraph is mainly based on the study of N Islam, *op. cit.*, and M.M. Akash, *op. cit.*

79 See the *Election Manifesto of the Awami League (in Bengali)*, 1970 and *Six Point Programme of the Awami League*, 1966.

It is noteworthy to mention that before the general election of 1970 almost all political parties of Pakistan emphasised the nationalisation of banks, insurance business, mass trading of sugar vapours, Lonbong in the election manifestos of various political parties and even unity since that the economic programme of the Awami League was no more radical than that of rightist Pakistan Convention Muslim League. For the text of the Pakistan Convention Muslim League Manifesto for the general election 1970, see T.A.J., *Pakistan Military Rule or People's Power*, 1970, pp.255-259. It envisaged the same pattern of public sector without using the word socialism.

A political party which wanted to win mass appeal and support among the students and workers could not easily disregard the prevailing political mood and break its pre-election pledge immediately after coming to power as an issue which even its political opponents pledged.

80 See the speeches of the leaders of the party trying to assure the people of their intentions to establish a socialism. For example, a senior minister who later became the President after Mujib was killed (although known to all for his rightist views) declared "It shall not be granted to help grow a capitalist class in Bangladesh.... The Awami League government is determined as pledged to establish socialism in the country." Reported in the *Bangladesh Observer*, 16.3.72. The Vice-President of the new republic announced "The government shall very soon nationalise the major industrial enterprises and commercial establishments owned by the foreigners in order to achieve the goals of socialism." Reported in the *Bangladesh Observer*, 10.1.72.

In order to control and manage the abandoned properties, the government promulgated on the 3rd January 1972 (i.e. after only 17 days of independence) *The Bangladesh (Taking over of Control and Management of Industrial and Commercial Concerns) Order 1972, Acting President's Order No.1 of 1972*<sup>81</sup>. Clauses 2(1) and 2(2) of the above order say:

2(1). Where the owners, directors or managers or majority of the owners, directors or managers, of any industrial or commercial concern have left Bangladesh or are not available to control and manage the concern, or where in the opinion of the government of Bangladesh, the owners or director of any industrial or commercial concern cannot be allowed, in the public interest, to control and manage the concern, the Government of Bangladesh may ... take over its control and management, or appoint a management Board or Administrator or direct any autonomous or semi-autonomous body or any other authority, to take over its control and management.

2(2). Where the government of Bangladesh takes over the control or management of any industrial or commercial concern under clause (1) all the powers and duties of the owners, directors, Board of Directors, and managers of the concern, including the power to operate bank accounts, shall vest in the government of Bangladesh.<sup>82</sup>

By the President's Order No.1 of 1972, 786 industrial enterprises, and 2187 commercial enterprises, a large number of residential and commercial establishments, private and commercial vehicles and other business ventures were vested in the government. In addition there were 12 non-Bengali commercial banks with 1175 branches with a large number of non-Bengali managerial staff.<sup>83</sup> In accordance with clause 2(2) of the above order, the government passed executive orders vesting the management of each abandoned enterprise in a board drawn from the Ministry of Industry, the workers, the available previous management cadres of the enterprise and outsiders designated by the government ostensibly for their managerial experience. This formation of management boards with officers of the Ministry of Industry practically over-strained the meagre

<sup>81</sup> Seethan and Ahmad commented that, "unfortunately, however, the act had many implications in its conceptualizing to pose an insidious series of legal problems for the government." Seethan and Ahmad, *op. cit.* p.116 also see the case of *Hemalal Heng Choudhury v. Bangladesh*, 33 D.L.R (1981) 394.

<sup>82</sup> Bangladesh Gazette Extraordinary, *The Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order 1972, Acting President's Order No.1 of 1972*. In the absence of the Constitution and the Parliament, Executive Orders were made by the Acting President/President in pursuance of the *Proclamation of Independence of Bangladesh 1971*.

<sup>83</sup> The figures are cited from Government of Bangladesh, *Review of the Activities of the Financial Institutions in Bangladesh, 1976*, p.8 also Government of Bangladesh, *Statistical Pocket Book of Bangladesh, 1987*, pp.127 and 325.

administrative resources of the Ministry of Industry. As a result, these boards were soon replaced by administrators especially appointed to manage these enterprises. Moreover, in a least developing country like Bangladesh, it was natural that genuine small industrialists suffered from shortage of credit facilities. Thus it became necessary to set in motion the institutions that were previously extending credit facilities. With this in view, the *Bangladesh (Administration of Financial Institutions) Order 1972* was promulgated. Under the provisions of this Order, administrators were appointed for the management of the branches of the Pakistan Refugee Rehabilitation Finance Corporation, the House Building Finance Corporation (the Bangladesh House Building Finance Corporation was later established under President's Order No.7 of 1973), the Investment Corporation of Pakistan, and the Equity Participation Fund. The administrators were authorised to do all the functions that had previously been entrusted to the Boards of Directors of these corporations.

These *ad hoc* measures could not solve the problem of management. The industrial sector needed long term solutions and a proper structure of management with a firm politico-economic philosophy. The youths and the workers were militant, as the memories of political subjugation, economic exploitation and disparity in economic and industrial development under a free enterprise policy leading to the concentration of wealth in the hands of 22 Pakistani families were still very vivid to them.<sup>84</sup> Even the Draft Fourth Five Year Plan 1970-75 recognized the need to control the concentration of private industrial income.<sup>85</sup> The plan avoided the use of the word "*nationalisation*" but concluded that big industries with sizeable and sophisticated technology, could not be left to the private sector. In the sphere of banks and insurance, excessive concentration of resource

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<sup>84</sup> These 22 non-Bangali business houses controlled as much as 40.8% of all private manufacturing assets in East Pakistan, i.e. Bangladesh, and 72% of fixed assets in the modern private manufacturing sector. There was a general feeling that industrial enterprises had been set up at the expense and through exploitation of the people of Bangladesh and henceforth they should belong to the people.

For a detail study on the concentration of wealth in Pakistan, see I.J. White, *Industrial Concentration and Economic Power in Pakistan*, 1974.

<sup>85</sup> See Draft Fourth Five Year Plan 1970-75, op.cit.

utilization in a few hands was pointed out and government control through nationalisation, majority share holding or stricter regulation of credit policies were identified as alternatives.<sup>86</sup>

The decision to nationalise the banks, insurance and major industries was announced on the first independence day i.e. 26th March 1972.<sup>87</sup> As the constitution of the country had not yet been framed and the parliament was not in session, the decision to nationalise was announced by the Prime Minister, Sheikh Mujibur Rahman. On the advice of the Prime Minister the President promulgated an ordinance, *President's Order No.27, The Bangladesh Industrial Enterprises (Nationalisation) order 1972*.<sup>88</sup> Along with the industries, the government, also on the same day, nationalised twelve commercial banks and set up six banking organizations with the entire assets and liabilities of each bank vested in the government.<sup>89</sup>

Apart from this, certain institutional readjustments were made in respect of the specialised financial institutions. New corporations were established or converted from old ones as inherited in the public sector. *The Bangladesh House Building Finance Corporation* was set up in place of the Pakistan House Building Finance Corporation operating in Bangladesh, but the entire authorised capital was subscribed by the government.<sup>90</sup> The IDBP and the Equity Participation Fund (EPF) were merged to create the "*Bangladesh Shilpa Bank*", with the entire authorised capital subscribed by the government.<sup>91</sup> Likewise, the PICIC, ICP, and the NIT were merged to set up "*Bangladesh*

<sup>86</sup> *Ibid*

<sup>87</sup> On the night of 25th March 1971 the Pakistan army started genocide in East Pakistan. Immediately after the midnight i.e. 26th March 1971 the independence of Bangladesh was proclaimed. That is why this day is officially celebrated as Independence Day. Up to 16th December 1971, Bangladesh remained under military occupation of Pakistan forces. On this day the Pakistanis armed forces surrendered marking the end of the liberation war. Then 16th December is commemorated as Victory Day.

<sup>88</sup> Prior to this, in December 1971, the shares held by the public in the State Bank of Pakistan, as well as other assets of the bank in Bangladesh were taken over by the government and Bangladesh Bank was established to function as the central bank of the country. See Bangladesh Gazette Extraordinary, *The Bangladesh Bank (Temporary Order) 1971, Acting President's Order No. 2 of 1971*.

<sup>89</sup> Bangladesh Gazette Extraordinary, *The Bangladesh Bank (Nationalisation) Order 1972, President's Order No.26 of 1972*.

<sup>90</sup> Bangladesh Gazette Extraordinary, *The Bangladesh House Building Finance Corporation Order 1972*. The term subscribed is used in the legislation itself.

<sup>91</sup> Bangladesh Gazette Extraordinary, *The Bangladesh (Administration of Financial Institutions) Order 1972*.

*Shilpa Rin Sangstha*"<sup>92</sup> In the field of insurance, two controlling public corporations were set up, one for life insurance and the other for general insurance business out of all the existing insurance companies.<sup>93</sup> Here too, the government subscribed the entire authorised capital.

Other public corporations such as the *Bangladesh Agricultural Development Corporation (BADC)*, *Agricultural Development Bank (Krishi Bank)*, *Jute Board*, *Tea Board*, port trusts, different city development trusts, *Water and Sewerage Authority (WASA)* in different metropolitan areas, *Inland Water and Transport Authority (BIWTA)*, *Bangladesh Road Transport Corporation (BRTC)*, *Bangladesh Railway* etc. continued their functions as before. *WAPDA* was bifurcated to establish the *Water Development Board* and *Power Development Board* with no authorised capital. Other than the existing public corporations a few public enterprises were set up in the agricultural sector such as the *Cotton Board*, *Tobacco Board* and *Horticulture Board*. The *Trading Corporation of Bangladesh (TCB)* was established to carry on the business of foreign trade. The *Consumer Supplies Corporation (COSCOR)* was set up mainly as a price stabilisation measure for essential commodities. The jute export trade was nationalised and the *Bangladesh Jute Export Corporation* was established. The *Bangladesh Shipping Corporation* was established for operation and development of marine transport services. *Biman - Bangladesh Airlines* - was created.

In the industrial sector, the government dismantled the EPIDC and instead created ten sector corporations<sup>94</sup> to operate the abandoned enterprises with fixed assets of more than Tk.2.5 million, the existing enterprises of the EPIDC and the nationalised industrial enterprises owned by Bangladeshi owners. Some abandoned enterprises were placed under

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Bangladesh Gazette Extraordinary. The Bangladesh Insurance (Nationalisation) Order 1972.*

<sup>94</sup> See article 10(1) of P.O. 27 of 1972.

two newly created public corporations, *Freedom Fighters Welfare Trust (Mukti Jodha Kalyan Trust)* and *Armed Forces Welfare Trust (Sena Kalyan Sangstha)*.

In the course of a year after liberation, 38 new public corporations were established in addition to 20 others which had been established during Pakistani rule.<sup>95</sup> Thus within a year, public enterprises grew in number and covered a wide range of activities. This widening of public enterprises took place in the name of building a socialist society in Bangladesh. While announcing nationalisation, the Prime Minister declared:

My government believes in internal social revolution. There must be a change in old social systems..... My government and party are pledged to introduce a scientific socialist economy. First step, namely nationalisation has been taken as the beginning of a planned programme towards socialisation of resources.<sup>96</sup>

In the same tone the finance minister claimed that:

The nationalisation was a bold step towards establishment of complete socialism in the country. This would enable the people to enjoy the profits of the industrial enterprises which were previously appropriated by a few capitalists.<sup>97</sup>

The minister of industries claimed, that the nationalisation would bring revolutionary change in the industrial field. Explaining the decision, he stated:

During the period of Pakistani administration a monopoly capitalism of twenty two families was established in the name of development. These twenty two families controlled the economy. They also used to control major share holdings in banks, insurance business and foreign trade helped..... The principal objective of the bloody war of liberation was to attain economic freedom..... and freedom from all sorts of political and economic servitude.<sup>98</sup>

Although there was no opposition to nationalisation *per se* when it was announced, there were signs of awareness that nationalisation would not, by itself, automatically give

<sup>95</sup> M.M. Zaman, 'Accountability of Public Enterprises in Bangladesh' in *Management and Development*, vol 10, No. 2, p.115.

<sup>96</sup> The speech of the Prime Minister was reported in all national dailies of 27.3.72.

<sup>97</sup> See *the Itihaque*, 3.4.72.

<sup>98</sup> *Ibid.*

rise to the establishment of a socialist society. A member of the *Jatiyo Sangshad* (Parliament) said, "this nationalisation is not socialism and it cannot be said that this is the first step of socialism. This has set up state capitalism, which is not conducive to socialism."<sup>99</sup> A major criticism against the nationalisation carried out by the government as a step towards socialism was that the government kept the marketing and distribution of the products of the nationalised sector insulated from public sector control and management. While a major segment of production was owned and controlled by the state the marketing and distribution were left to the private sector agents (who in most cases were greedy and dishonest). The government had no control over the market. A commentator in a national Daily wrote that this would frustrate the move towards socialism.<sup>100</sup>

Whatever was the ideological motive behind nationalisation, the fact was that through it the government became directly responsible for productive activity, in contrast to the old regulatory and promotional responsibilities. Public ownership on a large scale and diverse industrial activities gave rise to a monopoly situation, whether formal or real, instead of real competition. This tended to make almost the entire industrial sector in a single unit merging the problems of the firm with the problems of the economy.

The Nationalisation Order was followed by the government's declaration of investment policy.<sup>101</sup> The policy imposed limits or ceilings on private investment. New private investment was to be allowed in units with assets of no more than Tk. 2.5 million, which could grow up to Tk. 3.5 million through reinvestment of profits.<sup>102</sup>

<sup>99</sup> See *Jatiyo Sangshader Bistarika (Debates in the Jatiyo Sangshad)* (in Bengali), vol I, No 3, 12.4.73, p.89.

<sup>100</sup> R Islam: On Nationalisation. *The Intefaque* (in Bengali), 19.5.72.

<sup>101</sup> Government of Bangladesh, Ministry of Industries, *Investment Policy 1973*.

<sup>102</sup> It is important to note that while there was a limit on the size of an individual enterprise, there was no limit on the number of such a particular individual or group of individuals could own. (See *Ibid*) Such investment opportunities as existed within the limit of Tk. 2.5 million combined with the investments in the smaller abandoned units in which were available for purchase by the private investors, were large enough to absorb all private savings making such investment outlets. (N. Islam, *op. cit.*, p.31.) Moreover, during 1973-74 and 1974-75 the government licensed 172 enterprises with fixed assets per unit up to Tk. 2.5 million, whose half of total investment was restricted in limits of amount below Tk. 1 million. Similarly, whether private investment was encouraged by the ceiling size sector. During 1973-74, an array of 700 applications for loans were received by the financial institutions for investment within the ceiling. (*Ibid*.)

#### **1.6. The Change of Government Policies: The Beginning of the Rise of Private Sector.**

After the Nationalisation Order 1972 the next important step in the legal field was the framing of the Constitution in November 1972. The Constitution reflected the economic objectives, and political reality, as they were conceived by the Awami League ruling circle. Article 8(1) of the Constitution of Bangladesh spells out the fundamental principles of the state as democracy, nationalism, socialism, and secularism. The intentions of the leadership were manifested in various articles and in subsequent amendments to the Constitution. When framed in 1972 the Constitution provided for the separation of the judiciary from the executive, thus attempting to ensure the independence of judiciary. But soon it was realised by the ruling party that fundamental rights guaranteed by the constitution, independence of judiciary and the responsibility of the executive to the legislature were hampering the growth of the local bourgeoisie and political opponents were reaping the fruits of the democratic constitution.<sup>103</sup> In a deliberate move to concentrate power in the hands of the executive and to curb the increasing rise of the opposition the Constitution (Second Amendment) Act was passed on 22 September 1973.

The second amendment, for the first time, enacted provisions recognising and regulating preventive detention by adding clauses 4 and 5 to article 33 of the Constitution (the article which contained safeguards to arrest and detention). These clauses did not contain any express provision as to when a law providing for preventive detention could be passed or specifying the maximum period for which a person could be held in preventive custody. Where the Constitution did not originally contain any provision for the declaration of an emergency, the second amendment also conferred on the President the power to declare emergency with the consent of the Prime Minister. In the event of emergency being proclaimed, the fundamental rights guaranteed in articles 36-43 could be suspended so as to remove the restrictions imposed on the power of the legislature to make

<sup>103</sup> Derived from discussion with Badaruddin Ullah, a prominent political analyst of the country

any law or the executive to take any action contrary to the mentioned articles. Similarly, during the operation of an emergency, the President could issue an order suspending the enforcement of any fundamental rights.

Starting from 1973/74 there was increasing pressure for an upward revision of the ceiling on private investment and for allowing a larger role for foreign investment, especially its collaboration with domestic private enterprise.<sup>104</sup> By 1974 there were a number of factors which had contributed to an accumulation of surplus funds in private hands. This accumulation of surplus funds was possible through high profits earned in domestic and import trading activities, including illegal trade, such as trade in contraband goods and smuggling of jute and other exportables across the border. Since these transactions were illegal, the risks were high and hence profits once realised were high. Import licences, quotas, bank loans and official business permits were mainly disbursed to facilitate easy income for the ruling party cadre, and these were sold and resold several times before reaching the genuine traders and importers. In addition, many residential buildings and trading or commercial enterprises abandoned by Pakistanis were illegally occupied by private persons, in some cases under the cover of political protection. The "caretakers" of such commercial enterprises, hastily appointed by the government in 1972 immediately after independence, made large fortunes through the undeclared sale of assets. Moreover, there were gains to be obtained from rental or sales proceeds of abandoned houses which were illegally occupied by private persons.<sup>105</sup>

In this context, whether existing opportunities for private investment in the industrial sector were adequate or not to absorb available investible funds, was not a major issue. What was crucial was that government reverted, gradually if not immediately, to the pre-liberation policy of "*sponsored capitalism*" where the state would provide concessional financial and fiscal facilities to allow private investors to invest, to reap large

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<sup>104</sup> M M Akbar, *op. cit.*, p.17

<sup>105</sup> *Ibid.*

gains, to gain initial experience, if necessary with government subsidies, and then to grow in size and power.<sup>106</sup>

There was pressure not only for raising the ceiling on investment but also for declaring a moratorium on any action against ill-gotten or "black-money", i.e. money earned in illegal transactions such as smuggling and black marketing, bureaucratic or political corruption and avoidance of taxation. All hidden wealth was to be exempted from civil and criminal liabilities for past violation of foreign exchange and tax laws. One member of the Mujib<sup>107</sup> planning commission writes,

When the 1974-75 budget and Annual Development Plan came up for discussion at the end of May/June 1974, a rather unstructured discussion on the ceiling took place amongst the policy makers in the context of legitimizing black money.<sup>108</sup>

The pressure for raising the ceiling on private investment exerted by the new rich within Bangladesh was strongly and consistently supported by donor countries and foreign-aid agencies. The World Bank recommended raising the ceiling to Tk.10 million or removing it altogether.<sup>109</sup>

The move to raise the ceiling on private investment succeeded. The new investment policy<sup>110</sup> raised the ceiling of private investment substantially from Tk.2.5 million to Tk.30 million. Private foreign investors were allowed to enter into partnership with domestic private investors, mainly but not exclusively in projects where "technological and managerial gap existed."<sup>111</sup> Finally, the moratorium on nationalisation

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106 *N Islam, op. cit.* p.245

107 Sheikh Mujibur Rahman is considered to be the founder of Bangladesh and he headed the Awami League government (1972-August 1975).

108 B Sahbas and M Ahmad, *op. cit.* p.244 [Professor B Sahbas was the member of the Planning Commission in charge of industries.]

109 International Bank for Reconstruction and Development (IBRD) [frequently termed as the World Bank], *Bangladesh. Development in Rural Economy*, vol. 1, 1974, p.312

110 Government of Bangladesh, Ministry of Industries, *Rural Investment Policy*, 1974.

111 *Ibid.* p.3.

was extended from ten to fifteen years and fair and equitable compensation was guaranteed in the event of subsequent nationalisation.<sup>112</sup>

Within a few months after independence, one section of students and workers within the party was demanding more radical steps towards socialism while another group was denouncing socialism as an alien ideology not suitable for Bangladesh. The latter group along with the major group of the leadership was advocating "Mujibism"<sup>113</sup> as opposed to socialism. Both groups claimed the support of Mujib himself. But when the real test came for Mujib to choose one of them, he and the party blessed the latter group.<sup>114</sup> The former group later formed their own political party; the National Socialist Party (JSD). With the departure of the radical faction the petty-bourgeois leadership of the party started consolidating their position, this time without having any serious challenge from within.

The prevailing economic stagnation, accentuated by rapid inflation and marked by a severe famine in the third quarter of 1974, decreased the popularity of the party in power. The army and bureaucracy were unhappy, because of their subordinate role to the politicians, which was contrary to the long experience of the Pakistani era. In the face of decreasing public support, the government became more and more autocratic. The labour movements, and opposition political views were crushed through the *Special Powers Act, 1974* and the declaration of emergency.<sup>115</sup> As time passed, the emerging bourgeoisie, which was initially weak immediately after independence gained some strength and the civil and military bureaucracy were gradually consolidating. In order to consolidate political power and to satisfy different pressure groups, the government again amended the

<sup>112</sup> *Ibid*

<sup>113</sup> Mujibism was referred to the philosophy of Sheikh Mujibur Rahman the Prime Minister. The characteristics of Mujibism has never been explained either by Mujib himself or by his party. But judging from his speeches and other government policy declarations it is quite evident that essentially it means "mixed economy".

<sup>114</sup> Personal knowledge, also, see the Bangladeshi news papers of February-June, 1973.

<sup>115</sup> For details of the government of the *Special Powers Act 1974*, see Bangladesh Gazette Extraordinary, 1974. For detailed analysis of the declaration of emergency, see I. Ban, *Martial Law in Bangladesh 1973-79: A Legal Analysis*, in Ph.D. thesis submitted at the School of Oriental and African Studies) 1985, Chapter 1.

Constitution. Thus the *Constitution (Fourth Amendment) Act* was passed on the 25th January 1975 without any debate.

The Act changed the fundamental character of the Constitution. It replaced parliamentary democracy with a presidential one, curbed the independence of the judiciary, abolished judicial power to enforce fundamental rights, conferred the President with the power of vetoing a Bill passed by the parliament and gave the President the power of declaring Bangladesh an "one-party" state.

It is to be mentioned here that the Supreme Court in 1981 in the case of *Hamidul Haq Chowdhury v. Bangladesh* observed that by incorporation of a provision relating to a proclamation of Emergency in the Constitution and by introduction of Fourth Amendment in the Constitution by Act II of 1975 the basic and essential features of the Constitution were altered and destroyed. The Court further noted:

These alterations and amendments of the Constitution reduced the Constitution out of recognition. It was in our opinion, beyond the powers of Parliament as the donee of prescribed powers under a controlled Constitution to alter the essential features and basic structure of the Constitution.<sup>116</sup>

However, having observed the above, the court concluded that:

After a lapse of nearly six years interposed by extra-constitutional process which has not been resisted by the people, and having been recognised by several judicial authorities, these questions, namely, the unconstitutionality of the impugned enactment on ground of loss of competency of the Parliament in 1975 on account of the Fourth Amendment and creation of immunity of laws during proclamation of Emergency, though these were violative of Fundamental Rights, cannot be entertained.<sup>117</sup>

The President exercised his powers in accordance with the Constitution's Fourth Amendment to establish a one party state from February 1975, in which the party cadres

<sup>116</sup> *Hamidul Haq Chowdhury v. Bangladesh*, 33 DLR (1981) 394.

<sup>117</sup> *Ibid.* The Supreme Court in 1980 using the same "basic structure" theory in the case of *Anwar Hossain Chowdhury v. Bangladesh* [1980 B.L.D. (Pt) 1] held that the Jatiya Sangshad had no prerogative to change the basic principles of the constitution and ruled against the 8th Amendment of the Constitution. It may be mentioned here that the Bangladesh Supreme Court is not the only court which asserted the power of judicial review over amendments in the Constitution. See the Indian case of *Minerva Mills Ltd. v. Union of India AIR 1980 SC 1548* also *Sriera Laine case of Adam v. Attorney General* [1968-67] A.L.J.R.21, 283 quoted from J. Coomall, *Indian Judicial Activism, the Company and the Worker: A note on National Textile Workers' Union v. Ramabrahman* in the *International and Comparative Law Quarterly*, vol.39, 1990, p.438

and bureaucracy, including the army, were to be integrated under one unified leadership and control. The Communist Party of Bangladesh and the National Awami Party (M) joined the newly formed only legal political party but others did not. Between these two contending clear interest groups in the party, the President was the balancing force. In the meantime, all but three newspapers were banned. Thousands of political opponents were detained without any charge under the Special Powers Act.

Although leadership remained in the hands of the same petty bourgeois elements, with the joining of the communist party and National Awami Party (M), its leadership was not beyond question. Moreover, some of the programmes of the newly formed lone political party, "BAKSAL", (*Bangladesh Krishak Sramik Awami League - Bangladesh Peasants and Workers National League*) were viewed by the emerging bourgeoisie as being against their further development and potentially "socialist". The bourgeoisie, whose growth was mainly due to patronage by the state, the military and civil bureaucracy did not like the programmes considered to be socialist. Thus the right wingers of the Awami League, supported by international capital, conspired with a small section of army to eliminate President Mujib, because he was considered to be slow in bringing about the cherished reforms as conceived by it. Analysing the political developments in Bangladesh, Hamza Alavi in 1973 wrote:

[T]he Bengali bureaucracy exists, and the Awami League regime has identified itself with it and with the privileged groups [professionals, farmers with surplus, traders and bourgeoisie] in the country, but the latter are not backed by substantial military forces... It may yet be that a new bureaucratic-military oligarchy with outside aid will in due course consolidate its position and power in Bangladesh.<sup>118</sup>

On the 15th August 1975, President Mujib was killed in a military coup organised by a small section of the army.

<sup>118</sup> H. Alavi, 'The State in Post Colonial Societies: Pakistan and Bangladesh' in K. Gough and H.P. Sharma (ed), *Imperialism and Revolution in South Asia* 1973, p. 172 (emphasis added)

### 1.7. Declaration of Martial Law: The Acceleration of Bureaucratic Predominance and the Decline of Public Enterprises.

The military installed a new President, who was the Minister of Commerce in the Mujib cabinet and a vice-president of BAKSAL. Khondker Mustaque Ahmed, the new President, who was known to all as a man with bias towards a free market economy, preferred to keep the entire cabinet of Mujib. The entire cabinet which gave leadership during the war of independence in absence of Mujib was not only dropped from the cabinet but taken to custody. These four leaders, on the night of the 3rd November 1975, was brutally killed at the order of Mushtaque inside Dhaka Central Jail.

In subsequent months there were two more military coups. Khondker Mustaque Ahmed was removed from the office of the President. The country was placed under martial law and the Constitution was first suspended and later amended by martial law regulations.<sup>119</sup> The military government which was established after the coup on 7th November 1975, under the leadership of Gen. Ziaur Rahman, opted for a much greater role for the private sector. This coup sharply changed the political scenario.<sup>120</sup>

The industrial policy was again revised in order to increase the boundaries of private investment while cutting the size of the public enterprises.<sup>121</sup> Industries previously reserved for the public sector were now thrown open to joint participation of public and private enterprises.<sup>122</sup> Various policies, for example providing upto 70% of the total cost of establishing an enterprise by state owned financial institutions, to promote private capitalism were vigorously pursued. In order to legalise "black-money", the policy

119 The Constitution of Bangladesh does not contain any provision for the declaration of martial law or the suspension of the Constitution as a whole. Thus the suspension and the amendment of the Constitution by the martial law authority through promulgation of martial law orders violate the provisions of the Constitution.

The attitudes of Bangladesh judiciary on this is clearly expressed in *Hamidul Haq Chowdhury v. Bangladesh* [33 D.L.R (1981) 304 and *Ameer Hossain Chowdhury v. Bangladesh* (1988 WLJ (sp))]. For the attitudes of courts of other countries see Y.P. Chai, 'Coups and Constitutional Doctrine: The Role of Courts', *The Political Quarterly*, vol. 58, No. 3, 1987, pp. 308-311

120 S. Dym, 'After the Bangladesh Coups' in *The World Today*, vol. 32, 1976, pp. 18-24

121 It was possible because by 1975 state patronage already created a group of people who acquired sufficient wealth to establish enterprises previously reserved for exclusive state participation

122 Bangladesh Gazette Extraordinary, *Revised Industrial Policy 1975*.

declared, ".....these who would disclose such funds would be allowed to retain the same without any questioning by the government...."<sup>123</sup> An amount of Tk.1.3 billion black-money was declared by different individuals to the taxation authorities.<sup>124</sup>

The revised industrial policy also drastically changed the investment policy. The policy raised the ceiling of private investment further to Tk.100 million. Both local and foreign investors were allowed to participate with the public sector in setting up industries falling within the reserved list. Although a major share was to be retained by the public corporations, management contracts could be given to private investors on considerations of "economy, technology and management".<sup>125</sup> Tax holidays and other incentives introduced by the earlier government were not only re-emphasised but extended. The stock exchange was reactivated. Finally, the government decided to disinvest some industrial units which were placed under public corporations.

The decision to make payment of compensation for the nationalised enterprises to their previous share holders was also vigorously implemented. The revised industrial policy of 1975 also contrasted with the policy of the previous government in not containing any reference to socialism.<sup>126</sup> The Industrial Policy announced in May 1977,

<sup>123</sup> *Ibid*

<sup>124</sup> H Khanra, Public Sector, Black Money and Prisons, *The Holiday*, 28.8.77.

Commentators believe that the amount declared as a result of the Revised Industrial Policy was far short of all realistic assumptions regarding the widespread volumes of money in private hands through illegal payments by the state (*Ibid.*) The President of the Dhaka Chamber of Commerce and Industries opined that by the end of 1972 at least an amount of Tk.10 billion black money was concentrated in the hands of a very limited few in a country whose average annual GDP since liberation has been of the order of Tk.55 billion. A Alam, 'Farming out the Black Money', *The Holiday*, 8.6.77.

Legislation of black money effectively meant according some sort of legitimacy to the violation of existing laws and regulations. It also encouraged others to undertake such activities in the future. By way of legitimizing the black money, government rewarded those who made fortunes by a violation of laws in the context of a general state of deprivation in the economy. This was also against the expectations of the society. Moreover, it not only shows the failure of the government to enforce laws made by it but also its participation in their violation for private gain. Since the state was an active participant in the formation of black money it was natural on its part to legalize it.

<sup>125</sup> *Revised Industrial Policy, op cit*

<sup>126</sup> *The New Investment Policy of 1974*, although kept the promise for an expanded private sector still continued its formal rhetoric of socialism stating, "In pursuance of the government commitment to the establishment of a socialist economy, the key sectors including the bulk of the industries are already in the public sector. ... It is, however, considered conducive to the goal of rapid industrialization and mobilization of investment funds to afford scope to the private entrepreneurs to play an expanded role within the framework of a planned economy."

*The Revised Industrial Policy of 1975* abandoned the reference to socialism and justified the change in policy in the following terms "The government is of the view that while industries of basic and strategic importance or in the nature of public utility services, should remain in the public sector, for reaching the goal of mobilization of investment funds and rapid industrialization,

limited the participation of the public sector in eight categories of industries and announced a concurrent list of nine categories which were open to both public and private sector. This marked the end of the policy of nationalisation and the expansion of private sector. A careful review of the policy reveals that, however desirous the government was to reduce the frontiers of public enterprises, it cannot undermine the importance of public enterprises in Bangladesh.

Generous financial assistance was provided by the government not only in the form of loans but also in the form of equity. Liberal credit facilities from the public sector financial institutions were provided for industrial financing of the private sector. By 1976-77 the private sector was getting an edge over the public sector. The Bangladesh Shilpa Bank (BSB) sanctioned 90% of its loans to the private sector in 1976-77 compared to 17% in 1974-75 and 20% in 1973-74.<sup>127</sup> Increased tax holidays, rebate on payment of custom duties for import of capital equipment and raw materials, writing off the payment of interests accumulated over the principal borrowed, expert counsel provided by the government as well as lending agencies (all were in public sector), policies protecting the domestic market against foreign competition were some of the facilities granted to the local business community. There was a reduction of up to 75% in rates of various fees charged by the financial institutions for the private sector investors. The Investment Corporation of Bangladesh (ICB) was set up in 1976 to provide institutional support to the stock market. The liberalisation and incentive packages of the import and export policies increasingly favoured the private sector in terms of allocations as well as infrastructural facilities.<sup>128</sup> The Presidential Adviser in charge of the Ministry of Commerce emphatically

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the private entrepreneurs should be afforded adequate scope and facilities for setting up industrial enterprises within the broad framework of a planned economy . . .

127 Government of Bangladesh, Ministry of Finance, *Review of the Financial Institutions 1977-78*, pp. 71-72.

128 The Presidential Adviser in charge of the Ministry of Commerce described the import policy of the government as "the most liberal import policy for many years, even more liberal than the policies of the last days of Pakistan" quoted from "Ties Towards Private Sector," *The Hockey*, 15.7.77.

declared that the government aimed at "a reduction of the public sector and expansion of the private sector."<sup>129</sup>

During martial law (1975-79), a number of leftist politicians were arrested and even sentenced to long term imprisonment including the President, General Secretary and a number of national and regional executive members of the National Socialist Party (JSD),<sup>130</sup> Communist Party of Bangladesh (CPB) and others. A leader of the JSD Colonel Abu Taher was tried *in camera* and sentenced to death.<sup>131</sup>

Once the military government of Zia felt consolidated, it became anxious for its legitimacy for both internal and external reasons. Moreover during this period the army tried to revolt on a number of occasions.<sup>132</sup> So the need for legitimacy became a policy objective of the government and accordingly a country-wide referendum was organized.

The military government of Zia, after consolidation and crushing of opposition amended the constitution by a Martial Law Ordinance introducing a multi-party presidential system with the office of the President vested with sweeping powers.<sup>133</sup> Bureaucrats filled the vacuum in the major decision making bodies e.g. the Cabinet, the Planning Commission, National Economic Council etc.

During the rule of Zia the bureaucracy, military bureaucracy in particular, in the ruling coalition started gaining the upper hand by directly controlling state power which was utilised to strengthen its economic power through various legal and illegal means of state patronage and judicious use of the spoils system. In the tradition of the past, the

<sup>129</sup> *Ibid*

<sup>130</sup> For the ideological line of JSD see T. Mazurazzaman, 'Bangladesh: The Unfinished Revolution?' in *Asian Studies*, 1975.

<sup>131</sup> For details of the trial of Colonel Taher, see E. Bari, *op. cit.*, p.57.

It is to be mentioned here that already during the Mujib regime thousands of members of the JSD and other underground 'Communist parties' were killed, including the leader of an underground pro-Peking 'communist party'.

<sup>132</sup> F.H. Yusuf, *op. cit.*, p.90.

<sup>133</sup> E. Bari, *op. cit.*, p.42.

It may be recalled that the Awami League government of Sheikh Mujibur Rahman earlier switched over to one party presidential rule from the original multi party Westminster system of government.

proximity to the ruling power structure and the ruling party brought opportunities at the levels of the political and bureaucratic hierarchy to earn lucrative premia from the process of distribution of the substantial international aid/grants, issue of permits, licences, quotas and from bribery. It became politically expedient for Zia's government to further its group interests through various means of patronage and use of spoils system of which a further decimation of the public enterprises was a convenient means. Thus expansion of public enterprises was considered to be hindering the interest of the ruling elite. It was in the group interest of the ruling class even to allow the public enterprises to remain at their previous size.<sup>134</sup>

Since the imposition of martial law in 1975, the continued and unabated predominance of the bureaucracy and especially the military, in politics and administration even under an elected government became obvious. Although Zia was very popular,<sup>135</sup> he was under constant pressure from his army colleagues,<sup>136</sup> which left no doubt where the locus of power and authority remained in spite of the facade of democracy. Army officers wanted more participation in the administration, though they were already sharing with their civilian counterparts. Indeed, even the post election cabinet of Zia contained six retired army officers.<sup>137</sup>

Dissatisfaction within the army as well as bourgeoisie continued. The number of attempted coups during the rule of Zia is indicative of restive ambitions and certain lust for power of a few generals.<sup>138</sup> In May 1981, Zia was killed by a rival group in the army.

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<sup>134</sup> M M Akash, *op cit* p.19.

<sup>135</sup> Zia secured 98.88% of the total valid confidence vote in April 1977 referendum and 76.3% in the presidential election of June 1978.

<sup>136</sup> M Rashiduzzaman, 'Bangladesh in 1977: Dilemmas of the Military Rulers' in *Asian Survey*, vol.18, 1978, p.131.

<sup>137</sup> *Ibid*

<sup>138</sup> For more details of the coup attempts during that time, see E Bari, *op. cit.*, p.57

### 1.8. General Ershad's Regime: Further Consolidation of Bureaucratic Predominance and Decrease in Public Enterprises.

After Zia was killed, his civilian Vice-President, Justice Abdus Satter was elected President with a big margin. But right after the election the army chief of staff, Lt. Gen. H.M.Ershad, started to give provocative political statements regarding the need for participation by the armed forces in the political process. He then directly interfered in the functioning of the President, his cabinet and other functionaries of the government.<sup>139</sup> A sizeable section of the ruling party backed the army. The subsequent crisis between the President and the military bureaucracy culminated in the forced resignation of President Satter and yet another imposition of Martial Law on the 24th of March 1982 throughout the country. Through the promulgation of Martial Law Proclamation Order 1982,<sup>140</sup> Gen. Ershad became the Chief Martial Law Administrator with the legislative, executive and judicial powers vested in him. He had also the power to nominate a President for the republic.<sup>141</sup> The constitution was suspended and Parliament was dissolved. Strict censorship of newspapers was instituted.

The new regime led by Gen. Ershad reviewed the industrial policy. The new industrial policy as announced in June 1982 aimed, among other things, to i) expand the manufacturing sector with the increased participation of private sector; ii) limit the role of public sector to the establishment of basic, heavy and strategic industry.<sup>142</sup> According to the new policy, public sector investment was limited only to six sectors and the areas where both public and private sector could set up new industries were expanded. The

<sup>139</sup> This section is based on my personal knowledge and also on the information of the national dailies and weeklies between December 1981-March 1982.

<sup>140</sup> See Bangladesh Gazette Extraordinary, *Proclamation of Martial Law 1982*, 24.3.1982.

<sup>141</sup> Clause (3) of the *Proclamation of Martial Law* says, "I may nominate any person as President of the country at any time and who shall enter upon the office of the President after taking oath before the Chief Justice of Bangladesh or any judge of the Supreme Court designated by me. I may restrict or exempt such nomination from time to time and nominate another person as the President of Bangladesh. The President so nominated by me shall be the head of the state and act on and in accordance with my advice as Chief Martial Law Administrator and perform such functions as assigned to him by me." See the *Proclamation of Martial Law 1982*, *op.cit.* The CMLA first nominated a judge of the supreme court Mr. Justice Abanowadia Choudhury. The post of the President was subordinate to the CMLA. Within a year the appointed President was relieved of his post and the office of the CMLA and the President was combined together.

<sup>142</sup> Government of Bangladesh, Ministry of Industry, *New Industrial Policy 1982*.

existing size of the sector corporations was to be reduced by disinvesting the industrial units abandoned by non-Bengali owners in a phased manner. Provisions were also made to disinvest those units which were established with a corporation's own resources or government developmental funds. Shares of public sector enterprises were to be made available for public subscription retaining the majority share with the corporation. Provision was also made to appoint management contractors to run some of the bigger industrial enterprises in the public sector. Finally, it was decided to return the jute and textile mills to their former Bangladeshi owners.<sup>143</sup>

By 1982 state patronisation had resulted in a dramatic increase in the number of millionaires in the society.<sup>144</sup> The *New Industrial Policy of 1982* (NIP) was a response to this fact, i.e., the growth of a group who could take advantage of privatisation. Thus, it announced concrete steps for the growth of the private sector, which among others included increase of monetary incentives, such as reduced personal and company taxes, increased tax exemption and simplification of procedures to establish an enterprise, concessionary interest rates on loans for industries in less developed areas etc. Since 1982, several measures were taken to develop the institutional framework to facilitate the growth of private enterprises.<sup>145</sup> The Second Five Year Plan 1980-85 was revised in May 1983 with an emphasis to "allow private sector to have a more pronounced role in the economy".<sup>146</sup> Encouragement of private investment had become one of the main economic objectives of the government.<sup>147</sup>

143 *Ibid*

144 M M Akash, *op. cit.*

145 They are a) banks and insurance companies were allowed in private sector, b) Industrial Promotions Development Company (IDPC) with 30% government shares was set up for promoting private industries, c) leasing companies were allowed for government and financing of equipment to potential investors, d) a scheme was devised for protecting foreign currency loan from the adverse effect of the exchange rate fluctuation which was named as Exchange Fluctuation Buffer Absorption Scheme (EFAS) in 1983, e) bonded warehouse facilities were allowed to export oriented industries, f) a high powered monitoring committee was set up to review the baltic stocks arising out of tariff automation and suggest remedial measures.

146 Government of Bangladesh, Ministry of Planning, *Revised Second Five Year Plan 1980-85*, 1983.

147 *New Industrial Policy 1982*, *op. cit.*

The thesis covers the period up to 1980 and hence does not deal with the recent political changes.

In the same manner as Zia, Ershad promulgated a martial law order exonerating the holders of illegal money from any civil or criminal liabilities on their declaration of the amount.<sup>148</sup> The government denationalised a number of banks and industrial units. By June 1983, 185 nationalised industrial units were disinvested resulting in the decrease of public enterprises. Nationalisation in Bangladesh thus virtually came to an end before the end of 1983.<sup>149</sup> Like the previous regime, decimation of the nationalised industries was used as a means, like distribution of diplomatic assignments, secondment of army personnel to civilian posts, re-employment of retired army personnel to civilian jobs or fostering business enterprise operated by some ex-defence personnel<sup>150</sup> to pacify the armed forces. The government had also permitted the establishment of new private banks and insurance companies apart from denationalising two of the six nationalised commercial banks. A number of army officers were appointed as chairmen of various public corporations.

The government further liberalised its industrial policy and in 1986 announced a *Revised Industrial Policy* (RIP). Amongst many objectives the policy aims at effecting growth of industries with increased emphasis on private sector participation<sup>151</sup> and limiting the role of the public sector to the establishment of strategic and heavy industries.<sup>152</sup> However, the industrial policy 1986 pointed out that in areas and/or sectors where investment is considered desirable, but private investment may not be forthcoming, public sector may set up industries either by themselves or jointly with the private sector, which may in due course, be transferred to private entrepreneurs. The RIP emphasised for the conversion of the individual enterprises into public limited companies and

148 See, Bangladesh Gazette Extraordinary, *Martial Law Regulation No. V, 1982*

149 F.H.Yusuf, *op. cit.*, p.215.

150 *Ibid.*, p.108.

151 Effects of the policy of industrialisation through privatisation will be discussed in chapter 5.

152 The scope of the operation of public enterprises was limited to a) arms, ammunition and sensitive defence equipment, b) generation (excluding standby reserve generation), transmission and distribution of electricity, c) forest plantation and mechanised extraction within the bounds of reserved forests, d) telecommunications (two way light HF/ VHF/ UHF transmission), e) air transport (excluding cargo) and railways, f) atomic energy and g) security printing (currency notes) and minting. See, Government of Bangladesh, Ministry of Industry, *Revised Industrial Policy 1986*.

corporations into holding companies in appropriate cases. It also emphasised the off loading of 49% shares.<sup>153</sup>

The RIP continued its emphasis on the predominant role of the private sector and concrete steps in boosting the private sector were declared. Except in the cases of the reserved list of seven areas, private sector investment has been kept practically open without any ceiling and with the least formalities for registration/ sanction. There is also provision for private investment outside the reserved list in joint collaboration with the public sector corporations.

Various incentives have also been provided to boost private sector investment. The RIP among others, undertook the strategy of assisting and promoting local industries with comparative advantage through tariff rationalisation and appropriate fiscal measures. Above all private investors are allowed to invest their own resources without government permission.<sup>154</sup>

The government, to accelerate increased private investment in industry, shifted its role from regulatory to promotional and assistance and to this end established a Board of Investment in January in 1989 to deal with all matters relating to the establishment and operation of industrial units. The Board is headed by the President himself. Providing all kinds of capital and creation of infrastructural facilities for industries are among the major functions of the Board.

In terms of legitimizing his personal rule Ershad followed similar political steps as did late General Zia. He held referendum by asking whether people wanted him or not. He then formed his own political party, the Jatiyo Party (JP) with members drawn mostly from the BNP, right wingers of the Awami League, a few politicians of other smaller parties, retired military and civil bureaucrats.

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<sup>153</sup> This will be discussed elaborately in Chapter 5

<sup>154</sup> *Ibid.*

Once organised his political platform, Ershad in 1986 held parliamentary election and obtained 193 out of total 300 seats by rigging the election.<sup>155</sup> The election proved conclusively the hollowness of his pronounced intention to establish democracy in the country. After the election martial law was officially withdrawn. He, then, held Presidential election and got elected,<sup>156</sup> but the major opposition parties boycotted the election.

Once martial law was withdrawn and a facade of democracy established, the opposition to Ershad's rule grew. During October-November 1987, the opposition parties called for nationwide strikes for days together and repeated it resulting in chaos and paralysed normal economic life of the country. Initially Ershad tried to suppress the movement through political means but failed. He, thus, opted for using force and quickly dissolved the parliament, and declared a state of emergency, which meant restricting all political activities and the suspension of certain fundamental rights. Some political leaders, including the leader of the Awami League and the BNP were arrested, others were haunted by the police. Under the coverage of the Emergency, parliamentary election was held in early 1988<sup>157</sup>, which all major opposition parties boycotted. After the session of the Parliament convened emergency was first relaxed and then withdrawn.

The 1987 mass movement for the restoration of democracy failed because the two major opposition parties, namely the Awami League and the BNP, could not unite. In 1988 the country witnessed the most devastating flood, even major part of the capital Dhaka was under water. Due to flood, the opposition parties remained silent and could not go ahead with their programmes. The anti-Ershad movement lost momentum for the time being. But in 1990 the students belonging to all political parties unexpectedly united and

<sup>155</sup> The BNP boycotted the election on the ground that under Loked free and fair election will never take place and accordingly demanded his resignation before the elections. The Awami League, although demanded the similar thing but participated in the election to prove its sincerity about Ershad.

<sup>156</sup> In Bangladesh, the President is elected directly by the people before Bangladesh switched over to parliamentary system in July 1991.

<sup>157</sup> The Constitution of Bangladesh clearly says that the state of emergency cannot continue beyond 120 days and can only be extended for a further 120 days by the parliament and each extension requires the approval of the parliament. The Constitution also says that once the Parliament is dissolved by the President a new Parliamentary election must be held within 120 days or the President will have to re-convene the old Parliament.

vowed to fight for the restoration of democracy. The political parties had to follow suit because they feared losing control over the masses. In October-November, opposition parties unitedly organised rallies, frequently called for prolonged strikes, paralysed the economy. Ershad in vein tried all means including the use of force. The army realising the mood of the population decided not to side with Ershad. He had to resign and handed over power to the Chief Justice of the country, who would head an interim non-party government to hold free and fair parliamentary election, as demanded by the opposition.<sup>158</sup>

Since, the interim government's main function was to hold free and fair election it continued the policies adopted by Ershad. In February parliamentary election was held in which although the BNP, headed by the widow of the late Gen. Zia - Khaleda Zia, emerged as the single majority party but was short of 12 seats to form the government. The fundamentalist Jamat-e-Islami, banned during Awami League regime but revived by BNP, obtaining 18 seats supported the BNP. Thus, Khaleda Zia became the Prime Minister of the country.

It may be recalled that constitutionally Bangladesh had a presidential system of government where the president is both the head of the state and of the government. However, the BNP government, in spite of its election manifesto to retain present hybrid system, in the Budget session of Parliament introduced a bill to change over to the Westminster type and the bill was duly passed. On the 15th of September 1991,

158 The opposition parties demanded resignation of Ershad and transfer of power to the Chief Justice of the Country because they realised that under Ershad there cannot be any free and fair election. But, there is no constitutional provision of transferring power to the Chief Justice. However, in case of the resignation of the President, the vice-president, who can be appointed and dismissed by the President, automatically becomes the President and can continue up to the remaining tenure of office. (The Parliament modified this rule and the vice-president was required to be the acting master of the President during the Presidential election as in the U.S.A. and should remain in office during the full tenure of office of the President, which means the President limit the power of dismissal of the vice-President.) If both President and vice-President resign or are unable to function then the Speaker of the Jatiye Sangshad functions as President.

In order to give the way to hand over power to the chief justice without breaking the provisions of the Constitution, the opposition parties demanded the resignation of the vice-President first and the immediate appointment of the Chief Justice as the Vice President. After that new appointment Ershad as President should resign giving the way for the Chief Justice to become the President. But political and economic situation deteriorated so much that President, vice-President and entire cabinet of 17 resigned handing over power to the Chief Justice, once more in violation of the Constitutional provisions. The very resignation process is now treated as a revolution. Under the Constitution any person holding any office of profit cannot hold the office of the President. The Chief Justice was all along opposing the idea and he accepted the post on the condition that after holding free and fair elections he should be allowed to resume his former post. As in 1978 and 1986 martial law had been validated retrospectively by the parliament, the appointment of the chief justice and his return to his former post will also require retrospective validations. How competent is the parliament in validating something retrospectively which is *ultra vires* violates the Constitution has never been before in Bangladesh. For a detail of the changes see the news paper and journals of November 1991 issue 1991 and also the *Constitution of Bangladesh* as amended up to 1991.

referendum<sup>159</sup> was held and 84.42% of the votes casted was in favour of the change of governmental system from presidential to parliamentary one.

The shift of BNP stand seems to be dictated by a) popular demand, b) to avoid costly presidential election, especially after the recent devastating cyclone and c) above all the risk of not winning the election by the government because if the president is elected from any other party the parliamentary victory of the BNP will be almost meaningless. In that case the country is likely to face Constitutional crisis between the President who will be both head of the state and government and the prime minister who is the leader of the majority party in the parliament without real power. The constitutional crisis between the president and the prime minister will invariably worsen the present bad economic situation. In that case there might be a possibility of direct military take over which the government is trying to avoid.

In term of economic philosophy and the composition of the party, BNP and Ershad's JP do not differ in any manner. Therefore, one cannot expect any change in government's economic policies.

From the Awami League in the 1972-75, through military rules of Zia and Ershad (1975-1990), the bureaucracy, especially the army, gained hold over other groups of the ruling coalition. Since then the country is practically run by the bureaucrats in coalition with the army. Many army officers voluntarily retired and entered business, trade or manufacturing. In a country where unemployment among the educated is high, officers of the army leave their jobs early and start their own business venture indicating how easy it is for them to be in business because of their proximity to power structure. The civil bureaucrats also do not find any difficulty either in engaging themselves in business or in being absorbed by big business or by the non-governmental organisations (both local and foreign) on retirement.

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<sup>159</sup> According to the constitution amendment of 1978, the change of governmental system requires the holding of a referendum

The process of nationalisation under the Awami League followed by rampant privatisation of nationalised enterprises, the rapid establishment of private banks and insurance companies, the lavish invitation to foreign investment, the clear-cut domination of donor countries and aid agencies; the mushrooming of non-governmental organisations and the geometric growth of multi-millionaire trading bourgeoisie of whom a conspicuously increasing proportion had military and civil bureaucratic background and the increasing militarisation of the public administration and public enterprises administration are the logical culmination of the policies of the previous governments.

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## Legal Foundations of Public Enterprises in Bangladesh

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### 2.1. Introduction.

Bangladesh with its long history of colonial domination is not an exception to the pattern of development that generally took place in other colonial countries, both before and after independence.<sup>1</sup> During the British rule, capitalist relations of production were penetrating the economy of Bangladesh. Such penetration created and shaped the social formation of Bangladesh, however, at the same time, the pre-capitalist relations of production which were in vogue were preserved largely because they served to subsidise capitalist production.

Legality as a legal ideology was, often, presented by the colonialists as justifying part of their civilizing mission.<sup>2</sup> As part of introducing capitalist relations of production and part of fulfilling the civilizing mission, an array of prototype laws with minimal modification was introduced into India, as in other colonies. But with the weak penetration of capitalism,<sup>3</sup> given what had to be done to structure the colonial economy and to maintain it, universalism, freedom and equality of any significant kind, associated with legality and rule of law, was quite out of question.<sup>4</sup>

1. A vast literature on different colonial and post colonial states stand as evidence to the similar nature of development that took place in various colonial countries. For a survey of literature on colonial and post colonial states see P. Fitzpatrick, *Law and State in Papua New Guinea*, 1980.

2. R.A. Himselback, *Racism and Empire. White Settlers as Colored Immigrants in the British Self Governing Colonies, 1830-1910*, 1976, pp.13-16; R.B. Seidman, *The State, Law and Development*, 1978, p.201.

3. For a detail discussion of how capitalism penetrated into the economy of Bangladesh and its effect on the nature of state and law, see *the author, 'Capitalism and the State in Bangladesh' (The Growth and Development of Capitalism in Bangladesh)*, 1984. K. Ahmed, *The Socio-Political History of Bengal, 1875-1947*; H. Akbar, 'Bangladesh and the Crisis of Pakistan' in R. Mahomed and J. Neville (ed.), *The Socialist Register*, 1974; A.A. Abdulla, 'The Class Economic Nationalism: Pakistan and Bangladesh', A paper presented at the *Bangal Studies Conference*, Toronto, 1972; R. Sobhan, *Social Basis of Pakistan Crisis*, 1969; H. Roomfield, *State Conflict in a Plural Society. Bengal in the Twentieth Century*, 1968.

4. Researchers analysing state and law during colonial period in other developing countries also commented in the similar tone, see P. Fitzpatrick, *op. cit.*, p.38. Referring to the colonial situation in Kenya, Chai and McAuliffe mentioned that whatever else colonial law was, it was certainly

Law, in this thesis, is looked at as a type of carefully designed state action, distinctive in certain operational ways. It is not seen as isolated from politics to form an outside constraint on political life: rather, law is a sub-branch of politics conditioned by its purpose of legitimisation.

Industrialisation is a precondition for a country to approximate to the western form of development. But Bangladesh lacked and is still lacking in foreign-exchange reserves, capital, technical know-how and managerial expertise required for industrialisation. The world Bank, IMF and other developed countries, through bilateral or multilateral agreements, provided the bulk of the capital, technology and key management. Although the state and the resident bourgeoisie did assume some significant independence from the foreign bourgeoisie, they still operate in close conjunction with foreign capital which continues to provide the bulk of capital and technology. Even when the stake of the foreign bourgeoisie was being restricted in terms of ownership, such bourgeoisie derived compensatory returns from management contracts, the licensing of the know-how and in other ways. These returns were often inflated through transfer pricing mechanisms.<sup>5</sup> As well, the development of internal class conflicts and resulting inabilities had enabled the foreign bourgeoisie to manipulate the situation and contain the resident forces that sought to dominate it.<sup>6</sup>

In spite of all measures to boost private capital investment the response from the private entrepreneurs was so poor that the state had to participate directly in the economy by creating public enterprises. Investment, by donor countries in the public enterprises, provided for a convenient way for the guarantee of investment because state offered better

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not an exemplar of bourgeois legality. Y.P.Ghai and J.P.H. McAnis, *Public Law and Political Change in Kenya*, 1970, p.24. Writing of the colonial situation, Balandier noted that "the country had to be controlled, 'held down', so that the administrative system becomes an integral part of colonized societies." G.Balandier, *The Sociology of Black Africa: Social Dynamics in Central Africa*, (translated from the french by D.Clarson), 1970, p.29. The necessity of such containment was heightened by the numerically small presence of the colonists and their objectively weak position, resulting from the limited penetration of capitalism.

5. B.K.Jakragi, *op. cit.* p. 26.

6. *Ibid.*, see also J.P. Petrus, 'New Perspectives on Imperialism and Social Classes in the Periphery' in the *Journal of Contemporary Asia*, vol.5, no.3, 1975, pp.291-308.

prospect of repayment and the payment of interest. Thus many of the public enterprises were created in Bangladesh using substantial amount of foreign aid or loans.

Law and state played a more specifically purposive part in the emergence of the resident bourgeoisie.<sup>7</sup> Thus the political power is seen in this thesis as leading to economic power. Because of the dependence of bourgeoisie on state, it is of focal importance. State is not viewed here as an embodiment of some abstract idea of political will or sovereignty but as a reflection of the social dynamics resulting from either the constant change or relative stability of a mode or modes of production and the resultant class configuration.

## 2.2. The Colonial State and the growth of Capitalism

As in other colonies, capitalism was transplanted in Bangladesh, which was part of India, by colonial rule. Capitalism did not grow in Bangladesh like it grew in Europe. One of this differential growth was that, in India for that matter in Bangladesh, the nature of social evolution was different from that in Europe. In India, the dissolution of the primitive society or clan organisation was not followed by a slave system and feudalism. Marx termed the mode of production in India prevailing before its colonialisation as Asiatic Mode of Production.<sup>8</sup>

7. This is evident from discussions in chapter 1, also see P.K. Jha, *op. cit.* A similar view has been expressed in other colonial contexts, especially in Africa, see C. Meillassoux, 'A Class Analysis of the Renaissance Process in Mali' in the *Journal of Development Studies*, vol. 8, 1970; M. Mandata, 'Politics and Class Formation in Uganda, 1976'; S. B. Chakrabarty, 'Class Struggle in Tanzania, 1976'; V. G. Chib, 'Control and Management of the Economy: Research Perspectives on Public Enterprise', in *Class (ed.) Law in the Political Economy of Public Enterprise: African Perspectives, 1977* etc.

8. The following characteristics distinguish the feudal from the Indian (or Asiatic, Marx also sometimes mentioned it as tributary) mode of production.

1) The direct producer in the feudal mode of production - the serf - did not own the means of production or labour conditions of his own means of subsistence, i.e., land; so he had to provide to the owner of the land unpaid surplus labour which was the ground rent extracted from him by the private land lord by virtue of his ownership of the soil, this being the main form of wealth or means of production in feudalism. In India, on the other hand, the direct producer, the peasant, possessed the means of production and labour conditions of his own means of subsistence, i.e., land. His surplus labour was extracted from him in the form of tax not by any private landlord but by the state. 2) In the feudal mode, private ownership of land existed, the predominant powers being the private landlord's ownership. In the Asiatic mode there was no private ownership of land, although there was both private and common possession and use of land. It is important to note here that although the direct labourer remained the possessor of the means of production, i.e., land, he was not absolutely free because the property relations asserted itself as a direct relation between ruler and subject. Thus the actual possession of land in India, whether in private ownership (which later made the British rule come to be known as *feudal rule*) or in collective ownership (*village-community* relations) subordinated to the supreme landlord or real owner of the soil - the state. [D.D. Kosambi, *An Introduction to the Study of Indian History*, 1957, p. 323.] 3) In the feudal mode, the landlord was the sovereign over the serf. In the Asiatic mode, the state was the sovereign, because it was the supreme landlord. By not being the mere 'supreme landlord', Marx implied that there might be revenue farmers (taxes as landlord's) in India but they were not co-owners of sovereignty with the state. [K. Marx, *Capital*, vol. III, p. 119.] Under the feudal system, the sovereignty or political power of the state was decentralised because the private landlords were regarded as the owners of the soil. [M. Bloch, *Feudal Society*, 1974; H. Piore, *Early Democracies in the Low Countries*, 1971, pp. 66-71.] Under the Asiatic system the sovereignty of the state was undivided and concentrated because of the state's monopolisation of landownership. [Marx, *Capital*, vol. III.]

The king simply delegated to some persons the specific and individual rights of *zamin* i.e. the revenue collecting power. These *zaminders* and *jagirdars* (revenue collectors) were created by the King and could be removed by the king at any moment.<sup>9</sup> These *jagirdars* and *zamindars* were not feudal lords in the western sense of the term.<sup>10</sup>

The land lords, i.e., collectors of revenue, were not the owners of land. Land belonged communally (as usufruct) to the village, although ultimate ownership remained vested in the state.<sup>11</sup> In fact, the state's ownership of land was not in the nature of private but collective ownership. On the other hand, the responsibility for payment of the state's revenue was not an individual responsibility but the collective responsibility of the community. The *de facto* control of land remained vested in the village communities, and the supreme landlord was the state.

Since the owners of the conditions of production was the state, therefore, the claim on the surplus labour of the producers also lied with the state. The state extracted the surplus labour in the form of surplus commodity (both in kind and cash).<sup>12</sup>

The *jagirdars* and the *zaminders* could neither raise the revenue (or rent) nor evict the peasants because they were not the owners of the soil. Thus one of the prime factors -

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For details of Asiatic mode of production see K. Marx, *Capital*, vol.III, 1894 reprinted later in various countries; B.Hindman and P.O'Hara, *Pre-Capitalist Modes of Production*, 1975; L.Kotler, *The Asiatic Mode of Production*, 1976; G. Lichtenin, 'Marx and the Asiatic Mode of Production', in S. Avneri (ed), *Marx's Socialism*, 1975; D. Thorner, 'Marx on India and the Asiatic Mode of Production', in *Contributions to Indian Sociology*, vol IX, 1966.

<sup>9</sup> According to Azizul Haque, in the Mughal Revenue Administration (the Mughals ruled India before British colonized India), 'the *zamindar* was ... an agent of the Emperor for making due collections on behalf of the Emperor and was remunerated with a percentage out of the collections for his labour. The term '*zamindar*' was a later development in the land system of the country. In the *Ayats* - *Abkhari*, he was the *Amal*. Giver or collector of the revenues and he was directed to annually assist the treasury with loans of money and to receive payments at distant and convenient periods. ... Certain allotments of land were usually given to him rent free for his maintenance known as '*nashar*'.', A. Haque, *The Area Behind the Plough*, 1939, p.214.

This unique nature of tax - farming was also noted by famous European traveller Francois Bernier, who came to India in the seventeenth century. According to his descriptions, 'the king was the proprietor of the land, making over a certain quantity of military men, as an equivalent for their pay, and this grant is called *jah gir*, or as in Turkey, *amir*. The word *jah gir* signifies the spot from which to draw, or the place of salary. Similar grants are made to governors, also for the support of their troops, on condition that they pay certain sums annually to the king out of any surplus revenue that the land may yield.' F. Bernier, *Travels in Mughal India*, 1972 (reprint), pp 224.

<sup>10</sup> In the words of Max Weber, they were the holders of 'office *per se*'. The distinguishing characteristic of land relationship was that it was 'pre-feudalistic', not 'feudalistic'. M. Weber, *The Religion of India*, 1967, p.71

<sup>11</sup> K. Marx, *Pre-Capitalist Economic Formations* (edited with an introduction by E.J. Hobsbawm), 1971, p.69; R.D. Banerjaphy, *Banglar Itihas (History of Bengal)*, 1974, vol.1, pp.55-70

<sup>12</sup> A. Sen, *The State, industrialisation and class formations in India*, 1982, p.40.

the separation of the peasants from their land - for the emergence of wage labour was virtually non-existent in India. The revenue collectors share in the surplus was dependent on the state's surplus (which varied from one tenth to one fourth of the state revenue, depending on various factors), and the state's approval was required to impose a separate rate on the peasants (only in cases where the *zaminders* were not allowed to take share from the state).

Thus, the claim of the state as the supreme owner of the soil, on the surplus labour of the direct producers determined the nature of social formation and the state structure in India. In short, the state's domination over the social classes was ensured by its supreme landownership. The classes that grew were naturally subservient to the state either as direct producers or as hangers-on (as nobility or revenue collectors, literati and even merchants). The crucial question here (for the development of capitalism) is whether the *zamindars* or  *jagirdar* had proprietary rights over disposal of the soil, i.e. whether they could create a class of wage labourers by evicting peasants from the soil?

Since the reign of Akbar (late sixteenth century), the *zamindars* attained the right to sell their right to collect the revenue (*zamindari*) with the approval of the state but they failed to acquire the proprietary rights over the land<sup>13</sup> which was the hallmark of the landed aristocracy in Europe.

The nature of production in India was conditioned by the existence of the village communities, characterized by an organic unity between agriculture and industry.<sup>14</sup>

Evidently, production relations in these small communities were not based on exchange but on use value. In fact, the artisans in a sense were the employees of the village; craft production could function only as a subsidiary to agriculture. The artisans and other professionals were maintained at the expense of the whole community. They used to receive a fixed share of the produce from each cultivator for the services

<sup>13</sup> Habib, *The Agrarian System of Mughal India*, 1963, p.115.

<sup>14</sup> D.R.Cindgi, *The Industrial Evolution of India in Recent Times, 1866-1930*, 1971, p.10.

rendered.<sup>15</sup> Because of communal ownership by the village community, and the absence of legal ownership, the tax collector was not a co-sharer of sovereignty with the king. Therefore there was no conflict between the peasantry and the landlord over the physical possession of land and of labour services.

The conflicts, of course, were there between the village and the state but these were confined to the size of the revenue or the surplus of the soil. The basis of agriculture remained unchanged.<sup>16</sup> This was also the reason why there was no fundamental change in the nature of the state structure.

The absence of a conflict of interests between the peasants and the revenue collectors over the question of disposal of the land did not lead to the workers' separation from the land. Furthermore, the self-sustaining unity of agriculture and manufacturing contained all the conditions for reproduction and surplus production within itself.<sup>17</sup> Where such small self-sufficient units existed as part of a larger unity, it was very natural that they would provide a part of their surplus products to the large unity for maintaining communication, irrigation, war, religious worship, etc.<sup>18</sup> The unity of manufacturing and agriculture in the Asiatic mode of production resisted disintegration and economic evolution.

The merchants and artisans in Indian cities could not acquire power by balancing the feudal lords against the emperor. They had to remain satisfied with playing a role subordinate to the courts, noblemen, priests and soldiers. The city could not become a centre of bourgeois power struggle, first against feudal restraints and against the state

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15. *Ibid.*

16. Hence, Marx rightly remarked that, in spite of incessant changes of the dynasties, the structure of the economic element of society, i.e., the village community, remained untouched by the political sky. Marx, *Capital*, vol III, (Moscow edition), 1975, p.120.

17. Marx, *Pre-Capitalist Economic Formations*, op. cit., p.70.

18. *Ibid.*, pp.70-71

itself<sup>19</sup>, as was the case in feudalism. The nascent bourgeoisie failed to overcome the hegemony of the state.

Despite these impediments, a prosperous merchant class came into existence in the seventeenth and eighteenth centuries as a result of the opening of trade with the West. From the above discussions, the natural question is, how could this merchant class emerge as a social force when the Asiatic mode of production was a system based on, a more or less, inalienable interdependence between agriculture and the village artisan industry?

It should be noted here that it would be wrong to conclude from the above discussions that the Indian economy was totally immobile. In fact, under the impact of international trade, the Indian economy was undergoing a formidable change. In the urban centres of India there were merchants and artisans who catered to the needs of the court. With the expansion of sea trade, the demand for their products in foreign markets outstripped the demands of the court and its hangers-on. Since the beginning of the sixteenth century, Indian goods began to enter Europe directly via sea routes. This gave a tremendous boost to production in India, particularly to urban crafts.<sup>20</sup> Consequently, these merchants and urban artisans became less dependent on the court and emerged slowly as an incipient capitalist class which began to erode the autonomy of the village economy.<sup>21</sup>

The towns which were centres of administration were transforming gradually into flourishing trade centres. Merchant capital also took the fundamental step towards manufacturing industry by separating the producers from the products. Under such circumstances, it was not impossible that the Indian bourgeoisie could have triumphed and

19 *Mars, Pre-Capitalist* ..., *op. cit.*, p.131.

20 S. Choudhary, *Trade and Commercial Organisation in Bengal, 1650-1720*, with Special Reference to the English East India Company, 1975, p.29

21 Thus, in the seventeenth and eighteenth centuries there were many industries in India - the textile being the most important - that could compare favourably with the most flourishing industries of Europe at that period. For example, Delhi, Agra, Merrut, Lucknow, Lahore, Pune, Ahmadabad, Dhaka and many other Indian towns became great industrial centres. Usually a particular industry flourished in a particular city - for example, *muslins* at Dhaka, *silk* at Murshidabad, *shawls* at Srirangapatna. The towns in Bengal, especially Dhaka, Murshidabad and Malda, excelled in the production of both *iron* and *silk*. The *muslin* of Dhaka was the finest and best known of all those 'Manchester' manufactures, when he could not rival in fineness and delicateness that it was but 'a shadow of a commodity'. See Ostig, *op. cit.*, pp.33-35.

caused the birth of industrial capitalism. The development of the new form of commerce and industry was also working as a disintegrating force in the village community in some parts of India. The production of the village artisans, particularly in Bengal and other advanced areas, was no longer geared to meet the needs of the village; it was undertaken for foreign markets.

Until the beginning of the industrial revolution in England, the main interest of the British East India Company was not to turn India into a market, but to monopolize Indian exports which found a ready market in England and Europe. Before British colonization of India in 1757, wealth poured into India from various European countries.<sup>22</sup>

However, this trend was reversed when the company captured political power after the battle of Plassey in 1757. Since then, 'methods of power could be increasingly used to weigh the balance of exchange and secure the maximum goods for the minimum payment'.<sup>23</sup>

The victory of British East India Company destroyed indigenous capitalism in its nascent stage. The trade which was being carried on by the East India Company, and for which England had to pay huge amounts of bullion to Indian traders and manufacturers, was transformed into 'organised plunder'. The artisans were forced to accept whatever price the company and its native agents, known as *gomasthas*, paid them. As a result of this unprecedented organized economic drain from India, the rising merchant and artisan classes were completely wiped out.<sup>24</sup> Indian merchants were prohibited from buying from local producers, and forced to purchase goods at higher prices from the company and its servants. Thus ended the days of prosperity of the Indian merchants. Henceforth they were

<sup>22</sup> A. Sen, *op. cit.*, p. 46. Prior to 1757 the company had to pay in silver or gold in exchange of Indian goods, mainly textiles and silk, because the British industries could not offer much in exchange for Indian goods. N. Karim, *The Changing Society of India and Pakistan*, 1961, p. 73.

<sup>23</sup> R. P. Dutt, *India Today*, 1970, p. 101.

<sup>24</sup> What economic and socio-economic pressures were adopted by the British East India Company to eliminate the nascent Indian bourgeoisie have been vividly described by various Indian scholars. See R. P. Dutt, *The Economic History of India* (2 vols.), 1956; R. P. Dutt, *India Today*, *op. cit.* and B. K. Mukherjee, *The Rise and Fall of the East India Company*, 1956.

allowed to exist only as the agents of the company and their employees, in the form of *gomasthas* and *baniyans*.

The British government imposed a number of prohibitive duties on Indian goods in order to transform India into a British market.<sup>25</sup> The irony of the situation was that the Britain heavily interfered with economic affairs in India at a time when the ideological slogan was non-interference of the state in economic affairs.<sup>26</sup>

India's agriculture was gradually commercialised, which signalled the penetration of capitalism in agriculture, too.<sup>27</sup> The process of changing India into a market and supplier of primary products which could be exported to other countries necessitated the restructuring of her land relations on a commercial basis. To this end, new land tenure systems were brought into being without undermining the traditional concept of the state as the supreme landlord.<sup>28</sup>

The new land tenure system superseded the traditional right of the village community. Under the village community system, land was not a commodity, and could not be alienated without the approval of the village community. But under the new system land was transformed into a commodity which could be disposed of in the market like any other commodity.

One of the reasons for the introduction of the new land tenure system was to replace production for village use by that for the market. As the rural economy partially monetized and the rate of rent gradually increased, the peasant's need for cash also

<sup>25</sup> R.C.Dutt, *op. cit.*, p.266.

<sup>26</sup> Neither Adam Smith nor Ricardo had anything to say when the policy of free trade was reversed in the case of India. The British political economists were not ready to apply their theories in case of India until Davis crushed her industries. Heilbrunn pointed that the enthusiastic proponents of *laissez-faire* conveniently ignored their own theories in the case of India. See E.J. Heilbrunn, *Industry and Empire*, *op. cit.*, p.148.

<sup>27</sup> In the words of Sen, "India was turned into a supplier of primary products for the metropolitan capital, and a market for its finished goods. This process was accompanied by the conversion of Indian agriculture into a source of primitive capital accumulation." A. Sen, *op. cit.*, p.47.

<sup>28</sup> For a detail discussion on the change in the land tenure system under the colonial rule see M. Maitra, *Co-terminous Revolution in Bengal: Kichak (Ferozabad Settlement and the Peasants of Bengal)*, 1982, also see L. Kabir, *Land Law of East Pakistan*, (chapter - 1), 1969.

increased. He was, thus, forced to produce not only for home consumption but also for the market.

Moreover, the government's insistence on a regular repayment of rent, irrespective of the quality of harvest, led to the peasants' increasing indebtedness. With the increasing burden of land revenue, their dependence on credit also rose. The nearest person the peasant could approach for a loan was the village moneylender. But with the commercialisation of agriculture and the introduction of the British legal system, which recognised the absolute right of alienation of land, a significant change occurred in the function of the moneylender. He could then appropriate land for non-payment of a loan, something which would have been impossible under the village community system.

The transformation of agriculture on the basis of private property in land created a situation in which the peasants' burden of debt increased steeply and land ownership began to pass from the cultivators to the moneylenders. As a result a large class of parasitic landowners, moneylenders and land speculators came into existence and more and more people were drawn to these sources of income. Furthermore, since British rule destroyed the urban industries many uprooted people with no other employment fell back on agriculture, which in this way became the only source of livelihood for most of the people in Bangladesh.

With the passage of time, the *zamindars* degenerated into a selfish parasitic class of absentee landlords. Many *zamindars* also leased out their interests, and the middlemen leased out in turn, thus creating a long chain of rent receivers and rent payers who intervened between the state and the actual cultivators. The *zamindars* and intermediary rent receivers, in most cases spent the surplus produced by the cultivators, not on the improvement of agriculture, but on luxury goods imported from Great Britain.<sup>29</sup>

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<sup>29</sup> A. Sen, *op. cit.*, p. 88.

British capitalists, for the extraction of raw materials and commercial penetration, had to invest in railways, tea, coffee, jute, coal, iron ore, and other mining industries.<sup>30</sup> The Indians collecting and transporting raw materials and delivering British manufacturers to the hinterland, as agents or businessmen also owned capital, could not be excluded. As commercial penetration grew, the Indian trading class was gradually drawn into industrial activities, but their basic capital was formed from commerce.

British capital was mainly invested in those areas of the Indian economy which did not come into conflict with metropolitan industrial interests, and was confined to such enterprises as railways, coal mines, jute mills, tea, coffee and sugar plantations - industries related to production and export of raw materials. Later, the British investments in steel, cement and chemicals were ancillary to the railways and other raw material industries.<sup>31</sup>

There were three important industries in India by 1880 - jute, coal and cotton (excluding the railways which were owned by the government). The Indian merchants only played a leading role in the cotton industries. Why did Indian entrepreneurs play this important role in the development of cotton industries? They knew from their experience as traders of British cotton goods that the country had a big market for textiles: local industry had declined in the first half of the nineteenth century. Moreover, the market consisted of private Indian consumers, the discriminatory purchasing policy, as applied in the purchase of railway stores, could not be effective.

Once started, Indian entrepreneurs expanded their activities into other fields. In the emergence of the Indian Industrial bourgeoisie during British rule, capital was first accumulated in trade (even money-lending and landownership) and later invested in industry. While foreign finance capital operated in India unfettered, Indian capital had to function under various vexatious rules and regulations imposed by the government.<sup>32</sup> Thus

<sup>30</sup> J. N. Bhagwati and P. Dhari, *India: Planning for Industrialization*, 1970, p. 19

<sup>31</sup> For the period 1850-1914, the total British investment in India was £500 million. However, there was little capital export from Britain to India. Normally India's exports were always in excess of her imports. Only for seven years 1856-1862 there was an excess of imports over exports totaling 22.5 million pounds. R. P. Das, *op. cit.*, p. 133.

<sup>32</sup> A *See, op. cit.*, p. 76.

it was not surprising that the Indian industries were starving from capital shortage. Although there was no shortage of British capital, it was never invested into sectors which could have affected Britain's export market in India.<sup>33</sup> The British industrialists were opposed to Indian capital spilling into sectors other than the development of raw materials and extractive industries. In these circumstances, the only area in which, Indian capital made some headway was the cotton industry. When the weak Indian cotton industry began to emerge in the 1860s there was a demand in England for the removal of import duties on cotton goods into India which (in the absence of Indian cotton industries) had been imposed for revenue purposes.<sup>34</sup> The infant Indian industries needed tariff protection from the well-established industries of Britain. But in the name of free trade, protection was always denied to them.<sup>35</sup> It may be mentioned, for development, Indian industries needed not only money and protection, but also technical know-how. However, the colonial government did very little to import technical knowledge.<sup>36</sup> As a result, whatever progress Indian industrialists made before independence, they made without any help from the colonial state.

An industrial bourgeoisie came into existence in India in the second half of the nineteenth century; the commercial bourgeoisie was, of course, already on the scene. At the same time, a new middle class consisting of government employees, lawyers, doctors and other professionals began to form in the British established towns. This class was mainly recruited from the traditional 'literati' class which had been serving the administrative apparatus of the Moghuls and its potentates.

The professional middle class was created by the British to meet her administrative needs. The British government had to organize a huge and extensive state machinery to administer the country. It was not possible to staff this huge machine by bringing in

<sup>33</sup> V B Singh, (ed), *The Economic History of India*, 1965, pp 507-8

<sup>34</sup> *A Sen, op cit.* p 76

<sup>35</sup> *Ibid*

<sup>36</sup> D H Buchanan, *The Development of Capitalist Enterprise in India*, 1966, p 668

educated people from Britain other than to fill the upper posts. Moreover, the integration of colonial economy with the metropolitan needed youths educated in the English language. So in 1835, English was made both the medium of instruction of higher learning and the official language.<sup>37</sup>

So the middle class which emerged in India on the basis of English education was not a result of the growing economy; it was an offshoot of British rule. The colonial state had no intention of making education universal: its interests were best served by keeping the Indian middle class elitist in nature as was during the Mughal rule.<sup>38</sup>

Thus, the colonial state, as an extension of the metropolitan state, encouraged the development of an indigenous trading class from whom grew the Indian bourgeoisie, but its further development thwarted by various fiscal policies.

### 2.3. The Nature of the Bangladeshi State

After independence, the ideology of the civilizing mission found a counterpart in that of development and modernization. According to such doctrines the introduction of modern or western values and institutions would transform third world societies into a metropolitan likeness and in this way they would eradicate the backwardness that causes underdevelopment.<sup>39</sup> As with the general ideology of modernization, this theorizing

37. R.Some, *Jagata Janata*, 1957, p.37.

38. Macaulay expressing the rationale wrote, "we must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals and in intellect." Cited in B.B.Mishra, *The Administrative History of India*, 1970, p.154.

39. F.Snyder provides a comprehensive survey of literature on modernization theory and its critique, F.G.Snyder, 'Law and Development in the Light of Dependency Theory', *Law and Society Review*, vol.14, no.3, 1980. For critique of modernization theory see A.G.Frank, *Sociology of Development and Underdevelopment of Sociology*, 1971, D.M.Trubek and M.Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review*, 1974, pp. 1062-1102. As well as obviously serving the interests of metropolitan capital, the ideology of modernization, and its sub-branches of 'action building' and 'planning', serve to legitimate the position of the national bourgeoisie, the 'new elites', the resident agents and the indigenous vanguard of modernization. For a review of vast literature on law and development see F.Snyder, *op.cit.* This ideology also helped legitimate the arrogation of tremendous state power for the Herculean task of development and helped legitimate the broad, discretionary form of law. Such legitimations put emphasis in academic theorizing about law and modernization on the efficacy or over omnipotence of law as an instrument of development. D.M.Trubek and M.Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development in the United States', *op.cit.* Resident social formations and their law 'cannot lead to development' and indeed are 'the cause of underdevelopment in all its forms'. R.B.Seidman, 'Law and Development: A General Model', in *Law and Society Review*, vol.6, 1972, p.315.

sometimes explicitly sets a better, modern, western world, towards which transforming law is to aim. The conservation of the traditional mode of production had somewhat opposite ideological effect. For scholars of law and modernization, the introduced law itself, through some process of 'ethical infection', was to induce behaviour in conformity with bourgeois legality.

Due to their numerical shortage, the colonialists had to promote a compliant small group of people by building on hierarchies and inequalities within resident social formations to run colonial administration. Those in dominant positions within these formations had opportunities thrust upon them, becoming 'entrepreneurs' and 'businessmen'. Their sons monopolized educational opportunities and 'leadership training' and hence monopolized advancement in the state system.<sup>40</sup>

At independence, both in 1947 and 1971, due to their positions held during the colonial periods, they captured the political leadership. With the political independence, the British or Pakistani commercial enterprises could no longer rule directly; there had to be some resident ruling class. As the ruling class was not 'naturally' emergent (because indigenous class forces had been stunted) law and state came to play a central role in its promotion. However, this promotion tended to contradict the conservation of the pre-capitalist mode of production, which conservation was in the interests of the foreign bourgeoisie. Law and state then had a regulating or mediating role in relations between the resident bourgeoisie and the foreign, a role that predominantly, subordinated the resident element.

After gaining political independence both in 1947 and 1971, the functions of state and law and the forms of law came to resemble more, but far from entirely, the position of law and state within the capitalist mode of production. Some presence of the class formations characteristic of capitalism indicated that economic determinants were of more effect. Therefore, there was less need for direct legal controls to free production and to

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<sup>40</sup> A.Sen, *op. cit.*

maintain the economy. The operative combination of the capitalist and the pre capitalist modes of production were more structurally set. The worker did not have to be forced so much to labour<sup>41</sup> and then be compulsorily reintegrated into the old mode since he and his family were more dependent on wages. Through low wages and the precarious condition of employment the labourer were periodically expelled from the industrial sector and sent back to the rural areas.<sup>42</sup> The peasants were more tied to production for the market; and there was the ruralisation of the cities. With the determination of prices and the imposition of conditions as to output and quality; the peasants were not really selling their crops but rather their labour power. Thus peasants were really becoming disguised proletarians.<sup>43</sup>

Law and state also played (and are playing) a large part in containing competition from the national bourgeoisie. This function no longer took the form of direct legal prohibitions and controls of the colonial periods; rather, legality and the imposing of universal, 'modern' or 'modernizing' standards served to favour those who could comply with them. Laws attuned to metropolitan-style factors of production impose health, safety, environmental, quality and packaging standards on production and these standards serve to restrict the resident bourgeoisie.<sup>44</sup> The process of urbanisation and the combination of personal laws of inheritance often undermined the reproduction of big peasantry. Other classes and class elements were contained in a wide variety of measures which made for the continuation of colonial structures. Petty commodity producers were (and are) well restricted and harassed through laws relating to trade licensing, health standards, traffic obstruction and to many other things. In this their urban existence was not only made precarious but they were restrained in competing with the bourgeoisie. The proletariat, especially its more skilled element was contained by laws restricting and even frequently

<sup>41</sup> Before colonization, the social formation in India criminalized idleness or an "idle" laborer, so the producer had to be separated from the feudal means of production and legally coerced to work in various systems of forced and indentured labor. Taxes were introduced so an incentive to laborer to earn cash to pay the tax. A. Sen, *op. cit.*

<sup>42</sup> B.K. Jha, *op. cit.*

<sup>43</sup> *Ibid.*

<sup>44</sup> For discussions in African post colonial countries see G.W. Kasuya, 'The Impact of the Received Law on Development in Anglo-phrase Africa', Paper delivered at the British Sociological Association Annual Conference, University of Warwick, April, 1979, pp. 7-9.

prohibiting trade union activity and in laws which provided alternative, controlled form of 'industrial relations'. The peasantry continued to be largely self regulating.

The conservation of the old pre capitalist mode and the fact that most people had only a limited stake in the capitalist mode of production undercut the establishment of legality as a popular phenomenon. These same reasons and the weakness of the state tended to make people look to traditional relations, including personal law; for security of life and property. The overwhelming majority were rarely penetrated by the national law in ways likely to win the inhabitant's gratitude or support. Police were generally disliked and distrusted.<sup>45</sup> Legality at the national level and bourgeois legality in particular extend little mediating involvement to such people and must appear largely oppressive in upholding the interests of dominant class elements.

Beginning in 1947 with no industries in its modern sense, the industrial sector in Bangladesh now contributes about 10% of the G.D.P., of which more than half is contributed by public industrial sector.<sup>46</sup> This modest growth has been possible mostly as a result of the initiatives by the state to promote industrialisation through the creation of various public enterprises. This is not to say growth is unequivocally or predominantly beneficial. The rich are becoming richer and the poor poorer, resulting in the acceleration of conflicts between the two.<sup>47</sup> Moreover, with industrialisation the number of industrial labourers also increased.<sup>48</sup> Conflict between labour and capital often led to draconian political repression, like political killings, firing at unarmed peaceful demonstrations, suppression of political oppositions, the declaration of state of emergency, rule by martial

<sup>45</sup> The structure is not different in other developing countries. See M.B. Chinnai and D.J. Abbot, *Crises in Developing Countries: A Comparative Perspective*, 1973, pp. 24-26.

<sup>46</sup> Though industrial sector contributes only 10% of the GDP of Bangladesh, its sector performs a very significant negative role in the development of agriculture and infra-structure growth of the country. This modest industrial base accounts for about 70% of the foreign exchange earning of Bangladesh. [A.K.M. Hossain, 'Autosufficiency of Public and Private sectors in a Developing Country', *COMPROPE*, vol 3, no 2, 1967, p. 13]

<sup>47</sup> Recent academic research on poverty in Bangladesh confirms to the above statement. See for example, M. M. Akbar, *op cit*.

<sup>48</sup> In 1947, the number of industrial workers was 7,000 which rose to over 300,000 in 1969. See K. Ahmed, *Labour Movement in East Pakistan*, 1969.

law, detention without trial, arrest without warrant etc.<sup>49</sup> Moreover, the economic base of the resident bourgeoisie was weak, while the foreign bourgeoisie was unable to rule directly, because after political independence of the country their direct domination was not acceptable, made for considerable political instability and 'pure' force in the form of military government, tended to be the frequent option.

Despite its weaknesses the resident bourgeoisie had considerable comparative advantage over the foreign in some economic activities. There was also potential for conflict between the foreign capital and the bureaucratic bourgeoisie, with the latter wishing to extract more state revenue from the former. Since some of this revenue went, on extension services, grants and loans, to benefit the resident bourgeoisie generally, this issue gave some focus to pressures from the resident bourgeoisie. In this more complex situation law and state came to mediate between the foreign bourgeoisie and the resident.

The post-colonial Bangladeshi state played a more supportive role in the economy and, to some extent, a directive one. In doing this the state assumed flexible powers under broad, discretionary legal provisions. These provisions were applied in particularized ways. Legal subjects no longer operated outside the limits prescribed by the state, orienting their conduct by fixed rules of general applicability. Rather, whenever they had effective power or were otherwise recognised by the state, they bargained with the state for particularized outcomes on the context of those broad and discretionary legal provisions. The scarcity of administrative personnel with both competence and integrity made the discretionary policies all the more difficult to execute. Instead, discretionary policies increased the avenues of corruption. Big business were on the whole greatly favoured in the system of actually applied discretionary controls.

Law and state played a more specifically purposive part in the emergence of the resident bourgeoisie. Political power led to economic power. The state, fostered this class element through management and technical (extension) services, development grants and

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<sup>49</sup> See Chapter 1.

easy credits. Laws relating to trade licensing and to import controls created artificial and highly profitable monopolies for the resident bourgeoisie.<sup>50</sup> It was also through the state that the bureaucratic bourgeoisie assumed its economic power and indeed, very identity.

Apparently, there were broad and discretionary legal provisions enabling the state, and the bureaucracy, to control the foreign bourgeoisie. These included trade licensing, natural resource regulation and investment codes. Increasingly, the laws required some involvement of national elements in enterprises with the foreign bourgeoisie but left them with the benefit of management contracts and of the licensing of technology and know-how, these measures served to legitimate the continuing presence of the foreign bourgeoisie and to mask its persisting dominance. Since the presence of the foreign bourgeoisie was apparently a subject to restrictive conditions and apparently so controlled, there presence was rendered more acceptable. In this, the position of the ostensible controllers, the bureaucratic bourgeoisie, was also legitimated.

The discussion in the above three sections revolved around how the state participated in the formation of the ruling groups and how these ruling groups had used the state for their own qualitative and quantitative growth. The ruling party, the bureaucracy, both civil and military, and the donor agencies played their respective roles in this active nurturing. In this class configuration, however imprecise the differentiation process, the military and civil bureaucracy and the bourgeoisie it nurtured became part and parcel of the ruling class actively perpetrating the expropriation by dominating the state apparatus.

Beside, the common class interests, the family and social bonds, kinship structure, matrimonial relationship, etc., tended to cement this union of convenience between the bureaucrats and the resident bourgeoisie. Power and class are not necessarily matters of individuals, but of families. The same men played many roles and took part in politics,

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<sup>50</sup> This is derived from discussions in the previous chapter. In other colonial countries also more or less same development occurred, see for example, R. B. Soudmax, *op. cit.*, pp 412-413

administration and commerce. Their brothers, cousins, fathers and sons did the same. The result was a web of relations that brought the holders of power into overlapping and sustained contact.

The absence of a strong resident bourgeoisie allowed the bureaucracy to play a dominant role although, with bias to the resident bourgeoisie. Hamza Alavi described the bureaucracy in Bangladesh as "independent and superior to all social classes as being the dominant force in society rather than the instrument of the dominant class."<sup>51</sup> But in reality, as discussed in chapter 1, those who have command over or have access to economic resources or political decision making power tended to gain cumulative advantage in the operation of free market forces or to strengthen their economic and political power by the manipulations of state patronage, controls and regulations in their favour<sup>52</sup>. This tended to be true equally of the intermediate or middle classes like farmers with surplus, traders, merchants, rentiers and middle class professionals etc., as of the large-scale private industrialists or financial interests.

Economic power tended to flow from political power rather than vice versa. First, the bureaucratic bourgeoisie (which included both civil and military bureaucracy) was directly involved in the control of the means of production through various government regulations, the running of public enterprises and involvement in governmental joint ventures with the foreign bourgeoisie. Second, the bureaucratic bourgeoisie had charge of the allocation of state resources because, as mentioned in chapter 1, the country was

51. H Alavi, *The State in Post Colonial Societies: Pakistan and Bangladesh* in K.Gough and H.P.Sharma (ed), *Imperialism and Revolution in South East Asia*, 1973, p 143.

In a similar vein different researchers described bureaucracy of various developing countries. For example N Przeworski observed that even though the capitalist structure of society inevitably benefits the bourgeoisie, the state tries to maintain some degree of autonomy from direct capitalist control. N Przeworski, *The Problem of the Capitalist State*, *New Left Review* No. 58, 1969, p 245, and *State Power and Socialism*, 1978, p 12. The same vein is echoed by G. Therborn, *What Class has the Rubik's Cube? Who is Who?*, 1978; T. Skocpol, *States and Social Revolution*, 1979; E. Trimberger, *Military Bureaucrats and Development in Japan, Turkey, Egypt and Peru*, 1978 and many others in different ways but the message remains the same. For example, in analysing the role of the bureaucracy in Turkey, Egypt and Peru, E. Trimberger pointed out that the state played a "dynamically autonomous role, because it is much more dominant than any social class and has a significant degree of freedom to impose its own design on society." E. Trimberger, *op. cit.*, p. 7.

52. In this connection the following words of Nurul Islam, the first head of the Bangladesh Planning Commission, seems to be very relevant. He writes: "The concept of a 'neutral' state or a government run by a group of 'declass' visionaries holding the balance between the competing interest groups, but unrelated to and independent of them for its continuance in power seemed not very realistic, even though it was to be devoutly wished." N. Islam, *op. cit.*, p. 15.

mostly governed by martial law, which often played a significant part in the promotion of other groups within the ruling coalition headed by the bureaucracy. Third, much of the public revenue, a revenue derived in varying parts from the peasantry and the proletariat as well from the bourgeoisie, was used to pay the comparatively high wages and facilities of the bureaucratic bourgeoisie. Fourth, its advantaged position within the state system was used by members of the bureaucratic bourgeoisie, especially with military background, to set up their own business enterprises.

It is noteworthy to mention that historically in Bangladesh, public employment continued to be more valued than any other occupation. Public officials and the literati, being nearer to the state, had more social prestige and political power than members of other professions. This situation instead of changing was reinforced during the British and Pakistani rules, because due to their numerical shortage the British and the Pakistanis needed compliant class of people. Thus the general social prestige of the bureaucracy was rooted in the social milieu.

The Bangladeshi educated class, which the British and the Pakistanis aimed at creating, was to be a class of imitators, not an originator of new values and methods.<sup>53</sup> Unlike the West<sup>54</sup>, Bangladesh, under the British and Pakistanis, proceeded to encourage the type of education which would produce a class intended to 'develop' the economy in the interest of the metropolitan bourgeoisie. Moreover, the traditional bias in Bangladesh for administrative jobs and against commercial and industrial occupations led to the gearing of the educational machinery to satisfy the needs of the public service, thus perpetuating the old emphasis on literary education.<sup>55</sup> There was, however, a class of

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<sup>53</sup> H. B. Mitter, *op. cit.*, p. 11

<sup>54</sup> The West encouraged education to satisfy the needs of a developing economy. Max Weber has shown what an important role *Wissenschaft* (in particular the process of rationalization) has played in the development of the capitalist economy. Cf. Weber, *General Economic History*, 1907.

<sup>55</sup> Mitter, *op. cit.*, p. 11.

literati in Bangladesh that, unlike in the West, did not emerge from the rising bourgeoisie, but was a 'parasitic class' subsisting on state patronage.<sup>56</sup>

The public officials and literati were, in fact, the nuclei from which grew the educated middle class in Bangladesh. Public offices, both in pre-British India and under the British and the Pakistanis, were the instruments through which the economy was channelled. He who had control over public offices had control over the economy.<sup>57</sup> This was due to the fact that the bourgeoisie did not constitute any political element in the Bangladeshi body politic, and hence did not or could not play the role of its European counterpart.

Since the present study is on the public enterprises the above raised question did not get adequate illumination but extensive literature on the topic is available.<sup>58</sup> The issue was raised here only to describe the interplay between the state and polity in the context of Bangladeshi economy which influenced the emergence, development and gradual decrease in the numbers of public enterprises.

Over the years, since 1947, a new class of resident bourgeoisie gradually emerged mainly due to state patronisation. Since this class was the main beneficiary of the system it did not participate with the mass in the establishment of legality and rule of law. Rather it supported the dictatorial regimes to suppress any kind of movement for the establishment of democracy in the country. By 1989 this group gradually consolidated. Its greatest fear was that if the bureaucracy is not displaced from its earlier political position then the emerging bureaucratic bourgeoisie, especially with military background, would threaten its position in extracting undue advantages. As a result this group, along with the broad mass, was interested in the end of military dictatorship of Ershad. While the interest of the mass was in establishing legality and rule of law through establishment of democracy in

56 T. Chaud, *History of the Freedom Movement in India*, vol. 1, 1961, pp 301-2

57 A.Sen, *op. cit.*, p.82.

58 See for example, Sahaia, *op. cit.*; Sen, *op. cit.*; B.K. Jhaangir, *op. cit.*

the country, the resident bourgeoisie was interested in capturing political power themselves.<sup>59</sup> Thus in spite of the election promises of the present elected government of BNP to scrap all 'black-laws' including *Special Powers Act 1974*, nothing has been done yet. Clearly the interest of the government is to retain power without changing the authoritarian cast of the law. Though this class, at the moment, is showing signs of strength over bureaucracy but it is too early to predict which group in the ruling coalition, namely the bureaucracy (civil and military) and the resident bourgeoisie will be in control of political life of the country.<sup>60</sup>

#### 2.4. Public Enterprises and the Legal System in Bangladesh.

Since Bangladesh was a colony of Britain, the common law system with a heavy private enterprise bias has a profound influence on the legal system of Bangladesh. Many of the detailed operating concepts and rules of the common law system, including such notions as property, contract, tort, and adjudication, were adopted with the assumption of regulating a private enterprise oriented economy.<sup>61</sup> The company is the major institution for industrial and commercial activities.<sup>62</sup> And rules have been developed on the assumption that the basic responsibility of the management is to maximise profits. Although it is true that various rules have evolved to protect the public interest, there is a basic reluctance to interfere with the internal affairs of the company. Thus the system ensures considerable autonomy to the management. Rules of contract and tortuous and corporate liability were to a large extent determined by the needs of the private sector and the company form.

<sup>59</sup> In the present elected Parliament most members are from bourgeois background. But about one third of the cabinet members are retired civil servants and military officers.

<sup>60</sup> With the establishment of parliamentary government, the government is accountable to the elected parliament. As such theoretically the army and the bureaucracy is under the control of the parliament while since 1975 the parliament was subordinate to the executive government, which made it only to legitimise its actions, right or wrong.

<sup>61</sup> In fact most laws (both objective and substantive) in Bangladesh date back to the British period.

<sup>62</sup> The discussion in this section is heavily dependent on Chatterjee's above mentioned work. Although Chatterjee's discussion is general his ideas are limited in the present study while discussing the legal system in Bangladesh as far as public enterprises are concerned.

It does not mean that the legal system of Bangladesh or the common law, does not provide for the management of public enterprises. On the contrary, it provides for the management of public enterprises through the creation of public corporations. But the structural characteristics of the public corporation owe much to the company analogy with its apparent separation of ownership and control and the resulting emergence of management as a vocation in the general interest transcending the particular interests in the enterprise. Even the courts in most cases apply rules by analogy from the private sector in deciding public sector cases.<sup>63</sup> However, there are, relatively, fewer rules to deal with administrative behaviour of the public enterprises. This probably resulted in more dependence on executive discretion and *ad hoc* directives.<sup>64</sup>

Bangladesh inherited from the common law narrow and limited rules to regulate administrative behaviour. Moreover the courts have remained aloof from their regulation in line with the principle of autonomy granted to the board of directors. Thus, formal legislative and administrative controls have taken a more important role.

As in all countries, in Bangladesh public corporations have separate legal personality which means that, like any other private party, they are subject to the court's jurisdiction. In Bangladesh, however, no public corporation had ever sued another public corporation.<sup>65</sup> All cases are brought against them by private parties. In practice, disputes between public enterprises are resolved out of the court through informal channels at the intervention of the ministries. Informal settlement though reduces the load on courts and saves both money and time, but it limits the scope of courts to influence the development of legal doctrines in the relevant fields. The resolution of disputes between two public enterprises is considered by the government a matter of public policy rather than of law and that a court dispute between two public enterprises would create a bad image for the

<sup>63</sup> See the case of *M.H Chowdhury v. General Manager, Titas Gas Transmission & Distribution Co. Ltd.*, BCR 1988(7) 373.

<sup>64</sup> H.W.R. Wade, *Administrative Law*, (5th ed.), 1982, p. 19

<sup>65</sup> In a meeting on 25.2.85 between the President and the Executive Committee of CONCOPE (Consultative Committee on Public Enterprises) it was decided to make efforts to settle inter-corporation dues through CONCOPE. Reported in *CONCOPE*, vol 3, No. 1, 1985, p. 37.

government.<sup>66</sup> The implication of settling disputes out of the courts seems to de-emphasize the importance of established legal concepts. Thus more reliance on informal settlement of disputes simply over-emphasizes the importance of different plans of the government rather than the existing rules of law and the mode of their interpretation.

It may be mentioned here that the Bangladeshi society itself is not a very litigious society because 80% of the population are poor, illiterate and live in rural areas. In the past, the courts were situated in the sub-divisional towns which were not always well connected with the villages. More over, the court language was English and some of the magistrates were from Pakistan and spoke Urdu which was alien to the vast majority of the population who even do not speak or understand literary Bengali, spoken by the urban elite. Above all, there even existed a credibility gap between the court and the population who for cogent reasons believed that the courts were not impartial and were only for the richer section of the population.

After independence communication has improved<sup>67</sup> and Bengali has replaced English as the court language in the lower courts. And since 1983 with decentralisation, courts are now situated in Upazilla (sub-district) towns<sup>68</sup>. In spite of all these improvements the population is still poor and illiterate. Most of the people are not aware of their rights and even when they are aware they cannot afford a costly and lengthy legal process. Moreover, the causes of the credibility gap have not been properly addressed, resulting in its widening instead of narrowing. Thus in Bangladesh, not only the disputes involving public enterprises but most other disputes are settled out of the court.

As has already been stated, during the first three years after the independence of Bangladesh, the declared goal of the government was the achievement of a socialist

<sup>66</sup> The same view is expressed by all officials during discussion with the present researcher.

<sup>67</sup> All 668 Upazilla (administrative units) are now connected by roads and there are regular bus services from the capital Dhaka.

<sup>68</sup> During Pakistan, there were only 19 districts in East Pakistan and 42 sub-divisions, the courts were situated only in district and sub-divisional towns. More courts are situated in all 668 Upazilla.

society and the number of public enterprises attained its peak.<sup>66</sup> Nevertheless, the inherited common law system, which was biased in favour of private enterprise, remained unchanged. Many of the assumptions and rules of the old legal system were contradictory to direct state intervention in the economy. The growth of public sector not accommodated within the legal system seems to pose a grave threat to the relevance and indeed viability of the legal system generally. In such a situation the role of the legal system in consolidating changes through rules and institutions, and acting as a source of legitimacy for the exercise of state functions is generally jeopardised.<sup>70</sup> Instead of having even a minimum over-haul of the old legal system to accommodate the needs of the new society, the government tried to cope with the situation by retaining a wide discretion. The vesting of wide discretion in officials resulted in little concern to define standards and criteria for the running of the public enterprises. Therefore legislation to guide the exercise of power became less and less relevant. This had definitely its negative impact on the functioning of the public enterprises.

Any discussion on the legal system would be somewhat incomplete without looking at the provisions of legal services in the public enterprises in Bangladesh. All enterprises and corporations have their own legal departments. It is noteworthy that many of the personnel in the legal departments are not fully qualified lawyers and even many of them do not have any formal legal educational background. Thus in many cases opinion of private practicing lawyers is sought. Above all, in Bangladesh salaried lawyers i.e. who are in full time employment cannot appear before a court as an advocate. As a result private practising lawyers are hired by corporations to appear before the court on their behalf.

<sup>66</sup> This has already been discussed in chapter 1.

<sup>70</sup> Bangladesh had been ruled directly and indirectly by martial law for fifteen years out of its twenty years of existence, which means military dictators made the major segments of the prevailing legal rules and institutions unresponsive. Thus, already in the area of political and constitutional activity, the autonomy of the legal system has been eroded by frequent interventions by the armed forces. If the legal system is not used in the management of political and economic life serious doubts are raised as to how it can survive as a viable system to regulate other sectors of a community. For instance, with the proclamation of Martial Law the Constitution was subjected to a number of amendments in the Constitution issued by the Chief Martial Law Administrator. See the case of *K.A. Bhishamuddin Ahmed & others v. Bangladesh and others*, 1981 B.L.D. (AD) 187, also see the Federal case of *Sarda v. Ghouse* where it was observed that "where a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, ... and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order." P.L.D. 1958 B.C. 533

Thus there are three main sources of legal services for public enterprises: their own staffs in the legal department, law staffs in Ministries and private practitioners.

One of the basic causes of inadequate legal services rendered by the public enterprises legal officers is connected with deficiency and inadequacy of legal education. In Bangladesh law schools do not offer any subject on public enterprises. The personnel of the legal departments are inadequately prepared for the types of functions they perform. Yet legal officers in the public enterprises are to solve problems connected with such specialised fields as taxation, labour and international trade.<sup>71</sup>

## 2.5. The Constitution of Bangladesh and Public Enterprises.

The Constitution of Bangladesh was adopted on the 4th November 1972. When adopted, the Constitution envisaged the establishment of a socialist society. It reflected the economic objectives and political reality as conceived by the ruling Awami League. Part II of the Constitution laid down the fundamental principles of state policy. This part comprises of 17 articles.<sup>72</sup> Article 8(1) of the original Constitution spelled out the fundamental principles of the state as nationalism, socialism, democracy and secularism.<sup>73</sup> But more than any other principle of state policy, it was the principle of socialism<sup>74</sup> which had important ramifications in the economic field and is linked with the growth of public enterprises.

The Fundamental Principles of State Policy enumerated and visualized the economic and social pattern of life to be achieved. Article 10 said, "A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian

<sup>71</sup> All officers interviewed felt the need for reform in the content and techniques of legal education.

<sup>72</sup> Part II of the Constitution of Bangladesh consists of Articles 8-25.

<sup>73</sup> Secularism has been dropped by the Martial Law Order. Now the article reads, "The principle of absolute trust and faith in the Almighty Allah, socialism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy." See the Martial Law Proclamations (Amendment) Order, 1977, (Proclamations Order no 1 of 1977).

society, free from exploitation of man by man."<sup>75</sup> Other articles that were considered to be basically socialist and have relevance to the creation of public enterprises are articles 13-20. Some of these articles are reproduced below:

13. The people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following forms-

(a) state ownership, that is ownership by the state on behalf of the people through the creation of an efficient and dynamic nationalised public sector embracing the key sectors of the economy;

(b) co-operative ownership, that is ownership by co-operatives on behalf of their members within such limits as may be prescribed by law; and

(c) private ownership, that is ownership by individuals within such limits as may be prescribed by law.

14. It shall be a fundamental responsibility of the State to emancipate the toiling masses-the peasants and workers- and backward sections of the people from all forms of exploitation.

15. It shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view of securing to its citizens-

(a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;

(b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;

(c) the right to reasonable rest, recreation and leisure; and

(d) the right to social security, that is to say to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases.

16. The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health in these areas, so as progressively to remove the disparity in the standards of living between the urban and rural areas.

<sup>74</sup> N. Islam, *op. cit.*, p.32.

<sup>75</sup> This Article has been deleted from the Constitution by *Married Law (2nd Provisions) Order 4 of 1978* and the following has been inserted instead: "Steps shall be taken to ensure concubines or women in all spheres of national life."

19.(2) The state shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the republic.

From the above articles, especially from article 13 of the Constitution of Bangladesh, it is clear that the state should aim at securing common ownership or control over the instruments and means of production and distribution. Second, the same article prescribed the means of securing state ownership through the creation of an efficient and dynamic public sector embracing the key sectors of the economy. And lastly, it realises the importance of private ownership but recognises that private ownership should be kept within limits. True, the above mentioned articles fall under the heading of Fundamental Principles of State Policy. Indeed, it is not considered to be an operative part. However, it does not mean that these articles have no importance. The importance of Fundamental Principles of State Policy is clearly stated in article 8(2) of the Constitution which says that these principles "shall be fundamental to the governance of Bangladesh, shall be applied by the State in making laws, shall be guided to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens."<sup>76</sup> But the same article also clearly says that the principles "shall not be judicially enforceable."<sup>77</sup>

The Fundamental Principles are intended as a guide to government action. In fact, they indicate the social and economic goals of the nation. The fundamental principles in fact have moral rather than legal force. The Indian courts initially took a very narrow and restrictive view on the role of the Directive Principles but recently socio-economic

76. See article 8(2) of the Constitution of Bangladesh.

77. *Ibid.* In a writ case the High Court relied on a principle laid down in article 17 which is about establishing a uniform, mass oriented and universal system of education. But on appeal the Appellate Division commented that "it was unfortunate that the learned judges have taken upon themselves an enquiry which is not warranted by law in the Constitution" as the "Constitutional mandate provides in the chapter on Directive Principles of State Policy that these are not enforceable in the Court of Law." [Bangladesh v. Mrs. Winifred Kabir and Others, 1982 BLD (AD) 37.] Thus we see that the Appellate Division of the Supreme Court of Bangladesh takes a very restrictive and narrow approach towards Fundamental Principles of State Policy, as opposed to the Courts in India, which take a very wider approach towards Directive Principles. (The Bangladesh Constitution uses the expression Fundamental Principles whereas in the Indian Constitution it is called Directive Principles.) For example in the case of *Minerva Mills Ltd. v. Union of India*, Bhagwati, J. rightly observed that "merely because the Directive Principles are nonjusticiable it should not be construed that they are less important. The Directive Principles impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all." See *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC (1795).

objectives of the state have been recognized in interpreting them.<sup>78</sup> The attitude of judiciary in Bangladesh may also change towards the direction of the Indian interpretation because Bangladesh courts often follow the examples of decided Indian cases.

The ideals and objectives of the Constitution not only found their expression in part-II but are also enshrined in the Preamble to the Constitution, which says:

We, the people of Bangladesh, having proclaimed our Independence..... through a *historic war for national independence*,<sup>79</sup> established the independent, sovereign People's Republic of Bangladesh;

.....  
Further pledging that it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation—a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.<sup>80</sup>

Although, like the fundamental principles, the Preamble is not considered to be the operative part of the Constitution as it does not confer any power or create any authority, it broadly outlines the purpose and objects that it seeks to achieve and the inconveniences that it strives to eradicate. The preamble can be used as an aid to construing the enacting provisions.<sup>81</sup> At times it plays a decisive role in the interpretation of the law. If any ambiguity or conflicts arise as to the meaning of the language in the text of the law, then a reference could be made to the Preamble because it expresses the intentions of the framers and can, therefore, contribute to the understanding of ideals which do not seem to be precisely expressed.<sup>82</sup>

<sup>78</sup> See *Chandra Bhanu Beardsley and Lodgong Bangalera v. The State of Mysore and Others*, 1970 2 B.C.R., p.412. This case is not the first in its kind but is one of the earlier cases marking the change of judicial attitude.

<sup>79</sup> The italicized words are substituted for the words "a historic struggle for national liberation" by *Markal Law Proclamations (Amendment) Order 1977*, (Proclamation Order No.1 of 1977).

<sup>80</sup> See the Constitution of Bangladesh.

<sup>81</sup> See *Ammal Islam v. Bangladesh Bamon*, BLD (1984) HC:9

<sup>82</sup> In the case of *Sujan Singh v. State of Rajasthan* it was observed that the preamble is a key to open the mind of the constitution makers as to mischief which are to be remedied, and the objects which are to be accomplished by the provisions of the constitution. *Sujan Singh v. State of Rajasthan*, AIR 1967 SC 2861. The importance of the preamble is lucidly expressed in the case of *Misawa Mills Ltd. v. Union of India*. Chaudhary, C.J. speaking for the majority observed that "the edifice of our constitution (India) is built upon the concepts crystallised in the Preamble." *Misawa Mills Ltd. v. Union of India*, *op. cit.*

Although, the Constitution of Bangladesh initially envisaged the establishment of a socialist society through the democratic process, the subsequent amendments and the enactment of new oppressive laws<sup>83</sup>, by the same party (Awami League, who framed the Constitution) in power, raise serious doubt as to the real intentions of the framers.

Whatever was the ideological position of the Mujib Government, the Constitution envisages, among others, "state ownership that is ownership by the state on behalf of the people through the creation of the efficient and dynamic nationalised public sector embracing the key sectors of the economy."<sup>84</sup> Various organisations were created in the public sector during the first few years covering a wide spectrum of activities. At one end were enterprises whose roles were predominantly commercial and the other enterprises which were predominantly social service oriented.

It is clear from the above discussion that part II of the Constitution put enormous responsibilities on the state. The functions that were reserved for the state, in principle were in line with the public pronouncements of the party leaders. In any case, they were far in excess of the functions undertaken by a pure capitalist state. The state undertook many social-welfare responsibilities.<sup>85</sup> Part-II expected that the state through public enterprises should play more direct and dynamic role in the transformation of society and economy. Diverse objective ranging from production and commercial profitability to contribution to socio-economic development were sought to be achieved through public enterprises. Thus, the successful operation of the public enterprises is a constitutional obligation and sacred trust devolved upon the government.

It was mentioned in the earlier chapter that nationalisation took place in Bangladesh at a time when the country did not have a Constitution or a parliament to enact

<sup>83</sup> See the Special Powers Act, 1974, the Constitution Second and Fourth Amendments etc.; also see discussion in the previous chapter.

<sup>84</sup> Article 13(2) of the Constitution of Bangladesh, *op. cit.*

<sup>85</sup> See Article 10-19 of the Constitution of Bangladesh. It may be mentioned here that after the change of Awami League government through military coup, the new military government through martial law ordinance amended above articles and inserted new articles in their place. See the Martial Law Second Proclamation on Order 1978.

laws, hence nationalisation was carried through an executive order of the President. The Constitution, framed after eight months of nationalisation, contained a clause which legitimized the executive orders nationalising the banks, insurance companies and industries amongst a number of other executive orders which are listed in Schedule one of the Constitution. Thus article 47(2) reads:

Notwithstanding any thing contained in the constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this constitution;

Provided that nothing in this article shall prevent the modification or repeal of any such law or provision by Act of Parliament, but no Bill for such an Act, if it contains provision for or has the effect of divesting the state of any property, or of enhancing any compensation payable by the state, shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament.<sup>86</sup>

The above article made it difficult for the state to divest itself of public enterprises. They were given a constitutional status in the sense that the parliament could pass any law by a simple majority but the disinvestment of state property needed a two-thirds majority as is the case with the amendment of the constitution itself. But the military government amended this provision by a Martial Law Ordinance in 1977 empowering the parliament to divest any state property by a simple majority.<sup>87</sup>

The Constitution is the basic law of the country and it lays down the broad principles and objectives of the state. But, the realisation of these principles and objectives is done by specific legislation which aims at attaining specific results. *The Bangladesh Industrial Enterprises (Nationalisation) Order 1972*, which will be discussed below, was aimed at establishing and regulating public enterprises in the industrial sector.

<sup>86</sup> Article 47(2) of the Constitution of Bangladesh before the amendment of 1977.

<sup>87</sup> See *The Proclamation Order No. 1 of 1977, op. cit.*

## 2.6. The Nationalisation Order (P.O. 27) of 1972.

The concept of nationalisation, generally speaking, means taking over the ownership of established private enterprises by the state.<sup>88</sup> It is in one form or another, the fundamental technique in the establishment of state ownership and public control of the means of production, exchange and distribution.

"Nationalisation" as a legal concept first appeared in the Constitution of Mexico and in the first decrees after the 1917 Bolshevik Revolution in Russia. Although state direct management of economic life had occurred centuries prior to these developments, the social function of property was not recognised. The fundamental innovation in this new attitude towards property was that the basic aim of nationalisation was the utilization of all or part of the means of production in the interests of society as a whole, and not of individuals by converting private ownership into communal property.<sup>89</sup> Such a conception is opposed to the principle of absolute property rights derived from natural law as embodied for centuries in the positive law.<sup>90</sup>

There are differences between states using nationalization policy as an integral part of socialist strategy<sup>91</sup>, legitimized by organic laws instituted towards this end; and states which have used *ad hoc* nationalization strategies for different reasons. These latter states

<sup>88</sup> Nationalisation has been defined by various groups from different angles of view. Nationalisation has been viewed by Sharma as one of a number of ways in which the state can alter or terminate the control or ownership of private property. H.C. Sharma, *Nationalisation of Assets in India: retrospect and Prospect*, 1970, p. 1. White considers it as a measure which aims to restore a legal process whereby private rights and interests in property are completely transferred. G. White, *Nationalization of Foreign Property*, 1961, p. 41. For various definitions of nationalisation see M. Demba, 'Foreign Nationalisation, Some aspects of Contemporary International Law' in *The American Journal of International Law*, vol. 55, 1961; S. Friedman (1955); G. Fogel (1957); K.C. Bhambhani (1961); K. Katsarov (1964); W.A. Robson (1966); C.D. Foshat (1971); G.M. Ingram (1973); M.K. Nawaz (1975); M.G. Waha (1976).

<sup>89</sup> To attain this aim it is necessary for the means of production, if in private hands, to become the property of the community. W.A. Robson, 'Preface' in K. Katsarov, *The Theory of Nationalisation*, 1964, p.v.

<sup>90</sup> *Ibid.*

<sup>91</sup> The 19th Century stands against property as an exclusive right, (initially made by St. Simon and Proudhon in emotive terms, and later by Marx and Engels in a more scientific manner), but later used by governments in the 20th Century in both communitist and overweening capitalist relations of production. D. Bolok, *Nationalisation - A Road To Socialism?*, The Lessons of Tanzania, 1981, p.3.

<sup>92</sup> The Marxist definition of the mechanism of worker exploitation built into capitalist production systems demonstrated that this is in no way synonymous with socialist nationalisation theory. Nationalisation as a socialist strategy was tied up with the question of class structure, power, interaction and conflict. The change in ownership brought about by nationalisation brings into focus the question of new distribution patterns on terms of class interests. Thus, nationalisation as a part of a socialist strategy had a mechanism of its own, which must include a capacity to calculate and redistribute resources and benefit. This is not to imply that nationalisation strategy cannot coexist constitutionally with measures giving protection to private property. In this case the role of private property and private enterprise need to be converted from being the basis of economic life to being a mere link in the economic chain. K. Katsarov, *op. cit.*, p.13.

have, on the whole, retained both their respect, and their commitment to private enterprise. Nationalisation within this context usually represents a strategy aimed at repairing or consolidating a capitalist economy. In such cases, the underlying political interests of the state have generally been geared to the utilisation of nationalisation theory in order to prevent any basic restructuring of the politico-economic infrastructure of that society along socialist lines.

It is necessary to differentiate between policies of nationalization and what Bolton terms "etatisation", by examining the effects of state ownership on structures of production, relations of production, and the character of economic integration central to development strategy. In the case of *etatisation*, nationalized activities are merely absorbed into governmental machinery; there is no theoretical reason for changes in the values and ethics of enterprise management, nor any requirement for the state to give socialist political form to any concept of 'public good' related to its take-over of economic activities. In contrast, economic activity of the state within the framework of nationalization strategy follows imperatives of a new order, the objective being to serve the general interest without sole regard for commercial gain or fiscal consideration.<sup>92</sup> In Bangladesh, clearly, the policy was one of *etatisation*.

As described in the previous chapter, the ruling party suddenly after independence adopted a nationalization strategy mainly for immediate reasons of regime stabilization in a crisis situation. To some extent, the regime's enshrinement of politico-economic initiatives with an appropriate ideological framework made the situation complex. This involved some adjustments to property relations, but did not respect the structural change implicit in the terms of its political framing. Nevertheless, 'nationalisation' as embodied in the election manifesto of the Awami League, was more an expression of economic nationalism, verbally linked with, but not synonymous to socialist transformation.<sup>93</sup> In

<sup>92</sup> D Bolton, *op. cit.*, p.6.

<sup>93</sup> This proposition has now lost its earlier credibility even within the socialist. For example, the Socialist International which met in Stockholm in June 1990 and participated by more than 80 left-wing and social-democratic parties from around the world, rejected authoritarianism as a remedy for socialism. Willy Brandt, the president of the organisation, observed that 'social experience convinced the socialist parties that they were mistaken in having a strong confidence in the role of the state in the economic process. The new socialist manifesto asserted that 'market can and must function as a dynamic way of promoting

fact, contradictions soon became evident when the state tried to synthesize its control of production with continuing commitment to relatively unchanged patterns of economic development. Popular expectations which were raised through political appeal to sentiments of economic nationalism failed to be met in material terms.

*The Nationalisation Order 1972* is an omnibus piece of legislation of a general nature. It consisted of only 26 articles but covers a wide area of activities.<sup>84</sup> It covers jute goods, cotton textiles, sugar, food products of various sorts, chemicals, pharmaceuticals, fertilizers, steel products, timber products, cement, mineral products, leather goods and development, exploration, transmission and distribution of gas and other minerals.

After nationalisation, the "conglomerate" structure of EPIDC/BIDC was dismantled and in its place 11 new sector corporations were set up. It seems the government wanted to establish some uniformity in its interface with all corporations. As such, all provisions of the Order were equally applicable to all corporations regardless of diversities in the areas of operation and nature of activities, in spite of the fact that operationally it is difficult to accommodate the diverse characteristics of the corporations and their enterprises through general legislation owing to the special nature of their activities and responsibilities.<sup>85</sup>

Another characteristic of the Nationalisation Order is that it did not give any guidelines on many important issues. It merely proclaimed in the preamble that:

It is expedient to provide for the nationalisation of certain industrial enterprises in Bangladesh and for the establishment of corporations for the purposes of control, supervision and co-ordination of the nationalised and some other enterprises and for the establishment and development of new

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innovation and signalling the desires of consumers through the economy. Reported in *The Financial Times*, 23 June 1985, London.

<sup>84</sup> *The Bangladesh Industrial Enterprises (Nationalisation) Order 1972* being *President's Order No.27 of 1972* is reproduced in appendix-3

<sup>85</sup> In a study attempting to analyse the need for a general law on the working of public enterprises in India it was found that such a law would be impracticable as it would lead to greater rigidity by ignoring the individual characteristics of various enterprises. R.C. Manoverthan, 'General Law for Public Enterprise in India', in *International Review of Administrative Sciences*, vol.50, 1984, pp.308-403

In India the Administrative Reforms Commission recommended a separate law to be enacted for each sector corporation. See Administrative Reforms Commission, *Report on Public Undertakings*, 1967, pp.14-24, cited from L.Narain, op. cit., p.120.

industrial enterprises and for matters connected therewith or incidental thereto.<sup>96</sup>

Neither did the law indicate in unambiguous and definite terms what objectives such "control, supervision and co-ordination of the enterprises" were to achieve. The law left room for the executive to decide the objectives.<sup>97</sup>

Another reason for taking over was stated to be in "public interest"<sup>98</sup> although the leaders in their public speeches were referring to socialism.<sup>99</sup> It is not surprising, therefore, that in the absence of an expressed ideological motivation for the nationalisation and the subsequent conduct of the government, some critics described Bangladeshi socialism as the socialism of abandoned properties.<sup>100</sup>

The mere assignment of functions in respect of control, supervision and co-ordination for the affairs and business of the enterprises without identifying their objectives or purposes was inadequate to evolve an appropriate organisational and administrative structure for the nationalised industries.<sup>101</sup>

<sup>96</sup> See *The Bangladesh Industrial Enterprises (Nationalisation) Order, P.O.27, op. cit.*

<sup>97</sup> On the contrary, the law that took over the abandoned properties was more specific. It stated the reasons for taking over was "the absence of the owners and managers to carry on supervision or manage in person their industrial enterprises." See *The Bangladesh (Taking Over.....Concerns) Order, A.P.O.1 of 1972, op. cit.*

<sup>98</sup> See *P.O. 27, 1972*

<sup>99</sup> For the speeches of the leaders see Chapter 3.

<sup>100</sup> A.F. Haq, *Constitution Making in Bangladesh in the Pacific Affairs*, vol. 66, 1973, p.69.

This enthusiasm on the part of the basic nationalisation law in Bangladesh is in contrast with such laws in many other countries.

Thus, for instance, in Yugoslavia, the Provisional 1946 Act specified the motive of nationalisation as the desire "to give a final impetus to the principle of the collective ownership of the means of production, the main foundation of the state for the development of the national economy. (and to) the principle of the defence of the people against exploitation." Cited from Katarov, *op. cit.*, p.59.

In France, nationalisation laws were preceded by the declaration of the National Resistance Council led by General de Gaulle that included nationalisation in its programme for the future organisation in France. Nationalisation was viewed as "an economic system designed with a view to the development of national resources and not for the advantage of individual interests, in which the great sources of common wealth belong to the nation." Cited in Katarov, *op. cit.*, p.43.

In Britain The Transport Act, 1947 nationalised rail communication, the docks, inland waterways, highways and London Transport and placed the British Transport Commission under a general duty "to provide or promote the provision of an efficient, adequate economic and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard to safety of operation."

<sup>101</sup> As T.B. Haah points out, it is clearly important that the underlying purpose should be articulated in some form so that those concerned with managing the enterprise can know what is expected of them at the highest level of policy. T.B.Haah, "Control

There was obviously no clear conception about the exact place the nationalised industries and corporations were to hold in the administrative structure of government. As the economic, financial and social obligations of the nationalised industries and their corporations were not spelled out, it was likewise not clear if the industries were to be organised as business concerns or otherwise.<sup>102</sup> Therefore, it was essential to have a broad statement of objectives for public enterprises as a whole, and specific objectives and obligations for each individual enterprises.<sup>103</sup> Neither the *Nationalisation Order 1972* nor any subsequent policy declarations clearly spelled these aspects. Not only that, the *P.O. 27 of 1972* neglected the central question of how goals were to be set for the industries.

In the Bangladesh situation, the executive may have found it advantageous not to define policy so as to allow a convenient compromise between the government's political rhetoric and its actual practice. Thus, during the first three years of Bangladesh, a reverse process of policy formulation took place, with public enterprise determining major policy trends in production, technology, marketing, industrial relations etc., instead of being guided by policy.<sup>104</sup>

According to article 4 of the *Nationalisation Order*, ownership of the shares, assets and liabilities and other proprietary interests in the enterprises vested in the government and the enterprises were to be controlled, supervised and co-ordinated by the corporations in respect of the activities, business and other affairs. Little consideration was given to the means through which public enterprises would be linked to government policies or how the enterprises would engage in policy formulation in practice. Judging from the

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Systems for Public Enterprises in Developing Countries: A Framework for Control Systems', in P.Fernandez (ed.), *Control Systems for Public Enterprises in Developing Countries*, 1979, p.47.

<sup>102</sup> The point is written after discussion with government and corporation officials in Bangladesh and the observations reflect widely held views.

<sup>103</sup> In the similar circumstances of Anglo-phonetic African countries, Ghai has argued that such legislation presupposes the existence of already well defined goal of public enterprise and "while such legislation can provide for the outline of institutions and relationships, it cannot so easily deal with questions of policy: it tends to be in the nature of a *carte blanche* for the executive to determine the purpose and scope of the public sector." Y.P.Ghai, 'Law and Public Enterprises in Developing Countries' in V.V.Ramamoorthy (ed.), *Public Enterprises and Developing World*, 1984, p.59 |

<sup>104</sup> On the other hand, after the fall of Mujib regime a clear policy existed but was not embraced in the fundamental Order lines thereby increased the possibility for individual and varying interpretations of policy.

provisions of the *P.O. 27 of 1972*, it seems, the underlying assumption was that once ownership had changed, these problems would solve themselves. Thus the issue of ownership, which is a private law concern, resulted in the neglect of public law issues like institutionalising proper relationship between the government and the public enterprises.

The transfer of ownership of the shares, assets and liabilities and other proprietary interests of the enterprises, nationalised, to the government and allowing their control and supervision by the corporations, however, created confusion in the interpretation of the provisions because enterprises placed under the public corporations were incorporated as limited companies under the *Companies Act 1913*. But articles 5-7 of the *Nationalisation Order 1972* empowered the government to dissolve the Board of Directors, appoint new Directors, modify or amend the memorandum or articles of association. These enterprises after nationalisation clearly were not governed by the provisions of the *Companies Act 1913* gave rise to confusions regarding the legal status and character of the companies which were placed under the corporations<sup>105</sup> and the extent to which the *Companies Act* continued to be applicable to such companies.

The entire scheme of the Nationalisation Order seems to have retained the corporate status of an individual enterprise and allowed the enterprises to function as companies as they were functioning before the promulgation of Nationalisation Order 1972.<sup>106</sup> But articles 5-7 virtually took these enterprises out of the jurisdiction of the *Companies Act 1913*.

The properties owned by the enterprises continued to be considered as the properties of the companies and as such the companies continued to conduct the business and affairs relating to those properties. The Board of Directors of a company placed under the sector corporations constituted by the corporations were not the same as that

<sup>105</sup> The extent of confusion is evident from a series of cases brought before the courts where the main issue was to determine the status of the individual enterprises. For details see next chapter.

<sup>106</sup> See *A. K. M. Ayub Ak v. Eastern Refinery Ltd. and Others*, 32 D.L.R. (1980) 33.

constituted under the Memorandum and Articles of Association of a company or the *Companies Act 1913*. It was a board completely subservient to the will and wisdom of the government.

Not only had the provisions of the *Companies Act* relating to the mode of appointment of Directors been violated but also the very concept of the Board of Directors as a body vested under the law with power of company management was completely replaced by the wide sweep of power which was reserved for the government by article 5(b) of *P.O. 27 of 1972*.

Since the government was the sole shareholder, it retained the power of appointing the Management Board. The corporation, on the authority of the power delegated by the government, could form management boards for the individual enterprises under the corporation.<sup>107</sup>

*P.O. 27 of 1972* conferred power to the Board of Directors of the Corporations in such general terms and formulated them in such language that it is difficult, if not impossible, for the courts to apply the *doctrine of ultra-vires*. For this reason attempts to invoke the aid of the judicature in defining or limiting the power of the public corporations are unlikely to be successful.

There were only six articles pertaining to the financial operation of the nationalised industries, but they laid down a detailed procedure for financial accountability. The six articles were related to aspects of control, submission of annual budget, annual statements of accounts and audits etc.<sup>108</sup> Articles 18 and 20 referred to operational aspects of financing. Article 18 provided for an authorised share capital of Tk.10 million for each

<sup>107</sup> See Article 17 of the *Nationalisation Order, op. cit.*

It is to be mentioned here that even large private business conglomerates with subsidiaries appoint the management boards which in practice are subservient to the Board of directors. For the control mechanism of large private corporations see T. Halden, *The Control of Corporate Groups*, 1983.

<sup>108</sup> In the next chapter these issues will be discussed in detail.

Corporation to be subscribed<sup>109</sup> entirely by the government and an initial share capital of half a million Taka fully paid up and subscribed by the government. Article 20 conferred powers upon the corporations to spend such sums as they would think fit within the limits of their annual budgets approved by the government. Other than these aspects, the nationalisation statute did not contain specific Guide-lines on matters such as investments, pricing or profits. Nor did it seek to define the financial, social and economic obligations of the nationalised industries.

With the changes of governments in Bangladesh the *Nationalisation Order 1972* also underwent many changes. In spite of the fact that, since 1975 a programme of privatisation has been vigorously pursued, the corporations have a number of enterprises under them. It is likely that many enterprises would continue to remain under these public corporations for a long time.<sup>110</sup> Under these circumstances, it was expected that the Order would be replaced by specialised legislation on each corporation filling the lacunae and omissions of the original Order.<sup>111</sup> The specific features of the sector corporations and the circumstances of the markets encountered by them while defining objectives and broad means of achieving these objectives could have given due attention in drafting the new legislation. Instead, successive governments from time to time amended the *Nationalisation Order 1972* by executive orders, not as part of improving the efficiency of the enterprises but, to accommodate various degrees of privatisation.

As has been said, nationalisation in Bangladesh took place through an executive order of the President at a time when the country did not have a constitution and there was no parliament. It is interesting to note that the subsequent amendments to the Nationalisation Order were also made by executive orders. This performance of the legislative function by the executive resulted in executive i.e. bureaucratic control

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<sup>109</sup> This expression is used in the article itself.

<sup>110</sup> For reasons, why many enterprises would remain under public corporations instead of the programme of privatisation, see chapter 5.

<sup>111</sup> About 72% of total 45 officers interviewed, felt the need for specialised legislation.

becoming a significant feature of public enterprise management in Bangladesh at all stages, i.e. from the formation to determination of how surpluses generated should be appropriated. It is quite hypothetical to try to figure out the forms the enterprises would have taken if they had been formed by Parliament. But even in rubber stamp parliament, at least there could have been an opportunity to discuss and debate the provisions of the law more elaborately, and various views could have emerged that could have helped to refine them. This omission allowed the bureaucracy to determine the financial and organisational structures of public enterprises and their accountability patterns by consolidating its hold on them and setting up structures congenial to it.

The law is crucial to the efficient operation of public enterprises, but law itself is created by a group of people. It reflects the character of the law givers.

In retrospect it is clear now that the lack of a definite purpose, the existence of many lacunae and omissions in the nationalisation law itself was mainly due to the following reasons: a) it seems that the government soon after independence won through a war, did not have a clear idea of the objectives to be achieved by the enterprises or the mode in which they should operate. The government did not have enough time to evolve a policy for the public sector industrial enterprises or to the institutional implications of the policy; b) whatever policy the government had in mind could not properly communicate its intentions in clear terms to the draftsmen; c) since the drafting was made in haste, the draftsmen, burdened as they were with overwork, instead of giving serious thought had to rely as far as possible on precedents.<sup>112</sup>

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<sup>112</sup> Derived from the interviews with various government officials.

Professor Chai made a study on law and public enterprise in the Anglo-phonetic Africa countries and his observations seem to fit the Bangladesh situation too. [For details see Y.P. Chai, 'Law and Public Enterprises in Developing Countries', in V.V. Ramasasthan (ed.), 1984, op. cit., p.59.] His description, no doubt, reflects the true state of law in the Anglo-phonetic developing countries. I would like to add that it seems that some of the lacunae and omissions are consciously or subconsciously committed in Bangladesh to serve the interest of the law giving class.

## CHAPTER-3

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### Institutionalising Public Enterprises

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#### 3.1. Introduction.

The public corporation is the most widely used legal form for organising public enterprises in both developed and developing countries. The disadvantages of departmental enterprises under the direct control of the Ministers gave increasing popularity to an organisational form where government delegates responsibility to an autonomous or semi-autonomous body to manage public enterprises on its behalf. These bodies have been variously described in different countries as '*public corporation*', '*national corporations*', '*statutory corporations*', '*parastatals*', '*public boards*' etc. Out of these expressions, the term public corporation has for one reason or another, emerged as most fashionable in the contemporary use by various writers.<sup>1</sup>

Robson has rightly observed that, "the underlying reason for the creation of the modern type of public corporation is the need for a high degree of freedom, boldness and enterprise in the management of undertakings of an industrial or commercial character and the desire to escape from the caution and circumspection which is considered typical of government departments."<sup>2</sup>

Public enterprises are mostly organised in the form of public corporation, when it is expected that their operation should be run on commercial and business lines in order to generate profit/surplus to contribute to the revenues of the state. In this form of organisation public enterprises are judged by their total results and, subject to predetermined performance

<sup>1</sup> D N Chester, *Public Corporations and the Classification of Administrative Bodies*, *Political Studies*, vol. 1, p. 34.

<sup>2</sup> W. A. Robson, *Non-ownership Industry and Public Ownership*, 1962, p. 77.

criteria, they should be given full freedom of operation. The form recognises that complex industrial enterprises are not suitable for administration by government departments and by civil servants not trained for the job. It therefore aims at a balance between the flexibility and autonomy enjoyed by private commercial enterprise, with an independent legal entity with funds of its own and largely autonomous in its management, but with the responsibility to the public as represented by ministers and parliament.

Although a number of public corporations were established before the last world war, the main developments in this field in Great Britain have occurred since the end of the war with the advent of the Labour government and its policy of nationalisation of a number of basic industries in Britain.

In advocating the use of the public corporation form for public enterprises in Britain, Herbert Morrison sought a combination of public ownership, public accountability and business management for public ends.<sup>3</sup> According to him, the primary objective of the public corporation is the conduct of its business in the public interest, as opposed to private or sectional interests. It must break even or pay its way, although the profit motive should not be paramount. Furthermore, in Morrison's opinion, since it is impossible to set out what constitutes the public interest in legislation, adherence to this goal depended on the public spiritedness of the minister and the board of directors of the public corporations, who should be appointed by him on the grounds of competence to carry out the business in question. Checks on ministerial exercise of discretion with respect to the appointment and removal of the boards of directors, were to be provided by legislative provisions. These should require the minister to consult appropriate government agencies in making the appointments, and specifying certain qualifications which appointees shall have. Reliance would also be placed on civil service procedures. Recommendations of the minister's civil service advisers would appear in their minutes to him, which would be open to public inspection. The minister

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<sup>3</sup> H Morrison, *Socialisation of Transport*, 1933, p.140.

would also be accountable to parliament, and the press would act as an additional check on the exercise of his discretion.<sup>4</sup>

Thus the public corporations are created with the objective of securing the best of both worlds: on the one hand, autonomy, flexibility and initiative found in the private enterprise system; on the other hand, securing accountability to the public, to whom they belong and whom they serve. The public corporation is thus a hybrid organisation, combining some features of a government department and some of the features of a business company, and standing outside the ordinary framework of central and local government.<sup>5</sup> Indeed, Professor J.F. Garner has described public corporation as "an important third arm of government in addition to the traditional instruments of the central executive and local authorities."<sup>6</sup>

The administration of public corporation by a board appointed by the government but autonomous, within very wide limits, in the management of the enterprise, is now a fairly universal feature. It is an almost universal feature of the modern public corporation that the board is subject to an overall policy control by the departmental minister but the latter does not form part of the actual management. A corporation has a separate legal personality from its owners-the shareholders - who are represented by the Board of Directors. Varying degrees of overlap occur between these two groups from a Salomon<sup>7</sup> type of private company to a large public company. The larger the group of shareholders and the more complex the operations of the corporation, the more distinct is the separation between ownership and management. In case of the public corporation, the sole shareholder is the Government, being directly represented by the Minister who supervises the activities of a corporation. The

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<sup>4</sup> *Ibid.*

<sup>5</sup> H.W.R. Wade, *Administrative Law*, 1977, p.70.

<sup>6</sup> J.F. Garner, 'Public Corporations in the United Kingdom' in W.Friedman (ed.), *Government Enterprise*, 1970, pp.4-5.

<sup>7</sup> See the case of *Salomon v. Salomon* (1897) AC 22.

relationship between the Government and the corporations is expressed in the nature of this supervision.

The degree of ministerial supervision, where the minister is not represented on the Board, is perhaps the difficult and delicate aspect of this whole construction. Even if the law creating the corporation itself is satisfactory, it will always leave some room for the development of conventions which may hamper the work of the enterprise. It is now a universal practice to vest the power to appoint and dismiss the corporation's management board in the hands of the concerned Minister and to give him authority to exercise general supervision over the enterprise. The corporation is an indirect organ of government, hence, cannot, in the last resort, defend its autonomy against governmental intervention, "unless, of course, that government is so weak, ill-organised and feckless that it has lost authority over its creations."<sup>8</sup> If the minister intervenes frequently in matters of management, however the idea of public corporation is undermined.

Side by side with legal forms the socio-economic and political environment of a country is very important for the implementation of the norms of law. The role of legal norms is to "indicate, with all the authority that the law has, the type of relationship that is considered best to fulfil the purposes for which the enterprise has been created."<sup>9</sup> Unless such indications are realised in practice, little can be expected by taking the enterprise out of the department and handing it over to a corporation board.

The problem of executive interference is only one side of the coin. The practice in different developing countries testifies to the fact that the autonomy and freedom conferred on an enterprise by this form of organisation can be so large that it might grow into a quite uncontrollable empire unto itself. In such a situation, ensuring public accountability becomes a major problem. The danger that corporations may make good their escape from public

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<sup>8</sup> A.H. Hanson, *op. cit.*, p.343.

<sup>9</sup> *Ibid.*, p.344

accountability probably forced the governments of the underdeveloped countries to give autonomy to public corporation with one hand and promptly take it away with the other. This form of organisation constantly gives birth to tension between autonomy and control. Even developed countries, with experienced and sophisticated administrative apparatus and more stable political regimes than developing countries, are by no means certain that they have already established the right balance between autonomy and control. The controversies arising out of finding a right balance between autonomy and control are still continuing.

Many questions are still being raised as to the desirability of the adoption of public corporation form. Political interference has not been eliminated, and the governments in many developing countries are indiscriminately contracting out functions which they are not capable of discharging has given rise to a problem of co-ordination and supervision. Any of the positive advantages which are supposed to accrue from the use of the corporation device have remained mostly unrealized. Instead of witnessing flexibility and autonomy of operation with adequate public accountability one often witnesses sporadic and ill-judged intervention. Thus the quantitative growth of autonomous corporations has been simply an addition in an already chaotic administrative system of Bangladesh.

### **3.2. Public Corporations in Bangladesh**

In Bangladesh it was not so much the question of public ownership (since prior to independence a number of enterprises were already under government control and after independence the government had to assume the ownership of abandoned industries) as of business management or the commercialisation of state financial activities which required to be addressed. In order to achieve this, it was deemed necessary to adopt the public corporation form which embodied the Morrisonian concepts of "public accountability" and "public interest".

The use of the corporation form was justified in terms of the scale of operation and the need for specialised management and commercialisation of public enterprises. It was realised by the policy makers that civil service methods and the stifling effects of Treasury financial controls would limit efficiency and initiative of the public enterprises. It was also felt that if ministerial responsibility applied to the running of the public industrial enterprises, there was the risk of undue interference by the Parliament which would lead to inflexibility and undue centralisation. The advantages of the form lay in the fact that it "could be clothed with the powers of government but possessed of the flexibility and initiative of a private enterprise."<sup>10</sup>

Another reason for adopting the public corporation form was that before independence, the quasi-departmental form of EPIDC faced various organisational problems. "A number of studies connected with the organisational problems of EPIDC suggested the need to (i) break away from the overcentralised and bureaucracy dominated structure; (ii) provide professional management with clearly defined lines of responsibility; (iii) create conditions so that the enterprises could operate with sufficient freedom to be able to secure their own commercial viability."<sup>11</sup>

The government, while nationalising manufacturing enterprises, was guided by the recommendations regarding organisational problems of the erstwhile EPIDC.<sup>12</sup> As a result, these were reflected in the *P.O. 27 of 1972*. It originally created 10 corporations to supervise and coordinate the industries placed under them. Article 10 of the Order established the corporations for jute industries, cotton mills, sugar mills, steel mills, paper and board, fertilizer, chemical and pharmaceuticals, engineering and shipbuilding, minerals, exploration, transmission and distribution of oils and gas, food and allied industries, and forest products.

<sup>10</sup> The statement is attributed President Roosevelt (his message to Congress in 1931) quoted from A.D. Singh, *Judicial Control of Public Corporations in Modern India*, 1984, p.4

<sup>11</sup> R.Sobhan, *Nationalisation ...*, op. cit., p.190.

<sup>12</sup> Derived from interview with Rehman Sobhan who was the member of the Planning Commission, in charge of industries, during Mujib Chatterman.

In September 1972, the Government created the Bangladesh Tanneries Corporation and placed 30 enterprises under it.<sup>13</sup> Additional enterprises were placed under the management of corporations from time to time and the *Nationalisation Order 1972* was amended to accommodate such changes.

Table-3

**SECTOR CORPORATIONS WITH NUMBER OF ENTERPRISES UNDER THEM  
AS IN DECEMBER, 1972.**

Name of the Corporation	Number of Enterprises
Jute Industries Corporation	77
Textile Industries Corporation	72
Sugar Mills Corporation	16
Food and Allied Corporation	54
Fertilizer, Chemical & Pharmaceutical Corporation	13
Paper and Board Corporation	9
Tanneries Corporation	30
Steel Mills Corporation	20
Engineering and Shipbuilding Corporation	34
Minerals, Oil & Gas Corporation	7
Forest Products Corporation	20

Total

352

Source: Ministry of Industries,  
*Nationalised Industries*, 1975, p.6.

Despite a preference for the corporation form, the operations of some public enterprises were allowed to remain organised as departmental undertakings and control boards as they were during Pakistani rule and some public enterprises were also organised as limited companies. Generally, the enterprises in the nature of public utilities organised as departmental undertakings were financed through appropriation from the government treasury and were subject to the same budget, account, audit and control procedures as the government departments. For example Bangladesh Railway, the postal service, and the Telephone and Telegraph Board etc. are departmental undertakings. It may be mentioned here that although Telegraph and Telephone Board is a departmental undertaking still it has

<sup>13</sup> *The Bangladesh Industrial Enterprise (Nationalisation) (Provisional) Order, 1972 being P.O. 188 of 1972.*

been granted considerable autonomy<sup>14</sup> compared to the Postal Service. In Bangladesh, since some degree of autonomy is granted to some public enterprises falling within the departmental form of management compared to those of pure departmental form run as part of government department operated by civil servants, they are referred to as semi-autonomous bodies.

Public enterprises organised as public corporations are sometimes referred to autonomous bodies. In the case of departmental undertakings of a commercial nature, the government realised that their commercial character demanded degrees of flexibility and autonomy in their operations. Some reforms were made from time to time relaxing the normal rigid bureaucratic rules and regulations but in spite of this, they remained a part of the government department. It is thus evident that the legal form was not all that decisive, because the form could be manipulated, depending on socio-economic conditions of the country.<sup>15</sup>

In July 1976, corporations were reorganised by the Second Amendment Ordinance.<sup>16</sup> Accordingly the Bangladesh Sugar Mills Corporation and the Bangladesh Food and Allied Industries Corporation were merged to create the Bangladesh Sugar and Food Industries Corporation. Likewise, the Bangladesh Chemical Industries Corporation was constituted to embrace the activities of the three corporations dealing with the chemicals, fertilizer, paper and leather industries. Bangladesh Steel Engineering Corporation was set up to include industries in steel, shipbuilding and engineering. The Bangladesh Forest Products Corporation was merged with the Bangladesh Forest Industries Development Corporation (established during the Pakistani regime). Similarly some enterprises and their assets were transferred from Bangladesh Oil and Gas Corporation to the Bangladesh Mineral Exploration and Development Corporation, which was set up under P.O.120 of 1972. In December 1976

<sup>14</sup> See the *Telegraph and Telephone Board Ordinance, 1975 (Ordinance No. XLVI of 1975)*.

<sup>15</sup> In Bangladesh there was no public discussion regarding the adoption of public corporations form unlike some other countries e.g. India. On the nature of public discussion in India see F.V. Pyle, *Government Enterprise in the Indian Economy* Asian Survey, vol.3, 1963, pp.16-26

<sup>16</sup> See the *Bangladesh Industrial Enterprises (Amendment) Ordinance, 1976*.

the Bangladesh Petroleum Corporation was set up with four marketing companies, two blending plants and a refinery.<sup>17</sup> In 1985, Petrobangla and BMEDC were merged and BOGMC (Bangladesh Oil, Gas and Minerals Corporation) was created. The restructuring of the corporations were done on the ground of economy. It may be mentioned that the government at that time was privatising a number of enterprises and restructuring was necessary to accommodate privatisation.

Table-4

*RECONSTITUTED SECTOR CORPORATIONS WITH NO. OF ENTERPRISES UNDER THEM AS IN DECEMBER, 1976<sup>18</sup>*

Corporations	No. of Enterprises
BD. Jute Industries Corporation	78
BD. Textile Mills Corporation	75
BD. Sugar and Food Industries Corporation	58
BD. Chemical Industries Corporation	65
BD. Steel and Engineering Corporation	54
BD. Oil and Gas Corporation (Petrobangla)	4
BD. Mineral Exploration & Dev. Corporation	10
BD. Forest Industries Dev. Corporation	7
<b>Total</b>	<b>351</b>

These corporations were organised according to the technical similarity of products and processes of the enterprises under them. But in some cases the products were heterogeneous. For example, BCIC products ranges from fertiliser, pharmaceuticals, paper, boards and newsprints to cosmetics, dry cells, soaps and detergents. Likewise the manufacturing activities of BSEC encompassed steel making, steel products, manufacture of cooking utensils, bicycles, electric fans, television, radio, twin-ones, refrigerator, VCR, auto-rickshaw, ship-building, assembling of cars and buses to industrial plants and machinery. The corporations also varied in size, number of enterprises, number of employees, fixed assets

<sup>17</sup> See the *Bangladesh Petroleum Corporation Ordinance 1976*, (Ordinance No. LXXXVIII of 1976)

<sup>18</sup> The *Bangladesh Gazette Extraordinary*, 16th April 1976.

etc. Some of the variations of the corporations (manufacturing ones only) as in 1976 are shown in the table below:<sup>19</sup>

Table-5  
VARIATIONS IN THE SIZE OF THE CORPORATIONS.

Corporation	No. of enterprises	Fixed assets in mill. Tk.	No. of employees
BJMC	78	1700	199600
BTMC	75	611	65500
BSFIC	58	407	31600
BCIC	65	2017	25300
BSEC	54	804	14500

Source: Annual Reports of the respective corporations

Thus we see that the idea of integration of similar types of enterprises is behind the concept of sector corporations, each corporation being responsible for many enterprises.

Let us now examine the legal status of these corporations.

### 3.3. Legal Status of Public Corporations and State Immunity in Bangladesh.

The Nationalisation Order clearly determined the legal status of the corporations it created. Article 10(2) says, "Each corporation shall be a body corporate, having perpetual succession and common seal with power, subject to the provision of this Order, to acquire, hold and dispose of property, both movable and immovable, and shall by its name sue and be sued."<sup>20</sup>

The Supreme Court of Bangladesh had occasion to consider the true nature and character of public corporations in Bangladesh in *Bangladesh Small Industries Corporation*

<sup>19</sup> The table is prepared on the basis of the annual reports of the respective corporations. The year 1976 is chosen deliberately because in that year the corporations were reorganised and also because after this year many enterprises were privatised.

<sup>20</sup> See Article 10(2), *The Bangladesh Industrial... op. cit.*

v. *Mahbub Hossain Chowdhury*.<sup>21</sup> In this case the court observed that a statutory corporation is neither a department of Government nor its agent.<sup>22</sup>

Since the above mentioned article 10(2) of the Nationalisation Order 1972 made clear the status of public corporation in Bangladesh and in view of the observation made in the case of *Bangladesh Small Industries Corporation v. M.H. Chowdhury*<sup>23</sup> there is no controversy as to the legal status of public corporations. In a number of cases<sup>24</sup> the real controversy arose as to the legal status of individual enterprises placed under the corporations and to decide whether a nationalised company placed under a corporation retains its corporate character or not.

It seems from the decided cases that the effect of nationalisation on corporate character of individual enterprises is not uniform.<sup>25</sup> In *M.H. Chowdhury v. General Manager, Titas Gas Transmission and Distribution Co. Ltd.* Munim, F. J., mentioned a few criteria to ascertain the corporate personality of the enterprise. They are: whether the enterprise was incorporated as a company under the Companies Act prior to nationalisation, how far the enterprise is controlled by the corporation, composition of the Board of Directors, degree of autonomy enjoyed during the actual functioning of the enterprise etc.<sup>26</sup>

In the case of *Nishat Jute Mills Ltd. v. Md. Sanaullah*<sup>27</sup> the Supreme court held that "article 4 of P.O.27 of 1972 has vested cent percent shares of an industrial enterprise in the

<sup>21</sup> [29 D.L.R. (1977) (SC) 41]

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> See for example *New Dhaka Industries Ltd. v. Quasem Huda and others*, [31 D.L.R. (1978) (AD) 231]; *Bangladesh Chemical Industries Corporation and another v. Sr. Akbar Rashid*, [BSCR 1980 (SC) 27]; *Mirshak Hossain Khan v. Bangladesh Jute Mills Corporation*, [56 D.L.R. (1964) (AD) 203] and *Senior Manager, MIS Dist Textile Mills Ltd. v. Sadhanu Bikash Nath*, [1988 BLD (AD) 67]

<sup>25</sup> *M.H. Chowdhury v. General Manager, Titas Gas Transmission and Distribution Co. Ltd.*, [BSCR 1980 (SC) 373].

<sup>26</sup> He observed, "If in spite of a company or a enterprise being a public enterprise or a nationalised enterprise it is allowed by the corporation to manage its affairs according to the rules of its Constitution that is, its Memorandum of Association and Articles of Association or agreement or deed under which it was originally created, it may be said that such company or enterprise has maintained its corporate character. If this is not so and its functioning is seen to be controlled by the corporation, whatever independent entity it might have before its becoming a nationalised enterprise or company is subsumed into that of the corporation." *Ibid.*

<sup>27</sup> [40 D.L.R. (1988) (AD) 298]

Government but it has retained separate entity of the enterprise as an independent company under the Companies Act.<sup>28</sup> Similar view was taken in the case of *Mabarakganj Sugar Mills Ltd. v. A.B.M. Kazi Nazrul Islam*.<sup>29</sup> The Supreme court observed that, "notwithstanding the fact that under P.O.27 of 1972 the company was brought within the ambit of the corporation, that does not mean that the company became extinct nor, for that matter, can it be argued that the proceeding should not be initiated by the company itself."<sup>30</sup> In fact, according to the court, a reading of articles 4-8 of the *P.O.27 of 1972* together and as a whole indicates that:

After vesting of the shares of the nationalised company in the Government, care has been taken to protect the corporate existence of the company both from the mischief of being wound up under the Companies Act because of the legislative changes, and from any action being taken under the Memorandum or Articles of Association of the company affecting in any way its corporate existence.....The corporate character of the company under the Companies Act was never obliterated nor contemplated to be so.<sup>31</sup>

In the case of *Chairman, Bangladesh Steel Mills Corporation v. Md. Masood Raza and Others*<sup>32</sup> the Appellate Division made clear the legal position of a corporation in Bangladesh. The fact of the case was that a commercial firm was taken over by the government on 30.12.71 and was subsequently placed under Bangladesh Steel Mills Corporation. On representation by the partners of the firm the government on 17.1.1976 cancelled its earlier notification placing the firm under the said corporation and asked the corporation to hand over possession of the enterprise to the ex-partners. But the corporation did not deliver possession of the firm to the partners. The latter filed a *writ petition* in the High Court Division which directed the government and the corporation to deliver possession of the firm to its partners immediately. The corporation preferred an appeal against the order of the High Court Division to the Appellate Division. Amongst a number of issues in the case the court addressed the question raised, which is whether the corporation can challenge the

<sup>28</sup> *Ibid.*

<sup>29</sup> [1987 BLD (AD) 182]

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> [BCCR 1978 (SC) 79]

release order of the government and has *locus standi* to maintain the appeal. The court observed that:

The position of the appellant corporation is not that of an agent required merely to carry out the directions of the government in respect of an enterprise placed under it, but its position is that of a juristic person functioning in accordance with law as contained in President's order no.27 of 1972. The Government of the country which is the executive organ of the State undoubtedly exercises immense powers for the administration of the affairs of the State. But the exercise of such powers must be subject to the law of the country. From the provisions of President's Order no.27 of 1972 it is clear that the corporation is not, in the strict sense, an agent of the Government, but that all the actions of the corporation in respect of an industrial enterprise placed under Art. 10(1)(d) of the Order and also those of the Government in relation to such an enterprise are to be controlled and regulated by the provisions of the Order and the rules and regulations made under it. (Para 80)

The corporation has been invested with a legal personality and has the necessary legal competence to raise a question as to the legality of an act which seeks to affect its scheme of administration and management of the enterprise which was purported to have been lawfully entrusted to it for such administration and management. When such a question is raised, the Court is bound to give its decision on the question in the light of the law applicable thereto. The corporation also has its duties and responsibilities under the said Order and is accountable for all its actions. If in course of discharging its duties which are regulated by laws, the corporation comes across an order of the Government which in its opinion is not in accordance with the provisions of the Order or any other law, it will be its duty not to implement such an order but to place the matter before the appropriate authority for proper decision in the matter. (Para-81)<sup>33</sup>

Thus we notice that the Nationalisation Order created the corporations as a separate legal person which means they are technically separate and distinct from the Government. They do not enjoy the sovereign immunity of the state.<sup>34</sup>

How far is government liable for the actions of its agents and for the contracts executed by it?

In the Indian sub-continent since the time of East India Company, the sovereign has been liable to be sued in tort or in contract, and the common law immunity never operated in India. Section 65 of the *Government of India Act 1858* says "all persons and bodies politic

<sup>33</sup> *Ibid.*

<sup>34</sup> For a detail discussion of the theory of public corporation as a separate legal entity, see R.S. Arora, *Administration*.... op. cit. pp.65-

72.

shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State of India as they could have done against the said company."<sup>35</sup> Since 1861 the practice of the court was to separate commercial activities and the sovereign activities of the state. The leading case arising under the above section, is *P & O Steam Navigation Co. v. Secretary of State*.<sup>36</sup> The case was decided by Calcutta Supreme Court in 1861. In this case the P & O Co. made a claim for damages for injury caused to its horse by the negligence of some workmen in the Government Kidderpore Dockyard. It was held that the Secretary of State for India was responsible for the action of his servants in respect of what were described as the trading activities of the East India Company and of the Government of India. In an *obiter dictum*, the court added that:

There is a great and clear distinction between act done in the exercise of what are usually termed as sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. The latter and not the former acts are justiciable and cognizable by the courts.<sup>37</sup>

The functions of the modern state are so complex that it is not always easy to compartmentalize functions of the state into sovereign and non-sovereign. This leads to unnecessary uncertainty regarding the legal position.

In Bangladesh, there is no separate Act in the model of British *Crown Proceeding Act of 1947* or the *State Immunity Act 1978*. In determining the liability of the state in respect of contracts, reference to article 144 of the constitution of Bangladesh should be made, which says that the "executive authority of the Republic shall extend to the acquisition, sale, transfer, mortgage and disposal of property, the carrying on of any trade or business and the making of any contract."<sup>38</sup> Thus in exercise of the executive power given by Article 144 the government can carry on trade or hold property and enter into contracts. However, the article

<sup>35</sup> See section 65 *The Government of India Act, 1858*.

<sup>36</sup> [5 Bom. H.C.R. App.] cited from A.D. Singh, *op. cit.*, p.21.

<sup>37</sup> *Ibid.*, p.22.

<sup>38</sup> Article 144 of the *Constitution of Bangladesh*.

is confined only to giving capacity to the government to do these things. The actual carrying of trading by the government or the acquisition of property by it or the entering into contracts are governed by the laws relating to such trade, property and contract. In carrying out these activities, the government is on the same level as any other person. The contract is governed by the *Bangladesh Contract Act 1872* and the government as well as the other contracting party is bound by the terms and conditions of the contract. Thus article 145 (2) of the Constitution of Bangladesh says:

Where a contract or deed is made or executed in exercise of the executive authority of the Republic, neither the President nor any other person making or executing the contract or deed in exercise of that authority shall be personally liable in respect thereof, but this article shall not prejudice the right of any person to take proceedings against the government.

It is evident from the article that making and executing a contract is not a sovereign function imposed on it either by the constitution or by any statute. But in acting under a contract the government is legally on the same footing as other private persons. A party aggrieved by the exercise of a constitutional or statutory power by the government can bring a writ petition<sup>39</sup> against the government but a party aggrieved by the conduct of government under a contract cannot do so. It may enforce such right by suit for specific performance or may sue the government for damages for breach of contract.<sup>40</sup> Under article 146 of the Constitution the "Government of Bangladesh may sue or be sued by the name of Bangladesh."

The main objectives in setting up sector corporations were co-ordination and provision of common services among individual public enterprises in the same field. *P.O. 27 of 1972* looked at the sector corporations as apex bodies to supervise and co-ordinate<sup>41</sup> the enterprises placed under them. The stress on the theoretical advantages of public corporation in terms of efficiency led to the neglect of the important question of how goals were to be set

<sup>39</sup> Article 102 of the Constitution of Bangladesh.

<sup>40</sup> See the Indian case of *Niranjan Lal Dabma v. Union of India*, [A.I.R. (1976) Delhi 184].

<sup>41</sup> See article 17 of the *Natcoms/kancom Order 1972*, *op. cit.*

for the enterprises. Efficiency after all, is merely a means to an end, and how the ends were to emerge was not made clear.

The next two sections will discuss what functions are assigned to public corporations and examine how the corporations and enterprises under them are organised and function in reality.

#### 3.4. Functions of the Corporation.

In Bangladesh, the Ministry of Industry controls directly three corporations, namely the BCIC, BSEC and BSFIC. The pattern of management is more or less the same in all these corporations and they are created by the same legislation. But the workings of these three corporations differ.

The following case study of BSEC would give a general idea and indication of the workings of the other corporations.

BSEC is one of the most important public sector corporations. It is a heavy industry sector and as such likely to remain in public sector for a long time. It has enormous potential for production but is not performing so well due to many management problems.<sup>42</sup>

*P.O. 27 of 1972* says that "it shall be the function of a Corporation to control, supervise and co-ordinate, subject to any regulation made in this behalf, the activities, business and affairs of the scheduled industrial enterprises placed under it... and to establish and develop new industrial enterprises within their respective fields."<sup>43</sup> The above functions are too broad and vague and can be interpreted in different ways. Moreover it has failed to

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<sup>42</sup> M.A. Mohsin, 'The Public Enterprises of Bangladesh: An Assessment of Bangladesh Steel and Engineering Corporation' [unpublished], a paper submitted to the RPATC, in partial fulfilment of the requirements of the completion of the 5th Senior Staff Course held during 5.7.87-3.10.87, 1987, p.9. [The author was a Joint Secretary, Ministry of Industry.]

<sup>43</sup> Article 17 of the *Bangladesh Industrial Enterprises (Nationalisation) Order 1972*, pp. vii.

define the functions of the enterprises under them. Therefore, the Cabinet Division in 1976 issued guide-lines on different aspects of public enterprises.

The Cabinet Division's *Guide-lines on the Relationship between Government and Autonomous bodies/Corporations and the Autonomous Bodies/Corporations and Enterprises under them*<sup>44</sup> entrusted a corporation with a number of functions,<sup>45</sup> in particular, to operate on commercial considerations, having due regard to national interests, in the most efficient and economic manner; within the policy frame-work and guidance given by the Government.

Under the *Guide-lines* the functions of the corporation should be discharged, by advance planning of activities including investment programme setting target and allocating tasks, constant review of the targets set and the tasks given, by continuous research, and mechanisation.<sup>46</sup>

In April 1982 the Chief Martial Law Administrator appointed a Martial Law Committee to examine the organisational set-up of Ministries/Divisions, Departments and other organisations under them under the Chairmanship of Brigadier Enamul Haq Khan.<sup>47</sup> The Enam Committee assigned to the BSEC with as many as 23 functions in line with the Cabinet Division's *Guide-lines* of 1976. The functions included fixing up of annual targets in consultation with Enterprise Managements and as approved by the Ministry, so that reasonable profit can be earned, guiding the enterprises to generate funds, sustaining uninterrupted production by procurement of required raw materials economically, ensurance of proper distribution of the consumer goods throughout the country at the same fixed price, encouraging private sector in establishing ancillary and linkage industries, maintaining

<sup>44</sup> Government of Bangladesh, Cabinet Division: *Guide-lines on the Relationship between Government and Autonomous Bodies/Corporations and the Autonomous Bodies/Corporations and Enterprises under them*, 1976.

<sup>45</sup> See clause 5 of the *Cabinet Division's Guide-lines*, *op. cit.*

<sup>46</sup> *Ibid.*

<sup>47</sup> See Bangladesh Gazette, *Committee for Examining Organisational Set Up of Ministries/Divisions, Departments and other Organisations under them*, 18.4.82. The Committee is often referred to Enam Committee, after the name of its chairman. Among the terms of reference of the committee were to review/recommend *charts of duties* (in brief) of various Sections, Branches, Wings, Divisions and Departments and to suggest rationalisation of organisations and functions of Ministries/Divisions/Departments and various organisations.

desired level of employment and generating new job opportunities, and contributing to the creation of the social infrastructure within and outside the Corporation. Thus, it clear that the Committee entrusted the corporation with both commercial and social functions.<sup>48</sup> But the committee did not spell out how far the commercial functions be prioritised against the social functions. This created many problems and confusions. While the management strives at maximisation of profit the trade unions demand more social spending.

### 3.5. Organisation and Management of Corporations.

In 1972 , the Bangladesh Steel Mills Corporation and the Bangladesh Engineering and Shipbuilding Corporation were established.<sup>49</sup> These two corporations were merged in July 1976 and renamed the Bangladesh Steel and Engineering Corporation with an authorized capital of Tk. 20 million and a paid up capital of Tk.4 million. It had 65 enterprises under its control.<sup>50</sup> However at the moment it has 19 enterprises, with a net fixed asset of Tk.6441.3 million as at June 1988, under its control.<sup>51</sup>

The Board of Directors of the Corporation is responsible for the overall direction and administration of the affairs of the corporation.<sup>52</sup> The Board of Directors of BSEC consists of a Chairman and 4 other Directors viz. Director (Finance), Director (Planning and

<sup>48</sup> See the Reports of the Committee for Reorganisation of the Public Statutory Corporations, vol.XIII, part 2, chapter IX, 1983.

<sup>49</sup> In accordance with clause (1) of article 10 of P.O. 27 of 1972 the government issued two notifications, No. F/ST 3/1851 and No. F/ST/1/852, both dated 17th May 1972, amalgamating Bangladesh Steel Mills Corporation and the Bangladesh Engineering and Shipbuilding Corporation respectively.

<sup>50</sup> See the Bangladesh Industrial Enterprises (Nationalisation) (Second Amendment) Ordinance 1976, being Ordinance No. XXXV of 1976.

<sup>51</sup> Between October 1976 and July 1980, BSEC divested 27 enterprises through sale by open tender, 10 returned to their former Bangladesh owners, 4 were transferred to other corporations, 5 were wound up being non-operational, leaving at the moment 19 enterprises at its control. [BSEC Annual Report 1987-88, 1989, p.12 and p.45.] They comprise 2 units of basic metal industries, 6 metal rolling industries, 6 (transport sector) industries and 5 under miscellaneous category. Of these again, 6 were inherited from the former EPIC, 13 were nationalised as abandoned properties and one was established by the BSEC itself.

<sup>52</sup> Article 11 of the P.O. 27 of 1972 says that "the general direction and administration of the affairs and business of a corporation shall vest in a Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Corporation." Article 12 says that "the Board shall consist of a Chairman and such number of other Directors not exceeding six as the Government may fix." See the P.O.27 of 1972, op.cit.

Development), Director (Production and Engineering) and Director (Commercial).<sup>53</sup> Each director is in charge of a number of divisions. The Chairman is the chief executive officer of the corporation.<sup>54</sup>

Although theoretically the Board is the supreme policy making body of the corporation, in most cases the four full time functional directors of the Board function as "advisers" to the Chairman. Article 15 (2) says that "the Board may delegate its power to the Chairman for the purpose of efficient functioning of a Corporation."<sup>55</sup> In accordance with this provision the Board of Directors executed a power of attorney<sup>56</sup> delegating all powers to the Chairman. In reality, although the Board has delegated its collective powers to the chairman, the board members being executive directors meet frequently and informally discuss almost all issues. Apart from frequent informal discussions between the Board members, the Board generally formally meets once in a month.

The Chairman is made responsible for the performance of the corporation and has been given very wide powers. Therefore the Corporation must have the benefit of a competent head, if targets laid down and results expected of it, are to be achieved. At least, he should be in a position to inject the life and vigour required for the efficient operation of the organisation. He should be in a position to influence the process of growth and create the image which may spell success or the lack of it. It goes without saying that the personality of the Chairman is also important in the relationship with the government.

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<sup>53</sup> BSEC Annual Report, *op. cit.*, p. 3.

<sup>54</sup> Article 13 of the P.O. 37 of 1972.

<sup>55</sup> Article 15 (2), *ibid*.

<sup>56</sup> Loaned from the officials of the corporation.

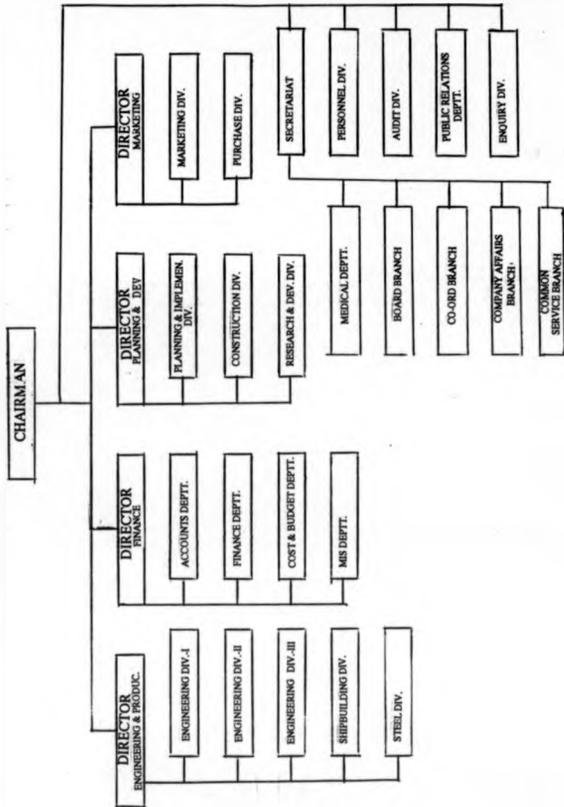
**TABLE-6**  
***DIVISIONS OF BSEC***

Divisions	Officers in-charge
1. Secretariat 2. Personnel 3. Training, Organisation and Method	Chairman
1. Accounts 2. Finance 3. Audit 4. Cost and Budget 5. MIS	Director (Finance)
1. Planning 2. Implementation 3. Construction	Director (Planning and Development)
1. Engineering-I 2. Engineering-II 3. Steel 4. Ship Building	Director (Production and Engineering)
1. Purchase 2. Marketing 3. Engineering-III	Director (Commercial)

Source: BSEC Head Office.

The functions of BSEC are conducted by 18 Divisions at its head office. A list of the Divisions along with the officers in charge of the Divisions is described in the table above. The organogram of the Bangladesh Steel and Engineering Corporation is shown on the next page.

ORGANOGRAM OF THE MANGLAHESE STEEL AND ENGINEERING CORPORATION



### 3.6. Organisation and Management of Enterprises.

The chief executive of the enterprise is a Managing Director or a General Manager<sup>57</sup>. He (MD or GM) is appointed by the corporation from its senior staffs. While it is the function of the corporation to appoint the chief executive of the enterprise, often the appointment is made with the informal concurrence of the Ministry of Industry.

Each of the 19 enterprises under the control of BSEC has a *Management Board*. The Management Board is the highest policy making body at the enterprise level<sup>58</sup> and at the same time the top management organ responsible for implementing the objectives of an enterprise. No qualifications or criteria were set out for Board membership. The criteria of selection are vague and permit of almost any person deemed fit by the corporation. The members of the Board are appointed by the corporation formally (but in reality by the Ministry) for such period as decided upon by the corporation. The Board members have no specific assignments and they are not individually responsible for any one or more spheres of the enterprise's working.<sup>59</sup>

The Board consists of such number of members as laid down in their respective Memorandum and Articles of Association.<sup>60</sup> The size of the Boards vary from 5 to 9. It is obvious that smaller Boards are more efficient. When the Board is a large one there is seldom unanimity of decisions, and there is often the practical problem of ensuring the presence of so many members of the Board especially when they are to meet frequently.

The board is headed by a chairman. Presently<sup>61</sup> Chairman of the Board of Directors of BSEC is the chairman of 3 enterprises, other directors of the BSEC work as the chairman of 5

57. Out of 19 enterprises in 15 the Chief Executive is called a Managing Director and in rest 4 General Manager. See *BSEC Annual Report*, op. cit., pp. 66-68.

58. Clause 3(4) of the *Cabinet Division's Guide book*, op. cit.

59. For a detail discussion on the appointment procedure see chapter 4 (4.2.2.1).

60. The *Cabinet Division's Guide book of 1976* provided for the composition of the Enterprise Board. According to it, the board should consist of "... Chief Executive of the Enterprise, Corporate Approver, Financial Institution officials and workers' representatives" (ibid.). No worker's representative has ever been appointed as the board is spite of the clear provision in this effect.

61. Also nationalisation all enterprises, including those under the control of EPIDC, need to be managed by a Management Board, usually headed by a member of the Board of Directors of the Corporation. The Secretary of the Ministry of Industry was the

enterprises, Additional Secretaries of the Ministry of Industry are the chairman of 2 enterprises, past and existing Joint Secretaries of the Ministry of Industries work as the chairman of 4 enterprises and Members of Parliament work as the Chairman of the remaining 5 enterprise.

The inclusion of the Members of Parliament in the board internalises political influence at the level of board decisions. Non-commercial objectives are often given priorities due to the fact that the M.P. is more interested in his chance of re-election. The non-commercial objectives, like expenditure in setting or maintaining school for the children of the staff where children of the locality also have the access, often negatively influences profitability of the enterprise while increases the popularity of the M.P.

The chief executive of the enterprise is the only full time member of the Board. The other members of the Board are all part-time members drawn from different Ministries, Planning Commission, Universities and the BSEC itself. Thus the board is a part time policy board.

A part-time "Policy Board" has the advantage that the government can draw the talents from different sources.<sup>62</sup> The other advantage is that not being involved in day to day management, it can take a more objective view of the manager's performance, and take a rather independent and critical view of the enterprises management. There are also disadvantages that members of the Board being appointed from different sources may not form a homogeneous working team. Since they are not responsible for carrying out the policies, the policy formulation may not conform to the needs of the situation. The part-time board members are generally unable to devote the time and attention needed for the purpose because most of them are pre-occupied with other responsibilities. Moreover, the part-time members are neither fully aware of the problems of the concerned enterprise nor in a position to make any significant contribution to the better performance and growth of the enterprise.

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<sup>62</sup> The discussion in this part is based on interviews with different officials both at corporation and enterprise level.

Sixty per cent of the total number of members of the management boards of public enterprises under BSEC are government servants. The appointments of civil servants have certain theoretical advantages like, a) they help in co-ordinating the activities of a public enterprise with government policies and national criteria, since they are supposed to have knowledge of them; b) they eliminate delays in government response to, or approval of, a board decision which needs it; and c) being bound by public service codes, they act 'fairly' and without self-interest.

The presence of civil servants on the boards have certain practical disadvantages too.

a) The inclusion of civil servants in the board in establishing co-ordination between the government and the enterprise, or in orienting the enterprise towards efficiency, remains unproven.

b) It is not certain that they carry to the boardroom clear policies or responses of the government. Their participation in board discussions does not necessarily represent the kind of enterprise-government dialogue which is desirable. They refrain from committing themselves clearly; instead, they play safe by deferring an issue for further consideration or by recommending too frequently that an issue under discussion be referred to the government before a final decision is taken which can ultimately prove restrictive of the initiative of top managers of the enterprise and condition its efficiency.

c) Since most members are government servants and the government itself is supposed to spell out national policies, there may be duplication or even conflicting efforts and above all, there is always a danger of some kind of hostility breeding between the Board and the management.

d) The government officials act more as representative of their respective ministries than as members of a team entrusted with the management and development of an enterprise.

They come to meetings with the pre-conceived government policies and try to remain in that mental framework. Business dynamism and innovation thus tends to suffer.

e) While civil servants find themselves placed on a board by virtue of their ex-officio position, it is not certain that they have inherent capability for the directorship concerned. Further, their impact on the board is likely to be out of proportion to their competence.

f) They can be an easy medium of transmitting a minister's interest, which the minister himself is not prepared to issue as a directive.

However, it is difficult to establish precise responsibility of the civil servants on the boards for lapses in enterprise efficiency. Thus, it will be unrealistic to expect that the government will not continue to keep civil servants in the boards. But some improvements should be done, for example, the number of official members should be kept to a bare minimum; they should be sent to board meetings with clear instructions on major issues, reflecting the government's views; the articles of association governing the board should indicate the nature of issues on which prior consultation or approval of the government is deemed necessary; and can take care of this aspect substantially. In the course of an inquiry or evaluation of the enterprise, the responsibility of the official members, along with the others, for any composite errors of the board should be presumed as a rule, unless there is specific evidence to the contrary. A different official should not be sent to the board meetings from a ministry every time; official directors should be given some training or orientation in the discharge of their responsibility with knowledge; and after every board meeting the official members should be asked to submit brief reports to their respective superiors on matters of major interest.

About twenty percent members of the management boards are appointed from the private sector. Appointments from the private sector can be useful, if the selection is made on considerations of merit and not patronage, and if the talents and experience of an appointee

are relevant to the enterprise concerned. But in the case of BSEC enterprises, in many cases, the above 'ifs' are absent.

Since many enterprises are loss making enterprises hence about ninety two percent officers interviewed felt the need to change the present policy board. However, only forty three percent felt that present policy boards should be replaced by functional or executive board with members drawn from within the enterprise itself. Their technical utility to the board would be at a maximum, once the objectives and targets of the enterprise are set by the corporation, agreed by the government, in a clear manner. They argued that since enterprises are showing poor performance during non-executive dominance on the boards for a long time - not necessarily for that reason alone, a change is likely to improve their performance. If the board is composed of people from the corporation then there will be no distinction between the board and the management. A board composed exclusively of insiders can have the disadvantage of excessive inbreeding. Hence it is in the interests of efficiency to include in it a sizeable number of non-executive directors so that they can bring into the boardroom considerations and questions that knowledgeable outsiders assume to be important.

It seems there is merit in having a mixture of *Policy and Functional Board*<sup>63</sup> i.e. to have a few full time directors and a few part time directors. This would have the advantage of providing effective collective leadership, and if more members were selected from the ranks of the enterprise, chances are that they would stay at their posts longer and provide continuity in policies and actions. Most importantly, the functional approach can be conducive to injecting professional behaviour in policy formulation and implementation.<sup>64</sup> A hybrid board rather than the functional one will allow the persons directly concerned with the enterprises to sit in the board and decide things within the objectives set by the corporation and decide the strategy of achieving things themselves. In other words that will allow more autonomy to

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63. About 57% of the officers are of the same opinion.

64. Over 72% of the officials interviewed agreed

them and make them more accountable for their actions since there would be none to blame excepting them.

Judging from the actual workings of the management board, it seems that the present policy board is all right, not because it is functioning well, but because it is not of much importance to have a policy board or a functional board since most things are decided by the corporation and the government. Hence, the functions of the board are very formal. Above all, the chief executive always is a key figure in the board as he controls the flow of information. There are practically many factors like personality of the members, deciding agenda, timing of the meetings etc., that come into play and either form can work well or badly depending on those factors. Indeed, it was clear that the success of the enterprise lay not so much in the hands of the board but in the hand of the Managing Director. The chief executive, depending upon his personal qualities and personality can manipulate many things including the board. Whether a board is a functional one or a policy making one there will always remain some controversies. Hence under the present system also one should not discount the possibilities of certain institutional problems cropping up which may cause management efficiency to deteriorate unless simultaneous corrective measures are taken.

An enterprise is basically an economic entity under the charge of a Board, owing allegiance to a political entity to whom it looks for survival and continuance. In reality the management board of an enterprise is not a supreme body in matter of management. There are two other tiers of authority, namely, the government and the corporation under whose direct control the management board operates within the rigid boundaries set for it. Thus an individual public enterprise industry has practically very little hand in shaping the industry. Its functions are only to manage it as desired by the government through the corporation. The government and the corporation exert much influence through a wide range of mechanisms: the organisation structure, the planning process, informal discussions, the norms and values of centrally imposed culture, the capital approval process, setting the targets, the centre's reaction to poor performance, the role of the staff department at the head office and many

more. All these mechanisms influence the behaviour of the individual enterprises. They also influence the behaviour of managers in the enterprises and as a result can influence the decision taken, and the motivation and efficiency of employees.

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**Relations between the Government  
and  
Public enterprises in Bangladesh.**

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**4.1. Introduction**

In the previous chapter it was mentioned that *P.O 27 of 1972* brought many industrial enterprises under public ownership. The government, instead of managing them directly, created some corporations to control and supervise the enterprises placed under them, on behalf of the government. The corporations have been made the guardians of the assets of the enterprises placed under their respective control and are responsible for ensuring that overall targets and objectives of the public enterprises are achieved. In short, the government, by an act of conscious policy, has created public sector corporations, given them an autonomous status and conferred on them a juridical personality.

A three tier system has been adopted for the management of the public industrial enterprises in Bangladesh consisting of the government at the top, sector corporations in the middle and the enterprises at the bottom. The interrelated activities in the system may be accordingly identified as follows:-

- i) Government sets the overall policies and objectives for the industry;
- ii) Corporations guide and supervise the individual enterprises to achieve the overall objectives;
- iii) enterprises act to achieve individually their share of required production of the sector.

The adoption of the public corporation form is based on the assumption that bureaucracy and bureaucratic methods are not conducive to efficient business undertakings. But in so doing, the government has created a new politico-managerial situation-the problem of defining the relationship between itself and the corporate body it has created, i.e., "the optimisation of the linkage between the state and the enterprise which can provide a sound foundation for the enterprise's success."<sup>1</sup> Fernandes writes that the successful functioning of public enterprises is conditioned by the nature of their relationship with the government and that "their efficiency and effectiveness can only be secured by a rationalisation of this relationship, and that, politically sensitive though the subject may be, there is a need for and a possibility of 'managerialising' the interlinkages between the state and the enterprises."<sup>2</sup> The relationship is expressed mostly in the extent and areas of control exercised by the government and the autonomy enjoyed by the enterprises.

In fact, a fundamental characteristic of public corporation form is a careful balance between control by the government of the policy of the corporation and the operational autonomy of the corporation. As Garner points out:<sup>3</sup>

A powerful corporation, having great financial resources, employing many personnel and possessing monopolistic powers conferred by statute, should be answerable in some measure to the elected representatives of the nation and to the courts of law ..... In many respects controls over such corporations seems tenuous and ineffective. On the other hand, any large commercial enterprise must be allowed freedom to carry on research, to experiment and even on occasion to make mistakes. Indeed the justification for the constitutional device of public corporations has been said to be as to secure freedom from civil service (and particularly Treasury) controls and from the influence of party politics.

A proper division of labour between the government and the corporation (under which the former makes policy and the latter manages), is implicit in the constitutional

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<sup>1</sup> P.Fernandes, *Managing Relations between Government and Public Enterprises*, Management Development series No.23, 1986, p.6

<sup>2</sup> *Ibid.*

<sup>3</sup> J.F.Garner, *Administrative Law*, 1989, p.368.

theory of the public corporation. Autonomy is necessary for strategic innovation, for adaptation to local and sectoral conditions and for implementation, since managers have a better understanding of markets, prices etc. than the government. The management cannot function well unless it has a certain freedom of operation.

Earlier, control and autonomy were seen as irreconcilable goals involved in a zero-sum game: the more one enhanced control the more one cut down on autonomy and vice versa.<sup>4</sup> The extent to which this is true, however, depends on the way in which control and accountability are effectuated. A UN Report on the subject finds that operational autonomy and policy control can be simultaneously enhanced provided the public enterprises are directed by objectives and controlled by results. The Report notes<sup>5</sup>:

In a real way, a higher degree of operational autonomy could reinforce the degree of enterprise integration with public policy. Through better practices of direction and target-setting, of performance measurement and control, more accountability can be secured. But it is accountability not individual actions and decisions but for results.

The establishment of a coherent institutional structure itself is not sufficient to guarantee that the functions and principles essential for sound management of the public enterprises will be carried out and observed. It is also necessary that the processes that underly the relations between the public authorities and the enterprises, and organize the exercise of the different functions, be defined and put into effect. Public enterprises are operated, influenced and affected by a series of external factors which make their operations different from those of private business enterprises. In a private firm, all management decisions are taken by its own board of directors, subject to the due observance of the laws and regulations laid down by the state. This is not the case in the public enterprises. Critical management decisions, particularly those of a strategic kind are

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<sup>4</sup> United Nations, *Measures for Improving Performance of Public Enterprises in Developing Countries*, 1973, p.41.

<sup>5</sup> *Ibid.*, p.44.

taken at the government level—i.e., their policies and activities are controlled externally, involving different government agencies, which, at times contradict each other.<sup>6</sup>

There are varying strands in the relationship between the government and the public enterprises, namely, the government as the owner; the government as planner, investor and development banker; the government as regulator; and the government as the Executive answerable to Parliament for the public enterprises. All these are reflected in a network of formal and informal controls and institutional arrangements. Thus most of the control emanates from the government. An examination of the system of control is therefore important for an understanding of the nature of public enterprises and the mode of its operation. A knowledge of the consequence of control is essential for policy prescriptions on the organisation of the enterprises and the optimum allocation of decision-making powers between the government and the enterprise management. The problem concerning this relationship is too much interference by the government in the management of the public enterprises, impairing their efficiency.<sup>7</sup> The cause of this problem is mostly the lack of clarity in the definition of the roles of government. Corporate form envisages that the government, through the appropriate Minister, should exercise control over policy making only, and not interfere in the day to day management of public corporations. Of course, to draw a clear demarcation line between policy making and day-to-day management is very difficult.

The aim of this chapter is to discuss the relationship between the government and public corporations as well as with individual enterprises to have a better understanding of the actual workings of the public enterprises in Bangladesh. In doing so, an account of the institutional working out of contradictory pressures for, on the one hand, autonomy for the public enterprises and on the other hand, political control is discussed. The chapter will discuss the areas, instruments and structure of control; accountability of public

<sup>6</sup> This is discussed in greater detail in P. Fernandes, *op. cit.*, p. 8.

<sup>7</sup> Even in Britain the situation is not very different. For example, the Committee on Public Accounts referred to the 'present level of governmental intervention in matters which are properly the responsibility of the industries ... leading to a blurring of responsibility and possible resentment'. See *Seventh Report, Department of Industry, Transport and Energy, The Monitoring and Control Activities of Sponsor Departments of Nationalised Industries, 1963*, p. xvi.

corporations, co-ordination of public corporations, performance evaluation, etc. This will help us to conclude how far the corporation form has been successful in Bangladesh in making a balance between executive control and enterprise autonomy. In fact, a study of law remains by and large incomplete without a study unveiling its actual implementation and the effectiveness of law can only be judged from its implementation. Above all, the actual degree of control may not correspond to the formal legal framework established.<sup>8</sup>

The discussion in this chapter will be mostly limited only to executive control over the public enterprises in Bangladesh because of the fact that other forms of control like parliamentary control (as will be seen later in the chapter) would not be very effective in the case of Bangladesh.

#### 4.2. Executive Control Over Public Enterprises

Public enterprises have a close and continuous relationship with the government; therefore, it is quite natural that a substantial degree of informality will always be there. There is widespread feeling that government makes public enterprises carry out its wishes without public acceptance of responsibility through what has been called in England the "lunch table directives".<sup>9</sup> The Board of Directors of the Corporations are afraid of annoying their ministers because it may affect their personal career. Though the government-public enterprise relationship is quite intimate, yet necessary distance has to be maintained in those areas where autonomy has been granted to public enterprises. If the enterprises are not allowed to benefit from their autonomy, there would be no point in establishing them as autonomous corporations with high-powered boards and their own independent staff. Formal powers of the government are laid down in wide terms in the *P.O 27 of 1972* and in detail in rules made thereunder. But to what extent public

<sup>8</sup> G. Sorensen, and O. J. Sorensen (eds.), *State Enterprise: Development or Business as Usual*, 1982, p.27

<sup>9</sup> First Report from the Select Committee on Nationalised Industries, 1967-68 (U.K.), Ministerial Control of Nationalised Industries, 1968, p.20.

enterprises are enjoying their autonomy and whether or not there is any balance between executive control and enterprise autonomy depends on the form, substance and application of executive control.

The term "control" has wide and various connotations. It may connote, "at the one end, the enunciation of general principles of policy and, at the other, supervision of the minutest aspects of the running of an enterprise including the setting of targets as well as the supervision of the day-to-day operations of the enterprises to ensure that the targets set are achieved."<sup>10</sup> In its latter connotation there is a danger of confusing between control and management. The constitutional theory of public corporations distinguishes control and management. Management is the carrying on the day-to-day operations of the enterprise within the parameters of legislative and administrative regulations. Control is used here to mean control of the enterprise by institutions extraneous to it. In order to maintain a distinction between control and management it is important that the regulations should be set out in broad terms and by general principles. Control should consist of policy formulation, target setting, evaluation of performance and the correction of erroneous methods.

The basic focus of this section is on the control purported to be exercised by the government.

#### **4.2.1. The Need for Executive Control.**

Since public corporations are deliberately set up as autonomous self-governing units, should they not be allowed to govern themselves and get on with the job? Is there any justification for government control over them?

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<sup>10</sup> Y.P.Olani: *Executive Control over Public Enterprises in Africa*' in G.R.Reddy (ed.), *Government and Public Enterprise*, 1963, p.185.

The answer to the questions posed is yes, public corporations should be given autonomy to function without interference in the day to day affairs of the enterprises but within the control of the government. Government control is not only desirable but necessary. The danger of non-control has been seen in other developing countries. For example, Mihiyo<sup>11</sup> mentions the formation of fictitious companies such as *Mwanukwacha Company* in the early seventies in Tanzania. Again, there was acquisition of obsolete equipment for enterprises knowingly and corruptly as was in the case of *Talcoshilin* in 1975, also in Tanzania.<sup>12</sup> Apart from the aforesaid, the right of the government to control public enterprises arises from:<sup>13</sup>

a. the government is responsible for the management of the overall economy, hence it should possess the right to control both public and private sector;

b. government is the sole/majority share holder of the public enterprises, hence as owner it has the right to control as a means of ensuring that the public investments are safe and productive and that the objectives for which the enterprises were set up are in fact achieved;

c. public enterprises are deliberately created as instruments to implement certain state policies and in the words of Professor Daintith<sup>14</sup> policy instruments based on *dominium* rather than *imperium* are likely to be more effective;

d. public enterprises are repositories of vast social, economic and political power and must therefore be controlled by the government on behalf of the society and should be accountable for the ways in which power is used.

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<sup>11</sup> F.B. Mihiyo, *Parliamentary Control and Accountability of Public Enterprises in Tanzania*, unannounced Ph.D thesis, University of Dar-es-Salaam, 1986, p.31.

<sup>12</sup> *Ibid.*

<sup>13</sup> For a more detail of arguments for the necessity of executive control see P.Fernandes, *op. cit.*, 1986, pp.23-29.

<sup>14</sup> T. Daintith, 'Legal Analysis of Economic Policy', *Journal of Law and Society*, vol 9, 1982, pp. 191-224.

Thus, we notice that the demands of the management of the economy and the social purposes of the public enterprises constitute the basis for executive control. There appears to be no diversity of views on the necessity of executive control over public corporations; the argument is over the degree of control and the manner of its exercise. Let us first look at the instruments of control available to the government in Bangladesh.

The problem of executive control over public enterprises in Bangladesh is complicated by the fact that apart from formal legal channels and methods of controls there exist official and unofficial interference in the functioning of enterprises. Public enterprises management are overburdened with various interferences from different quarters. In fact, one chairman of a public corporation viewed official and external unofficial interference as the biggest management problem of public enterprises in Bangladesh.<sup>15</sup> In spite of complains from the corporation officials, it is desirable that the government should undertake constant consultation with the enterprise management, so that its understanding of the workings of the enterprise improves and ensures proper monitoring, control, and evaluation. The dialogue should differ from a monologue from the side of the government or from a crisis probe.

#### 4.2.2. Instruments of Executive Control Over Public Enterprises In Bangladesh.

Article 11(2) of the P.O. 27 of 1972 says that "the Board shall be subject to the superintendence and control of the Government....." In Bangladesh executive control over public corporations covers an extensive area and virtually no functional area or general management is free from it.<sup>16</sup> In Bangladesh the following instruments of control are available to the executive:-

15. A. K. M. M. Hossain (then Chairman BCIIC), *Problems of Management in Public Enterprises*, CONCOPE Journal, vol.1, No.1, 1983, p.7.

16. The following observations of H.R. Zeyyed on Nigeria apply to Bangladesh. He observed "the Ministry usurps the powers of the board of directors, the latter struggle on the rights of management. The management in its own turn centralise all powers themselves." *Nigerian Management Review*, June 1966, p.156

### 1) Appointment and Dismissal of the Board of Directors.

One of the key instruments of executive control over public enterprises is the appointment and dismissal of the Board of Directors of the public corporations. The power of appointment and dismissal is important control, because firstly it enables the government to choose persons who subscribe to the objectives of the government as regards the public sector and who the government considers have the necessary skills and experience; secondly, it ensures the continued responsiveness of the board to the government policies, as well as the exercise of care in implementing them.

The sponsoring Ministry (in this study the Ministry of Industry) suggests the name of the Chairman of a corporation to the President. After Presidential approval appointments are not made by the sponsoring Ministry but by the Ministry of Establishment. Terms and conditions of all public enterprise officers are same and appointments are not made on contract, reflecting the market worth of an effective executive. Other Directors are appointed by the Ministry of Industry although they get their appointment letter from the Ministry of Establishment.

The *P.O. 27 of 1972* remained silent on standard procedure to be followed while appointing. Considering, however, that such important but unrestricted power may constitute an invitation to political interference or as has been expressed, in the abuse of appointment right itself, the *P.O. 27 of 1972* should have stipulated the minimum qualification to be possessed by members of the Board of Directors of the Public Corporations. Furthermore, fixed tenure of office for Board members should have been stipulated in the legislation. These would have provided a check on the arbitrary exercise of the right of appointment by the government. *The Nationalisation Order 1972*, however, simply says that "the Chairman and other Directors shall be appointed by the Government for such period and on such terms and conditions as the Government may determine."<sup>17</sup>

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<sup>17</sup> Article 12(2) of the *P.O. 27 of 1972*, *op. cit.*

The Ministry of Establishment on 16th January 1988 issued a Memorandum<sup>18</sup> which sought to lay down the conditions of service of the Chairman/Managing Directors and Members of the Board to be equally applicable to all public corporations. The Memorandum does not spell out the procedures for appointment but simply states that the Chairmen/Managing Directors and Members/Directors shall be considered from amongst a) senior executives of the Statutory or Autonomous bodies, b) in service civil and military officers, c) retired civil and military officers and d) people of competence from amongst the general public. The Memorandum is silent about who should recommend the name and on what basis and who the people to be consulted are, etc. But it was learnt from the officials that the respective Minister is consulted before the appointment of the Chairman by the President. The Minister, before recommending any name, consults the permanent secretary of the Ministry. In appointing the other board members the Minister generally consults the Chairman because top management is expected to work as a team and it is important for the chairman to know the other members of the Board. In some cases the Chairman of the corporation initiates the suggestion to the Ministry. Generally the Ministry suggests two or three names to the President but before any name is confirmed the President consults the Minister. The President sometimes appoints directly without consulting anyone. Once a name is recommended by the Minister to any post the President seldom objects because before recommending the Ministers informally agree with the President on the name.

It could not be learnt what criteria the government applies in appointing the chairman and the directors. It seems the Memorandum was mainly issued in order to standardise the conditions and privileges of the Board of Directors in different Corporations. By doing so it also legalised the appointment of military and civil bureaucrats in different managerial posts in Public Corporations. It may however, be mentioned that the Military government, even before this Memorandum, appointed a few military officers. On enquiry about the chairmen and other directors appointed since 1972

<sup>18</sup> Government of Bangladesh, Ministry of Establishment, Memorandum No. Estb (Rule 4) Misc. 687.3/200.

in the three corporations under study, it was found that professionals serving for a long time in the corporations were mostly appointed in these corporations. In all other corporations the chairmen and directors were appointed mostly from civil service or from the armed forces (both retired and serving). It was alleged by 90% of the officers of different corporations interviewed that the officers from the armed forces seldom showed much understanding of the technical and commercial aspects of the operations of the corporations while civil servants, although having some skills and are closer to the overall policies of the Government, were not sufficiently oriented to the exigencies of the industrial and commercial world. The situation worsened because often chairmen and directors were transferred to another job or reverted back to army or civil service for reasons of administrative exigency. This created more problems than it solved because by the time the appointees get to learn the intricacies of the job they were replaced by one who would also take some time to learn and by the time he learns, he is transferred. The cycle in this way went on and on.

S.M. Al-Hussainy (now Chairman of the Public Service Commission) in a paper presented in a seminar<sup>19</sup> correctly wrote:

Government's right as the owner of the enterprises to appoint the members of the Board and its Chief Executive and keeping them on their toes for likely removal at any time is understandable..... But what is not clear is the necessity to appoint people without sufficient education, skill and experience in the business of the enterprise.....

The appointment of the chairmen and members of enterprise board is the statutory power of the corporation. But all appointments are generally approved by the Minister not because this is a requirement of law but because the corporation board wants the firm backing of the Minister. In some cases the Minister directly appoints them. A few Members of Parliament from the ruling party are also appointed chairmen of the enterprise board.

<sup>19</sup> S.M. Al-Hussainy, "Rise and Fall of Public Enterprises", a paper presented at the seminar on Public Enterprises in Baghdad, organised by BPAIC [unpublished], on the 16 and 17 March, 1986, p.4

## 2) Directives:

Another major means of policy control envisaged in the *P.O. 27 of 1972* is the power of the Government to give directives to the Corporation Board of Directors in discharge of its functions. Article 11(2) says, "the Board shall be .... guided, in the discharge of its functions, by such general and special instruction, as may from time to time, be given to it by the government." Here the use of the word 'instruction' instead of 'directive' is worth noting. The general practice is that all directives are to be published in the official gazette and the government is accountable for them in parliament. By the deliberate use of the word 'instruction' the government is not required to make it public and hence can avoid the responsibility.<sup>20</sup>

As far as the constitutional theory of public corporation is concerned the directives should be of general nature on matters of policy involving public interests, but from the above article it is evident that the article conferred the power of giving specific instruction.

Theoretically speaking the system of control through directives has various advantages. In so far as the directives are confined to matters of general policy, they emphasize the division of responsibilities between the executive and the enterprise-policy versus management. Even when the directives relate to specific matters, they provide a clear method for the statement and communication of government policy. Directives increase the pressure for principled rather than *ad hoc* intervention. They help in the evaluation of the performance of the enterprise, because losses and inefficiencies resulting from the implementation of the directives cannot be ascribed to the enterprise. They can also be the basis of calculations of compensation to be paid by the government to the enterprise for pursuing non-commercial goals.

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<sup>20</sup> Gathered from interviews with some government officials

Despite these considerable theoretical advantages, little use is made of these formal directives. There are a number of reasons for this. First, the government is reluctant to accept responsibility for its actions. Second, there are alternative methods of control whereby the government can achieve the same objectives without perhaps the same degree of accountability.

In practice the power to issue instructions is used very sparingly, and 'general policy' is interpreted liberally. The government generally prefers to use advice, persuasion and informal pressure. A directive, somehow, is considered in the nature of 'overruling' an enterprise, or the government imposing upon a recalcitrant unit, and is, therefore, avoided. It is, of course, desirable for the instructions to be written rather communicated by phone or any other method in order that the public and parliament may know where the responsibility lies for certain crucial decisions taken.

Less formal but quite a common instrument of control are circulars issued from time to time by different ministries. The circulars are meant to serve a variety of purposes. For example, they may communicate policy, co-ordinate and also provide advice. The number of executive orders that are issued by different ministries is enormous. Once an order is passed, it is circulated to all organisations "*for information and necessary action*" regardless of their relevance. However, depending upon the nature of their contents, the enterprises give them weight according to their own judgement and approach. Sometimes circulars passed by a ministry contradict circulars of other ministries and clarifications and reversals take up quite some time. There is usually no systems approach in promulgating rules, regulations or issuing executive orders to guide the corporate management. More often than not, they stem from reactions of the government to sporadic happenings, but however, well intentioned they may be to correct errors, set the order and bring about a uniformity of practice, a series of *ad-hoc* directives do not necessarily add up to a systematic whole.

In Bangladesh, often unstructured interferences are made. Unstructured interferences are those interferences for which there is no formal provision in the instruments of government business applicable to public enterprises. They stem from either political preferences or personal interests and reasons of patronage. Top officials are often the source of such interventions. Enterprise managers generally collude, sometimes directly and sometimes passively, in the hope of favours or under fear of losing the job. In such system of wide scale unstructured interventions the managers take advantage of them for personal ends resulting in the development of a union of illegitimate interests between the managers and their masters.

### 3) Approvals.

Another instrument of control is through the mechanism of government approval, audit report and inspection. In Bangladesh certain decisions of the Board cannot be effected without the approval of the executive. Approval of the government is a must in most cases relating to the financial affairs of the enterprises. The Annual Budget Statement of the enterprises need approval<sup>21</sup>, investments also need approval; accounts are audited not only by an external auditor, but at times by the commercial audit office of the Auditor-General. The government has the right to extend the scope of audit including procedures of audit.

Though the budget of the enterprises is approved before the commencement of the financial year, the enterprise needs the permission of the government for procurement and expenditure beyond certain specified amounts. The borrowing of the enterprises requires ministerial approval. New investments, diversification and modernisation of the enterprises also require government approval. Bylaws made by the corporation in exercise of its power under article 17(3) of the *P.O. 27 of 1972* also require prior government

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<sup>21</sup> See article 19 of the *P.O. 27 of 1972*.

approval. The corporations are also entitled to make regulations in regard to their working and operations, which are subject to government approval.

*The Nationalisation Order of 1972* contains only few wide provisions regarding government control. But numerous matters of detail are contained in the rules made by the government from time to time. Indeed, the government enjoys authority over a large number of subjects through its rule making and regulation-approving powers.<sup>22</sup>

#### 4.2.3. Areas of Control.

##### (a) Finance

The finances of the wholly government owned public enterprises in Bangladesh are derived from the following sources<sup>23</sup>, a) grants made by the government and local bodies, b) loans obtained from government, c) loans obtained from other sources with general and special sanction of the government, d) foreign aid and loans, e) sale proceeds of bonds, securities, debentures and similar instruments issued under authority from government, f) all fees, levies, charges and rates received by the enterprise, g) sale proceeds of excess raw materials, finished goods, disposal of assets etc., earning from services rendered and i) earnings from investment.

The most extensive and elaborate controls relate to finance. Financial controls provide the basis for other controls, e.g. the choice of technology, location of projects, investment policy etc. Management of finance forms the core of overall management since every decision in an enterprise is ultimately a financial decision. Financial controls have assumed great importance in view of the fact that enterprises frequently need financial injections even sometimes for their current operations, and many need inputs from abroad

<sup>22</sup> The various rules and regulations are not available to the public. The fact that these are not always gazetted as such are treated as confidential. Even when these rules are gazetted from time to time, they are not of help because the dates of their publications are not easy to know and it is often difficult to obtain the relevant gazettes.

<sup>23</sup> Taken from enterprise officials.

which require the use of tightly controlled foreign exchange. Moreover, public enterprises do not have access to the commercial capital market. Enterprises turn to the government for their equity and borrowing. Industrial enterprises requiring special dispensation to overcome their liquidity crisis need the intervention of the sponsoring Ministry, Ministry of Finance, Bangladesh Bank (central bank of the country), the appropriate corporation and occasionally even the cabinet.

Foreign borrowing are also controlled by the government through the above mentioned agencies in addition to the External Resources Division of the Ministry of Finance. All agreements with foreign agencies are vetted by the Ministry of Law and the Ministry of Foreign Affairs as well as the Bangladesh Bank if any bank guarantee is involved. Financial controls have also developed due to Parliament's traditional concern over the allocation of money from the treasury and over its expenditure. A further reason for their importance lies in the fact that it can be easily quantified and a control over money can be used to bring about other forms of control. As a result of the importance of financial controls the Ministry of Finance assumes a key role in the regulation of public enterprises.

The law requires that all public corporations to submit their annual budget to the government for approval. The budget to be approved by the government covers revenue expenditure because capital budget expenditures (except those covered through surplus in the current budget and so appropriated with the concurrence of the government) are part of the ADP (Annual Development Plan). The enterprises are required to obtain permission of the Government, particularly of the sponsoring Ministry and Ministry of Finance in respect of disposal of surplus.

The corporations prepare their budgets according to specifications laid down by the Ministry of Planning and submit them to their respective administrative Ministries. The Ministry after due consideration sends them to the Ministry of Finance. The relevant divisions of the Planning Commission hold detailed discussions with each corporation

about their investment portfolio for inclusion in the ADP.<sup>24</sup> In this task they are guided by the experience of the corporation in the previous year and its actual expenditure capabilities in the current year. The final programme for the corporation is then collated with similarly discussed budgets from other corporations and aggregated into the development budget for the public sector. These worked out projects are, however, liable to cuts even when the same is finalised in view of the availability of resources and claims of other sectors. Further cuts are again negotiated by the division with the corporation. These cuts could go all the way through to the end of the cabinet decision approving the budget. The Ministry of Finance then integrates them in the national budget which, after the approval by the cabinet, is presented to the Jatiyo Sangshad.

It has now become a practice that although a financial budget for each corporation and enterprises under them are prepared at the beginning of each financial year, following a long and cumbersome procedure, these budgets require revision from time to time due to many factors, like inflation rising beyond expectation, fluctuations of currency in international markets, or delay in aids/loans/grants in time etc. One researcher<sup>25</sup> found that owing to unscientific capital expenditure planning and control the actual costs of almost all enterprises exceeded both the original and revised budget estimates from 1% to 118%.<sup>26</sup> It was found during research that the planners every year failed to estimate the working capital requirements resulting in the shortage and liquidity crisis.<sup>27</sup> Therefore, enterprises take the exercise of presenting budget demands to the government lightly, on which intensive technical inputs ultimately proves wasteful.<sup>28</sup>

<sup>24</sup> See Government of Bangladesh, Ministry of Law and Justice, *Public Corporations (Management Co-ordination) Ordinance, 1986*, Ordinance No. XLVII of 1986.

<sup>25</sup> M. Z. Hoque, *Financial Planning and Control in Public Sector Industries in Bangladesh*, unpublished Ph.D. thesis, Department of Finance, University of Dhaka, 1981.

<sup>26</sup> *Ibid.*, p. 213.

<sup>27</sup> M. Z. Hoque found that financial management inefficiency is the most vital factor leading to the bad financial performance of public enterprises in Bangladesh. *Ibid.*, p. 6.

<sup>28</sup> One senior official of BSSE, while discussing this point with me commented, "Though the annual budget works as a guide, it ends up as an internal document".

Moreover, the government annual budget is mainly 'resource-based' while the enterprise budget is 'need-based'. Above all, the finance ministry always feels constrained in funds and public enterprises need funds, even, sometimes, towards working capital and to improve the utilisation of capacity already set up. Therefore, public enterprises demand more funds in accordance with their needs. The finance ministry, on the other hand, finds it difficult to allocate them on grounds of scarcity of resources. The finance ministry in fact allocates money without knowing the needs of the individual enterprises under the Ministry of Industries. While allocating the money the finance ministry often cut the requirement of the Ministry of Industries in a mere arithmetic manner, i.e., a per centage cut in original demand, or allocates in an *ad hoc* manner. The chances of getting funds depend on the bargaining ability of the parent ministry with the finance ministry or the President's office. The allocations mostly depends on the mutual personal relationships amongst the parties involved. Thus, the budgetary process encourages *ad hoc* triangular bargaining among the corporation, the Ministry of Industries and the Ministry of Finance which ends up in the nature of a distribution of patronage. At the end, some enterprises feel abandoned in mid-stream.

The entire process of financing gets complicated by the system of annual lapsing of funds. Enterprises which do not utilise the allotments in a given financial year, even for cogent reasons and in the interest of economy of expenditure, tend to forfeit the allotment. This encourages them to draw the fund and use them up, even if spending them later on might be more economical.

Since, a cut of the demands made is expected, the enterprises follow the familiar trick of over-demanding, with the expectation that, after the inevitable per centage cut, enough funds may be received.

Thus, both economic logic and empirical review suggest that the present system of budgeting and financing are in need of fundamental change. The enterprises should be treated as investments; and the treasury should look for investment incomes in term of

cash every year. Where reinvestment is needed, the government should, as far as possible, openly rank as a shareholder or as a lender.

**(b) Investment**

Investment is another important area of executive control over public enterprises. Control over public corporations is exercised through their development budget for financing investment. Investments and capital expenditures require executive approval and the process of investment approval is a very complex one.

The Planning Commission is the main government agency which allocates resources for the development activities of the public corporations, particularly the expansion of existing capacity in an enterprise, including balancing and modernization of equipment and/or setting up of new projects. Individual enterprises submit their BMRE (Balancing, Modernization, Reconstruction and Expansion) programmes to the corporations controlling them. The corporation prepares a consolidated proposal on behalf of the corporation and submits it to the sponsoring Ministry after due consideration of all the proposals of the individual enterprises under it. The corporation determines the priority and take decisions about which enterprise under its control needs to be expanded or modernized or proposes to establish a new enterprise. The sponsoring Ministry in turn submits the proposal in the form of a working paper to the relevant technical division of the Planning Commission for inclusion in the ADP for the release of funds. The request for funds may have a domestic and a foreign resource component. Domestic resources are provided from the revenue surplus of the government on current account or by borrowing from the nationalised banks. The foreign exchange component comes entirely from foreign aid or credits. This means that any project from the public sector included in the development budget either has to have foreign credit already available or to have it lined up during the financial year. Negotiations with foreign agencies are the responsibility of the Planning Commission.

The feasibility of new investment projects, before inclusion in the budget, have to be evaluated and approved. Such projects are prepared according to a Project Evaluation Proforma (PEP) prepared by the Planning Commission, which takes account of the opportunity cost of such resources as foreign exchange, labour and other inputs. The technical division of the Planning Commission sifts the requests of all the corporations through mutual consultation with the corporations and tries to modify the projects list and works out a schedule of priorities in case there is shortage of funds. The evaluation of the project is submitted to an interministerial committee chaired by the member in charge of the relevant sector in the Planning Commission. Once the project is approved by the committee it is submitted to the National Economic Council (NEC), a sub-committee of the cabinet for final approval. The NEC's approval is usually a matter of formality, but decisions take time due to delays in convening the NEC. The approval of the project itself is not a guarantee of funds but is a precondition for funding from the ADP.

The net result of this funding procedure is that the corporations have no control over the shape, size or phasing of their investment portfolio. They can only voice their intentions and have to wait for the eventual approval of the budget in the cabinet meeting finalising the ADP in June of each year to know whether their plans can go ahead or not. Even here the phasing would be uncertain since this depends on aid being lined up and the phasing of the aid proposals for the project.

The decision making process on investment is a long and dilatory one. There is a large element of uncertainty and the enterprises are unable to plan ahead; the enterprises themselves have little say over their future plans and investments; and although the legal formulation envisages merely approval by the executive, in practice, decisions are made by the executive and foisted on the enterprises, frequently against their better judgement. It was reported by the Secretary General of the Consultative Committee of Public Enterprises (CONCOPE)<sup>29</sup> that the government, in principle, agreed that the public

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<sup>29</sup> CONCOPE is discussed later in the chapter.

enterprises should be allowed to invest directly part of their surplus in joint ventures or to invest in their modernisation.<sup>30</sup>

### (c) Prices

One of the major factors determining profit or loss of any enterprise is the pricing of product and their marketing. The pricing problems of public enterprises are important because most of them are monopolies. The problem of pricing is aggravated because of the lack of clarity on the cost to which to relate a price, on the financial objectives, and on the adequate managerial incentives for improved performance.

In Bangladesh the price of product of public enterprises is often controlled by government thus causing loss at times. The government imposes one-sided control on the price of the end products while it has no control over the price of inputs which seriously hampers the economic profitability. The effort of the enterprises is directed primarily towards fulfilment of the production targets in order to show their performance but due emphasis is not generally given to marketing. In most cases the enterprises do not have the liberty to sell their products at their discretion, resulting in stock piling, with its dangerous consequences in some of the enterprises.<sup>31</sup>

Procurement prices of some of the agricultural products like jute and sugar cane, which are used as main raw materials for jute and sugar industries, are also fixed by the government.<sup>32</sup> This fixing of prices of raw materials by the government causes problem of procurement and ultimately affects productivity and profitability of the enterprises. For example, the price of jute in the open market was very low in 1983.<sup>33</sup> As a result the

<sup>30</sup> See 'Secretary General's Annual Report', published in the CONCOPE Journal, Post-Flood Issues, 30.10.1984, p.21. The decision of the government was never implemented.

<sup>31</sup> M. Islam, *Business in Bangladesh*, 1981, p.209.

<sup>32</sup> For a detail of pricing of products of public enterprises see, S. Jahan, 'Pricing and Subsidy in Public Enterprises', paper presented at a seminar on *Public Enterprises in Bangladesh* [unpublished], organised by EPATC from 16-17th March 1985.

<sup>33</sup> Information derived from discussion with General Manager (Audit) BJMC.

growers were in trouble. In order to bail out the farmers, the government instructed the nationalised jute mills to procure jute at a fixed price determined by government which was much higher than the market price. Again, the nationalised mills were obliged to buy certain quantities of jute which they did not require. The prices of sugar cane is fixed below the market price so the sugar cane producers do not get an incentive to grow enough sugar cane for the mills. Moreover, the growers sell their sugar cane to private parties at a higher price.

Theoretically the government directly fixes the prices of only three essential goods, viz. fertilizers, sugar and newsprints. The prices of all other products are supposed to be determined by the enterprises in consultation with their respective corporations.<sup>34</sup> But practically, the government has a big say in determining the prices of all products of the public enterprises. Increase of prices beyond 10% requires approval of the government.<sup>35</sup> The administrative Ministry is constantly kept informed about changes in the prices of products.

The prices of the products determined by the government is much lower than their production cost, not to speak of any profit. The prices of 80% products of BCIC are fixed by the government.<sup>36</sup> On many occasions, the government approval on price adjustment proposals was delayed and even refused.<sup>37</sup> As a result, the price adjustment could not be made for many years, thus seriously affecting profit. Although the cost of production increased due to factors beyond the control of the corporation, such as devaluation of Taka, enhancement of wages and salaries, upward revision of gas and electricity prices and the impact of inflationary tendency on the overall economy.<sup>38</sup> Price adjustments to

<sup>34</sup> Letter from Mr. Awarazzeem Choudhary, Joint-Secretary, Ministry of Industries, Government of Bangladesh.

<sup>35</sup> See Ministry of Industries, *New Industrial Policy*, 1982.

<sup>36</sup> M.A.Rashid, 'Industrial Development of Bangladesh: A Case study of BCIC', paper submitted to the EPATC in partial fulfillment of the requirements for successful completion of the sixth Summer Staff Course held from the 17th October, 1987 - the 21st January, 1988, p.30.

<sup>37</sup> *Ibid.*

<sup>38</sup> For example, the cost of production in the gas consuming enterprises increased by Tk. 162.50 million due to the enhancement of gas price by 20%. Moreover, the cost on account of imported pulp increased by Tk. 74.20 million due to higher price of pulp in the international market and devaluation of taka in 1986-87. But the selling price of fertilizer, paper and newsprint could not be revised by the corporation in keeping with the rising cost of production. It may be mentioned in this connection that the selling price of newsprint was fixed at Tk. 14,000.00 per ton including subsidy from government in October 1982. Since then the cost of

reflect changing circumstances are often delayed and fall short of what is needed to keep up with rising costs.

The government, of course, has the right to determine the prices lower than the cost price in the pursuit of social goals like consumer subsidies, control of inflation, and resource mobilisation. It is however important that when prices are so fixed, the enterprises should not be blamed for inefficiency or loss. Either the government should transfer a compensatory sum to the enterprise or the accounts of the enterprise, and other publicity, should make the cause of the loss clear.

However, in an ordinance in 1986, the government took the responsibility of reimbursing to a public corporation the financial loss incurred by it or by any of its enterprises "consequent upon the following by it or by such enterprises of any specific instructions given by the government on matters relating to the business or administration of such corporation or enterprises."<sup>39</sup> But serious doubts have been raised by the officials of the corporations; after three years of the Ordinance no concrete step had been taken to reimburse the loss. Even in future if this provision of the Ordinance is implemented, it is unlikely that the government would promptly reimburse the amount. There is danger that by the time the corporations receive the money, its value shall have declined due to inflation while the corporations would carry on with the burden of paying the bank interests.

The above ordinance failed to ensure that executive control do not unduly restrict enterprise autonomy in determining its price structure while ensuring that the pricing policies of the enterprises do not represent an abuse of monopoly power, where the

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production has gone up to Tk.15,725.00 per ton due to an increase in salary and wages in June 1985. Thus the corporation was incurring a loss of Tk.1,725.00 per ton of newspaper. But still October 1987 the government did not approve the proposal of B.C.C. to raise the price. In October 1987 the price was raised to Tk. 16,750.00 per ton including the government subsidy of Tk. 3,000.00 per ton. It may be mentioned that the export price of newspaper in 1987 was Tk. 17,500.00 per ton. In the same way, the price of fertilizer produced in Ghosaul and Farachangai was fixed at Tk.3,039.00 per ton and that of fertilizer produced in Zia Fertilizer Factory at Ashangai was fixed at Tk.4056.00 in July, 1985, the average price being Tk.3,600.00 per ton. But subsequently the price of gas and electricity went up, and the wages and salaries increased. As a result, the cost of production increased to more than Tk.4000.00 per ton on average. Learn from interviews with a senior official of B.C.C. who wished to remain anonymous.

<sup>39</sup> See section 11 of the Public Corporation (Government Co-ordination) Ordinance, 1986, op. cit.

enterprise enjoys it. Most of the periodic interventions by the executive in fixing the prices turn to be *ad hoc* in nature and inconsistent among different enterprises and consumer groups.

**(d) Personnel**

In the area of personnel the control by the government is extensive. The corporation or enterprise management is not free to prepare and staff its own organisation structure. The corporations are required to submit an organisation chart with a staffing pattern through the administrative Ministry to the Staffing Pattern Committee of the Establishment Division. An inter-ministerial committee meets to decide on the acceptability of the proposed pattern. Commenting on personnel control in Bangladesh, Sobhan and Ahmad write:-

The approach of the bureaucratic machinery to staffing patterns is tradition bound, office oriented and static. It normally does not take adequate cognizance of the needs of a growing enterprise nor of the externalities of on-the-job training. The basic approach fails to appraise the rationale of the organizational structure, job specifications, specialisation and span of control. Instead it demonstrates an inherent desire to administer cuts for the sake of asserting the principle of control. This in itself takes time and constrains the enterprise from equipping itself to discharge its responsibilities effectively.<sup>40</sup>

Furthermore, the government retains the prerogative to stop recruitment either as a measure of economy or as an attempt to relocate surplus personnel. The government determines the wages, fringe benefits and incentive bonus for the public enterprises. One National Pay Scale has been introduced both in the civil service and in the industrial sector. This was done under the apparent policy of establishing parity with the civil service. But this brought down the financial benefits of the employees and managers of the public enterprises to what they used to enjoy before independence. So, there is little scope

<sup>40</sup> R. Sobhan and M. Ahmad, *Public Enterprises in an Intermediate Regime: A Study in the Political Economy of Bangladesh*, 1980, p.248.

to reward the managers and employees financially. Although the government had fixed the lowest level of pay for the industrial workers, this was far less than the minimum index of living. Unsatisfactory pay perhaps motivated the skilled workers, supervisors and managers to migrate to other countries, especially to the Middle East, in quest of better wages and salaries. Fresh recruitment of competent personnel to the managerial cadre was rendered difficult because of the absence of attractive terms and conditions of services.

On the other hand, many *ad hoc* employees were thrust upon various public enterprises by government for political reasons. These employees were maintaining their jobs virtually without doing any work. Some of the enterprises have fictitious labour force and at the end of the month the salaries of those fictitious employees are withdrawn by various labour leaders in conjunction with the management. These sorts of gross corruption and financial irregularities are used to pacify the labour leaders in order to destroy a healthy trade union movement. The labour leaders sometimes have the blessings of the government and the local management of the concerned enterprise in some cases was helpless in eradicating these corruptions due to the direct and indirect blessings of the government. In short, a sound personnel management policy is not pursued in the country.

Following the recommendations of the Enam Committee, the government took the decision on 24.7.83 that, "the corporations shall liberally offer contracts with appropriate salary and attractive terms and conditions of service to qualified and able persons having requisite expertise, experience and qualification."<sup>41</sup> But like many other government policies this has never been implemented and, given the dominance of bureaucracy in the Bangladeshi society, there is little hope that the bureaucracy will ever allow the employees of the public enterprises to get better salary levels than itself.

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<sup>41</sup> The decision of the government was published in Bangladesh Gazette Extraordinary dated 24.7.83.

**(e) Procurement**

Procurement by the public corporations is controlled by various government rules. The rationale for restricting the procurement by the corporations up to a certain limit is to check corruption and irregularities. Public enterprises are allowed to make purchases up to a certain limit. The limit is small for any enterprise. Beyond this prescribed limit, it has to be processed through the ministry for approval of the cabinet sub-committee. This limitation by the government in the name of checking corruption helped in the concentration of powers by the executive eroding autonomy of the enterprises. This has not only a negative impact on the operations of public enterprises but the constitutional requirement as to non-interference in the day-to-day operations of the enterprises is in effect violated. So far as corruption is concerned, the government has other means at its disposal for checking it. This limitation on the power of procurement constitute an important area of executive control and is seen by many officers of corporations as a means of direct interference with the day to day operations of the enterprises. The bureaucracy does not seem to loose control of the channels of corruption. It does not seem eager to stop corruption rather wants to have a due share in it.<sup>42</sup>

The Finance Division's office Memo No.MF/FD/ABWS-1/124/85 describes the limit of financial powers delegated to the public enterprises for procurement, as shown in the following table:-

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<sup>42</sup> Derived from personal interview with many persons of various professions

TABLE-7

## FINANCIAL POWER FOR PROCUREMENT OF PUBLIC ENTERPRISES

Name of agencies	Limit of financial powers
A. Enterprises	Upto Tk. 2 crores
B. Corporations	
a) large sector corporations/Autonomous Bodies viz. BADC/BWDB/PDB/BJMC/BTMC/BPC/BCIC/BSEC//BSFC/BOGMC	Upto Tk. 5 crores
b) Other Corporations/Autonomous Bodies and Executing Agencies	upto Tk. 2.5 crores
C. Ministers	upto Tk. 15 crores
D. Cabinet Committee on government purchase	Above Tk. 15 crore

Source: BSEC: Administrative and Financial Authority, 1988, p.25. Based on Government of Bangladesh, Finance Division's Memo No. MF/FD/ABW/S-1/124/85 dated 6.7.85.

The procurement procedure is no simpler than the investment procedure as discussed earlier. Let me first describe the procurement procedure in Bangladesh.

#### I. Procurement Procedure

Foreign procurement of materials is based on the Annual Import Policy published by the Ministry of Commerce and is divided into two shipping periods: July to December and January to June. 50% of the foreign exchange quota is available in each shipping period.

Procurement procedure of the corporation is laid down in the Manual of Purchase. The following procedure is followed in making purchases of materials from abroad.

Stores Purchase Requisition (SPR) is the basis of all procurements. The SPR indicates budgetary sanction and contains all basic important information regarding materials to be procured. On receipt of the SPR, Purchase Division of BSEC initiates procurement action in the following manner: if the purchase falls in the category of non-proprietary types and their estimated value is above Tk. 100,000, the item is advertised

through at least two widely circulated dailies (one Bengali and one English). If the goods are of proprietary nature, quotations are invited directly from manufacturers or their authorised agents irrespective of value.

Tender documents form the basis of evaluation and selection of any offer. Tenders must be accompanied by earnest money equivalent to 1% of the total quoted value subject to a maximum of Tk. 500,000 and minimum of Tk. 1 thousand. All purchases except cash purchase have to be processed through a Tender Committee. For purchases above Tk. 5 million Tender Committee composes of:

- |                                 |                    |
|---------------------------------|--------------------|
| 1. Secretary, BSEC              | : Chairman         |
| 2. Chief Finance Officer        | : Member           |
| 3. Controller of Accounts       | : Member           |
| 4. Head of concerned Division   | : Member           |
| 5. Head of concerned enterprise | : Member           |
| 6. General Manager (Purchase)   | : Member Secretary |

The finance Division of the Corporation is entrusted with the responsibility of arranging foreign exchange allocation from the government for financing all imports whether made by the corporation or by an enterprise.

As soon as the purchase order is placed with the supplier, BSEC processes application for import licence to be issued by the Controller of Imports and Exports (CI&E). Letter of Credit (LC) is opened in the nominated commercial bank in favour of the supplier.

Foreign procurement is mostly done against Credit/Grant/Barter/Trade Agreements with foreign countries or agencies etc., having their own rules. The purchase is made by the Purchase Division of BSEC in accordance with the terms and conditions of the respective protocols. The involvement of the government and the specific rules contained in Credit/Grant/Barter/Trade Agreements make the procurement procedure highly

complicated and lengthy often resulting in the failure of contracts, shipment, nonavailability of required type of raw material at needed times and in most cases materials are procured at high prices due to tied nature of sources.

Two specific cases<sup>34a</sup> of foreign procurement of raw materials during financial year 1986-87 made by the BSEC for Chittagong Steel Mills Ltd. (CSM) are described below as examples to show the complexity of the procedure. The two cases i) procurement made by BSEC requiring the approval of the Ministry of Industries (sponsoring Ministry) and ii) procurement made by BSEC clearly illustrates the extent of government controls over public enterprises. The cases will show that public corporations ought to be given meaningful practical autonomy and not the autonomy in theory.

## **ii. Two cases of foreign procurement.**

### **a. A Case of Procurement through the Ministry**

The first case deals with import of (i) 10,000 MT (metric ton) of Heavy Melting Steel Scrap No.1 and (ii) 10,000 MT Bundle Steel Scrap No.2 for CSM. As the cost of the purchase was more than Tk. 5 crores (10 million = 1 crore) it was beyond the financial limit of BSEC therefore, had to be sent to the Ministry of Industries for approval.

Since the inception of CSM, almost all its steel scrap requirement has been met by importing against international tender. During the initial years, out of the total requirement of about 70,000 MT, only 5-6 thousand MT of steel could be procured locally per year and the rest was imported. From 1981-82 ship breaking industries started growing up in the country creating an alternative source of scrap for the CSM. Government also directed Bangladesh Railway to supply all its scrap to the CSM. It was felt that these sources could sufficiently meet the needs of CSM. Therefore, the government banned import of scrap in 1982. Since then the CSM had been using locally procured steel scrap. From 1984-85 the situation began to change; many re-rolling mills were set up and started using steel scrap

<sup>34a</sup> The information, in the two case studies, is derived from relevant files of the BSEC, made accessible during field work conducted in connection with the present thesis.

as raw materials. With increased demand for scrap, its price also went up and the ship breakers found it more profitable to supply the scraps to the re-rolling mills. On the other hand supply of scraps from Bangladesh Railway continued to decline.

In order to meet the situation, the CSM made a detailed proposal to the BSEC on 11.9.85 for import of 10,000 MT of heavy melting steel No. 1 and 10,000 MT of bundle steel scrap No.2 during 1986-87. The BSEC in turn sent the proposal to the Ministry of Industries (MOI) on 16.10.85. On 3.11.85 the MOI asked the BSEC to furnish the following information: i. price of scrap procured from local sources and ii. estimated price of imported scrap, if import is allowed. After getting the information from the CSM, BSEC supplied the detailed information as asked by the MOI on 1.4.86.

On 27.8.86 a meeting was held in the MOI with the representatives of the BSEC and Ship Breakers Association (SBA) where it was decided that the SBA be allowed to take part in the international tender and they would enjoy 15% price benefit as usual.

After a series of correspondence between MOI and BSEC, the MOI approved in principle the import proposal after nearly a year. On 13.10.86 the MOI advised the BSEC for obtaining Right to Refusal (ROR)<sup>43</sup> from the MOI.

International tender notice appeared in the national dailies on 23.10.86. In response to the tender notice, 14 and 11 quotations were received for the two items respectively. The SBA did not participate in the tender, but made a representation that they were willing to supply scrap at the rate of Tk. 5500 per MT against import price @ TK. 6000 per MT. On 21.2.87 the BSEC wrote to the MOI objecting the representation and stated that the lowest bidder offered to supply @ US \$ 103 i.e Tk. 3130.44 per MT.

Three bidders, namely, Trade Venture, Meghna Enterprises and Jamal & Brothers claimed themselves to be the lowest bidders. All these three parties managed to get

<sup>43</sup> According to the Customs Division's office Memo No. MBG (POLICY)-2/ACDHS dated 9.4.82, government agencies of the government institutions system will first obtain the "Right of Refusal" (ROR) from the MOI before they place orders for their requirements with the foreign suppliers. This system has been introduced as a check on the use of imported materials when local products could meet the requirements.

recommendations in their favour either from the Deputy Prime Minister (who was in charge of MOI) or the State Minister for Industries.

Two meetings of the Tender Committee of the BSEC were held on 14.12.86 and 19.1.87 respectively to consider the tenders. The recommendations of the Tender Committee were placed before the Board of Directors. The Board at its meeting held on 31.1.87 accepted the offer of M/S. Trade Venture, being the lowest bidder, for supply of 10,000 MT (+ - 10%) HMS scrap No.1 @ US\$ 112.22 per MT and also the offer made by Meghna Enterprise, being the lowest bidder, for supply of 10,000 MT (+ - 10%) HMS scrap No.2 @ US\$ 95.90 per MT. Since the estimated values of steel scraps was US\$ 2,289,320.00 (Tk. 70,723,047.00), the Board recommended sending the proposal to the MOI for approval. On 5.2.87 BSEC sent the proposal along with the following papers to the MOI:

- a. Minutes of the meetings of the Tender Committee,
- b. Resolution of the meeting of the Board of Directors,
- c. Filled in proforma prescribed by the MOI,
- d. Tender documents.

The CSM, in the meantime, sent reminders on several occasions stating the alarming situation of the stock of raw materials (steel scraps) it had.

On 8.2.87, BSEC requested Trade Venture and Meghna Enterprise for extension of their Bank Guarantee of earnest money and the validity of their offer up to 15.3.87. Accordingly these two firms extended their validity of offer and Bank Guarantee. Finally, the tenders received approval from the MOI on 12.3.87.

It is curious to note that even after the approval of the tenders by MOI, it requested the BSEC for submission of necessary papers/documents for issuance of ROR on 15.3.87. It is to be recalled that the BSEC had already done so on 1.11.86 and on 23.11.86 once again sent a reminder to the MOI. On receipt of the letter from the MOI, BSEC with

surprise on 20.3.87 wrote explaining the position to the Ministry that the procurement proposal and the tenders had already been approved. Order was issued in favour of M/S Metalink Marine Corporation, USA (Principal of M/S Meghna Enterprise) for supply by May, 1987. Trade Venture did not submit performance guarantee and as such instead of issuing supply order to it BSEC initiated the process of procurement under STA/Barter.

#### **b. A case of Procurement directly by the Corporation**

This case describes import of 3,500 MT (+ -10%) Cold Rolled Steel Strips (CRSS) under Barter/STA for CSM during Financial year 1986-87. On 11.4.87 BSEC invited tenders from 11 agencies for supply of the above quantity of CRSS for CSM since these 11 agencies were registered agencies to supply the specific item under Barter/STA. In response to the tender invitation, 3 tenders were received, from M/S Bangladesh Export Import Co. Ltd. (BEXIMCO), M/S Transcom Ltd. and M/S Inter-Trading Ltd.

The tender Committee in its meeting held on 20.4.87 decided that BEXIMCO, the lowest bidder, would furnish the name of the country of origin of supply and the last date of shipment. Keeping in view of the increasing trend of price of CRSS in the international market and also taking into account the stock position of CSM, it was also decided that additional 3,700 MT of the same item might be procured from Transcom, the second lowest bidder. The Tender Committee also decided that Transcom would be asked to say whether it was willing to supply at the lowest price quoted by BEXIMCO along with the country of origin and last date of shipment.

Tender Committee again met on 21.4.87 and the committee was informed that BEXIMCO mentioned that Belgium would be the country of origin of its supply and also indicated that shipment would be possible by August 1987. Transcom informed that it could not contact its principal due to Easter holidays and requested the extension of its offer up to 22.4.87. The meeting recommended to accept the tender of BEXIMCO and

decided that the last date of acceptance of offer would be 27.4.87. The Tender Committee also agreed to extend the validity of offer up to 22.4.87 as requested by Transcom.

On 22.4.87 the recommendations of the Tender Committee were placed before the Board of Directors meeting and the Board accepted the recommendations. On the same day Transcom replied to BSEC to the effect that it was ready to supply at the price quoted by BEXIMCO, Belgium would be the country of origin for supply and August 1987 would be the last date of shipment. On 26.4.87 Transcom in supersession of its previous letter informed BSEC that the country of origin for supply would be South Korea in lieu of Belgium.

On 28.4.87 the recommendation of the Tender Committee for accepting the offer of Transcom was placed before the members of the Board of Directors through circulation. Instead of considering the case the members decided to hold an emergency meeting. Instead of holding an emergency meeting of the Board, on 6.5.87 the recommendations were again placed before the members of the Board of Directors through circulation and it was approved.

On 20.5.87 a meeting was held in BSEC to consider certain amendments of terms and conditions of the tender submitted by BEXIMCO. The amendments as proposed were (a) acceptance of charter party bill with the condition of liner delivery and (b) acceptance of the thickness of 0.70 mm instead of 2.50 mm of the inner tube sheet of coil. These were approved and a proposal of BEXIMCO for supply of additional quantity of 300 MT CRSS was approved as well.

Another meeting was held in BSEC on 29.6.87 to consider the request of Transcom for extension of last date of shipment up to October, 1987 and it was approved. On 30.8.87 Transcom wrote to request for some modification of CRSS was approved on 2.9.87.

In a telex message dated 29.9.87 Transcom informed BSEC that the shipment of 2999.08 MT out of 3700 MT had already been done and requested extension of period of shipment for the remaining part up to 31.10.87. The Corporation approved the extension.

From the analysis of the two cases described one can see that in the case of the procurement involving permission of the Ministry it took about one and half years to take a decision on procurement of the raw materials (during this time on several occasions CSM informed about the alarming situation of stock); while the procurement by the corporation took only 4 months time. If the enterprise i.e CSM was allowed to procure directly probably it would have been much earlier.

Secondly, with the present delegated financial power to corporation i.e Tk.50 millions, it was learnt from the officials of CSM that it is possible for BSEC to import 2300 MT BP sheet which can cater the needs of CSM for 15 days only. Likewise a quantity of about 8,000 MT steel scrap/pig iron can be imported with the same amount of money. But the monthly requirement of BP sheet is 4,500 MT and that of pig iron and steel scrap is 8,000 MT each. In consideration of the monthly needs of the CSM I was told that 10,000 MT is economic. But the value of import of this quantity would go beyond the financial power of BSEC.

Thirdly, the time lag involved in the first case may be attributed to the delay in decision making process caused by lengthy and cumbersome procurement procedure.

Fourthly, the work of the MOI seemed to be ill co-ordinated and too bureaucratic. This is evident from the fact that on 13.10.86 MOI advised BSEC for obtaining ROR which the BSEC did on 1.11.86 and BSEC issued a reminder on 23.11.86 about the issuance of ROR. But it was noticed that even after the approval of the procurement proposal by MOI on 11.10.86 and approval of tenders on 12.3.87, MOI on 15.3.87 asks for submission of necessary papers/documents for issuance of ROR.

Fifthly, external pressure made procurement slow. As we find in case no.1 that Chittagong Steel Mills (CSM) was very concerned with pressure of the private suppliers mostly from the SBA (Ship Breakers Association). This is another example of the correctness of my hypothesis made in chapter 1 that public enterprises in Bangladesh were used by the state to create a class of indigenous bourgeoisie. CSM expressed concern to BSEC in its letter dated 28.5.86, "we request to protect CSM from the far-reaching collusive activities of SBA..." We also noticed that three bidders got recommendations from the DPM and State Minister for Industries and thereby tried to influence BSEC.

Sixthly, we have noticed that the corporation did not explain why instead of calling a fresh tender the second lowest bidder was given the contract to supply 3,700 MT and what was the compulsion to agree to the proposals of the two bidders to change the specifications. It may be a possibility that had the changed specification been announced and a fresh tender called more bidders could have participated even with lower price.

Thus we see that procurement of materials in public enterprises suffers from many ills and bad tradition like lack of proper coordination between procurement and production departments, untimely requisition, inadequate check and inspection and biased attitude. It was alleged by officials and trade union leaders that the procurement of spores and accessories is made more or less from a selected few businessmen. Sometimes poor quality raw materials rather than those specified are purchased and the public enterprises are compelled by the government to accept them.<sup>64</sup> It is to be borne in mind that cost of raw materials constitutes a major cost component and the malpractices in procurement adversely affect the performance of public enterprises for which they are blamed for no fault of theirs.

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<sup>64</sup> 82% of the officials and trade union leaders, out of 77 interviewed, expressed the same opinion

#### 4.3. Accountability of Public Enterprises in Bangladesh.

In addition to maintaining control over the public enterprises during a financial year the government monitors the performance and conduct of public enterprises periodically (generally after a financial year) against pre-determined norms and targets. Article 22(2) says, "a corporation shall, as soon as possible after the end of every financial year, furnish to the government a statement of accounts audited by the auditors.....together with an annual report on the conduct of its affairs for that year." This *a posteriori* control can be termed as accountability<sup>45</sup> which means the public enterprises are responsible to explain their conduct/performance.<sup>46</sup>

We can therefore state that accountability exists when there is some form of a principal-agent contract.<sup>47</sup> In case of public enterprises in Bangladesh the target mutually agreed by the government and the corporation serve as the said contract. We can similarly identify the form that accountability must take when we have established the terms (i.e. the actions required) of the contract.

*P.O. 27 of 1972* emphasises the role of audit as the primary method of evaluation.

Public enterprises are required to keep proper accounts and other relevant records and prepare annual statement of accounts, including profit and loss account and balance sheet.<sup>48</sup> The prepared accounts are audited by at least two Chartered Accountants within the meaning of the *Chartered Accountants Ordinance, 1961 (Ordinance X of 1961)*

<sup>45</sup> "The term accountability means the oath, requirement, or responsibility to provide an account (by no means necessarily a financial account) or reckoning of the actions for which one is held responsible." R.Grey, D.Owen and K.Maudsler, *Corporate Social Reporting, Accounting and Accountability*, 1987, p.2.

<sup>46</sup> M.Ahmad, Law, Organisational Framework and Management Infrastructure of Public Enterprises in M.Ahmad, *State and Development: Essays on Public Enterprises*, 1987, p.48.

<sup>47</sup> The practical meaning can be more clearly illustrated by talking in terms of 'principals' and agents. The terms 'principal' and 'agent' are used in their common law of contract sense, to mean one party (the agent) acting on behalf of some other party (the principal). There exists, between the principal and agent, a contract which delineates the rights and duties of the parties. The contract need be neither written nor explicit. Under the contract (usually implicit), the principal typically gives instructions to the agent or what actions are expected of him, gives some considerations (typically remuneration) and some power over resources with which to fulfil those actions. In so doing the principal places two responsibilities upon the agent: responsibility for action, responsibility to account for those actions, i.e. accountability. For more detail of the theme see R.H. Gray, 'Accountability, Financial Reporting and for-profit Organisations', in *The British Accounting Review*, vol. 15, No. 1, pp.3-23.

<sup>48</sup> Article 21 (1) of *P.O. 27 of 1972*.

appointed by the government.<sup>49</sup> The auditors in their report upon the annual balance sheet and accounts are required to state "whether in their opinion the balance sheet is a full and fair balance sheet and contains all necessary particulars and is properly drawn up so as to exhibit a true and correct view of the state of affairs of a corporation and in case they have called for any explanation or information from the Board, whether it has been given and whether it is satisfactory."<sup>50</sup> The government also retained the right to enlarge or extend the scope of audit including procedures of audit.<sup>51</sup> The audited accounts are then submitted to the administrative Ministry and are published in the official gazette.<sup>52</sup> The reports are then submitted to Parliament.<sup>53</sup>

In all cases the Government Commercial Audit is undertaken after the periodical internal audit by the Corporation auditors and statutory annual audit in accordance with Article 21.(2) are completed. Thus the Government Commercial Audit can be regarded as nothing but post-mortem review and analysis of the accounts and performance of the enterprises.

Apart from the Government Commercial Audit, the Auditor General has constitutional responsibility for ensuring that public funds are properly spent and managed. However, he has certain limitations as institution of evaluation. He cannot go sufficiently into the merits of any policy objectives or decisions of the enterprise.

The system of accountability through audit is more concerned with probity and the correct compliance with procedures, rather than with efficiency with which an enterprise had carried out its functions. Moreover, a careful review of the accounting and financial practices relating to public enterprises reveals that the costs, on the basis of which the net revenue figure is calculated, are not economic costs, and that the real net revenues are,

<sup>49</sup> Article 21 (2) of P.O. 27 of 1972.

<sup>50</sup> Article 22 (3) of P.O. 27 of 1972.

<sup>51</sup> Article 22 (4) of P.O. 27 of 1972.

<sup>52</sup> Article 22 (4) of P.O. 27 of 1972.

<sup>53</sup> Article 22 (5) of P.O. 27 of 1972.

therefore, lower than even the low recorded figures. Thus resulting in unnoticed losses sustained by the economy through the undervaluation of resources used by public enterprises.<sup>54</sup> The basic criterion for evaluation is financial measured in terms of money. The accounts and reports mostly fail to provide much information which could enable one to make an assessment of the performance of the enterprise and its contribution to national economic and social development. This is because it is based on the traditional company audit. The public enterprises need the vision of social audit. For example, energy used for a unit of output or wastage per unit of output is better indicated in social accounting than in financial terms, free from the changing price levels of product, energy and materials. It may be mentioned here that even now a days the private companies are more and more adopting social auditing to evaluate their performances.<sup>55</sup>

#### 4.4. Performance Evaluation

Performance evaluation is an attempt to establish how far an enterprise has achieved what it intended to achieve. The need for proper evaluation is increasingly felt because of the complicated nature of functions public enterprises perform. They have both commercial and extra commercial objectives. Thus only profit and loss based evaluation is not sufficient for them. Moreover, simple profit and loss account would give a very distorted picture of the situation since public enterprises are characterised by many price distortions. Indeed, the implications of the 'public' characteristic of the enterprises are not addressed by the evaluation processes designed so far. Therefore, the problem of evaluating the way in which the public and enterprise characteristics are synthesized is mostly left untouched.

In Bangladesh to help constant review of performance of the enterprises the corporations were required to submit their monthly MIS report to many government

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<sup>54</sup> The net revenue is the difference between revenues and costs as recorded in the accounts.

<sup>55</sup> For a detail of social auditing and the practices in private companies of UK, USA and France see Oney, Owen and Kaiti, *op.cit.*

agencies.<sup>56</sup> This adds up to a tremendous workload of reporting. The MIS Division of BSFIC, for example used to issue 19 regular reports, and many *ad hoc* reports. Most of these reports contained duplicate data which was already available e.g. in the standard monthly MIS report. There was no standardisation or co-ordination. Any government agency could call for any data at any time, and the public corporations had to meet the demand, whatever the cost. Bennet in his article mentions in detail the archaic condition of affairs. He writes, "despite this volume of data, government agencies never seem to have the information they need."<sup>57</sup> Thus, it seems there is clear influx of aimless routine information into government offices, which helps neither evaluation nor control in a logical manner.

In order to solve the problem, the Ministry of Finance, in association with the Ministry of Industries, since 1984 has worked out a project for development of management information system (MIS) and performance evaluation of public enterprises. The project is designed to implement a system to provide government agencies with information which is regularly required for (i) budgetary and financial control, (ii) financial, economic planning and policy making and (iii) performance evaluation.

Since then, a system called SABRE (System for Autonomous Bodies Reporting and Evaluation) involving computerised database in the Monitoring Cell collects regular information on standard input forms and the computer then generates standard (output forms) reports for distribution at regular intervals to major users, such as President's Secretariat, Finance Division and External Resources Division of the Ministry of Finance, Planning Commission, Ministry of Planning, Ministry of Industries, Ministry of

56. For example BSEC MIS report of July 1988-May 1989 was sent to as many as 62 organisations/persons. (See BSEC office memo no. BSEC/MIS/07.00/88-89/ 4809 dated 21-06-1989.) They also report on their activities quarterly. Apart from the administrative Ministry, they are required to report to the Ministry of Planning (Implementation, Monitoring and Evaluation Division). They report on their utilisation of foreign aid to Ministry of Finance (DIA). Reports are also regularly submitted to the President's Secretariat, all wings of Ministry of Finance, Planning Commission, Ministry of Commerce, Ministry of Labour, Bangladesh Bank, Bureau of Statistics etc. It was noticed that same data is reported in different formats to different agencies; e.g. industrial production is reported to the Ministry of Finance, Planning Commission (General Economic Division, Evaluation Section, Money, prices and Private Investment Section, National Income Analysis Section and Industrial Sector Division), Ministry of Planning, Ministry of Industries (Production cell and Corporate Bodies Wing), National Centre for Monitoring Labour Productivity and Bureau of Statistics.

57. A. H. M. Bennet, 'Performance Evaluation and Monitoring of Public Enterprises' in the *COMCOPE Journal*, vol. 4, No. 2, 1986, p.21.

Commerce, Bangladesh Bank, Ministry of Labour and Manpower Development. The data base is accessible to major users through terminals in their offices. The system considerably helped in minimizing the amount of duplication in reporting.

One of the main objectives of the project is to set up a workable system of performance evaluation which is based on criteria agreed in advance by each corporation and the government. Each enterprise under a corporation submits its MIS report to the Corporation. A monthly co-ordination meeting is held between the representatives of the enterprises and the Corporation. In the meeting performance of each individual unit is reviewed and discussion regarding all difficulties, shortcomings and bottle-necks are held and remedial actions are suggested. Results of actions taken again is reviewed in the next co-ordination meeting.<sup>58</sup>

System of performance evaluation is directly linked with the system of accountability. Since public enterprises have been established by the state involving public funds it is necessary that government should constantly monitor their performance in order to ensure judicious, efficient and economic use of public money. Government is also expected to ensure that such public enterprises, by operating at their attainable capacity and achieving their respective objectives discharge their social responsibilities and thus help achievement of overall socio-economic goal of the nation.

The performance of public enterprises can only be judged by a set of criteria for evaluation of performance and in Bangladesh the criteria of evaluation have nowhere been laid down. Traditional profit and loss account was kept and used as the determinants of the performance of the public enterprises. The assumption behind commercial audit is that since public enterprises in the field of industries operate like the private enterprises therefore they should keep accounts in the same way as the private enterprises. An enterprise earns revenues and it incurs costs in earning revenues. The difference is either

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<sup>58</sup> For detail of the system see M. Mostafizuzzaman, 'Accountability of Public Enterprises in Bangladesh', *Management and Development*, vol. 17, No. 3, 1985, pp. 107-127.

net profit or loss. Moreover, profit and loss account is well understood document whose variables can be easily quantified in terms of money. But it gives rise to confusion between the government and the corporations because traditional profit and loss account does not take into account the loss suffered while performing extra enterprise duties or the loss due to the fixation of lower prices by the government. Moreover, why should public enterprises use the same tools and criteria since they are set up for different purposes from private enterprise?

There are certain limitations in the use of profitability solely to measure the performance of public enterprises. The limitations are i) public enterprises have non-commercial objectives and it is very difficult to quantify them in terms of money, ii) profitability of an enterprise as shown by the profit and loss account is often different from its true economic profitability, iii) multi-period effects of action are not same in every year, iv) accounts are kept in terms of Taka, and the Taka is losing value as inflation continues year by year, hence can give a very misleading picture, for instance an enterprise which appears to have made a profit may have made a real loss and v) there are also factors beyond the control of the corporation.

In 1986 the government promulgated the *Public Corporations (Management Co-ordination) Ordinance 1986*<sup>59</sup>. Section 9 of the above ordinance speaks about performance evaluation in the following words:-

9. Performance evaluation.-(1) Every public corporation shall prepare an annual performance report in respect of itself and its enterprises and submit it to the Ministry or Division which has administrative control over it within such time as may be specified by the Council.

(2) The Ministry or Division to which the report has been submitted shall forward it to the Ministry or Division dealing with finance, together with its comments thereon, within one month of its receipt and that Ministry or Division, in its turn, shall forward the report to the Council, together with its comments thereon, within similar time.

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<sup>59</sup> Government of Bangladesh, Ministry of Law and Justice, *The Public Corporations (Management Co-ordination) Ordinance, 1986, Ordinance No. XLVI of 1986.*

(3) An annual performance report to be submitted under subsection (1) shall be accompanied by an audited statement of the accounts of the public corporation and its enterprises.

(4) The Council shall determine the method for its evaluation of performance of public corporations and their enterprises and shall use the annual performance reports submitted under subsection (1) as the basic document for such evaluation.

(5) The Council shall complete the evaluation of performance of a public corporation and its enterprises within three months from the date of receipt by it of the annual performance report of the corporation under subsection (1) and shall submit a report, containing the results of such evaluation, to the President and send a copy thereof, together with its recommendations, if any, to the Ministry or Division which has administrative control over the corporation.

(6) The Ministry or Division receiving the copy of a report under subsection (5) shall take, as expeditiously as possible, all measures necessary for implementation of the recommendations, if any, of the Council.

Thus, from the section it is evident that the Government realised the need to switch over from the traditional profit and loss accounting system to an alternative system. The section does not talk about any criteria to evaluate the performance instead it allows the corporation to work out its own system of evaluation and report to the administrative Ministry. The section merely determines the procedure to deal with the performance evaluation report sent by public corporations.

The above mentioned Ordinance says, "A corporation shall prepare management objectives for itself and its enterprises.....and shall submit the same to the Ministry or Division which has administrative control over it..."<sup>60</sup> on the basis of "general guide-lines for preparation of management objectives"<sup>61</sup> prepared by the Council for Public Corporations. The guide-lines are prepared "at least six months prior to the commencement of every financial year."<sup>62</sup>

During the planning/budgeting process, each enterprise management meets with the corporation Head Office, and agrees what its objectives should be in the next year,

<sup>60</sup> Section 7(2), *The Public Corporations (Management Co-ordination) Ordinance, 1986, op. cit.*

<sup>61</sup> Section 7(1), *ibid.*

<sup>62</sup> *Ibid.*

how each objective should be measured, what percentage weight should be given to it, and what should rate as poor, fair, good, very good and excellent performance with regard to each objective. Any number of objectives can be listed, provided their measurement, weightage and scaling can be agreed. It does not matter that some objectives may be associated, e.g. profit and production, since this can be allowed for in choosing weights. Weight must add to 100%. The scaling is negotiated having regard to past performance, and expected future conditions and constraints. The Corporation then consolidates all its enterprises and submits the consolidated report to the administrative Ministry. Every public corporation, at least three months prior to the commencement of a financial year, prepares a statement indicating the production target, profit and performance criteria to its administrative Ministry.<sup>63</sup> Once the corporation submits its management objectives to the administrative Ministry the Ministry examines them. It has a right to make modifications.<sup>64</sup> The Ministry in its turn forwards it with its comments to the Council for Public Corporations for approval. After the approval with or without modifications it is sent back to the Ministry and Corporations. The Council after co-ordinating the management objectives of the different public corporations and making necessary modifications, gives its approval to them and informs the respective public corporations and their administrative Ministries or Divisions as the case may be, at least one month before the commencement of the financial year.<sup>65</sup>

The corporations agreed in principle to use Performance Index Method to evaluate their performance. The essence of the system is that the corporation should prepare a list of all objectives for a year itself. Once the list of objectives is prepared then the corporations weight the importance of each objectives and put an index value to each of the objectives to determine the grading of performance. The performance criteria are

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<sup>63</sup> Section 8(1), *ibid.*

<sup>64</sup> Section 7(3), *ibid.*

<sup>65</sup> Section 7(4), *ibid.*

finally set out on a Performance Evaluation Grid as will be illustrated in the example provided later.

The main features of the performance index method are agreement by the enterprise and its evaluating authorities before the start of the period. During the year actual performance is measured and combined into an index in the same way, and reported to both enterprise management and the supervisory authorities. If corrective action appears to be necessary, such action is then taken. However, theoretically the benefit of the method is that clear objectives will make day to day interference in the enterprise management unnecessary. Any unwise interference can be used to escape responsibility. The management is offered an additional incentive to improve performance by giving them a bonus based upon the actual achievement.

Although the performance index system has been accepted in principle but due to practical problems like deciding the precise weight an enterprise wants to put on a specific item and then get it agreed both by the corporation and the government. Moreover, different enterprises of the same corporation put different weight on the same item which would not allow the corporation to judge the comparative performance of different enterprises if each of them are judged by different parameters. But from the theoretical point of view it is definitely a right step considering the fact that the government realised the need to change the present defective system of performance evaluation based on profit and loss accounts.<sup>66</sup> Moreover, performance index system represents an attempt, even if incomplete, at treating evaluation as a system.

In absence of practical details I am using a hypothetical example cited by Bennet to illustrate the working of the system.<sup>67</sup> Bennet takes the example of BTMC because the

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<sup>66</sup> This approach has recently been applied in Pakistan, in enterprises under the Ministry of Production. However, the tangible results of the workings in real life are not known. For a detail of Pakistan system see S.A. Nawab, 'Evaluation of Public Enterprises: The Pakistan Signaling System', *Public Enterprise*, vol.5, 1965, pp.155-163.

<sup>67</sup> See Bennet, *op. cit.*

corporation produces only cotton yarn and cloths while BSEC enterprises produce varieties of products and hence is easy to illustrate.

**TABLE-8**

**BD. Textile Mills Corporation: Performance Evaluation Grid**

Criteria (Perf. indicator)	Weight	Poor 0	Fair 10	Good 20	V.Good 30	Excell. 40
1. Net profit before tax (lac taka)	50%	less than 1550	1550 -1850	1850 -2050	2050 -2150	2150 or more
2. Production of yarn (lac lb.; 32 count)	20%	less than 1100	1100 -1200	1200 -1250	1250 -1350	1350 or more
3. Production of cloth (lac yards; 54 pick)	10%	less than 590	590 -635	635 -675	675 -720	720 or more
4. Inventory of stores, spares and finished goods (% change during a year)	10%	10% incr or more	3-10% incr.	3% decr. 3% incr.	3-10% decr.	10% decr. or more
5. Employment (increase in authorized posts filled during year)	10%	less than 100	100 -170	170 -230	230 -300	300 or more.
	100					

Performance is monitored regularly during the year on each of the chosen criteria, and review meetings are held to correct shortfalls and improve performance. At the end of the year, the over all performance index is evaluated as follows:

TABLE-9

BTMC:	Performance	evaluation	1984/85	(Hypothetical		figures)
	result achieved		score	X	weight	= index
1. Net profit	Tk. 1822 lac		10		50%	5
2. Prod'n of yarn	1264 lac lb		30		20%	6
3. Prod'n of cloth	681 lac yd.		30		10%	3
4. Inventory	11% increase		0		10%	0
5. Employment	168 more		10		0%	1
<b>Performance Index</b>						<b>15</b>

In this example the scores have been set so that the highest possible performance index is 40. This could be linked with an incentive system under which all senior management get a bonus of up to 40% of their basic salaries. In our example they would get 15% bonus.

#### 4.5. Parliamentary Control over Public Enterprises.

Theoretically Parliament, as the direct representative forum of the people, is the main body to which the government including the public enterprises are accountable. But in Bangladesh, Parliament did not function for more than 10 years out of 18 years of its existence. All governments, but the present one, have been changed through military coups. Governmental activities centre round the Military President and the very existence of the Parliament depends upon the President. Moreover the ruling parties in Bangladesh have always managed to capture more than two thirds of the total seats in Parliament which effectively reduced the position of the Parliament to a somewhat ornamental and formal one. In such circumstances the discussion on parliamentary control over public enterprises will be more a theoretical exercise than of any practical value.

Parliamentary control over public enterprises in theory are to be exercised mainly through questions and answers, debates<sup>68</sup> and by the two important Parliamentary committees namely Public Accounts Committee and Committee for Public Undertakings. There are number of instances when the committee recommended actions against corruption and irregularities of some politicians and bureaucrats, but instead, they were rewarded by the government.<sup>69</sup>

The four Parliaments (1973-75, 1979-82, 1985-86, 1988-90) spanning a period of 8 years, have failed to make any impact on the activities of public enterprises. The lack of interest of legislators in the public enterprises is manifested by the fact that the Public Accounts Committee (PAC) meet at irregular intervals. Even when PAC does meet, only few members choose to show up. It does not mean that all MPs belonging to the ruling party always turned a deaf ear to the affairs of the public enterprises or the country. The disaffection of party members were/are handled 'differently and outside the Parliament'.<sup>70</sup> The effectiveness of the parliamentary control over the government as a whole and public enterprises in particular also depend upon factors like qualities of the members, nature of the questions asked, knowledge of the members on technical issues involved. From the proceedings of the Jatiyo Sangsad<sup>71</sup> it is evident that most questions asked not well articulated and the answers are also kept vague. In the debates in most cases there is apparent lack of proper home work. M.Huq aptly describes the situation in the following words:-

The Parliaments, when in operation, have been found to have accentuated the centralizing tendency of the executive governments instead of restraining it.... The almost total and precarious dependency

68. Even in country like Britain with long parliamentary history, questions and answers did not prove to be very effective control because a minister may avoid to give an answer that contains useful information. There is a large degree of discretion on the hands of the minister in deciding whether a question is to be accepted or whether a question should be answered. (See *Report of the Select Committee on Nationalized Industry, HC 371, 1967-68*). In other words the government can manipulate many things including the parliamentary time. Therefore Parliamentary question does not provide any successful form of accountability.

69. Learn from discussions with 2 members of the Public Accounts Committee and from the minutes of the meeting of PAC. In fact, during the working of the committee, in dissent, one member of the Public Accounts committee (Mr. Nazul Islam Mondol, M.P.) told me, "the Committee is simply another jewel in the costly ornament called Jatiyo Sangsad worn by one of the poorest countries in the world."

70. M.M.Khan, 'Public Enterprises in Bangladesh: Context, Motivation and Leadership', *Public Enterprise*, vol 9, Nov. 3-4, 1985, p.320.

71. See the proceedings of Jatiyo Sangsad, *Jatiyo Sangsadsar Datarha* (in Bengali) [Debates of National Assembly]

of the members of the Parliament on the executive governments for their own enrichment or even survival may be regarded as the basic factor behind such a behavior.<sup>72</sup>

In short there is no meaningful parliamentary control over public enterprises.

The discussions in the previous sections would help us to sketch the structure of control over public enterprises in Bangladesh to provide some idea of the control hierarchy.

#### 4.6. Structure of Control.

Control structures have several tiers. At the bottom is the individual unit which may be an enterprise or a branch of a multi-branch enterprise. These units have very little policy making options. Even within the framework of their budget and programme, they do not enjoy any meaningful operational autonomy. For most decisions, in matters of personnel, procurement beyond a limit, finance, purchase, prices, investments etc they have to turn to the next tier i.e. the corporation.

It was clear that BSEC itself do not have adequate operational or managerial autonomy and hence cannot delegate what they do not have. But whatever autonomy it enjoyed, it did not appear that BSEC wanted to delegate it to the enterprises under its control.<sup>73</sup>

Above the individual enterprises stand the corporations which deal directly with the government. The individual enterprises are fully controlled by their respective corporations and the corporations are strongly controlled by the government. In practice government emerges as a multiplicity of public agencies and departments with divergent

<sup>72</sup> Md Muz, "Towards Understanding Relationship between the Government and Public Enterprises in Bangladesh: with emphasis on Public Corporations", paper presented at the seminar on Public Enterprises in Bangladesh [unpublished], organized by BPATC, 18-17 March, 1986, pp 7-8

<sup>73</sup> Almost all officers from BSEC interviewed by me made the point. Although they made it clear that whatever autonomy they enjoy they try to delegate maximum to the enterprise. But the enterprise officials did not think in the same way. From empirical review it seems the enterprise officials are more averse to trust.

goals and perspectives. Thus government control often is not integrated resulting in confusions which in turn hampers efficiency.

The third tier is the administrative ministry. This tier includes such ministries as Finance, Commerce, Planning, Establishment, Labour and Law. These ministries exercise independent control functions over the public enterprises. The administrative Ministry, Ministry of Finance and the Planning Commission are the most important supervisory bodies which among other things, oversee, regulate, advise, persuade and maintain almost a continuous liaison with public enterprises. Their role in controlling the operation of public enterprises is extensive and covers almost all conceivable areas of management.

The fourth tier is the Minister himself. His authority is co-extensive with that of the Ministry and beyond. The Minister is approached by the public corporations under his ministry on all policy issues as well as for protection from the proposed and actual interference or control of other ministries. His authority is particularly invoked against political pressures for patronage or for resolving labour disputes. The minister also conducts some of the review meetings and enterprise meetings.

The fifth tier of control is the Council for Public Corporations and the National Economic Council (NEC). The Council is the co-ordinating body with wide range of functions and controlling instruments at its disposal. The NEC approves all investment proposals and clear all economic policies.

The sixth tier is the President. His powers and authority are coextensive with the government, the people and the country itself. Obviously he has little time to devote to enterprises personally, hence formal control is through policy decisions sought on specific issues and appointment of the Board of Directors of the public corporations. But the intervention could go beyond this to removal of Chairmen/Directors and ordering an enquiry into the affairs of any enterprise. Theoretically, Jatiyo Sangsad is the final tier of control.

In addition to the regular government structure, frequent use has been made of special, *ad hoc* enquiries. These have been established at various levels by different authorities. They have been established either to investigate the conduct of particular enterprises or to examine the general structure of organisations and relationships with a view to reform.

In this complex structure of control there is no real co-ordination. There is a need for co-ordination of the various controls exercised by different public agencies and departments. From the point of view of enterprises this adds a new dimension to the problem of relationships with the state and creates the problem of a variety of signals. Unless the government co-ordinates various controls, there is the danger of conflicting directives or signals being given to enterprises. Co-ordination is also necessary to produce some coherence out of the multiple objectives and purposes of the enterprises and the interests which seek to promote themselves through the enterprises. Co-ordination is also required to introduce intra- and inter-sectoral balances in harmony.

#### 4.7. Co-ordination of Public Corporations in Bangladesh.

The Nationalisation Order 1972 did not create any single agency to co-ordinate the activities of different corporations. The government in 1986 promulgated an Ordinance to "provide for the co-ordination of management of the affairs and business of public corporations."<sup>74</sup> In order to achieve these objectives it created the Council for Public Corporations (CPC). The CPC consists of the following members:-

- a. Minister for Finance,
- b. Minister for Planning,
- c. Minister for Industries,
- d. Minister for Energy and Mineral Resources,

<sup>74</sup> See the *Public Corporations (Management Co-ordination) Ordinance 1986, op. cit.*

e. Minister for Commerce and

f. Ministers who have administrative control over any public corporation are also members in meetings which considers any matters concerning those corporations.<sup>75</sup>

The President nominates a member of the Council to act as its Chairman. Currently the Vice President, who is also Minister in charge of Industries, is the Chairman of the Council. The main functions<sup>76</sup> of the Council are to formulate guide-lines for preparation of management objectives and guide-lines for preparation of budgets by public corporations. The Council also approves production targets, profit and performance criteria, declaration of dividend, contribution of profit to government. The Council also periodically evaluates and monitors performance of public corporations. It has the prerogative to appoint various committees of experts to advise it in matters of management, technical matters, evaluation of performance etc.

From the composition of the Council it is evident that the government is aware of the problem of co-ordination among public corporations and thus a very high powered council has been created with relevant Ministers.

The Ordinance does not clearly speak about secretarial back up. It also does not mention which particular Ministry shall provide the secretarial assistance. The co-ordination process is going to be a continuous process and hence it is important that it has a location in a Ministry which has an overview of the total economy of the country. The Autonomous Bodies Wing (ABW) in the Ministry of Finance was working as the Secretariat for CPC. It was soon found that the ABW was unable to perform all the difficult tasks of the CPC except problems directly linked with finance. Thus, in a meeting held between the President and the representatives of CONCOPE, held on 25.8.1988 at the latter's secretariat, it was decided that a separate wing would be created at the Prime

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<sup>75</sup> Section 4(2), *ibid.*

<sup>76</sup> For the functions of the Council see Section 5, *ibid.*

Minister's secretariat which would work as permanent secretariat for CPC and also be concerned with matters connected with public enterprises.<sup>77</sup> It is interesting to note that although it was decided that the Prime Minister's secretariat will be the location of the CPC secretariat but the Prime Minister is not a member of the CPC. In fact it seems more logical for the Prime Minister to be the Chairman of the CPC. Many countries have a permanent secretariat which makes the work of co-ordination much easier.<sup>78</sup> Instead of having a body meeting on occasions of necessity a permanent co-ordinating body could be established which would improve and simplify channels of communications, help to unify and built up expertise in the government. This permanent body should represent the ministries, trade union and consumers- whose task would be to make policy guide-lines. But under the politico-economic realities of Bangladesh with the pre-dominance of military-civil bureaucracy one cannot expect such a wide representative body.

The Council seems too high powered with little day to day technical knowledge of the management problems. Perhaps a council with permanent secretaries and relevant experts instead of Ministers would have been more effective, with the proceedings being overseen by the cabinet. Perhaps the government created such high powered body in order to avoid another layer in the administration of public corporations. Since the Council started functioning only a year ago little is yet known.

Until 1980, there was no formal forum for the public enterprises to co-operate and co-ordinate amongst themselves and to mutually exchange view on matters of common interest. CONCOPE (Consultative Committee of Public Enterprises is now such an organisation.

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<sup>77</sup> The decision of the meeting of 25.8.88 was reported in the *CONCOPE Journal*, post flood issue, 1988, pp 45-49.

<sup>78</sup> For example in India RPE (Bureau of Public Enterprises) is a permanent co-ordinating body.

#### 4.8. CONCOPE and its Role

The notion that corporate public enterprises might benefit from the establishment of certain "common services" is not particularly new. In the early 1950's Herbert Morrison, urged the chairmen of the British Boards to create a common efficiency unit for their own use. As it was conceived by him, it would have been "a collective creation" of the boards, composed of able people, and available to any of the boards "for the investigation of 'headaches'."<sup>79</sup> But the boards then resisted the proposal, which they considered a reflection on their ability to administer their own undertakings.<sup>80</sup> Over the years, however the notion of common services gained some momentum in different countries like Yugoslavia, India, Ireland, UK etc.<sup>81</sup> The ICPE report on focal points noted that the array of interlinkages in which public enterprises are involved includes linkages arising within the family of public enterprises and strongly made out a case for the establishment of an organisation of the various public enterprises of a country.

Public enterprises in Bangladesh have been criticised even made scapegoats and sacrificed often without a proper and objective analysis of the causes of their inadequate performance. In the wake of some of the unfounded criticisms the public enterprises management found itself defenceless.

It was therefore necessary to have a separate organisation of the public enterprises, which would be able, not only to present their viewpoints and try to safeguard their legitimate interests but also be able to develop better cooperation and co-ordination among themselves. As a result Consultative Committee of Chairmen and Managing Directors of Autonomous and Semi-autonomous Bodies was established in October, 1980. Later in 1982 the name has been changed to CONCOPE (Consultative Committee of Public Enterprises). In March 1984 CONCOPE was formally registered under the *Societies*

<sup>79</sup> H. Morrison, *Government and Parliament*, 1954, pp.274-75.

<sup>80</sup> W. A. Robson, *Nationalised Industry and Public Ownership*, 1962 (2nd edition), pp.204-5.

<sup>81</sup> For a detail, see R. Weinstahl and C.O. Neill's (ed.), *Getting Together in Public Enterprise*, 1967.

*Registration Act 1860 (Act XXI of 1860)*. It was expected by the organism that it will help improve operational efficiency in public enterprises through adoption of better management techniques and to improve managerial skills in public enterprises.

The government, in November 1985, formally recognised it as the representative body of the public enterprises. The importance that government attaches to CONCOPE and the nature of functions it is expected to perform are underlined in a letter from the Cabinet Division, which quoted its specified objectives of helping in the growth of the economy, promotion of better co-ordination, of the functions and operations of public sector corporations and autonomous/semi-autonomous bodies, developing better management relationships and improving the overall level of efficiency of public sector organisations for ensuring adequate return on Government investments. It would be consulted from time to time (at least quarterly) on issues concerning the public sector enterprises and particularly in its close collaboration with all public sector corporations, autonomous or semi-autonomous bodies to develop sound practices for implementing Government decisions as well as for suggesting co-ordinated thoughts and ideas.<sup>82</sup>

Since 1984, CONCOPE has been holding regularly annual conferences and annual general meetings. Apart from holding its own Executive Committee meetings, it meets with the government, especially the President. The government has consulted CONCOPE on number of policy decisions and its members now serve in interministerial committees relating to income tax, sales tax, customs duty, excise duty, turn over tax, shop tax etc. It publishes a quarterly journal which focuses on trade, industry, economics and other aspects of public enterprises. Through the journal and other public relations exercises like bringing out special supplements in the National Dailies or Weeklies, CONCOPE tries to focus the activities of various public enterprises in Bangladesh to the public.

Thus, it has provided a forum for public enterprises to get together and discuss issues of common interests. In addition to its main function of providing a forum in which

<sup>82</sup> See Cabinet Division letter No. CD/C5/185/224 dated 13.11.85.

government leaders and managers of public enterprises can discuss issues of common interest, CONCOPE arranges training programmes and workshops for officers working at various levels in public enterprises.

It has provided a much needed lobby for the public enterprises to put their case, supported by facts and figures, to the rest of the society, and to protect the public enterprises against both uninformed and unfounded criticisms about their performance and succeeded in making the government realise and also to take measures to check undue political and administrative interference in their day to day work.

There is every reason to be apprehensive about the role it might take. It is getting to be too powerful a lobby that escapes meaningful accountability and oversteps its functions, thus creating a psychological contradiction with the bureaucracy and the private sector.

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**Privatisation in Bangladesh**

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**5.1. Introduction**

A review of the annual reports of various public corporations in Bangladesh reveals that public enterprises in most cases are not performing well as expected. This bad economic performance of the public enterprises is not unique to Bangladesh. The World Bank, in its 1983 *World Development Report*, concluded that the problem with public enterprises is economic inefficiency, leading to a financial burden which echoes throughout the economy. Privatisation offers one of the main solutions to the problems of inefficiency and bad economic performance of public enterprises which adversely affect economic development of a country. Hence, increasingly, the call is for "privatisation" because it is presumed that subjecting the public enterprises to the discipline of the market will *per se*, make them more efficient.<sup>1</sup>

Now, privatisation has become a universally popular phenomenon. Even in Eastern European countries it has become both an end and means to improve the efficiency of the public enterprises. The World Bank (IBRD) and other international financial agencies are not only emphasising the policy of privatisation but effectively providing technical support and financial assistance to accelerate the process of privatisation in the developing countries. This phenomenon has so much engulfed the world that now the question increasingly has become not whether to privatise but how to privatise fast. The recent changes in the Eastern European countries provide evidence to the above statement.

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<sup>1</sup> IBRD, *World Development Report 1983*, 1983.

There are variety of other reasons put forward for privatisation, see section 5.2 below.

The term "privatisation" has been used in the literature to refer to a number of developments,<sup>2</sup> such as the break up of the monopoly of a public enterprise, the liberalisation of licensing requirements and procedures (e.g. bus deregulation in Britain), contracting out specific activities to the private sector by public agencies (e.g. cleaning and laundry services in British hospitals, rubbish collection in municipalities) and contracting out the management of a public enterprise to a private company (quite common in some developing countries).

Privatisation is a socio-economic and legal process through which private entrepreneurs are induced to participate in the public enterprises. As a process, it denotes, reducing the roles of government, while increasing those of the private sector, in activities or asset ownership.<sup>3</sup> In its narrow sense, however privatisation means partial and full transfer of public sector enterprises from the state ownership to total, majority or minority private ownership or to private control. It goes beyond the simple transfer of ownership to cover, as well, leases and management contracts. At the broadest level, privatisation refers to the introduction of market forces into an economy, usually with respect to public enterprises.<sup>4</sup> Thus, privatisation encompasses the general reassignment of property rights from the state to the individual, contracting out the delivery of public enterprises to the private sector or cut backs in state activities to allow greater room for private initiatives. It is important to note that privatisation is often only an element of a broader economic policy (or reform) that may include deregulation and liberalisation with the emphasis generally as much on improving the efficiency of retained public enterprises as an effort to divest. Thus privatisation is to be understood not only in the structural sense of who owns an enterprise but in the substantive sense of how far the operations of an enterprise are brought within the discipline of market forces. However, in Bangladesh privatisation

<sup>2</sup> Ramaswami mentions that fifteen connotations were used in an European symposium, for details see V.V. Ramaswami, 'Privatisation: The UK Experiences and Developing Countries' in Ramaswami (ed), *Privatisation in Developing Countries*, 1989, p.62.

<sup>3</sup> E.S. Savas, *Privatisation: The Key to Better Government*, 1987, p.1.

<sup>4</sup> V.V. Ramaswami, *The Economics of Public Enterprises*, 1991, p.397.

seems to be applied in its narrow sense covering the transfer of commercially oriented public enterprises to private sector.

The aim of the chapter is to discuss the process of privatisation in Bangladesh, thus echoing my earlier concern with institutional design. The chapter also discusses the introduction of the holding company in Bangladesh as one of the techniques of privatisation. It will also throw some light into the performance of privatised industries. The central hypothesis of the chapter is that privatisation in Bangladesh was carried out not so much to improve the efficiency of public enterprises by bringing them within the discipline of market forces, but on ideological bias. As such like nationalisation, privatisation programme remains a superimposed policy of the executives without any public debate or the participation of the parliament. It was mentioned in previous chapters that nationalisation had been undertaken without adequate analysis of issues of institutional design and of institutional arrangements for relations with government. The techniques adopted for privatisation show a depressingly similar poverty of institutional and constitutional analysis.

This chapter will not deal with the theoretical and general broad debate, as to what privatisation can accomplish or is privatisation desirable, because of two simple reasons. The first, the thesis deals specifically with the public enterprises in Bangladesh and not about privatisation, which itself by its own importance should be the subject matter of more in depth research. Moreover, it is impossible to properly address the complex sets of problem connected with privatisation within the limit of this chapter. Secondly, the general and theoretical issues are well covered in the existing literature on privatisation.<sup>5</sup>

<sup>5</sup> See for example, E. Berg and M. Shirley, *Disinflation of State-Owned Enterprises in LDC's*, 1985; J. Vickers and G. Yarrow, *Privatisation and the Natural Monopolist*, 1985; M. Shirley, *Managing State-Owned Enterprises*, 1985; J. Kay, C. Meyer and D. Thompson (eds), *Privatisation and Regulation - the UK Experience*, 1988; P. Cook and C. Kirpatrick (eds), *Privatisation in Less Developed Countries*, 1988; V. V. Ramaswatham (ed.), *Privatisation in Developing Countries*, 1989; I. J. Cleyte and J. N. Choudhry (eds), *Privatisation and Deregulation in Global Perspective*, 1990; *The Economics of Public Enterprise* (especially last two chapters), 1991.

## 5.2. Rationale for Privatisation in Bangladesh

The rationale for privatisation differs from country to country, enterprise to enterprise.<sup>6</sup> In Bangladesh, the rationale for privatisation were not officially spelled out. However, the speeches of government leaders and the Industrial Policies announced after 1975 give some insight. Conceptually the reasons seem to be two, namely government policy bias towards market economy and the government's economic policy to assign greater role to the private sector in the industrialisation of the country.

Privatisation also reflected the realisation that public enterprises in Bangladesh were over-extended for the state to manage efficiently. It was too big and state was doing far too many things that could be done more efficiently by the private sector. These activities were diverting public money and managers away from more priority activities of government. Thus, the Zia government's main objective was to reduce the size of the state in an attempt to create a leaner and more efficient state apparatus. Therefore, logically, 'over extended' public sector required 'rolling back'. This over-extension of public enterprises was blamed for poor production performance and low profits or even losses. This general proposition is empirically unproven. There is insufficient evidence as to the inverse relationship between economic performance and the size of the public sector.<sup>7</sup>

Almost all publications of the Ministry of Industries regarding industrial sector made it clear that public enterprises in most cases are not performing financially well, hence they should be transferred to private sector which is more profit making.

While factually one cannot deny that there are many cases of financial losses in the public sector but as discussed in the previous chapter the losses may have been the result of wrong investment choices. Restructuring might have transformed the financial situation

<sup>6</sup> For rationale of the British privatisation, see D. Hoold and D. Suel, 'Privatising Public Enterprises: An Analysis of the Government's case', *Political Quarterly*, vol. 53, 1982, pp 333-347. Scrutinise the reasons for privatisation mentioned in the official documents, see for example, *White Paper on Worker privatisation in the U.K.*, Cmd 9734, 1984.

<sup>7</sup> An extensive review of public records along with research in this area conducted by BIDS shows that there is no empirical evidence in support of this policy assumption in Bangladesh. See R. Sabhan and A. Akbar, *Disinvestment and Industrialization: Profile and Performance*, (mimeo), Research Report New Series no. 30, BIDS, July 1984. Various researchers of other countries also did not find sufficient evidence to the above assertion. See C. Kirshenick, *State: Background Observations on Privatization* in Ramaswami (ed):1989, pp 94-95

into one of profits.<sup>8</sup> Moreover, the losses may be in the nature of "planned losses" in the sense that the enterprises may have been induced by the government to undertake investments and operations in the interest of achieving certain goals like regional development, workers' welfare, benefiting the consumers with prices lower than the production cost, etc. Therefore, performance of public enterprises should not only be judged by financial losses, performance in fulfilling 'non-commercial' objectives should have been taken into consideration. Thus the losses argument has to be judged with care; and symptoms have to be distinguished from root causes. Above all, there are many private enterprises whose performance are not at all satisfactory financially. Therefore, it is difficult to agree that the change of ownership will automatically bring profits.

It is often mentioned by government Ministers<sup>9</sup> the losses of the public enterprises are mostly caused by the government's bureaucratic and unproductive control systems and it is difficult to bring reforms. Therefore, it is claimed, privatisation will cure the roots of losses like slow decision making due to political-bureaucratic requirements, a preoccupation with procedures rather than results, a neglect of markets and clients and a management environment in which reward is only remotely related to performances.

Apart from the above reasons, conceptually, privatisation in Bangladesh shares many of the ideological underpinnings of the programme adopted elsewhere, for example, the assumption that privatisation will democratize capital by increasing the number of individuals and concerns responsible for the conduct and management of the production apparatus within the state. In industrialised developed countries, privatisation is seen as a way to bring stock ownership to the grass roots.

Another major argument in favour of privatisation in Bangladesh is to reduce fiscal and credit pressures. Governments since 1975 coup, are increasingly considering

<sup>8</sup> There are several instances of capital restructuring undertakes in Britain, which helped produce improved financial results in the subsequent years e.g. British Steel Corporation, National Freight Corporation etc., before privatisation, were making profit.

<sup>9</sup> See for example the interview of Mr. Moudud Ahmad, then Minister for Industries, with the *Wanddy Bichitra*. See *The Bichitra*, 21.9.86, pp.12.

privatisation as a means of getting rid of unprofitable public enterprises which require budget subsidies and continued infusion of credit aggravating the problem of budget balancing and contributing to inflation. The problem centres around the absence of an effective budget constraints. If the public enterprises are allowed to function on commercial principles and to borrow money from the financial market instead of government subsidising losses and more market discipline is introduced the problem could have been tackled.

Another reason behind privatisation is the desire of the government to respond to the expectations of its natural constituency by providing enhanced profit opportunities for the private sector. Privatisation help to ease the problem of public sector pay. The trade unions in the private sector are aware that excessive pay award may lead to bankruptcy but no such constraint exists in the public enterprises since public enterprises funds are connected with national exchequer and the government is unlikely to close the enterprises because of bankruptcy. However, privatisation is not the only solution to the problem of excessive pay demands, the problem can be solved by removing access to exchequer funds.

It would seem however, that the government's privatisation programme was undertaken more to please the donor agencies especially the World Bank and the IMF. Indeed, the need for privatisation was not felt by the government of Bangladesh but was super imposed by the World Bank, IMF and Western donor countries. The very Articles of Agreement of the World Bank required it "to promote private foreign investment by means of guarantees for participation loans and investments made by private investors."<sup>10</sup> It is well known that the policy of privatisation as one of the ways of implementing structural changes towards a market economy is a precondition of obtaining World Bank and IMF loans.<sup>11</sup> Thus the goals of privatisation, it seems, are political and ideological.

<sup>10</sup> Quoted from A.I. MacBean and B.N. Saravanan, *International Institutions in Trade and Finance*, 1981, p.213.

<sup>11</sup> Common features of economic structural adjustment programmes generally include a) to eliminate controls on finances and private enterprise, b) reduce the role of the public sector in the economy, c) adopt a wage-price policy that redistributes incomes from labourers to property owners, d) devalue the currency and remove foreign exchange restrictions etc. For details of the conditions attached to IMF loans see J.Williams (ed.), *IMF Conditionality*, 1983. Referring to IMF loan conditions, Martin Burke points out that the conditionalities have as their real objective for privatisation making third world economies more

Efficiency, development and other economic aims of privatisation are for the most part implied.

### 5.3. Background of Privatisation in Bangladesh

As discussed in chapter 1, although the Awami League government followed a policy of nationalisation, various measures were taken to strengthen the private sector side by side with it. The government, as early as 26th March 1972, in its industrial policy announcement, declared its decision to divest itself of enterprises with less than Tk.1.5 million in fixed assets.

In 1972 the government had to take over 786 abandoned industrial enterprises. Of these, 221 enterprises were placed under different sector corporations set up under *P.O. 27 of 1972*. Subsequently, after proper verification 77 units were deleted from the list of the abandoned enterprises, 163 were returned to their owners and 14 more considered to be commercial concerns. The remaining 311 enterprises were relatively small (less than Tk. 1.5 million) were placed under the management boards in various regions of the country. Thus they were kept outside the *Nationalisation Order 1972*. Divestment of these enterprises started in May 1972 under the Awami League Government and by September 1978, 211 units of this category were divested.

Since 1973, there has been always a policy of encouraging more private sector investment for the industrialisation of the country.<sup>12</sup> The only difference is that the Awami League government seemed to encourage private capital while at the same time keeping the public sector unaffected; the subsequent governments wanted to limit the size of the public sector to a minimum. The upward trend in the private sector investment since 1973 is shown in the table below:-

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dependent on outside capital. J.M. Barba, Private versus Public Construction in Honduras: Issues in Economics and Ideology in D.J. Cayle and J.N. Goodrich (eds), *Privatisation and Deregulation in Global Perspective*, 1990, pp. 213-233.

12. See chapter 1.

Table - 10

## Sanction for Private Industrial Sector Investment Since 1973.

Year	No. of unies sanctioned	Amount sanctioned (in million taka)	Actual investment
1973-74	295	87	82
1974-75	276	150	133
1975-76	265	702	198
1976-77	439	810	620
1977-78	552	2092	975
1978-79	749	2179	1050
1979-80	928	3034	1200
1980-81	1740	6680	1530
1981-82	607	2280	1060
1982-83	636	3740	1370
1983-84	2503	11180	1350
1884-85	*5505	9380	1140
Total	14495	42914	11708

\*Includes 2280 cottage industries.

Sources: FFYP, TYP, SFYP, TFYP.

Privatisation as a conscious policy of the government came into effect after the overthrow of the Awami League government by a military coup. Zia's military regime, in December 1975 decided to disinvest some of the abandoned enterprises placed under the corporations.<sup>13</sup> According to the criteria laid down by the Government of Zia, only those units which were comparatively small in size, uneconomical for the sector corporations to run, unprofitable and located in remote areas were to be privatised.<sup>14</sup>

The sector corporations under Zia regime prepared a list of enterprises to be privatised. The following table will show the sector wise number of enterprises listed for privatisation in 1977.

<sup>13</sup> See *Revised Investment Policy 1975*, op. cit.

<sup>14</sup> Government of Bangladesh, Ministry of Industries, *Papers on Objectives and Procedures for Disinvestment*, September 1978.

Table - 11

Sector	No of enterprises listed for privatisation in 1977-78.
Jute	6
Textile	3
Chemicals	38
Sugar and Food	17
Steel and Engineering	15
Wood Products	4
Total	83

Source: Ministry of Industries.

Thus the objective of privatisation was to streamline and improve the operative efficiency of management of the remaining public enterprises and to reactivate and invigorate the private sector.<sup>15</sup>

Side by side with it, a decision to return the specialised textile units to their former Bangladeshi owners was also taken. Later the government decided to return the jute twine mills to their former Bangladeshi owners from whom they were nationalised and to divest the abandoned jute twine mills. In order to implement the decisions of the government the P.O. 27 of 1972 was amended by a Martial Law Order.<sup>16</sup> These decisions have special significance because jute and textile mills were considered by the Awami League government as the hard core public sector.<sup>17</sup> Furthermore, the return of the nationalised jute and textile mills to their former Bangladeshi owners was considered by the government as a measure to create confidence in the minds of the future investors about the security of their investment. Apart from it, by September 1978, a total of 211 abandoned enterprises had also been privatised through public sale.

In June 1982 a *New Industrial Policy (NIP)*<sup>18</sup> was announced. The *NIP* sought to expand further the private sector while reducing the size of the public sector. It sought to

<sup>15</sup> *Ibid.*

<sup>16</sup> See the *Bangladesh Industrial Enterprises (Nationalisation) (Amendment) Order 1976*.

<sup>17</sup> Govt of Bangladesh, Ministry of Industries, *Industrial Investment Schedule for Two Years 1976-78 for Private Sector*, 1976, p.22.

<sup>18</sup> Government of Bangladesh, Ministry of Industries, *The New Industrial policy*, June 1982.

"limit role of the public sector to the establishment of strategic and heavy industries."<sup>19</sup> It confined the activities of public sector industries only to seven categories of industries and sought to reduce the size of the sector corporations. Thus the government changed the method of initiating new projects and allowed the private sector to invest in areas that were formerly the exclusive domain of the state. By a process of attrition, over time, the state is expected to control fewer and fewer transactions.

The success of the privatisation programme is connected with the private savings and their mobilisation. As mentioned in earlier chapters, private capital accumulation in Bangladesh was mostly the product of state sponsorship, proximity to administration etc. There was a huge amount of money illegally earned in the private hands which remained unutilised. Therefore, in order to invigorate the private sector by bringing unutilised ("black-money") funds into productive stream, the government promulgated Martial Law Ordinances exonerating those who would disclose such funds from criminal liabilities, provided such funds were used for new investments or purchase of disinvested units.<sup>20</sup>

Within one year time, i.e. by 1983, the military government of Ershad almost completed the privatisation of remaining abandoned enterprises. It further widened the scope of privatisation in the following directions<sup>21</sup>:

(a) Reduction in the size of the public sector corporation by disinvestment of abandoned/nationalised industries in a phased manner irrespective of the question of profit or loss of those enterprises;

(b) Privatisation of those enterprises which are established by the corporations with their own resources/ADP funds where such units are found to be unable to compete with private sector or are incurring continuous losses.

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<sup>19</sup> *Ibid.*

<sup>20</sup> How much of the legalized "black money" has been invested in the industrial sector is unknown. But from discussion with various persons it transpired that very little amount has been invested in the manufacturing sector. (Chapter 3 discusses at some length about black money and the Martial Law Ordinances exonerating persons who disclosed them and invested the money in Bangladesh.)

<sup>21</sup> For details see R/P 1086.

(c) Off loading of up to 49% shares of enterprises managed by sector corporations for public subscription or operation by the ICB in order to reactivate the share market; and

(d) Return of nationalised Jute and Textile mills to their former Bangladeshi owners/share holders in order to create investment climate and confidence in the minds of the prospective entrepreneurs.

(e) Provision was also made to appoint management contractors to run some of the bigger industrial enterprises in the public sector.

The following table will show the total number of enterprises privatised (only those which were placed under the sector corporations) and the corporation wise break down.

Table - 12

Corporation	Units before privatisation	Units privatised before 1982	after 1982	Total
BCIC	88	51	12	63
BSFIC	68	31	15	46
BSEC	64	22	13	35
BJMC	79	5	32	37
BTMC	60	4	28	32
BFIDC	22	3	1	4
<b>TOTAL</b>	<b>381</b>	<b>116</b>	<b>101</b>	<b>217</b>

Source: derived from data collected from the Ministry of Industries and Sector Corporations.

Between 1976 and 1989 a total of 217 enterprises were privatised. These constituted 56.9% of the total of 381 enterprises originally placed under the 6 sector corporations. Of the total 217 privatised enterprises, 116 were privatised during December 1975-May 1982 i.e. by the government of Gen. Zia. The remaining 101 were privatised within 16 months since July 1982 i.e. after Gen. Ershad came to power.

#### 5.4. Techniques used in Bangladesh for Privatisation.

Privatisation encompasses many different techniques and does not follow any single model.<sup>22</sup> It has taken different forms in different countries. Some states have resorted predominantly to the sale of shares to the general public, while others have sold shares or assets of public enterprises mainly to single buyers, and many have resorted to both. A number of governments also have used "non-sale" privatisation or what might be called "privatisation of management" such as management contracts and leases. There are first time privatisations of public enterprises originally established by the government, and there are many reprivatisation.

The most commonly used methods of privatisation are: public offering of shares, private sale of shares, new private investment in a existing public enterprise, sale of government or public enterprise assets, fragmentation (or break up into component parts), management or employee buyout, and lease and management contract.<sup>23</sup>

The legal form of organisation of public enterprises heavily influences the necessary mechanical steps for the transfer of their ownership and, therefore, also to a large extent the ease with which the process of privatisation can be implemented. For instance, a public limited company whose shares are already being traded requires a relatively simple privatisation process, consisting only of offering additional blocks of shares currently held by the state to the general public through the stock exchange. At the other end of the spectrum would be a public enterprise set up as a statutory corporation or a government department. Neither could be privatised in its current form but needs to be transformed into a stock corporation subject to ordinary company law of the country so that shares can be offered to the private sector. Legislation is necessary in such cases and personnel may need to be transferred from state to private employment regimes.

<sup>22</sup> For details of different techniques of privatisation see World Bank, *Techniques of Privatisation of State-Owned Enterprises* (Draft Report), Industry Department/Legal Department, July 1987.

<sup>23</sup> *Ibid.*

In case of Bangladesh, the following methods were used for privatisation, namely, sale of enterprises (mostly abandoned ones), return of jute and textile mills to their former Bangladeshi owners, partial public offering of shares and management contract to a private party.

This section will deal elaborately with the sale procedure, return procedure and partial offerings of shares but management contracts will be avoided because privatisation is used in its narrow sense i.e transfer of ownership from the state to the private sector.

#### **A) Sale of Public Enterprises**

A list of industries offered for sale was first prepared by the Ministry of Industries and a floor price called the "National Reserve Price" (NRP) was fixed by the government.<sup>24</sup> How the NRP was calculated nor the details of the pricing was made public. Only a consolidated figure was quoted.

Tenders were then invited for the sale of enterprises. The NRP was taken as a basis for considering the acceptance of price quoted by the bidders. An enterprise was sold at a price either at NRP or at the quoted price of the highest bidder, whichever is higher.

The successful bidder had to pay the quoted price in instalments. He was required to pay 25% down payment of the sale price for an enterprise situated in developed areas and 20% for an enterprise located in less developed areas. The balance was to be paid in three equal annual instalments for developed areas and four equal annual instalments for less developed areas. The payment of instalments began after the expiry of 24 months from the date of execution of the Deed of Agreement for sale.

The sale procedure did not attempt to curb the growth of cartelisation. Two adverse consequences on the distribution of wealth follow from this. First, the buyers

<sup>24</sup> For detail of sale/revival/return of abandoned industrial enterprises see S.H. Chisty, 'Privatisation in Developing Countries: The experience of Bangladesh', *Conference on Privatisation*, Asian Development Bank, Manila, January 31-February 1, 1983.

came from the wealthy section of the community. Second, if buyer is an enterprise in the same line, the degree of concentration on the supply of outputs increases. Since Bangladesh is dominated by a handful of big private groups the disadvantages of such concentration is likely affect the consumers. Indeed, 70% buyers were already incumbent in the sector. In retrospect, it now seems that the sale procedure was promotive of cartelisation hampering competition and fair play of market forces. Such sale of public enterprises thus, helped in the concentration of capital in a few hands.

Since no floatation took place, instead private bidding was the method of sale, therefore public disclosure of information through a full prospectus was not issued. The process was, indeed, shrouded in secrecy. This illustrates how privatisation took place away from the public gaze and with no national debate and minimum of information, even for the workforce involved. To treat such constitutional change as purely private matter is to outrage even the most attenuated conception of democratic accountability.

It is thus evident that the bidder paid only between one fifth and one fourth of the NRP. Moreover 90% out of 73 interviewed including officials of different corporations, trade union leaders and businessmen told that the NRP was fixed far below the actual market price. Above all enterprises were sold at easy terms, e.g., the terms of repayment etc.

#### **B) Return of Public Enterprises to their Former Bangladeshi Owners**

The government through Ministry of Industries and Commerce notification no. *JD/IC/TJM-1/82* dated 27.9.82 decided to transfer all the shares in industrial enterprises to their former Bangladeshi shareholders and published a list of industrial enterprises. In pursuance of the Second proviso to clause(2) of Article 4 of the *P.O. 27 of 1972* the government made offers to the persons entitled to receive payment of compensation under

Article 9 of the said Order to sell on the terms and conditions to the respective shareholdings in such industrial enterprises as on the date of nationalisation.

It is necessary to mention here that all these enterprises were incorporated under the *Companies Act 1913* as joint stock companies before nationalisation. Therefore in transferring the shares to their former owners, the above mentioned government notification simply made provision for the transfer of shares in the following manner:

The above mentioned government notification laid down the terms and conditions for the transfer. The price fixed for each such share remained same as worked out at the time of payment of compensation.<sup>25</sup> In cases where the Bangladeshi shareholders held less than 51% of the shares, they were required to buy additional shares to enable them to acquire controlling shares of 51% or more, before the actual transfer of management.<sup>26</sup> But the additional shares were to be sold on the basis of revaluation.<sup>27</sup> As to the payment of the original shares held the purchasers were required to pay 51% of the total value immediately and the remaining 49% within a period of 1 year.<sup>28</sup> For the additional shares the purchaser was allowed to pay 10% of the full value immediately and the rest within a period of 5 years in 10 half yearly instalments. In this case also it is evident that the government disposed of public property giving benefits to a few individuals whereas depriving the whole nation.

If the former owners refused to purchase the shares offered the shares were to be offered to other private investors. In absence of sufficient response from the private buyers the government reserved the right to sell them to financial institutions like BSB, BSRS, ICB, insurance companies etc. which held shares in the mills prior to nationalisation.<sup>29</sup>

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<sup>25</sup> Government of Bangladesh, Clause 2, Notification no. JD/ICT/M-182, dated 27.9.82 issued by the Ministry of Industries and Commerce.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Clause 3.

<sup>29</sup> *Ibid.*

The new shareholders were not allowed to sell their shares within the period of encumbrance without prior approval of the government.<sup>30</sup>

In case of failure to pay in due time the purchaser was liable to pay on the defaulted instalment a penal interest @2% above the contracted rate.<sup>31</sup>

The new shareholders were to accept the full liabilities of the company on the same terms and conditions as existed on the day of transfer.<sup>32</sup> They were also required to take over all staff and workers in employment on the day of transfer along with liabilities for service benefits.<sup>33</sup> In addition they were required to take over an agreed number of officers and staff, employed by the corporation, likely to be declared surplus after transfer of the mills to the previous shareholders from the Corporation.<sup>34</sup> Termination and retrenchment within a period of 1 year was forbidden.<sup>35</sup>

Thus it is evident that, although many of the enterprises privatised do not strictly, call for regulation after privatisation because of their size, the mantle of former public enterprise status persists, and a regulation against termination and retrenchment of labour was forced on them while there was no regulation against closure. The legislation involved is very much a skeleton structure and little provision is made as regards the design of the privatised company.

For uninterrupted operation of the enterprise the government reserved the right to form the first Board of Directors. This Board was to be a temporary one functioning for a period not exceeding one year or till a new Board of Directors is elected in accordance with the Articles and Memorandum of the company, whichever is earlier.<sup>36</sup>

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30. Clause 6.

31. Clause 7.

32. Clauses 9-12.

33. Clause 17.

34. *Ibid.*

35. *Ibid.*

36. Clause 13.

In case of the violation of any of the terms the government reserved the right to intervene in the affairs of the company.<sup>37</sup> But the government notification does not spell out the measures the government is likely to take in the event of violation of any of the terms, which means the government intended to leave a wide discretion with it.

By transferring ownership to the former Bangladeshi owners, the government denationalised 33 jute mills with a total national production capacity of about 38% and 27 textile mills with a spinning capacity of 45% and weaving capacity of 57%.

The following table will illustrate the number of disinvestments, (both category a and b), in Bangladesh as on September 1989:-

Table - 13

Categories	Number
1. Industries soldout/disinvested by DG Industries (small units not placed under any corporation)	269
2. Industries disinvested from the corporations	
a. Fully abandoned enterprises	125
b. Partly abandoned	38
Total	432

Source: personal collection from the MOI.

### C) Partial Offerings of shares

The government in its *NIP 1982* and *RIP 1986* decided to convert the sector corporations into holding corporations and the enterprises under them into subsidiaries and then to offer load 49% shares i.e the holding corporations to keep 51% shares in the subsidiaries. The proposal for the introduction of holding companies is thus seen as a preparatory step towards privatisation.

<sup>37</sup> Clause 17.

### 5.5. The Introduction of Holding Company in Bangladesh

The previous chapter concluded that although *P.O 27 of 1972* created sector corporations and placed different enterprises under them, these were no more than an administrative device of the government and were subject to extensive control and direction denying their legal or organisational form. It was mentioned that the problems of corporations were more or less connected with bureaucratisation of business, over - centralisation and interference by government in the day to day operations of the enterprises, lack of adequate and meaningful control by the government and its failure to ensure the accountability of the public enterprises. The bureaucratic structures of management and control resulted in the absence of effective market discipline and control in the operations of these enterprises. The prevailing system was eroding autonomy, inhibited management development, caused delays in decision making and reduced the public enterprises' capability to respond to changes in the market.<sup>38</sup> All these adversely affected the performance of public enterprises resulting in the necessity for more financial injection from the government. The financial problems of public enterprises in turn invited more government intervention seriously constraining their autonomy and entrepreneurial innovation and development. Thus a vicious circle is established.

Reforms to rectify the situation was felt necessary in all quarters (government, corporation and public in general). All reforms were directed towards enhancement of autonomy of public enterprises, introduction of market orientation, promotion of entrepreneurship and commercial behaviour.<sup>39</sup>

To alleviate the situation, the introduction of the holding corporation has been first suggested by CONCOPE. It was hoped, that the holding company would provide an organisational structure conducive to the efficient functioning of the public enterprise. The

<sup>38</sup> See *Enam Committee Report*, op. cit.

<sup>39</sup> See the *Cabinet Divisions Guide Book, MIP 1086*, *Enam Committee Report*, op. cit.

assumption behind such change of organisational form is that legal form of organisation is important to the efficient functioning of public enterprises. Thus CONCOPE attached considerable importance to devising a proper organisational structure for public enterprises in the belief that certain forms of organisations, rather than others, can be more conducive to the efficient functioning of the public enterprises through a proper division of authority and responsibility between the Government and the public enterprise management.

The holding company by serving as a buffer between the government and subsidiary companies can provide a high degree of autonomy to the subsidiaries. It would also be able to protect the operating subsidiary companies from undue political interference.

By standing between policy makers (the government) and implementers (management of the subsidiary companies) it is in a position to allow a sharper distinction to be made between policy and operations.

It would be able to utilise more efficiently the scarce managerial skills, because of their centralisation in the holding corporation. This concentration of experts would allow for an expert scrutiny of the affairs of the subsidiaries than would be the case if these experts had to be spread through the entire public sector. And given the quality of its staff, it should be able to translate policy into operative goals and strategies for the guidance of the subsidiary units.<sup>40</sup>

Moreover, in several other developing countries like Tanzania, Zambia, Ghana, Lesotho and Malawi, state holding companies have played a key role in the public sector for many years. A few more had expressed their interest in reforming their public enterprises by introducing this model. The Sengupta committee in India<sup>41</sup> also

<sup>40</sup> For the other theoretical advantages of the holding company form in public sector see Y.P. Ghai, 'The Management of Public Enterprises Through Holding Corporations', *Public Enterprises*, vol. 10, No. 1, 1980, pp. 19-24.

<sup>41</sup> See Government of India, Ministry of Industries, *Report of the Committee to Review Policy for Public Enterprises* (popularly known as Arjun Sengupta Committee after the name of its Chairman)

recommended the adoption of this form of organisation in India, although India first introduced this structure in 1973 in some sectors. The holding company model is also widely used in Western European countries, but there are differences in models prevailing in different countries. This might have induced Bangladesh to reform her public enterprises in this direction.

Above all, the holding corporation form at least theoretically provides solutions to the basic organizational dilemma of public enterprises i.e. how to reconcile autonomy with public accountability. It is more useful both an effective evaluation and monitoring of the performance of the enterprises for a greater decentralisation of operation, while it keeps the operations of an enterprise at 'arms length' from the government and promotes decentralised decision making within the enterprise.

In Bangladesh, the arguments in favour of, or against, the adoption of the state holding form of organization and its usefulness in the public sector are at present largely theoretical because holding corporations in Bangladesh have not fully started functioning yet. It is therefore too early to comment on any practical aspects of their functioning. The following sections will only give some insights for the future researchers to undertake an in depth research on the functioning of holding companies in Bangladesh which is increasingly becoming due now.

#### **5.5.1. Holding Company - Defined**

The concept of the holding corporation came from corporate organisation in the private sector towards the end of nineteenth century. With the diversification and extension of production and expansion into overseas operations, the holding corporation form became dominant in large private firms in this century.<sup>42</sup> "It was a response in large part to the problem of the span of coordination and control over production and marketing which

<sup>42</sup> A.D. Chandler, *Strategy and Structure, Chapters in the History of Industrial Enterprise*, 1962, p.4.

restricted expansion or diversification in a unitary form.<sup>43</sup> Public enterprises were restructured on this model only after 1930s. Moreover, some of the advantages of the holding form derive from its role in the private sector. Its adoption in the public sector was in part for similar reasons, and in part for others.<sup>44</sup> In this chapter the emergence of holding company within large private enterprises is not discussed<sup>45</sup> because of the limitation of size and contents of the present thesis which is a study of public enterprises in Bangladesh.

Most of the managerial problems which private enterprises experience are more or less similar to that of the public enterprises, but there are problems which are specific to public enterprises. For instance, in the private sector, the management of the holding company is for all effective purposes autonomous of its shareholders and a centre of policy making, and the company is in a good position to rationalise, co-ordinate and respond to a rapidly changing environment and exploit economies of scale. The management of the public holding corporation is not in a similar position since the government always remains as active share holder. Some of the advantages of the holding form in the larger private enterprises may not be "attainable" or even "desirable" in the public sector.

The essence of this structure in public sector is basically; government's interface with the public enterprises takes place at the level of the Board of the Holding Company which is responsible for the operation of a number of subsidiary companies. The government in turn set the goals and targets for the Holding Company and receives periodical performance reports regarding the overall efficiency of the holding company. it introduces an intermediate level of management i.e. the Board of the Holding Company between the Ministry and the Companies, reconstituted as subsidiary companies. As a

43 O.R. Williamson, *Corporate Control and Business Behavior*, 1970, p.27

44 Y.P. Ghai and A. Bohn, 'Editorial Introduction', *Public Enterprise*, vol.10, no.1, p.12.

45 For the historical emergence of holding company form see A.D. Chandler, *Strategy and Structure* ... op. cit. 'The Development of Modern Management Structure in the US and the UK' in L. Hirsch (ed.), *Management and Business Development: An Historical and Comparative Study* and D.F. Channon, *The Strategy and Structure of British Business*, 1973.

result, the interface between the government and the subsidiary companies is minimised without sacrificing the essential need for co-ordination of the operation of the companies.

Two broad (formal and functional) approaches can be applied to define a state holding company.<sup>46</sup> According to the formal and legal approach, a holding company is a company which either holds a majority of the equity in the subsidiaries or has control over their operations through other legal means. However, the holding company and the subsidiaries are separate legal entities and have their own boards of directors.

According to the functional approach, which takes into consideration the *de facto* relationship between the headquarters (or board) of a company and its operating units, if the operating units have substantial operating autonomy and are run as separate profit centres, then the company can be described as a holding company, irrespective of whether the operating units are separate legal entities or merely division within one company.<sup>47</sup>

Large private diversified business in the US and UK to some extent prefers multi-divisional form rather than the holding form.<sup>48</sup> In the multi-divisional form, semi-autonomous operating divisions are set up and organised along product, brand, geographical lines. The divisions are separately managed. A general office, manned by senior executives, is responsible for the destiny of the entire enterprise, formulating general and long-term strategies and allocating resources. The routine day to day operational activities are left to the management of the divisions. In the holding company form the operational activities are delegated to different companies, each a legal entity in its own right (with concomitant structures), and in general can exercise a greater degree of autonomy than divisions in the multidivisional form.

Multidivisional form and holding form overlaps in many large firms. The choice between the two forms was often determined by history or law rather than by rational

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<sup>46</sup> Y. P. Ghai and A. Behm, *Editorial Introduction*, *op. cit.*, p.11.

<sup>47</sup> *Ibid*

<sup>48</sup> For the reasons for the preference of Multi Divisional form over the holding form see Chances, *op. cit.*

considerations.<sup>49</sup> The Multi-divisional form and holding form even may achieve similar results.<sup>50</sup> In the strict legal sense this consequence does not follow automatically, since the parent company has the potential of complete control over the policy and activities of its subsidiaries. It is a flexible instrument to design various forms of relationships. Indeed Hadden has shown that some British firms have been able to achieve a high degree of control over the operations of their subsidiaries.<sup>51</sup>

The holding company structure for public enterprises involves a tripartite relationship between government, holding company and subsidiaries. The main thrust of this tripartite relationship revolves round the organisational problem of balancing centralisation and autonomy on the one side and coordination and accountability on the other. There has been little research on the actual operation of the holding company involving a tripartite relationship.

#### **5.5.2. The Tripartite Relationship: Some Problems of Centralisation and Autonomy**

The organisation of the holding company structure in public enterprises is complicated by the fact that the holding company itself is not the final unit of control. While in the private sector there is a dual relationship between the parent company and subsidiary, in the public enterprise there is a tripartite relationship between government, holding company and the subsidiaries.

The holding company is seen as a unit of control vis-a-vis the subsidiary but in its relation to the government, the unit of control is ultimately the ministry or government agency. This complicates the issues of control, centralisation and autonomy.

Arguments about efficient and productive organisational structures usually revolve around the conflict between centralisation and autonomy. The concepts '*centralisation*'

<sup>49</sup> Y. P. Ghel, 'The Management of Public Enterprises Through Holding Corporations', *Public Enterprises*, vol. 10, No. 1, 1990, p. 21.

<sup>50</sup> *Ibid.*, p. 22.

and 'autonomy' themselves have multifaceted meanings depending on the way they are viewed.<sup>51</sup>

Lack of clear directives and plurality of goals in the public sector further complicate the question of centralisation and autonomy. Public enterprises are hybrid organisations pursuing both commercial and non-commercial goals. As discussed in chapter 4 the real problem occurs when various government agencies have different preferences, for instance, the Ministry of Labour may be interested primarily in employment, the Ministry of Finance in profit, the politicians in low prices. The underlying problem is thus one of plural principles with different objective functions.

Under the above circumstances, the question of how much autonomy should be given to the operating units becomes very important. A holding company can be used as a vehicle in the control system of a public enterprise, it can also act as an intermediary between minimising the political element in public control. This clearly illustrates the problems of centralisation and autonomy in the tripartite relationship.

One task is to translate public control goals into meaningful directives to the operating management better than the government department. This, however, is based on the assumption that the holding company has some autonomy from the government when it translates broad public goals set by the government into meaningful directives and communicating these directives to the subsidiaries. This autonomy may arise because of the closer operating relationship between the parent and the subsidiary and because the holding company is manned by professional management experts rather than the bureaucrats. On the other hand, the holding company does not have complete autonomy because the public goals are set by the government and may conflict with the business

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51. T. Hadden, *The Control of Corporate Groups*, 1963.

52. Brooke points out that 'myths' and 'legends' have grown around the concepts of 'decentralisation' and 'centralisation'. The concept of centralisation can be associated with many other concepts, like 'authority' or 'power', or in the context of 'geographical space'. According to Brooke, 'the concept [centralisation] stems from questions about power in questions of decision making, from questions of participation and influence in questions on communication' [Brook, op. cit., pp. 1]. The concept is not only relative but of a second order dependent upon others for its meaning. What aspect of decision-making functions for example, is centralised - decision-making, the power to make decisions, the influence on decisions...?

goals which the parent and subsidiaries may consider more important. How much autonomy then would the holding company have in translating public goals, which it may disagree with, into meaningful directives for its subsidiaries?

A further complication might arise when any government agency as a unit of control tries to step in and take part in operations of subsidiaries. In such a situation over centralisation, instead, could take place. Even if decentralisation is desired, subsidiaries might actually refer decision-making to the Ministry, thereby by passing the holding company, which would result in centralisation. This might arise when subsidiary managers see the holding company as ineffective in decision-making and instead view the Ministry as providing a more active and clear leadership. Where the Ministry takes a more active role, managers of operating units may tend to see the Ministry as a better partner than the holding company. The role of holding company as a unit of control, in such circumstances, would be considerably reduced.

The holding company form instead of increasing might actually decrease the autonomy of the operating units. The constitutional theory expects that the holding corporation would exercise its power of control for rational economic reasons, and represent sensible allocation of responsibilities between the holding and subsidiary companies. But in practice, as will be seen later, this might not happen, and control might instead stifle initiative and demoralise the management of operating units. The civil servants and politicians are unlikely to give up whatever privileges or patronages the enterprise finds in them. The usefulness and purposes of such corporate control depend to a large extent on the nature of the board and management of the holding corporation. For example, if the board is merely an extension of government arm as opposed to expected independent group of management and business experts then the holding company form may in fact increase political control over the operating units.<sup>53</sup>

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<sup>53</sup> Ayns and Haggard, *op. cit.*

Moreover, the holding corporation might cause delays, confusions in relationships and responsibilities by itself being another additional layer in the system of control and regulation in the management of public sector. It might also reduce the efficiency and proper accountability of the subsidiary companies because decisions are likely to be made about the subsidiaries by persons remote from actual operation. They have a tendency towards cross subsidisation and the aggregation of accounts which might adversely affect the accountability and performance of individual enterprise otherwise would be regulated by the discipline of the market.

Above all, the government is unlikely to be a passive share holder like most share holders of the private holding company. In fact, the governments in different countries have devised many mechanisms like ministries of public enterprises, secretariat of public enterprises, central audit bureaux to discharge some of the functions of the holding corporation and in practice for many purposes the government remains the holding corporation which reduces the flexibility of the holding company to rationalise, co-ordinate and respond to a rapidly changing environment and exploit economies of scale.<sup>54</sup>

### 5.5.3. Functioning of Holding Company in Bangladesh

In 1987 the government amended the *P.O. 27 of 1972* making provisions for the corporations to off-load 49% of their shares in the enterprises under them. The amendment encourages the transformation of the corporations into holding companies with the individual enterprises as subsidiaries.<sup>55</sup> The *RIP 1986* also emphasised it.<sup>56</sup> In order to revitalise the share market and to allow small investors to invest, the *RIP 1986* announced

<sup>54</sup> Y P Ghai, *The Management of Public Enterprises through Holding Corporations*, *Public Enterprises*, op. cit.

<sup>55</sup> It may be mentioned here that during pre-liberation period EPIDC used to hold shares in its enterprises on behalf of the government and managed the affairs of the companies as managing agent through Managing Agency Agreement. The amendment is considered to be a means of privatisation. During my discussion with different persons it transpires that the amendment is seen as a means to keep the bureaucracy and the rich happy. The bureaucracy wants to keep a tight grip on the economy and complete privatisation would mean they would loose the direct control and in some cases loss of authority. The government can then find time to state about some of their bureaucrats and military officers for different reasons. The rich also have the possibility of investing in the on going enterprises rather than taking trouble of establishing new enterprises themselves.

<sup>56</sup> *RIP 1986*, op. cit. *pari-4*.

the off loading of 49% shares in some of the enterprises. It was decided by MOI to off load 49% of the shares of 52 public enterprises controlled by it gradually.<sup>57</sup> So far 49% shares of 11 enterprises of 3 corporations under MOI have been disposed off. The enterprises converted into subsidiary companies of the corporations by amending the Memorandum and Articles of Association of these companies are<sup>58</sup>:-

#### **BCIC**

1. Usmania Glass Sheet Factory Ltd.
2. Kohinoor Chemical Co. Ltd.
3. Eagle Box and Carton Mfg. Co. Ltd.
4. Chittagong Cement Clinker Grinding Co. Ltd.

#### **BSEC**

1. Eastern Cables Ltd.
2. Atlas Bangladesh Ltd.
3. Metalex Corporation.
4. National Tubes Ltd.

#### **BSFIC**

1. Dhaka Vegetable Oil Industries Ltd.
2. Renwic-Jagnefswar & Co. Ltd.
3. Kushtia Sugar Mills Ltd.

Only 11 of the intended 52 industrial enterprises 49% shares were off loaded because the government realised that the financial market in Bangladesh is not in a position to acquire all the shares of the 52 public enterprises.<sup>59</sup> The private individual business houses earlier were offered the sale of some public enterprises. So it was expected that there would not be enough private response if more enterprises are sold out in the manner described earlier. Moreover, the vast majority of population live in rural

<sup>57</sup> Information given by officials of the MOI.

<sup>58</sup> Personal collection from MOI.

<sup>59</sup> Discussions with the officials of the MOI.

areas, agricultural in occupation, illiterate, therefore unlikely to have investing interest, even knowledge of share availability.

It may be recalled that industrial enterprises placed under the sector corporations were set up as limited companies.<sup>60</sup> On nationalisation or taking over of management of abandoned industries certain provisions of the Articles of Association of those companies were kept in abeyance.<sup>61</sup> These companies were exempted from some of the mandatory requirements of the Companies Act 1913 for example the holding of (annual general meeting) AGM, submission of statements etc. Therefore, in order that these can continue as joint stock companies, *the Bangladesh Industrial Enterprises (Nationalisation) (Amendment) Ordinance, 1987* inserted the following after clause (4) of Article 462:-

(4A) Where the Government sells or otherwise transfers under clause (2) any industrial enterprise or any share or proprietary or other interest therein, the provisions of the Companies Act, 1913 (VII of 1913), relating to holding meetings, balance sheet, minimum subscription, prospectus, statement in lieu of prospectus, filing of returns in respect of such industrial enterprise or transfer of such share or interest for the period preceding the sale or transfer shall be deemed not to have been applicable thereto.

The judiciary in Bangladesh while considering all these and the fact that the companies were effectively run by the government through the sector corporations still concluded that these companies are separate legal entities.<sup>62</sup> Thus, although officially the legal form of organisation for public industrial enterprises was the public corporation, but legally speaking, as confirmed by the judicial decisions, they were subsidiaries of the respective corporations which were nothing but holding companies. From this, one can also easily argue that the corporations used multi-divisional form model i.e. the individual enterprises functioned as divisions of the sector corporations rather than as subsidiaries.

The formal introduction of holding company form by the *RIP 1986* is viewed by the government as a convenient way to help gradual privatisation. But CONCOPE

<sup>60</sup> *The Companies Act 1913* has the provision of incorporating a limited company either as private limited company or as public limited company.

<sup>61</sup> See P.O. 27 of 1972 and its subsequent amendments, *op. cit.*

<sup>62</sup> *Bangladesh Gazette Extraordinary, The Bangladesh Industrial Enterprises (Nationalisation) (Amendment) Ordinance, 1987, Ordinance No. VII of 1987, 7.5.87.*

recommended the introduction of holding company in order to increase the autonomy of the individual enterprises. Thus the adoption of holding company form by *RIP 1986* is associated more with privatisation rather than a search to delegate more autonomy to the individual enterprises or to introduce market mechanism.<sup>64</sup> Here, once again, we see that the same form is capable of being used for accomplishing different purposes.

There were few legal formalities which were required to be taken for the conversion of the existing units into subsidiaries as they were already incorporated as limited companies (mostly public limited companies). Only the Articles of Association were required to be changed in order to accommodate a number of things set by the government. Necessary amendments were done in the Articles of Association of those companies whose 49% shares were proposed to be off loaded. The changes were similar in all cases and the language used were also more or less identical. The shareholders of the company are divided into two following groups:-

- (A) Minimum 51% of the shares to be retained by Group 'A' i.e. the government/corporation.
- (B) Up to 49% of the shares to be offered for sale to the general public including financial institutions like ICB etc. as follows:-
  - (i) Up to 34% of the total shares to be offered to and held by the general public.
  - (ii) Up to 15% of the shares to be offered and held by the existing staff, and workers and officers working in the company. If the staff, and workers and officers do not subscribe the entire shares or any part thereof the unsold portion of such shares shall be retained with the government/corporation which may be offered to the existing staff and workers of the company subsequently. In case,

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<sup>63</sup> Some of the decided cases in Bangladesh are mentioned in Chapter-3.

<sup>64</sup> This point will be discussed later more elaborately.

any part of group 'B'(i) shares remain unsold, the balance is to be treated as group 'A' shares.

By keeping 51% of the shares the state (civil and military bureaucrats), it seems assured of direct management and control of the enterprises. The 34% offered to the general public effectively would satisfy the former bureaucrats because they lack capital to set up their own enterprises or for many reasons cannot buy a disinvested enterprise. People serving in different organisations have also the opportunity to invest their small investments. The 15% offerings to the workers and staff of the enterprise, seems to aimed at defusing labour opposition to privatisation.<sup>65</sup> It is to be mentioned that the government knew it very well that the employees financially and psychologically would not be able to take advantage of the 15% offerings to them. Precisely that has happened. In 62% of the enterprises the workers and staff was not able to purchase 15% offered to them because of shortage of cash.<sup>66</sup>

After issue of shares the Board of Directors is to be composed of 9 people and they are to be nominated/appointed/ elected as follows:-

a) 5 Directors (including the Chairman and the Chief Executive) are to be appointed by the holding company i.e. the corporation - the possessor of 51% shares.

b) 3 Directors to be elected by group 'B' (i) shareholders i.e. the possessors of 34% shares.

c) 1 Director elected by group 'B' (ii) shareholders i.e. shareholders from the staffs, workers and officers of the company. If the staffs, workers and officers do not own at least 12% of the total shares they are not entitled to nominate a Director.

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<sup>65</sup> This view is shared by most trade union leaders and some corporation officials interviewed.

<sup>66</sup> Laursen from interview with a Joint Secretary of the Ministry of Industry

However, the group 'B' shareholders are entitled to elect one Director for each 12% or at least equal to or more than half thereof of their shareholding subject to maximum 4 Directors as noted above. But in case of any undersubscription of group 'B' (i) and (ii) shares, the number of such Directors as may fall short of the total number of Directors due to proportionate shareholding shall be nominated by the group 'A' shareholders so as to constitute the full Board as required by the Articles of Association.

The chairman of the Board of Directors is nominated by the group 'A' shareholders and the enterprise chief executive (generally a Managing Director) is appointed by the holding company. It is to be mentioned here that in all articles of the subsidiary companies these provisions are the same. Thus it is clear that the shareholders have no say in the affairs of the company and the government through the holding company makes all decisions. While this is the case then it is doubtful what benefit is going to be accrued from the much publicised change of form. It is thus clear that company law techniques have been used to effectuate partial privatisation in Bangladesh. But how this off loading of 49% shares will affect the operation of enterprises are as yet unclear. What is certain, however, is that the idea that these joint ventures will operate just like any other private company, and subject only to market constraints has not proved feasible.

The government through the *Bangladesh Industrial Enterprises (Nationalisation) (Amendment) Ordinance, 1987* simply inserted a new clause after clause (4) of Article 17 of P.O. 27 of 1972. The new inserted clause says that, "(5) The Corporation may ..... manage the affairs of any enterprise or company in which it holds shares or interest if the enterprise or company so requests."<sup>67</sup> In compliance with the above, the Articles of Association of all 11 companies whose 49% share was offered for sale kept provisions for the Board of Directors to enter into a *management contract* with the corporation (holding

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<sup>67</sup> See *Ordinance No. VII of 1987, op. cit.*

company). In the Articles of Association it is clearly mentioned that, "the final amount shall be such as may be determined by the corporation".<sup>68</sup>

The subsidiaries have in fact entered into Management Contract with their respective corporation. The Management Contract is also identical for all the subsidiaries. The Management Contract between a subsidiary enterprise and the Corporation is reproduced as appendix-4 as an example.

By Management Contracts the subsidiaries have entrusted all operational responsibilities to the holding company. The holding company undertook the responsibilities of all major management activities such as investment, procurement, production, marketing, financing, staffing, fixation of prices of the products. Thus the institutional advantages of the holding form connected with decentralisation and autonomy is denied, of course the holding company form envisages that certain functions are to be handled centrally to ensure economies of scale and maximum utilisation of scarce management resources (both human and material). The subsequent administrative practice in Bangladesh, however, indicates that there is a definite trend towards over centralisation and attendant reduction in the operational autonomy of the subsidiaries.<sup>69</sup> Thus the potential of the form in ensuring autonomy have been short circuited if not negated by the use of other means.

The concentration of almost all conceivable powers in the hands of the holding company by the management contract would definitely demoralise and stifle the management initiatives of the subsidiaries. Under the circumstances, it is doubtful, how far the holding company would be able to help induce commercial outlook and culture which in turn would expose the subsidiaries to the market forces.

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<sup>68</sup> For example see section 5(b) of the Articles of Association of Azim Bangladesh Ltd.

<sup>69</sup> Brooker also has shown that it is fallacious to assume that the holding company subsidiary relationship is necessarily decentralised. See M. Brooker, *Centralisation and Autonomy: A Study in Organizational Behavior*, 1984.

Two years only have passed since Bangladesh officially introduced the holding form. Thus it is too early to comment on any operational aspect. But the indications of past two years are that the holding company form, requiring a clearer division of responsibilities between the government, the holding company board, management of subsidiaries; and a greater restriction of government power than the other legal forms, is not operating as it should have been, as evidenced from the repeated notifications of the President's secretariat reminding the concerned authorities to respect the operational autonomy of the public enterprises as is envisaged in the *Cabinet Division's Guide-lines of 1976*. From the repeated reminders from the President's Secretariat to the Ministries, it is evident that until now the problems of centralisation, autonomy, coordination and control by the government as owner remain to be solved in Bangladesh. Thus by itself form means very little, it really matters how and for what a form is used. As has been mentioned earlier, the corporations in Bangladesh were really functioning as holding companies even before the amendment of the *P.O. 27 of 1972* in 1987. The off loading of 49% of the shares simply converted the individual subsidiaries into joint ventures where the government through the corporations are not only holding the majority shares but controlling the enterprises in all possible ways. It is thus questionable how far the efficiency of the enterprises are going to be influenced by these changes. The objective of privatisation to improve operational efficiencies of the enterprises are definitely not going to be achieved. Only 3 out of the 11 subsidiaries who off-loaded their 49% shares could declare a small dividend while the rest although made some profit but could not declare any dividend on the share. It is to be kept in mind that all these 11 enterprises were profit making enterprises even before the disposal of 49% shares. Though 3 enterprises declared dividend but it was learnt that they had to declare dividend because of the pressure of the Ministry which was eager to show success of the policy. Because of little profit and non declaration of dividend on the share the value of the shares fell. This will have definite negative consequence on the future sale of shares of other public enterprises. It seems the government realised the situation, therefore in spite of the lip service is not off-loading 49% shares of other public enterprises. Because of decline of share values the small

investors are not only suffering but are discouraged to buy new shares. Many sold their shares even at low price in anticipation of further decline while those who have money are accumulating shares at low price in anticipation of future rise or to increase social prestige by becoming a director of any enterprise or to have sufficient share to influence the board decisions.

Let us now see how far the government has achieved its objectives behind privatisation.

#### 5.6. Privatisation in Bangladesh - Evaluated.

It has now almost become the universal belief that private enterprises are more efficient than the public enterprises. This has led to the assumption in Bangladesh that a transfer of public enterprises to private ownership would lead to an improvement in the operational performance and profitability. The assumption is derived from the historical performance of private enterprises and empirical evidence from other countries. It is "certainly not derived from any empirical evidence on the performance of private enterprises in post liberation Bangladesh."<sup>70</sup>

No proper research on privatisation in Bangladesh exists. There is no substantive published official materials either. The only research undertaken on the performance of denationalised industries is by Sobhan and Ahsan in 1984.<sup>71</sup> Subsequently two papers were written in part fulfilment of the requirement of successful completion of the course in BPATC<sup>72</sup> and one published in a local Weekly.<sup>73</sup> But all of them are based on the work

<sup>70</sup> R. Sobhan and A. Ahsan, *op. cit.*, p.4. A study of enterprises in other countries, also found that there is no clear evidence of the superiority of private enterprise. See R. Millward, 'The Comparative Performance of Public and Private Ownership' in Loed Reil (ed.) *The Mixed Economy*, 1982, pp. 35-93.

<sup>71</sup> Sobhan and Ahsan, *op. cit.*

<sup>72</sup> For example see A.H.M. Nooruddin, 'Some Basic Issues on Privatisation of Industries in Bangladesh', (unpublished), BPATC Second Senior Staff Course on Administration and Development, February 1986 and H. Rahman, 'Review of the Performance of Industries/Enterprises under Privatisation', (unpublished), BPATC 9th Senior Staff Course on Administration and Development, November 1989.

<sup>73</sup> C. Muehaddy, 'Nationalisation/Denationalisation Debate', *The Weekly Bichitra*, (in Bengali), 25.11.85.

of Sobhan and Ahsan. The conclusions reached by them, although not conclusive because based on only a few enterprises and out of date, will no doubt help to understand the situation. One of the reasons for the absence of research on the field is the nonavailability of data on private enterprises. Data on public enterprises are reasonably comprehensive. Thus it is impossible to compare performances of the enterprises both before privatisation and after privatisation. The conclusions, summarised below, reached by them are very discouraging.

As discussed earlier, the NRP was fixed far below the market price of the enterprises.<sup>74</sup> Even then a huge amount of consideration money remained unpaid by the purchasers.<sup>75</sup> Often the new owner took a loan from financial institutions against the purchased enterprise in addition to the amount of bank loan to the enterprise since its birth. It may be mentioned here that in Bangladesh an unduly large part of the capital comes from public financial institutions as loan capital.<sup>76</sup> Thus the real stake of the new investor is a minor fraction of its total capital outlay, yet he is in control of its use. Since the NRP was fixed far below the actual market value of the enterprise sold, several entrepreneurs got back their investment with profit, soon after taking possession of the enterprise by selling machineries, already produced finished goods, spares and accessories, raw materials etc. While he had the scope to profit from the situation, his risk of loss is relatively small. Once he got his investment back with profit, some even made the enterprise 'sick'. The losers are the creditors, mainly public financial institutions (public enterprises) and the workers lose employment.<sup>77</sup> There is also a decline in the levels of employment in these enterprises. Above all, many privatised enterprises were

<sup>74</sup> The woefully *Bichitra* cites the examples of Nabucco Shacrinu and Bread Factory, Albert David, Pabell Bank etc. *Ibid*, p.20.

<sup>75</sup> The amount with interest is more than Taka two billion (Tk. 243,00,61,821.00), *ibid*.

<sup>76</sup> The ratio at present is upto 80:20.

<sup>77</sup> From 1974-85 the ISB, BSRS and other DFI's gave investment loans totalling Taka 9134,000,000.00. The private sector received about 96% of the total loan. Since then the government has written off about 5 billion taka. As a result ISB and BSRS have hardly any funds left to finance future investments. *Nouruddin, op. cit.*, p.23.

closed by the new management. The MOI knew about the situation but did not disclose the exact number of enterprises closed after privatisation.

Referring to the privatisation of 22 textile mills in 1982-83 Ramanadham notes that privatisation was carried out "at the cost of the long term interest of the economy".<sup>78</sup> He further quotes Lorch, who undertook a study of privatisation of textile mills in Bangladesh sponsored by UNDP, that "the objectives of a privatisation policy are sacrificed for the effectiveness of its implementation; the means prevail over the ends."<sup>79</sup>

*The Weekly Bichura* in its leading article concluded that selling public enterprises by tender or other means created only new owners of industries without establishing new industries.<sup>80</sup> Instead of privatising the public enterprises the government would have encouraged the private sector to invest in new enterprises thus helping the industrialisation and elevate the employment situation in the country. Since the private sector was busy in buying the already established enterprises there was less incentive to take the trouble of establishing a new one and to take the risk of efficient operation. Privatisation, thus in a way, hampered further industrialisation of the country. The government even admits of decline in production in different privatised enterprises.<sup>81</sup>

After privatisation the contribution towards the national exchequer by way of different taxes from these enterprises drastically reduced because of tax evasion. Even if a public enterprise suffered from loss still it contributed more to the national exchequer by way of tax than a profitable private enterprise because the private sector in Bangladesh in collaboration with bureaucrats manipulates the taxes and even do not pay it at all.<sup>82</sup> The private sector has more opportunity and incentive to feedling with accounts where as

<sup>78</sup> V.V. Ramanadham, *The Economics of Public Enterprises*, 1991, p.419.

<sup>79</sup> *Ibid.*

<sup>80</sup> C. Menhuddy, *op. cit.*, p.19.

<sup>81</sup> Government of Bangladesh, Ministry of Finance, *Jajay Orthomonth Jarip (National Economic Survey) 1984-85*, (in Bengali), 1984, p.54.

<sup>82</sup> This is derived from interviews with officials of the MOI, corporations and general public. Almost every one expressed the same view although government officials try to qualify their answer in different ways.

public sector management has little chance and has no incentive of feeding with the accounts. Indeed, tax evasion has become almost synonymous with private enterprise in Bangladesh.<sup>83</sup> Even there are many allegations of manipulations of electric and telephone bills in conjunction with corrupt officials of Power Development Board and the Telephone and Telegraph Board.<sup>84</sup>

Moreover, because of privatisation there was a transfer of a large quantum of public assets to the ownership and control of what at most amount to 217 families, if one indeed assume one family as controlling one enterprise. These concentration of wealth in a few hands, in a country where some are rich while the vast majority are not only poor but live below the poverty line will surely give rise to tension and violence if not now but in future.

In spite of the present apparent failure of the privatisation programme, it is expected by the government that the policy of privatisation will take some time to show its positive results. Most of the government officials interviewed tried to defend the privatisation policy on theoretical grounds<sup>85</sup> and cited the examples of other countries, mostly industrialised ones. The government could not provide empirical evidence behind the success of privatisation in Bangladesh. How far the experience of developed countries with different level of socio-economic and political development will benefit Bangladesh is very questionable.

Although, so far, privatisation programme of the government failed to show any spectacular economic results but undoubtedly there is a sense of competition between the public and private sector mills after privatisation. Before privatisation, it was difficult for the government to correctly evaluate the performance of public enterprises since the

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<sup>83</sup> In spite of the present government's commitment towards more privatisation, the Finance Minister while talking to the newsmen on the performance of national economy made the above remarks.

<sup>84</sup> I personally found 4 cases of gross manipulation of bills.

<sup>85</sup> These include prepositing about the beneficial effects of the introduction of the profit motive, the removal of government from commercial decision making, the discipline imposed by the stock market and the enhanced strategic position of management.

government was unable to compare it with private sector. The privatisation policy substantially reduced government's burden on account of the otherwise recurring payment of subsidy to the ailing public enterprises.

However, optimistic the government officials are, judging from the present facts one has to agree with a remark of a trade union leader in BSEC while talking to me, that "privatisation in Bangladesh is nothing but a loot of public property." Privatisation was possible because of the government policy of generous financial assistance from public financial institutions to its selected and chosen persons.

It would thus appear that change of policy towards privatisation by Zia governments has been an act of faith rather than result of pragmatism in public policy. The extension of privatisation policy by the military government of Ershad also was not derived from a careful review of the available evidence. It may be mentioned that while the government in 1972 nationalised it also did not consider its actual ability to manage the over stressed public sector. Incidentally, it is not a coincidence that the changes in public policies in Bangladesh always occurred through executive orders rather than by Acts of Parliament well debated in its floor. Policies were always thrust from above. The people of the country virtually had no say or control over the policies. The nationalisation and consequent policies are no exceptions.

It must be kept in mind that enterprises vested in the private sector either through disinvestment of public assets or through investment funds provided by public financial institutions should, from the social point of view, be regarded as part of the public domain. Thus the efficient and socially optimal use of their assets must remain as much a concern of the public as is the case with public sector assets.

## Conclusions

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As has been discussed, contradictions conditioned the birth of public enterprises and the actual constraints of the workings of the nationalisation policy of the Awami League government soon after the independence of Bangladesh, in December 1971. While the direction of state policy was theoretically towards establishing a socialist state but the character of the state remained anti-socialist. As such the interests and activities of its dominant elements were expected to be directed towards surplus extraction. In this task the dominant class expected state policy to legitimise the appropriation of the surplus and to give it extended control over public resources thereby enabling it to maintain its material interests.

The contradictions within the system have, however, been sharpened by legitimisation of the ethic of private accumulation with its concomitant channelling of state resources and policy towards the private sector. In such a situation the tendency of public enterprise personnel to participate directly in the process of surplus extraction from their own enterprise has become much more apparent. In this situation, public enterprises became a composite part of the state. The principal contradiction between the private and state components of the bourgeoisie became one of the division of the spoils.

As discussed in chapter 1, the private sector in Bangladesh has been spoofed both before and after liberation. Its growth was not the result of personal initiative, drive, inventiveness and imagination.<sup>1</sup> It was rather the outcome of a political decision to create an artificially wealthy Bengali class so as to form a significant bastion of support for the prevailing rulers. After liberation, under the protective wings of the Awami League, BNP and Jatiyo Party a small selected group of people amassed huge wealth through the patronage of the state like permits, import-export licences, dealership and smuggling across the borders<sup>2</sup> resulting in private accumulation beyond limits. The present system of

1. R. Sakhna and M. Ahmad, *Public Enterprises in an Intermediate Regime: A Study in the Political Economy of Bangladesh*, 1980, p.5.

2. F.H. Yousif, *Nationalisation of Industries in Bangladesh*, 1985, p.94.

licensing and other fiscal measures tend to favour those who are already active in a field where permission of some sort is needed to continue or to expand. Those who are already in business are also better informed and are able to establish relations with the key officials. Thus a tie between the government and the existing firms develops. Also, it is easier for an overburdened bureaucracy to deal with a few large business houses than with a number of small firms or new ones. This tends to restrict competition, favour monopoly and oligopoly, and pamper vested interest.

The distribution of the surplus extracted from the public enterprises to the trading bourgeoisie weakened the public enterprises and strengthened the dominant group viz, bureaucracy within the bourgeoisie. Once the petty-bourgeoisie became strong the state gradually abrogated the democratic principles enshrined in the constitution and started to use law to suppress opposition. The procedural and substantive values associated with law were ignored at the convenience of those in power<sup>3</sup>.

In post colonial Bangladesh in the absence of strong local bourgeoisie (manufacturers), the petty- bourgeoisie (traders i.e shop-owners, commercial houses, professionals, farmers with surplus) always look for its development and sustenance to the state. More over, the country was ruled for more than 15 years out of its 20 years of existence. As a result, bureaucracy (both civil and military), as the organised and educated force tends to get upper hand over the popular representative institutions like Parliament. The wielders of political and economic power are moving in and arrogating unto themselves the task of making the major decisions for society. Although, mass participation in the running of the country is not only a means to achieve proper accountability thereby ensuring social justice, it is, in itself, a human right. After all, do not all people have the right to participate in decision-making processes that affect their lives and fortunes? The participation of the mass in the political processes (save

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<sup>3</sup> See chapter I.

occasionally to vote for the legitimization of their rulers) has little bearing on the functioning of the government.

The near absence of non-bureaucratic power-base due to weak economic and social process gave rise to a highly centralised, bureaucratic and authoritarian system of administration. The system of administration concentrates decision making power in the central bureaucracy, centres of responsibility are squeezed correspondingly and the social processes do not generate enough of countervailing forces. The bureaucracy thus goes on to devise a system of negative control over the public enterprises in its own fashion. Controls in most cases thus become bureaucratic in nature- too detailed, extensive, inflexible and procedure bound. The bureaucracy not only dictates policies which are however, often conflicting and vague due to reflections of divergent socio-economic interests upon the administrative apparatus but also extensively intervenes into the day to day management of public enterprises. This thus leads to the removal of the boundary between policy and management on which rests the whole rationale behind the introduction of public corporation or holding company model.

Operationally, the public corporation form of management was introduced as the institutional device to manage the public enterprises in the industrial field. The provisions of the *President's Order 27 of 1972*, however, appear to have equipped the government, at that time led by petty-bourgeoisie and since 1975 dominated by military bureaucracy, with dominant role in respect of running the enterprises. Owing to the preponderance of civil service practices the corporations soon began to be run like government departments. The vast complex of industries compressed into a few corporations made the organisation extensive, unwieldy and overcentralised. The corporations attained a monolithic character although subservient to ministries for virtually everything.

In spite of adopting public corporation model, autonomy in public enterprises, as has been seen, is virtually absent. Government control extends over the personnel, financial, production and marketing functions of public enterprises. Government control

symbolizes control of the public enterprises by bureaucrats working in the concerned Ministries. Under this situation, it can be concluded that the government is playing the role of massive holding corporation.

In such circumstances, the administrative accountability so envisaged by laws became obviously ineffective as it compromised efficiency, flexibility and operational freedom of the enterprises. Instead of evaluating performance and emphasising on goals it stressed more enforcing detailed procedures and regulations as in the case of departmental undertakings run by the bureaucrats. As was discussed in chapter 4, series of returns and reports were asked for, streams of instructions, directives and circulars were regularly issued on every conceivable aspect of management and compliance was ensured by almost reducing the public enterprises a subsidiary part of the bureaucracy. This system of administrative accountability lost its main context and direction. It ultimately proved to be self defeating, more because the controls used over public enterprises made bureaucratic perspectives prevail not the commercial or social perspectives. In such circumstances legal reform became a product of the pursuit of common interest of the ruling class rather than a set of changes imposed by the executive government seeking to achieve uniformity and conformity to principles, or imposed by politicians seeking cost reductions or greater political responsiveness.

The system of parliamentary accountability as implicit in the theory of public corporations or holding companies presupposes a mature democracy, political stability and acceptance of the politico-economic institutions and purposes. In Bangladesh, this assumption seems to be pre-mature and thus political accountability has at best worked as means of political control and at worst as a promoter of political patronage. The replication of public corporation or holding company as legal forms in Bangladesh, without meaningful democracy, primarily means an introduction of a foreign or a new tier in the system of existing bureaucracy.

It is evident from chapter 4, that public corporation model has been clearly unsuccessful as a means of public ownership. On the other hand, no general framework of policy has yet been devised within which the industries could be permitted autonomy, and the result has been increasing detailed intervention in a strategic vacuum.

One of the great issues emerging within the public enterprise arena is the general lack of systematic approaches to or criteria for the creation, management, accountability and supervision of public enterprises. In retrospect, it is astonishing that, over a period of two decades, the nationalized industries have been left to operate with virtually undefined objectives. As a result, managements have continually had to look over their shoulders at the priorities of the government of the day - priorities that have been largely determined by macro-economic policy.

Thus, the balance between control and autonomy which constitutes the very essence of the relationship between government and public corporations is difficult to attain in Bangladesh because the forces that shape the nature of state administration and the role played by public enterprises in the development of dominant economic groups do not normally allow such a balance. On the contrary, the tendency is always to create an imbalance in favour of the executive government. As such, law and legal form failed to achieve its potentials.

The failure of law to induce change in support of development objectives in developing countries is common. Reasons for the failure vary. Some scholars of law and development have ascribed the law's failure to the contradiction between what are perceived as "authoritarian legal orders and the participatory imperatives of development."<sup>4</sup> Myrdal explained what he termed 'soft development' in terms of,

A general lack of social discipline in underdeveloped countries, signified by many weaknesses; deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials on various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general

<sup>4</sup> R.Seidman, *The State, Law and Development*, 1978, p.466.

inclination of people in all strata to resist public controls and their implementation. Also within the concept of the soft state is corruption, a phenomenon which seems to be generally on the increase in underdeveloped countries.<sup>5</sup>

It can be said that these factors have been at play in the situation of Bangladesh. However, it would be too simplistic to characterise all the shortcomings of the incorporation policy as due purely to the failure of law as such to bring about the changes legislated for. As was indicated in the thesis, the role of law was never an autonomous one. It was largely an attempt to legitimise policy choices based on economic, political and other concerned considerations. Economic factors, among others, therefore, played a significant role. Law has been used as part of the state's response to the economic imperatives of development.

From the discussions in chapter 1 and 2, it was evident that nationalisation was viewed by the Awami League government as almost exclusively a matter of transferring property rights whereas the issues of control and accountability were treated as determined by ownership and therefore of little interest by their own right. This led to the assumption that a change of ownership would in itself cause the replacement of the profit motive with 'public interest'. There would therefore be little necessity for the conscious design of institutional arrangements for political and legal regulation of public enterprises or to ensure proper accountability.

With the change of Awami League government this attitude found its reflection in justification for privatisation. It is thus assumed that a transfer of ownership will itself free the public enterprises from government interference and will lead directly to discipline by impersonal market forces. As has been discussed in chapter 5 this follows neither in principle nor in practice. From this it can be concluded that a generalised advocacy of either nationalisation or privatisation as such will lead one to neglect the real important issue of the relationship between the government and industry. Unfortunately, following

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<sup>5</sup> G. Myrdal, "The 'Soft State' in Underdeveloped Countries" in *UCLA Law Review*, 15, 1968, p. 1120.

the common law tradition, Bangladesh does not have an adequate public law to provide the means for the resolution of these problems.

It is inadequate to assert that the answer to the deficiencies in nationalisation revealed in this thesis is simply to expose the industries to the free play of market forces. Implicit in most advocacy of liberalisation the assumption that free competition is a form of natural equilibrium created simply by the removal of state intervention. Yet an increasing body of literature has underlined that there cannot be any radical separation between public and private, 'the intermingling of functions, the relationships of financial interdependence on the government, and the interpretation of highly skilled man power cadres have obliterated many of the traditional "public-private" distinctions.'<sup>6</sup>

The first issue raised by privatisation is that of the openness of governmental pressure in relation to privatised concerns. We have seen that techniques are available drawing on company law and contract for the exertion of such pressure. Even if these are not used for such a purpose, many of the privatised enterprises will exist within a framework of government decision making through the retention of substantial role in determining development and depletion through the licensing and fiscal regimes and through a continuing role in export and import policy. There has been little discussion of the forms through which such governmental decision making will be exercised. If nothing else some degree of regulation will be needed to give an appearance of political respectability to enterprise sales. This raises key issues of institutional design which have so far been largely ignored.

The other major issue to be confronted in designing regulatory institutions is that of their procedures. Once it is realised that the decision-making of regulatory bodies is not a mechanical process of removing obvious blocks to competition but is a 'surrogate political process'<sup>7</sup>, the issue of procedural legitimacy becomes of central importance.

<sup>6</sup> B.L.R. Smith (ed.), *The New Political Economy*, 1975, p.1.

<sup>7</sup> R. Stewart, 'The reformations of American administrative law', *Harvard Law Review*, vol. 88, 1973, p. 1670.

However, as has been discussed, in Bangladesh, proper attention in the designing of appropriate regulatory arrangements after privatisation has not been given. There was no public debate or discussion on the subject, thus the question of paying any attention to procedural aspects never arose. So the institutions and practices are inadequate for public and private enterprises.

Under the present politico-economic situation of Bangladesh, despite the current emphasis on private sector development and the privatisation of many public industrial enterprises, 168 industrial enterprises remained under public domain<sup>8</sup> partly because the government is not prepared to give up ownership and control, that goes with it, in certain categories of industries as mentioned in *RIP 1986*; and partly because the absorbing capacity of the private buyers is not large enough to permit total divestitures or they are not interested in taking over certain industries. The natural monopolies like gas, electricity, water, telecommunications, posts, railway will remain under public domain for a long time because private sector presently lacks sufficient resource and experience to run them. There is also no plan to privatise them. Moreover, as discussed in chapter 5, the privatised industries failed to show much positive results which slowed the pace of privatisation in Bangladesh. Thus for good or ill, public enterprises in one form or another will be around for a long time. In any case, at present public enterprises in Bangladesh are continuing to play a meaningful role in the economy. Because of their preponderance, the efficiency and effectiveness of the public enterprises will largely determine the efficiency and effectiveness of the national economy and the success or failure of plans for development and the consequent elevation of the living standards of the people. It is therefore worthwhile to make efforts to improve the performance of public enterprises.

Thus, more important than the issue of what should be the size and arena of public or private enterprises, is the need to assure that whatever enterprises remain in the public domain be accountable, responsible, responsive and well managed. This can be met by setting their goal and objectives. And this can be done by a new legislation well debated in

<sup>8</sup> See table

the parliament and not by bringing amendment after amendment through executive orders, as is the case now. Of course law and legal forms are not totally irrelevant or empty shells as suggested by authors, like Renner.<sup>9</sup> An essential precondition of efficient performance of the public enterprises is the commitment of the ruling elites towards that end.

Therefore the problem of devising more satisfactory means of public ownership requires urgent attention of the lawyers. This is more so, because public ownership by itself is no guarantee of democratic control of an enterprise, which should get more priority than the question of ownership because neither public nor private ownership automatically brings efficiency. Above all increase in democratic participation is not opposed to increased efficiency, though not a pre requisite.

The central issue will thus remain the neglected legal task of conscious institutional design. But this should not be misunderstood as implying that there is no place for market competition. In fact competition amongst various enterprises under the same corporation should be promoted through policies of liberalisation or effective 'yardstick competition' within the public enterprise concerned, or to formulate and effectively monitor their pricing and investment criteria in such a way that the consumers are protected from the evils of monopoly and a misallocation of resources does not take place. The natural monopolies like, gas, electricity, water supply, railways, etc., should be broken into smaller and competitive units, subjected to inside competition, and required to act as commercial undertakings.

A pragmatic public policy should recognize where private alternatives might work better and, by the same token, where new forms of public provision may ameliorate endemic shortcomings of the markets. Most of all it must recognize that markets are not natural creations, they are always legally and politically structured. Hence the choice is not public or private, but which of many possible mixed public or private structures works best. Indeed the real debate should be changed from public enterprises versus private

<sup>9</sup> K. Renner, *The Institutions of Private Law and their Social Functions*, 1940, p.215.

enterprises, to the issue of how is democracy to be combined with autonomy.<sup>10</sup> Liberalisation is a creation of the state itself thus requires state intervention to keep it in operation<sup>11</sup>. Once competitive conditions are seen as requiring deliberate creation and policing, this raises the question of the accountability of the regulators who undertake this task.

As has been seen, in Bangladesh in absence of democracy, there was no accountability of the government to the people. Constitutional provisions were violated time and again. In absence of ensuring proper accountability of the government to the people how there can be accountability of public enterprises which are in practical sense the extension of the government of the day? Thus without establishing democracy in the country (to which the present elected government is at least theoretically committed) the designing of any regulatory or institutional means will be of less practical value.

It was clear from the discussion in chapter 4 that the public corporation as a legal form of operating public ownership was not successful in Bangladesh. Holding company form instead has been advocated by the government.<sup>12</sup> But as it was seen, holding company was not introduced as an answer to the inadequacies of the public corporation form but as a way of privatisation. This *ad hoc* selection of the method of public ownership most convenient for government neglected broader issues of accountability and participation. Other problems also remain unresolved, in particular, the pervasive difficulties of reconciling the positive role of government with the autonomy of public enterprises. Although successive governments felt the need for granting greater autonomy but when it came to implementation the problem has always been by-passed. It is quite legitimate for the government as the owner of public enterprises to use them as

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10. Similar idea is expressed by G Hodgson, *The Democratic Economy*, 1984, p.206.

11. D. Coombe, *Representative Government and Economic Power*, 1982, pp.13-14; G. Hodgson, *op. cit.*, pp.77-8).

12. See the *NIP of 1982*.

instruments of its economic and public policies, but government interventions must be open.

Enterprises listed for divestiture but not yet privatised call for a public sector model of management. This implies that the management is given autonomy in taking input and output decisions, for example, in laying off unproductive and surplus labour. The emphasis of the operations should be on profit as if the enterprises are privately owned, and an attempt should be made to limit their extra-enterprise objectives ( and design the mechanics of any continuing obligations.) The government has to ensure that they operate in such a way that their appeal to potential buyers improves rather than deteriorate over time. Unfortunately, plans for changes in the institutional and legal framework were produced (introduction of holding company), without any debate and amounted not to any general design.

It will be unrealistic to think that the public enterprises could be and should be made completely autonomous and independent from government's supervision. The problem is not one of avoidance of government's supervision and guidance but the real problem is that the government intervention is often excessive and not based on well established rules and conventions. Often the interference is not related to efficient functioning or for achieving the objectives of the enterprises.

The task therefore is to establish the institutional means to ensure openness. The starting point for this should be the recognition that dialogue between public enterprises and government is inevitable and that mutual recognition of a division of responsibilities is only likely to occur through such dialogue. Other forms of openness, for example through outside scrutiny of corporate planning and performance, would also be needed to prevent a convenient symbiosis between the interests involved. This indicates to a need to review the present mechanisms available for measurement and publicity, for example through more coherent arrangements for efficiency audit. Improved relations can be brought about through a freer flow of information between public enterprises and government at the planning stage. The implication is that planning should be taken more

seriously as a joint activity within which mutual commitments can be established. Incoherent and confused relations with government and absence of meaningful outside scrutiny is likely to adversely affect economic performance. In this sense the thesis is in total agreement with Freedman's view that 'institutional legitimacy is an indispensable condition for institutional effectiveness'.<sup>13</sup> The central point here is that the means for accountability and other forms of democratic legitimacy should not be considered as mere optional extras but essential to the success of public ownership.

Reforms in investment decision, in the assignment of extra enterprise obligations, in the rules of operations, in monitoring, in evaluation and in the exercise of relationships with the government are needed. A number of possible reforms are available which do not depend upon transfer of ownership. They include; establishing a more "arm's length" relationship between government and the public corporations; allowing direct access to the capital market; shortening time horizons for pricing decisions; introducing independent regulatory commissions to control tariffs; changing managerial incentive structures etc. In fact, the reforms suggested by the *Committee on Reorganisation of Public Statutory Corporations (Enam Committee)* were focused on clarifying objectives of the enterprises; improving the relationship between enterprises and their sponsoring ministries; establishing elaborate schemes for measuring the cost of social objectives; establishing formal performance contracts between the enterprise and the government; and developing shadow pricing mechanisms allowing the enterprise's true economic performance to be measured.<sup>14</sup> If these announced measures are put into practice then there is no reason why the public enterprises in Bangladesh should not improve their performance. But most measures still remain unimplemented. Before blaming the public enterprises for their alleged inefficiency they should be given a chance to operate as commercial enterprises.

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<sup>13</sup> J.O. Freedman, *Crisis and Legitimacy*, 1978, p.10

<sup>14</sup> The recommendations of the committee has been accepted by the government in principle and the government announced certain measures in accordance with the recommendations. The measures announced by the government were published in Bangladesh Gazette Extraordinary dated 24.07.1983.

In Bangladesh inefficient plan strategies and inefficient government administrations have also to a large extent, resulted in the inefficiency of public enterprises. To deal with the inefficiency of public enterprises without improving efficiency of public administration, would amount to dealing with symptoms rather than root causes.

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## APPENDICES

## APPENDIX 1

*Public Sector Institutions in Bangladesh at Liberation***A. National Institutions with Headquarters in Pakistan**

Name in Pakistan	year	New name in BD.
1. State Bank of Pakistan	1948	Bangladesh Bank
2. National Bank of Pak	1949	Sonali Bank
3. Industrial Dev. Bank of Pakistan	1959	BD. Shilpa Bank
4. Pak. Industrial and Investment Credit Corporation	1957	
5. National Investment Trust	1962	BD. Shilpa Rin Sangatha
6. Investment Corporation of Pakistan	1966	
7. Equity Participation Fund	1966	
8. Agricultural Dev. Bank	1961	BD. Krishi Bank
9. House Building Finance Corporation	1952	No change in name.
10. Pak. Insurance Corporation	1959	Not replicated.
11. Security Printing Press	1962	
12. Pak. International Airlines	1959	Bangladesh Biman
13. Radio Pakistan	1948	Radio Bangladesh
14. National Shipping Corporation of Pakistan	1963	BD. Shipping Corp.
15. Pak. TV Corporation	1965	TV Corp. of BD.
16. Trading Corp. of Pak.	1967	Trading Corp. of BD
17. Atomic Energy Commission	1965	Same

*B. Public Institutions under the Government of East Pakistan.*

Old Name	year	New name in BD.
18. E.Pak. Industrial Dev. Corp.	1962	BD. Ind. Dev. Corp.
19. Agricultural Dev. Corp.	1961	same
20. Water and Power Dev. Board	1959	same
21. Small Industries Corp.	1957	same
22. Road Transport Corp.	1961	same
23. Pak. Eastern Railways	1962	Bangladesh Railway
24. Inland Water Transport Authority	1958	same
25. E.Pak. Shipping Corp.	1964	BD. Shipping Corp.
26. Forest Industries Dev. Corp.	1957	same
27. Film Dev. Corporation	1957	same
28. Fisheries Dev. Corp.	1961	same
29. Dhaka Improvement Trust	1956	same
30. Khulna Dev. Authority	1960	same
31. Chittagong Dev. Authority	1959	same
32. Water and Sewerage Authority	1959	same
33. Jute Marketing Corp.	1957	same
34. Jute Price Stabilisation Corporation	1968	same

## APPENDIX-2

### Public Sector Corporations in Bangladesh (1986)

#### A. Industrial Sector:

1. Bangladesh Jute Mills Corporation
2. Bangladesh Textile Mills Corporation
3. Bangladesh Sugar and Food Industries Corporation
4. Bangladesh Chemical Industries Corporation
5. Bangladesh Steel and Engineering Corporation
6. Bangladesh Small and Cottage Industries Corporation.
7. Bangladesh Jute Corporation
8. Bangladesh Handloom Board
9. Bangladesh sericulture Board
10. Telephone Shilpa Sangstha Ltd.
11. Bangladesh Export Processing Zones Authority
12. Bangladesh Film Development Corporation
13. Bangladesh Mukti Jodha Kalyan Trust

#### B. Financial and Insurance Sector

14. Sonali Bank
15. Janata Bank
16. Agrani Bank
17. Rupali Bank
18. Bangladesh Krishi Bank
19. Bangladesh Shilpa Bank
20. Bangladesh Shilpa Rin Shangstha
21. Investment Corporation of Bangladesh
22. Bangladesh House Building Finance Corporation
23. Shadharan Bima Corporation
24. Jiban Bima Corporation

#### C. Transport and Tourism Sector

25. Bangladesh Inland Water Transport Corporation
26. Bangladesh Inland Water Transport Authority
27. Bangladesh Shipping Corporation
28. Chittagong Port Authority
29. Port of Chalna Authority
30. Bangladesh Road Transport Corporation
31. Bangladesh Biman
32. Bangladesh Parjatan Corporation
33. Civil Aviation Authority

#### D. Agriculture and Water Resources Sector

34. Bangladesh Agricultural Development Corporation
35. Bangladesh Forest Industries Corporation
36. Bangladesh Fisheries Development Corporation
37. Bangladesh Tea Board
38. Bangladesh Water Development Board
39. Dhaka Water Supply and Sewerage Authority
40. Chittagong Water Supply and Sewerage Authority

E. Energy Sector

41. Bangladesh Oil, Gas and Mineral Corporation
42. Bangladesh Petroleum Corporation
43. Bangladesh Power Development Board
44. Rural Electrification Board

F. Area Development and Spatial Planning Sector

45. Dhaka Improvement Trust
46. Chittagong Improvement Trust
47. Khulna Development Authority
48. Rajshahi Town Development Authority

G. Trading Sector

49. Trading Corporation of Bangladesh
50. Bangladesh Consumers Supply Co. Ltd.

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Source: The Bangladesh Gazette, Extraordinary, July 1986.

The  
Bangladesh Gazette  
Extraordinary

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Sunday, March 26, 1972  
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GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH  
MINISTRY OF LAW AND PARLIAMENTARY AFFAIRS  
(Law Division)

NOTIFICATION

No. 287-Pub- 26 March 1972-The following Order made by the President on the advice of the Prime Minister, of the People's Republic of Bangladesh on the 26th March, 1972, is hereby published for general information:-

GOVERNMENT OF THE PEOPLE S REPUBLIC OF BANGLADESH  
MINISTRY OF LAW AND PARLIAMENTARY AFFAIRS  
(Law Division)

President's Order No. 27 of 1972.

THE BANGLADESH INDUSTRIAL ENTERPRISES (NATIONALISATION) ORDER  
1972.

Whereas it is expedient to provide for the nationalisation of certain industrial enterprises in Bangladesh and for the establishment of Corporations for the purpose of co-ordination and supervision of the nationalised industrial enterprises and for matters connected therewith or incidental thereto

Now, Therefore, in pursuance of the Proclamation of Independence of Bangladesh read with the Provisional Constitution of Bangladesh Order, 1972, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order:-

1. (1) This Order may be called the Bangladesh Industrial Enterprises (Nationalisation) Order, 1972,

(2) It extends to the whole of Bangladesh.

(3) It shall come into force at once.

2. In this Order, unless there is anything repugnant in the subject or context-

(a) "Board" means the Board of Directors of a Corporation;

(b) "Chairman" means the Chairman of a Corporation;

(c) "Corporation" means a corporation established by this Order;

- (d) "Director" means Director of a corporation;
- (e) "Government" means the Government of the People's Republic of Bangladesh;
- (f) "prescribed" means prescribed by rules or regulations made under this Order;
- (g) "Scheduled industrial enterprises" means industrial enterprises enumerated in the Schedules to this Order.

3. The provisions of this Order and any rule or regulation made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

4. On the commencement of this Order, all the shares in each of the scheduled industrial enterprises or as the case may be the industrial enterprise placed under a Corporation by an order under clause (1) of Article 10 which have not already vested in the Government by or under any other law for the time being in force, shall, by virtue of this Article and without further assurance, stand vested in, and allotted to, the Government free of any trust, mortgage, charge, lien, interest or other encumbrance whatsoever, and the Government shall, as from such commencement, be the sole share-holder of such industrial enterprises.

5. Notwithstanding anything contained in any memorandum or articles of association of any scheduled industrial enterprises or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10, or in any charter, agreement, contract or other instrument whatsoever, the Government may, in respect of any such industrial enterprise;

(a) the Government may, in respect of any scheduled industrial enterprise, take such measures and do such things as it deems necessary or expedient for the purpose of efficient running of such industrial enterprise;

(b) dissolve the Board of Directors of such industrial enterprise and appoint new Directors;

(c) terminate any managing agency agreement in respect of such industrial enterprise; and

(d) modify or amend the memorandum or articles of association or any charter, agreement, contract or instrument of such industrial enterprise.

6. Every provision in any law or in any memorandum or articles of association or any other charter or instrument of any scheduled industrial enterprise or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10 providing for any consequence to follow, or requiring any act or thing to be done, or entitling any person to do any act or thing or to take any action whatsoever, as result of a reduction in the number, of the members of such industrial enterprises below a certain number, shall be of no effect in relation to such industrial enterprise.

7. The Government may, by rules, modify in their application to any scheduled industrial enterprise or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10 any of the provisions of the Companies Act, 1913 (act VII of 1913), or of any rules made thereunder.

8. Until the Government otherwise directs:-

(a) the Board of Directors of a scheduled industrial enterprise, or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of

Article 10 which was in existence immediately before the commencement of this Order, shall continue to function, a Board appointed by the Government;

(b) the chief executive of a scheduled industrial enterprise or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10 shall on behalf of the Government continue to exercise such powers of management in respect of the scheduled enterprise or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10 as were vested in him immediately before the commencement of this Order; and

(c) all contracts and agreements, including the managing agency agreements, and all rules, regulations and bye-laws of any scheduled industrial enterprise, or, as the case may be, the industrial enterprises placed under a Corporation by an order under clause (1) of Article 10 which were in force immediately before the commencement of this Order, shall continue to remain in force.

9. The Government shall pay in respect of the shares vested in the Government under Article 4 such compensation as may be determined by it:

Provided that such compensation shall not exceed the paid-up value of such shares.

10. On the commencement of this Order, there shall be established the following corporations:

(a) Bangladesh Jute Industries Corporation, which shall have and exercise all the powers of a corporation in respect of the industrial enterprises engaged in jute manufacturing enumerated in the First Schedule;

(b) Bangladesh Cotton Mills Corporation, which shall have and exercise all the powers of a corporation in respect of the industrial enterprises engaged in cotton manufacturing enumerated in the Second Schedule;

(c) Bangladesh Sugar Mills Corporation, which shall have and exercise all the powers of a corporation in respect of all the sugar mills enterprises enumerated in the Third Schedule;

(d) (i) Bangladesh Steel Mills Corporation;

(ii) Bangladesh Paper and Board Corporation;

(iii) Bangladesh Fertiliser, Chemical and Pharmaceutical Corporation;

(iv) Bangladesh Engineering and Shipbuilding Corporation;

(v) Bangladesh Minerals, Oil and Gas Corporation to be called in short Petrobangla;

(vi) Bangladesh Forest Product Corporation;

(vii) Bangladesh Tanneries Corporation which shall respectively have and exercise the powers of a corporation in respect of such industrial enterprises, including industrial enterprises vested in Government under the Bangladesh Abandoned Property (control, Management and Disposal) Order, 1972 or owned and managed by a statutory corporation, which the Government may place under it by an order notified in the official Gazette.

(1A) Notwithstanding anything contained in any other law, an industrial enterprise, placed under any Corporation by an order notified in the official Gazette under sub-clause (d) of clause (1) of Article 10, and all shares or other proprietary interest in such industrial enterprise shall be deemed to have always vested in the Government and no such order shall be challenged on the ground that the industrial enterprise or the shares or interest therein had not vested in the Government, or that the industrial enterprise, or any share or interest therein, was not liable to be vested in the Government.

(2) Each corporation shall be a body corporate, having perpetual succession and a common seal with power, subject to the provision of this Order, to acquire, hold and dispose of property, both movable and immovable, and shall by the said name sue and be sued.

(3) The head office of each Corporation shall be at Dacca.

11. (1) The general direction and administration of the affairs and business of a corporation shall vest in a Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Corporation.

(2) The Board shall be subject to the superintendence and control of the Government and shall be guided, in the discharge of its functions, by such general or special instruction as may, from time to time, be given to it by the Government.

12. (1) The Board shall consist of a Chairman and such number of other Directors not exceeding six as the Government may fix.

(2) The Chairman and other Directors shall be appointed by the Government for such period and on such terms and conditions as the Government may determine.

(3) The Chairman or any other Director may, at any time, resign:

Provided that his resignation shall not take effect until accepted by the Government.

(4) No act or proceeding of the Board shall be invalid merely on the ground of existence of any vacancy in, or any defect in the constitution of the Board.

13. (1) The Chairman shall be the chief executive officer of a Corporation.

(2) The Chairman and any other Director shall exercise such powers, perform such functions and discharge such duties as may be prescribed.

14. (1) The meetings of the Board shall be held at such times and places and in such manner as may be prescribed:

Provided that a meeting may also be otherwise convened by the Chairman when he so thinks fit.

(2) If for any reason the Chairman is unable to be present in a meeting of the Board, a Director authorised in writing by the Chairman shall preside at the meeting.

(3) At a meeting of the Board each Director shall have one vote and in the event of equality of votes the Chairman shall have a second or casting vote.

15. (1) The Board may appoint such committee or committees as it thinks fit to assist it in the efficient discharge of its functions.

(2) The Board may delegate its power to the Chairman for the purpose of efficient functioning of Corporation.

(3) The Chairman may delegate his powers to the officers of a Corporation.

16. A Corporation may appoint such-officers, consultants, advisers, auditors and employees as it considers necessary for the efficient performance of its functions on such terms and conditions as it may determine.

17. (1) It shall be the function of Corporation to supervise and co-ordinate, subject to any regulation that may be made in this behalf, the activities, business and affairs of the scheduled industrial enterprises placed under it by Article 10.

(2) Without prejudice to the generality of the foregoing provision, the Corporation shall have to exercise such powers as may be prescribed in respect of the scheduled industrial enterprises.

(3) The Corporation shall, in respect of any scheduled industrial enterprise, also exercise such of the powers of the Government as the Government may by notification in the official Gazette delegate to the Corporation.

(4) Notwithstanding anything contained in this Order, a Corporation shall exercise such other powers and functions as may be conferred on it by or under any law.

18. (1) the authorised share capital of each Corporation shall be one crore of takas each, to be subscribed by the Government, in the manner determined by the Government from time to time according to the requirements of the Corporation.

(2) The initial share capital shall be five lakhs of taka fully paid up and subscribed by the Government.

19. A Corporation shall by such date in each year as may be prescribed, by rules, submit to the Government for approval a statement, to be called the Annual Budget Statement, in the prescribed form for every financial year showing estimated receipts and expenditure and sums which are likely to be required from the Government during that financial year.

20. (1) A Corporation may spend such sums as it think fit on the basis of the Annual Budget Statement approved by the Government under Article 19.

(2) A Corporation may, with the prior approval of the Government, borrow such sums, with or without security, as may be required by it to discharge its functions under this Order.

21. (1) A Corporation shall maintain proper accounts and other relevant records and prepare annual statement of accounts, including a profit and loss account and balance-sheet.

(2) The accounts of Corporation shall be audited by not less than two accountants, being chartered accounts within the meaning of the Chartered Accounts Ordinance, 1961 (Ord. X of 1961), who shall be appointed by the Government.

22. (1) A Corporation shall furnish to the Government such returns, reports and statements as the Government may from time to time require.

(2) A Corporation shall, as soon as possible after the end of every financial year, furnish to the Government a statement of accounts audited by the auditors under Article 21 together with an annual report on the conduct of its affairs for that year.

(3) The auditors shall in their report upon the annual balance-sheet and accounts state whether in their opinion the balance-sheet is a full and fair balance-sheet and contains all necessary particulars and is properly drawn up so as to exhibit and correct view of the state of affairs of a Corporation, and in case they have called for any explanation or information from the Board, whether it has been given and whether it is satisfactory.

(4) The Government may, at any time, issue directions to the auditors requiring them to report to it upon the adequacy of measures taken by the Corporation for protection of the interest of the Government and creditors or upon the sufficiency of their procedure in auditing the affairs of a Corporation and may, at any time, enlarge or extend the scope of the audit or direct that a different procedure in audit be adopted or that any other examination be made by the auditors if in its opinion the interest of the Government so requires.

(5) The copies of the audited accounts and annual report shall be published in the official Gazette and shall be laid before the Legislature.

23. No provision of law relating to the winding up of companies shall apply to a corporation and a Corporation shall not be wound up save by order of the Government and in such manner as it may direct.

24. The Government may, by notification in the official Gazette, make rules for the purpose of giving effect to the provisions of this Order.

25. (1) The Board may, with the previous approval of the Government, make regulations, not inconsistent with the provisions of this Order and the rules, to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Order.

(2) All regulation made under this Article shall be published in the official Gazette and shall come into force on such publication.

26. (1) The Government may, by order transfer to a Corporation such portions of the property, assets and liabilities, and such officers and employees of the Bangladesh Industrial Development Corporation as the Government deem fit on terms and conditions to be determined by the Government.

(2) The Government may also, by an order, transfer to a Corporation such portion of the property, assets and liabilities and such officers and employees belonging to the Government as it may deem fit on terms and conditions to be determined by the Government.

Dacca:  
The 26 March, 1972

A.S. CHOWDHURY  
President  
of the People's Republic of Bangladesh.

AZIMUDDIN AHMED  
Deputy Secretary.

APPENDIX-4

MANAGEMENT CONTRACT

This MANAGEMENT CONTRACT is made and entered into on this the .... day of 1988.

BETWEEN

....., a public company incorporated under the Companies Act, 1913 having its registered office at Bangladesh Steel House, Kawran Bazar, Dhaka hereinafter referred to as the "COMPANY" (which expression shall mean and include its successors-in-interest, legal representative and assign) of the ONE PART.

AND

....., a corporation established by statute under the Bangladesh Industrial Enterprises (Nationalisation) Order, 1972 by the Government of the Peoples Republic of Bangladesh (President's Order No. 27 of 1972) and having its office at Kawran Bazar, Dhaka, hereinafter referred to as the "BSEC" (which expression shall mean and include its successors-in-interest, legal representative and assign) of the OTHER PART.

WHEREAS the COMPANY in the course of its business requires management, administration and other allied services for efficient business operation of the country.

AND WHEREAS the COMPANY has requested the BSEC to perform such management and other services as required by them and the BSEC has accepted the said request.

AND WHEREAS in the Articles of Association of the COMPANY it is provided, inter alia, that the Board of Directors of the COMPANY may enter into management contract with any Corporation for management service of the Company on such terms and conditions as may be mutually agreed upon.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES THE AFORESAID PARTIES ABOVE-NAMED HAVE MUTUALLY AGREED TO EXECUTE THE SAID MANAGEMENT CONTRACT AS FOLLOWS:

#### A. APPOINTMENT OF BSEC

The COMPANY hereby appoints the BSEC for a period of 10 (ten) years with effect from 30th June, 1987 to manage and administer the Company in matters relating to operation and business of the Company.

#### B. SERVICE OF BSEC

BSEC shall provide such managerial, administrative, advisory and other allied services for efficient and proper operation and function of the business of the COMPANY the scope of which is detailed hereunder:

01. BSEC shall advise and guide the COMPANY in all major activities such as investment, procurement, production, marketing, financing, staffing and other areas of operation.
02. BSEC shall extend the appropriate guide-lines for the COMPANY to enable it to operate on commercial consideration for achieving target of production and sales within the budget approved by the Board.
03. BSEC shall advise the COMPANY on measures to be taken for improving performance of the COMPANY to attain better result and to earn profit.
04. BSEC shall assess the performance of the COMPANY on the basis of relevant information provided by the COMPANY and make appropriate recommendations to the COMPANY for improvement and better results.
05. BSEC shall prescribe and frame proper measures to ensure economic and efficient use of all resources available at the disposal of the COMPANY and prescribe means to keep the rate of wastage at minimum level.
06. BSEC shall assist the COMPANY by providing appropriate rules and regulations for day to day maintenance of the plant and equipment and to keep the same in good running condition for optimum utilisation of the production facility.
07. The COMPANY shall regularly provide the BSEC with MIS Report and all other reports, returns and accounts incidental to all its activities and the BSEC shall advise where required, the COMPANY in the light of the said information to ensure better results and optimum efficiency in operation.
08. BSEC shall assist the COMPANY continuously to improve its profitability by improving the standard of efficiency of manpower, method, machine and elimination of wastage of materials.
09. BSEC shall prescribe guide-lines and advise the COMPANY for initiating and undertaking research and development activities.
10. On the request of the COMPANY, BSEC shall give advice, guidance, decisions and approval in the functional field of the COMPANY, including, making and framing of such guide-lines as and when required by the COMPANY in all matters.
11. BSEC shall perform any other function as BSEC and the COMPANY may find necessary and expedient.

#### C. FIXATION OF PRICE AND SALE OF THE PRODUCTS OF THE COMPANY

- a) The cost and the proposed price of the products of the COMPANY shall be placed periodically before BSEC for examination and approval of the competent authority. The

annual production target of the COMPANY with due recommendation shall be placed before the Corporation for fixation of the target prior to taking any decision in the meeting of the Board of Directors.

b) BSEC shall recommend appropriate measures for ensuring brisk sale of the products of the COMPANY and for the removal of bottlenecks, if any, in the marketing of the said products including the imposition of restriction in the import of wires manufactured by the company.

#### D. PROCUREMENT OF RAW MATERIALS

12. BSEC shall assist the COMPANY by providing proper procedural rules for efficient procurement policy for the instant and timely supply of raw materials and spare parts to ensure uninterrupted production line and to achieve production of optimum quantity and standard quality goods.

13. BSEC shall prescribe appropriate rules for material management keeping in view that the level of stocks are kept at the minimum.

#### E. APPOINTMENT OF THE CHIEF EXECUTIVE/MANAGING DIRECTOR, OFFICERS AND OTHER EMPLOYEES OF THE COMPANY.

14. BSEC shall select/appoint the Chief Executive/Managing Director of the COMPANY and such other Officers, Consultants, Advisers and Employees as may be necessary for the efficient operation of the COMPANY on such terms and conditions as may be determined, and agreed upon.

15. BSEC may, if it considers expedient in the interest of better administration of the affairs and business of the COMPANY, transfer Officers and other Employees of BSEC to the COMPANY, including such workers from any enterprise placed under the BSEC, on such terms and conditions as may be determined and mutually agreed upon between the BSEC and the COMPANY.

16. The organogram of the COMPANY showing the total requirement of personnel with job specifications shall be placed with their due recommendation thereon before the BSEC for finalisation before taking decision in the meeting of the Directors.

17. BSEC shall provide the appropriate procedural guide-lines for the appointment, recruitment, training and promotion of officers/staff/workers within the approved organogram of the COMPANY.

18. BSEC shall provide and frame appropriate procedural guide-lines in matters of management relationship and disciplinary action in respect of officers/staff/workers of the COMPANY.

19. BSEC shall provide appropriate rules for giving of prizes, commendation certificate, cash awards, special increment and special promotion to the concerned personnels of the COMPANY.

20. BSEC shall provide proper and efficient guide-lines for the development of manpower and to arrange training programme for the workers/employees/officers of the COMPANY.

#### F. BUDGET AND ACCOUNTS OF THE COMPANY

21. The Revenue and Capital budget and BMRE Scheme, if any, shall be placed before the BSEC for finalisation prior to taking of any decision in the meeting of the Board of Directors.

22. BSEC shall prescribe proper financial rule for capital/revenue expenditure within the approved budget, specifying the persons authorised to incur or approve the expenditure.

23. BSEC shall provide appropriate procedural guide-lines and measures for ensuring economic utilization of the COMPANY'S funds.

23. BSEC shall be provided with all audit reports of the COMPANY from which they advise the COMPANY for better result and improvement in the financial management.

#### G. REMUNERATION OF BSEC

25. In consideration of the services rendered by BSEC the COMPANY shall pay such remuneration to BSEC from time to time as may be fixed mutually during the tenure of this Management Contract.

#### H. TERMINATION

26. This Management Contract shall remain valid until it is mutually discontinued by both parties, i.e. by BSEC and the COMPANY.

27. Upon termination of the Management Contract for any reason whatsoever, all amount due and owing as between the COMPANY and BSEC shall become immediately due and payable, without prejudice to any claim otherwise arising from any breach of this Management Contract.

#### I. ARBITRATION

28. In case of any dispute or differences arising between the parties relating to this Management Contract, the same shall be referred to the arbitration of two arbitrators to be appointed one each by the parties and the decision of the arbitrators shall be final and binding upon the parties. The arbitration shall be in accordance with the Arbitration Act, 1940 or any amendment made thereof.

IN WITNESS WHEREOF THE PARTIES ABOVE NAMED HAVE  
SEALED AND SIGNED THIS MANAGEMENT CONTRACT ON THIS THE ---- DAY  
OF -----1988

## APPENDIX - 5

### List of persons interviewed in Bangladesh

(Number of persons in the bracket)

[In the interest of anonymity names and official positions are avoided. Since precise rank would identify individuals too readily, hence "officials" is used.]

#### Members of Parliament

Mr. A.S.M. Abdur Rab.  
Mr. Nurul Islam Moni.  
Mr. Monzur Rahman Biswas.  
Mr. Abdur Rahim.  
Mr. Mr. Fazle Rabbi.

#### Ministry of Industry

Additional Secretary (1)  
Joint Secretary (3)  
Deputy Secretary (5)  
Assistant Secretary (5)

#### Ministry of Finance

Joint Secretary (1)  
Assistant Secretary (6)

#### Planning Commission

Member Planning Commission (1)  
Senior Assistant Secretary (3)

#### Ministry of Law and Justice

Joint Secretary (1)  
Deputy Secretary (2)

#### Dhaka Chamber of Commerce

Members of Executive Committee (5)  
Officials (3)

#### Bangladesh Shilpa Bank

Officials (3)

#### BJMC

Officials (7)

#### BCIC

Officials (6)

BSEC

Officials (12)

Labour leaders (3)

BSFC

Officials (5)

Apart from the above persons, interviews with 57 officials, at various levels, and 38 labour leaders and workers of different enterprises were held. The enterprises are:-

Atlas Bangladesh Ltd.,  
Bangladesh Machine Tools Factory Ltd.,  
Bangladesh Diesel Plant Ltd.,  
Bangladesh Cycle Industries Ltd.,  
Chittagong Steel Mills Ltd.,  
Chittagong Cement Clinker & Grinding Co. Ltd.,  
Dhaka Steel Works Ltd.,  
Eastern Cables Ltd.,  
Eagle Box & Carton Manufacturing Co. Ltd.,  
Gazi Wires Ltd.,  
Karnaphuli Paper Mills Ltd.,  
Karnaphuli Rayon & Chemicals Ltd.,  
Kohinoor Chemical Co. Ltd.,  
Mehar Industries (Bangladesh) Ltd.,  
Metalex Corporation Ltd.,  
National Tubes Ltd.,  
North Bengal Paper Mills Ltd.,  
Pragoti Industries Ltd.,  
Usmania Glass Sheet Factory Ltd.,  
Zia Fertiliser Co. Ltd.