MARTIAL LAW REGIMES: CRITICALLY SITUATING THE VALIDITY OF THE FIFTH AND SEVENTH AMENDMENTS

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INTRODUCTION

An unenviable feature of the constitutional development of Bangladesh is that it had to withstand two extra-constitutional, i.e., Martial Law regimes. These Martial Law regimes, however, were subsequently validated by the Fifth and Seventh Amendments of the Constitution.

Paragraph 18 was inserted in the Fourth Schedule of the Constitution by the Constitution (Fifth Amendment) Act, 1979. It needs to be mentioned that the Fourth Schedule was included in the Constitution in 1972 to validate activities of the pre-constitutional government, before the adoption and coming into force of the Constitution on the 16th December, 1972. Hence, it can be suggested that the Fourth Schedule was not intended to be a mechanism for validation of post-constitutional Martial Law regimes. Newly inserted Paragraph 18 into the Fourth Schedule by the Fifth Amendment to the Constitution ratified all Martial Law Proclamations. This Paragraph legalised all the actions of the Martial Law authorities and precluded judicial review of those acts. The Fifth Amendment is not a constitutional amendment in strictly legal terms, as it did not change any constitutional provision directly. It only gave a stamp of legality to those constitutional changes which were already affected by the Martial Law Proclamations.

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According to Article 142 of the Constitution of Bangladesh only the Parliament has the authority to amend any provision of the Constitution by a two-thirds majority (in some cases a referendum is also required[1]).

The Constitution (Seventh Amendment) Act, 1986 followed the same pattern and inserted Paragraph 19 to the Fourth Schedule of the Constitution to ratify and confirm all the activities of the Martial Law regime of General Ershad. This Amendment also precluded any judicial review of those acts.

These two Martial Law regimes and their subsequent validations by the Fifth and Seventh Amendments raise a series of questions concerning their legality; both substantive and procedural. Were the two Martial Law regimes legal under the constitutional dispensation of Bangladesh? Were they justified under the Kelsenian doctrine of efficacy or the doctrine of state necessity? If the Martial Law Proclamations and all activities of Martial Law regimes were legal then why did they require validation at the time of their termination? Can Parliament validate anything which is otherwise invalid from its very beginning? Can a Martial Law Proclamation amend any provision of the Constitution and can the Parliament give legal coverage to that amendment? More importantly, can Parliament amend any provision of the Constitution which is considered as a basic structure of the Constitution? These are the issues for a critical scrutiny of this paper.

Though some academicians and jurists have invested their efforts to determine the validity of the two Martial Law regimes and the Fifth and Seventh Amendments, but these attempts have focussed on these two Amendments separately or in isolation from each other.[2] No comprehensive analysis for both the Martial Law regimes and their legal validity has not yet been attempted. This article, therefore, attempts a comparative inquiry into the validity of these two Martial Law regimes. The role of judiciary and the status of the Constitution during the Martial Law regimes have also been scrutinised.

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1 Article 142(1A) mandates that any amendment to the Preamble and articles 8, 48 and 56 requires referendum. The requirements of referendum for amendments of articles 58, 80 and 92A were omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991)

2 See below and generally, Choudhury, G.W., The Last Days of United Pakistan, London, 1974.

The Constitution has and in fact been amended by these two amendments and it is unlikely that another amending act will or even can repeal these amendments without jeopardising the legality of actions taken on the basis of the amended Constitution. Nevertheless, an understanding of the legal lacunae engendered by these amendments, hopefully, will counsel a different path of constitutional development than has been the case in the past.

This article is divided into four main sections: Martial Law; the First Martial Law Regime and the Fifth Amendment; the Second Martial Regime and the Seventh Amendment; and Judicial Review of the Fifth and Seventh Amendments. In all these sections our tool of scrutiny of the Amendments have primarily been two: applicable legal doctrines and judgements of the Supreme Court of Bangladesh. Engagements of these tools, in terms of the analysis of this article, were deemed essential as our analysis is primarily a legalistic one; though the conclusions are certainly not without political ramifications for the future contours of our state.

MARTIAL LAW AS A LEGAL CONCEPT

The expression 'Martial Law' has been used in three contexts by various authors at different times. Firstly, in earlier times, 'Martial Law' was used to mean military law. The law regulating the discipline and governance of the armed forces was termed as 'Martial Law'. The term retained this connotation up to the later part of the eighteenth century. Prior to that, there was no distinction between the military law and Martial Law as these had a common historical origin in the law that had been administered in medieval England in the court of the Constable and the Marshall. Secondly, 'Martial Law' is used to mean 'Military Government' in occupied foreign territory and signifies the law administered by a military commander in occupied foreign territory in times of war. In this sense, Martial Law is a part of international law; it is beyond the scope of municipal or constitutional law.[3] In international law, Martial Law refers to the powers of a military commander in wartime in enemy territory. However, such an understanding of Martial Law, it needs to be added, is distinct from Martial Law as a machinery for the enforcement of internal disorder in times of war or

[3] Bari, M. E., "The Imposition of Martial Law in Bangladesh, 1975: A Legal Study", vol. 1:1 (1989) The Dhaka University Studies, Part-F, p.59.

internal upheavals.[4] Thirdly, 'Martial Law' is used to mean the deployment of troops for suppressing riot, rebellion, insurrection or other internal disorders according to the direction of the civil authorities, without proclaiming Martial Law. The right of the civil authority to take the support of military forces for restoring order is common to the law all the countries. This right of the executive, however, cannot be properly called Martial Law in the sense that it has now come to be understood, particularly in the coup-prone countries. In the absence of an alternative and strictly in the traditional usage of the term, 'Martial Law' means the use of military forces in the aid of the civil authorities in suppressing riots and other public disorders.[5]

In *Umar Khan vs Crown*[6] Muhammad Munir, C.J. quoted departmental instructions to Martial Law Chiefs which run as under:

> Martial Law means the suppression of ordinary law in any part of the country by military authority, whose sole duty is to restore such conditions of things as will enable the civil authority to resume charge. In order to attain that object the military officer may issue such orders, and enforce them in such a manner, as may be necessary for that purpose only. His authority is, for the time being supreme, but in practice the amount of his interference with the civil administration and the ordinary courts is measured by military necessity. He should not interfere beyond what is necessary for the restoration of order, and should whenever possible, act in consultation with the local civil authorities.... . Since Martial Law owes its existence to necessity, the justification of all acts done under Martial Law depends on their being necessary. The Military officer must at all times be guided by military exigencies of the situation. Having provided for these, he should confine himself to action directed to the restoration of order. It should be borne in mind that improved administration is not the object of Martial Law, that example and punishment are not its end, but only its means, and allowable only so far as necessary for its legitimate object: and that its severities can only be justified when they are necessary for the restoration of order and the reestablishment of civil authority."[7]

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4 Islam, M., Constitutional Law of Bangladesh, Dhaka, 1995, at p.61.

5 Supra note 3, at p.59.

6 DLR(W.P.C.) p.115.

7 Chowdhury, B. H., J., Evolution of the Supreme Court of Bangladesh, Dhaka, 1990, at pp.120-21.

The above instructions were intended to be followed by the military authorities when they administer Martial Law in aid of a civil government. The instruction reveals clearly that it is not upto the military to look for faults with civil administration as long as the civil authorities do not bring the country to a dangerous pit.[8]

However, distinct from the above meanings of 'Martial Law' in traditional legal literature, in the wake of coup d'etat in the developing countries, particularly after decolonaisation of the 1960s and frequent take-over of the state powers by the Military,[9] the term 'Martial Law' has acquired a new meaning. This new meaning has been captured in the following description:

> Martial Law in its proper sense means that kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or war when the civil government is unable to function or is inadequate to the preservation of peace, tranquillity and enforcement of law and by which the civil authority is either partially or wholly suspended or subjected to the military power. Therefore, it is an emergency measure and is the great law of social defence. In constitutional law, Martial Law finds its justification in the common law doctrine of necessity for its promulgation and continuance; measures taken in exercise of the power of Martial Law must be justified by the requirements of necessity alone, the necessity to restore law and order. Thus it can be declared in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function and flourish. The declaration of Martial Law would, in case of foreign invasion, mainly serve the purpose of enabling the forces of the country to be better utilised for its defence and in case of rebellion or other serious internal disorders would enable the government to arrest persons resisting its authority, summarily try and promptly punish them when the ordinary course of justice, is for its slow and regulated pace, utterly inadequate in an emergency when every moment is critical.[10]

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[8] Ibid., at pp. 123-4.

[9] For a comprehensive analysis of military coup d'etat and military regimes in the third world, see Muniruzzmana, T. Military Withdrawal from Politics, Dhaka, 1988.

[10] Supra note 3, at pp.59- 60.

JUDICIARY AND MARTIAL LAW REGIMES

Martial Law is usually promulgated to assist the state in suppressing disorder and it is not brought to destroy the civil government and legal order. But what happens if the military commander forcibly takes over the state power and abrogates the constitution? The persons bound by oath to preserve and protect the supremacy of the Constitution imposed Martial Law and abrogated the Constitution of Pakistan in 1958.[11] The Pakistan Supreme Court found this revolutionary government to be legal. Generally, the judges, as Mustafa Kamal, J. said, have approached the powers of the usurper in revolutionary situations in two broad ways; first, by applying the Kelsenian doctrine of revolutionary legality and, secondly, by applying the doctrine of necessity.[12]

Hans Kelsen in his "General Theory of Law and State" presented the legal effects of a revolution in a rational and systematic manner. To Kelsen, a revolution means a successful revolution. To be successful the old order ceases and the new order begins to be efficacious,

> because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal.[13]

Kelsenian doctrine was first applied by the Pakistan Supreme Court in *State vs Dosso* where Munir, C.J. held that the new legal order after a revolution should be judged by reference to its own success. He considered the Proclamation of Martial Law in 1958 by Iskander Mirza as revolution and declared this revolutionary government legal. Munir C., J. observed:

> It sometimes happens, however, that a ... Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution ... any such change is called revolution, and its legal effect is not only destruction of the existing Constitution but also the validity of the national order ... the revolution itself becomes a law creating fact because thereafter its own

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[11] Supra note 4, at p..61.

[12] Mustafa, K, J., Bangladesh Constitution: Trends and Issues, Dhaka 1994, at p.64.

[13] Quoted in ibid., at p.63.

> legality is judged not by reference to the annulled Constitution but by reference to its own success ... . Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.[14]

Kelsenian doctrine of revolutionary legality was followed in *Uganda vs Commissioner of Prisons, ex parte Matovu* (Uganda 1966-7). When the 1962 Constitution of Uganda was abolished by the National Assembly and the 1966 Constitution adopted in its place, the High Court of Uganda came to the same conclusion. As a result, the then Prime Minister was installed as Executive President with power to appoint a Vice-President which, according to the court, was a revolution.[15]

The Kelsenian doctrine was referred in the Appeal Court and Privy Council stages of *Madzimbamuto vs Lardner-Burke* (Rhodesia 1966-8). In this case the question of legality of revolutionary government came up for consideration by the Privy Council when the Prime Minister of Rhodesia made a unilateral declaration of independence. The appellant challenged her husband's detention without trial by the rebel government. Referring to the *Dosso* and *Matuvo*, Lord Reid, delivering the majority judgement observed, "Their Lordships would not accept all the reasoning in these judgements but they see no reason to disagree with the results."[16]

The doctrine of efficacy enunciated by Kelsen, however, was not followed in *E. K. Sallah vs Attorney General* (Ghana 1970). A few years after the Ugandan and Kenyan cases, the question of revolutionary legality came up before the Pakistan Supreme Court in *Asma Jilani vs Punjab*.[17] The court found Yahya Khan to be an usurper, overruled the *Dosso* and observed: "... it is an equally well established principle that where the civil courts are sitting and the civil authorities are functioning the establishment of Martial Law cannot be justified . . . "[18] In the same case the Supreme Court further observed: "The principle

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[14] *State vs Dosso*, PLD 1958 SC 588.

[15] *Uganda vs Commr. of Prisons, Ex P. Matuvo*, (1966) E.A. 514, quoted in supra note 4, at p.61.

[16] Quoted in supra note 4, at p.62.

[17] PLD 1972 SC 139.

[18] Ibid.

laid down in *Dosso*'s case is wholly unsustainable and cannot be treated as good law either on the principle of *stare decisis* or even otherwise".[19]

The other approach of the Judges to meet the revolutionary situations is to apply the doctrine of state necessity. Sometimes revolutionary steps are taken by the incumbent authority not covered by the express words of the Constitution, but such unconstitutional behaviour is taken to be necessary for the survival of the state. It is considered as a constitutional deviation and it is sought to be justified in the interest of averting an impending disaster and preventing the state and society from dissolution.[20] The doctrine of state necessity was followed in Special Reference No.1 of 1955 by the Governor General,[21] *Republic vs Mustafa Ibrahim* (Cyprus 1964) and *Begum Nusrat Bhutto vs The Chief of Army Staff and the Federation of Pakistan*.[22]

The Peoples' Party of Pakistan won in the general election held in March, 1977. The opposition parties raised complaints of massive rigging and manipulation in the election. There were continuous street agitations followed by ransack and violence, resulting in loss of lives. An initiative of inter-party negotiations for establishing an interim authority with adequate power to supervise fresh election failed. Against this backdrop, the Commander-in-Chief of the Army took over power and proclaimed Martial Law. In this case, filed by Mrs. Bhutto, the respondents took the stand that the sole aim of taking over power was to organise a free and fair election — the Constitution was not abrogated, the elected President continued in office, the Chief Justice was giving advice and guidance in legal matters — the respondents argued. The Pakistan Supreme Court found constitutional deadlock and held that Bhutto government had lost its authority to rule the country. The Court further held that, situation was different from the situation obtaining in the *Dosso* and the *Asma Jilani* cases where the Constitutions were abrogated. By applying the principle of state necessity the court held that the taking over of power by the Chief of Army Staff was valid and legal and considered it as a mere constitutional deviation, rather than usurpation.[23]

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[19] Ibid.

[20] Supra note 12, at p.64.

[21] PLD 1955 FC 435.

[22] PLD 1977 SC 657.

[23] Paraphrased from Islam, supra note 4, at p. 65.

> The upshot of this doctrine (doctrine of necessity) is that 'in order to bridge the gap between the law and facts of political life,' and to avoid the possibility 'that a State and the people should be allowed to perish for the sake of its Constitution' and to accommodate an action which was 'undoubtedly an extra constitutional step, but obviously dictated by the highest consideration of State's necessity and welfare of the people,' the doctrine of sate necessity is to be read into a written Constitution and the Constitutional deviations are to be upheld to preserve the State itself.[24]

It, however, needs to noted that sometimes some judges have interpreted constitutions to reach a different decision. For example, Justice Yakub Ali in *Asma Jilani vs Government of Punjab* held:

> My own view is that a person (usurper) who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law making. May be, that on account of his holding the coercive apparatus of the state, the people and the courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and the courts will not recognise its rule and act upon them as *de jure*. As soon as the first opportunity arises, when, the apparatus falls from the hands of the usurper, he should be tried for high reason and suitably punished.[25]

However, the much used "Kelsenian" theory of revolution in these judgements seem to have ignored one fundamental question of the Kelsenian revolution for the new legal order to be valid or justified. For a new legal order to be justified it has to be revolutionary and for it to be revolutionary, there must be a change in fundamental norms of the political system. The military take-overs are difficult to characterise as revolutions in the Kelsenian sense of fundamental change in the norms of political system but are, in fact, changes in the personnel at the helm of the state. These Martial Laws did not attempt any far-reaching change in the political system of the county. However, it also needs to be recognised that it is the realm of political scientists and not legal science to investigate the quantum of changes brought about by a military take-over and whether such changes would qualify as 'revolution'.[26]

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[24] Supra note 11, p.64.

[25] Quoted in supra note 7, at p. 126.

[26] For a short overview of these and related issues, see Kazimierz, O., "Law and Revolution" in Zenon, B. (ed), Revolutions in Law and Legal Thought,

The First Martial Law Regime and the Fifth Amendment

A group of unruly army officers, breaking chain of command killed the President of the country, Bangabandhu Sheikh Mujibur Rahman, along with his family members, on August 15, 1975 and Martial Law was proclaimed. The first Martial Law regime, installed on August 15, 1975, continued till April 6, 1979.

On the morning of August 15, 1975 Major (Retd.) Shariful Hossain Dalim, one of the coup leaders, announced Martial Law in the following words:

> I am Major Dalim announcing the fall of the autocratic government of Sheikh Mujib. Sheikh Mujib has been killed and the armed forces have seized power in the greater interest of the country under the leadership of Khandaker Moshtaque Ahmed who has taken over as the President of Bangladesh. Martial Law is declared.[27]

It is clear from the above mentioned announcement that Khandaker Moshtaque Ahmed did not declare Martial Law. However, the subsequent Proclamation made on August 20, 1975 by Khandaker Moshtaque Ahmed stated that he had "placed, on morning of the August 15, 1975, the whole of Bangladesh under Martial Law by the declaration broadcast from all stations of Radio Bangladesh."

Khandaker Moshtaque Ahmed was sworn in as the President of the country by the acting Chief Justice of the Supreme Court, Syed A.B. Mahmud Hossain in the afternoon of August 15, 1975. The swearing-in of Khandaker Moshtaque Ahmed did not comply with the

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Abedreen, 1991, at p. 1. That army take-over of the state power not for any fundamental (revolutionary) changes but merely as a change in personnel at the helm of the power is, perhaps best epitomised by the following comments of a scholar of constitutional development of Bangladesh, when she writes:

During this period (October, 1991) Sattar reportedly told a visiting constitutional expert who was pleading with him to arrive at a compromise and avert the impending imposition of martial law: 'How can I avert martial law? Ershad wants to be a military president and also perhaps, in due course, want to be assassinated'.

in Choudhury, D., Constitutional Development in Bangladesh: Stress and Strain, Dhaka, 1995, at p.73.

[27] Lifschultz, L., "The Army's Blue Print for a Take Over", Far Eastern Economic Review, 5 Sept., p.16, as quoted in supra note 3, p.61.

requirements of Article 55 of the 1972 Constitution. According to Article 55, the Vice-President will succeed the President if there is a vacancy until a new President is elected. Moreover, the taking of oath also ignored another constitutional requirement — Form I of the Third Schedule of the Constitution — which provided that the President be sworn in by the Speaker of the House of Nation. Administration of his oath of office as the President, as mentioned, was performed by the then acting Chief Justice, though legally, the Speaker of the House had not ceased to hold office as the Parliament was not yet dissolved.

A Proclamation was issued by the President on August 20, 1975. This Proclamation was a brief but comprehensive document which completed the purported legal formalities of his taking over full powers of the government with effect from the morning of August 15, 1975.

Though Martial Law was declared on August 15, 1975, the Constitution was not abrogated; it was made subservient to Martial Law Proclamation. The supremacy of the Constitution was, consequently, negated. Moreover, the Preamble and Article 8 of the Constitution, which are considered basic structures of the Constitution, were amended by Martial Law Proclamations and Orders. According to Article 142, only Parliament has the constitutional mandate to amend any provision of the Constitution. However, the Martial Law was declared and the Constitution was, nevertheless, amended.

The second parliamentary election was held in 1979 through which the Martial Law Administrator General Ziaur Rahman's newly created political party secured two-thirds majority. The first session of the new Parliament was convened on April 1, 1979 and on April 6, the Constitution (Fifth Amendment) Act, 1979 was passed to legally validate the action taken by the Martial Law Government during the period between August 15, 1975 and April 9, 1979. The Act amended the Fourth Schedule to the Constitution by an addition of new Paragraph 18 thereto which provided, *inter alia*, that

> all Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders and other laws made during the period between August 15, 1975 and April 9, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in the Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, ... are hereby ratified and confirmed and are declared to be validly made, done or taken and shall not be called in

question in or before any court, tribunal or authority on any ground whatsoever.[28]

The Constitution was amended several times during the Martial Law regime of about four years (1975 to 1979) through four major Martial Law Proclamations and various Proclamation Orders made thereunder. After the Fifth Amendment Act was adopted the overall Constitution came to be a different one,[29] though not completely an uprooted one, from the one adopted by the Constituent Assembly on December 16, 1972. It may be noted that the Constitution (Fifth Amendment) Act was passed when the Constitution was not fully revived.[30] The Fifth Amendment brought about, *inter alia*, the following changes in the Constitution:

1. In the Preamble the words "a historic war for national independence" were substituted for the words "a historic struggle for national liberation."
2. Religious words "BISMILLAH-AR-RHMAN-AR-RAHIM" was inserted in the beginning of the Constitution, i.e., above the Preamble.
3. In the original Constitution it was provided in Article 6 that the citizens of Bangladesh would be known as 'Bangalees'. This was change to provide that citizens would be known as 'Bangladeshis'.
4. One of the four major fundamental principles of state policy 'secularism' was omitted and in its place a new one, 'the principle of absolute trust and faith in the Almighty Allah' was inserted. (Article 8)
5. Another fundamental principle of state policy, 'socialism', was given a new explanation to the effect that 'socialism' would mean economic and social justice.' (Article 8)

The Doctrine of State Necessity and Kelsenian Paradigm

For the first time Martial Law was declared in Bangladesh at a time when the law and order situation was strained, though the formal

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[28] Paragraph 18, Fourth Schedule, The Constitution of the People's Republic of Bangladesh.

[29] Halim, Md. A., Constitution, Constitutional Law and Politics: Bangladesh Perspective, Dhaka, 1997, at p.147.

[30] Supra note 4, at p.19.

institutions were functioning. The imposition of an one party political system from the beginning of the year (1975) had upset many an adherent of pluralist democracy, but their opposition to the new system was mute.

Under the Common Law doctrine of state necessity an imposition of Martial Law could only be justified out of necessity to suppress riot, rebellion or insurrection and to restore peace and order. The promulgation of Martial Law on August 15, 1975 in Bangladesh, it can be argued, can not be justified under the doctrine of state necessity as there was no major disorder nor a rebellious situation prevailed in the country.[31] Here the observations made by Hamoodur Rahman, C.J. in *Asma Jilani vs State of Punjab*[32] is relevant, where he remarked:

> We must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil government only where a situation has arisen in which it has become impossible for the civil courts and the other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil courts or the abrogation of the authority of the civil government. The maxim *inter armes leges silent* applies in the municipal field only where a situation has arisen in which it has become impossible for the courts to function, on the other hand, it is an equally well established principle that where the civil courts are sitting and the civil authorities are functioning the establishment of Martial Law cannot be justified.[33]

And

> It is, therefore, not correct to say that Proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend.[34]

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[31] Supra note 3, at p.64. However, for different views, see Choudhury, D., supra note 26, Lifshultz, L., Bangladesh: The Unfinished Revolution, London, 1979; Ahmed, M., The Era of Sheikh Mujib, Dhaka, 1983, Ahamed, E., Society and Politics in Bangladesh, Dhaka, 1989, and Ahamed, E., Military Rule and the Myth of Democracy, Dhaka, 1989.

[32] PLD 1972 SC 139

[33] Ibid., at p.187.

[34] Ibid., at p.190.

The situation in Bangladesh was different from the situation obtaining in the *Dosso* and the *Asma Jilani*; rather it had some similarity with the fact of the *Begum Nusrat Bhutto*. In 1975 the usurper did not abrogate the Constitution, but allowed the Constitution to operate subject to Martial Law Proclamations, Regulations and Orders and shortly thereafter by another Proclamation set a time limit for holding election for the full restoration of the disturbed constitutional order. It could not be said that the legal order established by the Constitution was dead.[35] Dieter Conrad has made a distinction between the two types of usurpation:

> Briefly, the typical two situations and their essential differences may be described thus; one, where the revolutionary power attempts to change the basic constitutional structure and to introduce a new order; the other where extra constitutional action is but taken in order to defend and eventually restore the existing Constitution. These two types of extra-constitutional action may conveniently be characterised by drawing on a distinction from the German doctrinal discussion, namely of commissarial and sovereign dictatorship . . . the difference is that the commissarial dictator is ultimately bound to, though not presently restricted by, the existing Constitution. While the sovereign dictator justifying his actions from the future order is not measured by any precise constitutional yardstick (though by the requirements of either a mandate or a final ratification) and usually reserves power to judge on the appropriate time required.
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> In case of sovereign dictatorship the question of the application of the principle of revolutionary legality arises if the regime is found to be legal because of the effective control of the sovereign dictator and the death of the old legal order, that is the end of the matter... . In the case of commissarial dictatorship there is no claim of death of the old legal order and as such the question of application of the principle of revolutionary legality does not arise. It is straightaway a question of the application of the principle of necessity to legalise the actions of the usurper, which the court considers to be a temporary constitutional deviation rather than usurpation, till the constitutional order is restored.[36]

However, it seems that Martial Law was declared on August 15, 1975 as a precautionary measure to deal with disturbances which might arise as a consequence of the assassination of Sheikh Mujib and the

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[35] Supra note 4, at p.68.

[36] Quoted in ibid., at pp.68-9.

military take-over. It is to be noted that Martial Law was proclaimed at a time when Bangladesh was already under an emergency power. From the usual practice of the Third World countries by which a military ruler comes into power, it is clear that not only in Bangladesh but in many other countries a group of army officers overthrow a legitimate civilian government by means of coup d'etat and proclaim Martial Law not for the purpose of restoring law and order or for establishing peace and security, but to obviate any public opposition to their extra-constitutional acts.

The authorities on constitutional law in Great Britain did not deal with this kind of Martial Law.[37] However in 1963 Justice Murshed of the East Pakistan High Court in *Lt. Col. G. L. Bhattacharya vs State*[38] had held, with reference to the imposition of Martial Law in Pakistan in 1958, that the declaration of Martial Law after a revolution constituted a new departure and had little to do with constitutional Martial Law.

In spite of the promulgation of Martial Law on August 15, 1975, the basic norm or the total legal order of the country, the 1972 Constitution of the People's Republic of Bangladesh, was neither abrogated nor suspended. The military government decided to rule the country by the 1972 Constitution and Martial Law Proclamations and Regulations. They made the Constitution, as already mentioned, subservient to Martial Law Proclamations. Thus, subject to Martial Law Proclamations, Regulations and Orders, the Constitution remained the fundamental law of the country. The judiciary continued to function, subject to limitations put on its jurisdiction by the Martial Law authorities. The judges of the Supreme Court did not take a new oath under the Martial Law regime. Therefore, the Martial Law declared on 15 August, 1975 cannot be properly termed as a revolution in Kelsenian terms since the existing legal order, the 1972 Constitution, was not destroyed and replaced by a new one. This first military take-over was in fact a constitutional deviation rather than a total new dispensation and the declaration of Martial Law by the army was a precautionary measure against any possible resistance to the regime. Thus, the 1975 Martial Law can be described as Martial Law *sui generis*, fundamentally

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[37] Supra note 3, at p.65.

[38] PLD 1963 Dacca 377.

different from Martial Law in the sense in which it is generally used in the Common Law.[39]

Judicial Review during the First Martial Law Regime

The 1956 Constitution of Pakistan was abrogated on October 7, 1958 when Martial Law was declared for the first time in Pakistan. The 1962 Constitution was also abrogated on March 25, 1969 as Martial Law was declared for the second time. Unlike the 1956 and 1962 Constitutions of Pakistan, the 1972 Constitution of the People's Republic of Bangladesh was not abrogated at the time of the proclamation of Martial Law on August 15, 1975, neither was it suspended at any time. Although the 1972 Constitution of Bangladesh was allowed to operate throughout the whole period of Martial Law, it was made subordinate to the First Martial Law Proclamation issued on August 20, 1975 by the then President Khandaker Moshtaque Ahmed. The unamended and unsuspended constitutional provisions were kept in force and allowed to continue, subject to the First Proclamation and Martial Law Regulations or Orders made by the President.

The first Proclamation declared that, "the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me (i.e., the President) in pursuance thereof, continue to remain in force."[40] Moreover, it was stated that the First Proclamation and the Martial Law regulations and Orders should have effect notwithstanding anything contained in the 1972 Constitution or in any other law for the time being in force.[41] Therefore, it is evident that the Constitution of Bangladesh was made subservient to Martial Law Proclamations, Regulations and Orders made by the President and it was clearly provided that Martial Law Proclamations, Regulations and Orders would prevail over the provisions of the Constitution during the Martial Law period. In other words, under the first Proclamation, the Constitution lost its character as the supreme law of the country.[42]

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39 Supra note 3, at p.66.

40 Clause (e) of the First Martial Law Proclamation promulgated by the then President Khandaker Moshtaque Ahmed on August 20, 1975.

41 Clause (d) of the First Martial Law Proclamation.

42 Supra note 3, at p.70.

In a number of cases the highest court of Bangladesh considered the status of the Constitution during first Martial Law regime and held the Constitution to be subservient to Martial Law Proclamation. In those cases judiciary decided that under Martial Law Proclamation constitutional jurisdiction of the Supreme Court was abated. In the following we scrutinise these cases to glean their legal reasoning vis-à-vis the relationship between Martial Law and the Constitution.

Halima Khatun vs Bangladesh[43]

The provisions of the President's Order No. 16 of 1972 relating to abandoned property were made more stringent by the Martial Law Regulation No. VII of 1977. The Supreme Court was debarred from determining any question relating to legality of government action under the above mentioned President Order. All the judgements, decrees and orders of the courts were annulled which were passed for the restoration of any abandoned property under the said President Order. One Halima Khatun filed a writ petition by which she challenged the taking over of her property as an abandoned property. But on the ground that it required the determination of disputed questions of fact, the High Court Division discharged the Rule. She made a petition for leave to appeal to the then Supreme Court (now Appellate Division). At the hearing for leave to appeal it was argued that the Proclamation of August 20, 1975 did not authorise the Chief Martial Law Administrator to oust the jurisdiction of the Supreme Court by means of an enactment like Regulation No. VII of 1977. In the case,

> It was submitted that the constitutional jurisdiction of the Supreme Court can not be taken away or curtailed only by a Proclamation. A Regulation is in nature of an ordinary Act or Ordinance which cannot be used to alter or amend the constitutional provisions. The virus of the Regulation was challenged not because of want of authority in the Chief Martial Law Administrator but because it constituted an abrupt departure from a consistent practice. It was further argued that neither the Constitution nor the Proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and the power of the law-making authority is circumscribed by the limitation inherent in these Proclamation itself.[44]

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[43] 30 (1978) DLR (SC) 207.

[44] Supra note 12, at pp.66-7.

However, the Supreme Court did not accept these submissions. The Court declared that under the Proclamation the Constitution had lost its character as the supreme law of the country.[45] The learned Judge (judgement by Fazle Munim, J.) observed:

> What appears from the Proclamation of August 20, 1975, is that, with the declaration of Martial Law on August 15, 1975, Mr. Khandaker Moshtaque Ahmed who became the President of Bangladesh assumed full powers of Government and by clauses (d) and (e) of the Proclamation made the Constitution of Bangladesh, which was allowed to remain in force, subordinate to the Proclamation and any Regulation or Order as may be made by the President in pursuance thereof. It may be true that wherever there would be any conflict between the Constitution and Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not seem to concede such superiority to the Constitution. Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as the supreme law of the country. There is no doubt, an express declaration in Article 7(2) of the Constitution to the following effect: 'This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of inconsistency be void'. Ironically enough, this Article, though it still exists, must be taken to have lost some of its importance and efficacy. In view of clauses (d), (e) and (g) of the Proclamation the supremacy of the Constitution as declared in that article is no longer unqualified. In spite of this Article, no constitutional provision can claim to be sacrosanct and immutable. The present constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation.[46]

Clause (g) of the Proclamation of August 20, 1975 stated that, no court including the Supreme Court has any power to call in question in any manner whatsoever or declare illegal or void the Proclamation or any Regulation or Order. The Court considered this clause and held that, "there is no vagueness or ambiguity in the meaning of the words used in the clause as regards the total ouster of jurisdiction of this

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[45] For scathing comments on this see, Islam, M. A., "Status of a Usurper: A Challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh", vol. II (1997) The Chittagong University Journal of Law, 1 at p. 17.

[46] 30 (1978) DLR 207, at p. 218.

Court."[47] It was the duty of the judges to administer a 'harsh' or even an unjust law. The Court did not accept the argument that neither the Constitution nor the Proclamation had any authority to interfere with the exercise of judicial power by the Supreme Court. It also did not accept the argument that the power of law making authority is circumscribed by the limitation inherent in the Proclamation itself. The sole purpose of these arguments was to achieve an equation of co-existence between the Constitution and the Proclamation. But the Court put the Constitution in no uncertain terms as subservient to the Proclamation. There was no saving of judicial power at all.[48]

It needs to be pointed out that the Constitution cannot be made subservient to any law as Article 7(2) of Bangladesh Constitution unequivocally declared the Constitution as the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall, to the extent of inconsistency, be void.

How in law "the Constitution lost its character as the supreme law of the country" and again, how the will of the people of Bangladesh, as manifested in the Constitution, lost its importance are the principal questions which the Judge and the Court failed to address in this case. The Judges failed to clarify under which authority they arrived at the decision that the Constitution had lost its status as the supreme law of the country.[49] In this case the Supreme Court did not take into consideration the fact that the *Dosso* situation may not have prevailed in the present case. Moreover, the Constitution having not been abrogated, the question of a new legal order replacing the existing one could not have arisen. If the Constitution is allowed to operate and the court is operating under the Constitution, then only the principle of state necessity can be restored to, to find the action of the usurper justified and legal. But the principle of necessity, even if applicable, cannot normally extend to the ouster of the court's jurisdiction.[50]

Sultan Ahmed vs Chief Election Commissioner[51]

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[47] Ibid., at p.219

[48] Supra note 12, at p.68.

[49] See Ahmed, Z., "Law Minister Deserves Congratulations", 51 (1999) DLR Journal.

[50] Supra note 4, at p.70.

[51] 30 (1978) DLR (HCD) 291.

Touching upon the same questions, Sahabuddin Ahmed, J. in the case of *Sultan Ahmed vs Chief Election Commissioner* observed as follows:

> On plain reading of these provisions of the Proclamation it is as clear as anything that the Martial Law is the supreme law of the land and that though the Constitution has not been abrogated it has been made subordinate to the Martial Law and that the Constitution will continue in force subject to the Martial Law, that is to say, it will have effect so long it does not come in conflict with the Martial Law.[52]

It is not clear under which authority Shabuddin Ahmed, J. made the Constitution subservient to Martial Law.

Haji Joynal Abedin vs State[53] *and State vs Haji Joynal Abedin*[54]

The High Court Division considered the Martial Law promulgated on August 15, 1975 as constitutional deviation in *Haji Joynal Abedin vs State*. Badrul Haider Chowdhury, J. delivered the judgement in the following language:

> We have already found the present Martial Law is completely different from that of 1958 or 1969. The Constitution has not been abrogated; only certain part of it has been circumscribed by the Martial Law Proclamation out of necessity. This Martial Law is a mere constitutional deviation and not one of Wellingtonian style.[55]

The High Court Division took the view that the Martial Law Courts and the ordinary courts were existing side by side. It did not accept the view that the jurisdiction of the superior courts had been ousted so far as Martial Law Courts are concerned. A sentence of death passed upon five condemned prisoners by a Special Military Court was declared by the High Court Division to have been passed without lawful authority and of no legal effect.

However, on appeal by the State, the Appellate Division set aside the judgement of the High Court Division in *State vs Haji Joynal Abedin*.[56] Ruhul Islam, J. of the Appellate Division held:

> From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a

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52 Ibid., at p. 297.

53 30 (1978) DLR (HCD) 371.

54 32 (1980) DLR (AD) 110.

55 30 (1978) DLR (HCD) 371, at p. 396.

56 Ibid.

> position subordinate to the Proclamation, inasmuch as the unamended and unsuspended Constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial Law Regulations or Orders; and the Constitution was amended from time to time by issuing Proclamation. In the face of the facts stated above I find it difficult to accept the arguments advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammelled by the Proclamation and Martial Law Regulations... . The moment the country is put under Martial Law the above noted Constitutional provision along with other civil laws of the country lost its superior position. Martial Law Courts being creatures either of the Proclamation or Martial Law Regulation, have the authority to try offence made triable by such courts.[57]

The Appellate Division by a majority allowed the appeal of the State and set aside the judgement of the High Court Division on the ground, *inter alia,* that, "the writ jurisdiction of High Court Division as conferred under Article 102 of the Constitution is to be exercised subject to the bar put under the Proclamation and Martial Law Regulation"[58] and the Supreme Court further held that "the High Court Division was not justified in interfering with the proceedings of Martial Law Courts."[59]

There was a lone dissent by Justice K.M. Subhan of the Appellate Division, disagreeing with the majority. Mr. Justice K.M. Subhan supported the view taken by the High Court Division that the Constitution and Martial Law were coextensive and the Constitution was not subordinate to the Martial Law. Justice Subhan was later removed by the usurper.[60]

K. M. Subhan, J. in his dissenting judgement said that, the President still takes oath to "preserve, protect and defend the Constitution" and he has not determined, through express legislation, if the Martial Law Regulations or Orders shall have precedence over constitutional legislation. It is interesting to note that the Appellate Division came round to the last expressed views of the learned dissenting Judge (K.M. Subhan, J.) in a subsequent cases.[61]

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[57] 32 (1980) DLR (AD) 110, at p. 122.

[58] Ibid., at p. 126.

[59] Id.

[60] Supra note 45, at p.18.

[61] Supra note 4, p.72.

A leading lawyer has rightly commented:

> These cases are testimony as to how under Martial Law dispensation of the Fundamental Right of the petitioner including the right to have redress under writ jurisdiction was allowed to be obliterated and how the highest court made itself and the Constitution subservient to Martial Law Proclamation by abdicating its role and jurisdiction which could otherwise be exercised by upholding the view taken by the High Court Division.[62]

The Legality of the Imposition of Martial Law

The declaration of Martial Law in Bangladesh in 1975 cannot be considered legal as the 1972 Constitution does not envisage any imposition of Martial Law. The 1972 Constitution, supreme law of the country, does not recognise Martial Law and no reference has been made to Martial Law throughout the text of the Constitution. The term Martial Law had been included in Article 196 of the 1956 Constitution and Article 223-A of the 1962 Constitution of Pakistan. The above mentioned Articles enacted provision for passing an Act of Indemnity in respect of any act done in connection with Martial Law administration. But corresponding Article 46 of the 1972 Constitution of Bangladesh does not include a provision like those of the Constitutions of Pakistan. Article 46 empowered Parliament to pass an Act of Indemnity in respect of any act done in connection with liberation struggle or the maintenance or restoration of order in any area in Bangladesh by any person in the service of the Republic or any other person. Thus, it is clear that in Pakistan Articles 196 and 223-A of the 1956 and 1962 Constitutions, respectively, recognised the possibility that Martial Law might be promulgated under the Common Law doctrine of state necessity for maintaining law and order or for restoring public order in any area of Pakistan. But the 1972 Constitution of Bangladesh did not afford any recognition to Martial Law and it was omitted from the analogous Article 46. Therefore, it is clear that the 1972 Constitution does not contain any provision for the imposition of Martial Law under any circumstance. The Constitution does not permit Martial Law even for the sake of restoring law and order. Thus, it is submitted that the declaration of Martial Law in Bangladesh in 1975 was illegal. Moreover, Martial Law was proclaimed in Bangladesh in peace time and there was no question of suppressing riot, rebellion or

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[62] Supra note 45, at pp.18-9.

insurrection. So, the Proclamation of Martial Law on August 15, 1975 did not fulfil the requirements of the doctrine of state necessity and as such, was unjustified.[63]

In fact, Martial Law was proclaimed in Bangladesh as a means to implement a coup d'etat and to obviate any public opposition to extra-constitutional acts of the coup leaders. Being an upshot of that Proclamation the whole First Martial Law regime lacked validity. Moreover, the changes made to the Constitution by the Martial Law Proclamations are also unconstitutional. The fact that the Fifth Amendment of the Constitution, before the withdrawal of Marital Law, had to validate all Martial Law Proclamations, Regulations and Orders is another indication of the recognition by the authors of such Proclamation, Regulations, etc. that those legislating activities could be challenged as unconstitutional and, hence, needed to be brought within the formal legality of the Constitution. This realisation led to the incorporation of these Proclamation, Regulations and Orders promulgated during the Martial Law regime into the Constitution by an amendment which was affected by the Fifth Amendment.

CONSTITUTIONALITY OF THE AMENDMENTS

During the First Martial Law regime some provisions of the Constitution were amended on several occasions by the Martial Law Proclamations. There is no ambiguity in the procedure for amendment of the Constitution as provided for in Article 142. The amendments of the Constitution by a process different from that provided by Article 142 is difficult to accept as valid and legal. Article 142 provides that any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by an Act of Parliament and the concerned Bill must be passed by the votes of not less than two-thirds of the total number of members of Parliament.[64]

Amir-ul Islam has commented:

> In the civilianisation process General Ziaur Rahman sought to legitimate and ultimately gave election in 1979 and while Parliament was sworn in and the Constitution was restored in a mutilated form, all proceedings before a Martial Law Court was saved and validated by the Constitution (Fifth Amendment) Act, 1979. All amendments,

[63] Supra note 3, at pp.66,-7 and 72-3.

[64] Article 142(1) of the Constitution of the People's Republic of Bangladesh.

> additions, modifications, etc. made in the Constitution along with orders, actions and proceedings taken thereunder were ratified and confirmed and declared to have been validly made by inserting them in the Fourth Schedule of the Constitution which was meant only for saving some existing pre-constitutional laws while the original Constitution was promulgated.[65]

It is, thus, clear that the amendment can be seen to have been affected to remove the stigma of illegality and unconstitutionality of the Proclamations, Regulations and Orders proclaimed during the First Martial Law regime.

Now moving on to an analysis of the Fifth Amendment from a broader perspective, we may mention that it is not expedient to test the validity of any amendment only by reference to relevant provisions of the Constitution. An amendment may also be tested in the light of the historical facts and socio-political reality that give validity to any Constitution. Historical facts also become important in terms of the moral authority a Constitution.[66]

It is well recognised that during the war of liberation, the people were inspired by high ideals of democracy, nationalism, secularism and socialism[67] which were, after liberation, incorporated into the Constitution as the guiding principles. Participation of the people in the liberation war was spontaneous and universal and people from all religious denominations were equally involved in the struggle to liberate the country from the clutches of Pakistani occupation army. It is generally accepted that almost 3 million people may have died in the war of liberation. This was also A complete rejection of the "two nation

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[65] Supra note 45, at p.21.

[66] Alam, S., "State Religion in Bangladesh: A Critique of the Eighth Amendment to the Constitution", vol. 4:3 (1991) South Asia Journal, p.319.

[67] See for example, Harun-or-Rashid, The Foreshadowing of Bangladesh: Bengali Muslim League and Muslim Politics, 1936-47, Dhaka, 1990; Islam, S., History of Bangladesh, 1704-1971, 3 volumes, revised edition, Dhaka, 1997, particularly volume 1; Maniruzzaman, T., The Bangladesh Revolution and it's Aftermath, Dhaka, 1976; for a historical depiction of the secular roots of Bengali Muslims see Roy, A., The Islamic Syncretistic Tradition in Bengal, Princeton, 1983; Ahmed, R., The Bengali Muslims 1871-1906: A Quest for Identity, 2nd edition, Delhi, 1988 while for a different view, see Hashmi, T.I., Peasant Utopia: The Communalization of Class Politics in East Bengal, 1920-1947, Dhaka, 1994.

theory" propounded by Muhammad Ali Jinnah on which Pakistan was founded.[68]

It was natural that the high ideals for which liberation war was fought would be enshrined in the Constitution of independent Bangladesh as the basic principles of state policy.[69] The divisive politics based on religion and the hatred engendered by such politics led to the consensus that in independent Bangladesh there should not be scope for communalism in all its forms, including renunciation of abuse of religion for political purpose and the elimination of discrimination between person and person on the basis of religion. Secularism along with democracy, Bangalee nationalism and socialism were the basic features of the Constitution which was adopted by the Constituent Assembly.

However, the changes introduced by the Fifth Amendment negated the basic structures and pillars of the Constitution — "It has been a mockery at those who with lofty ideals in their hearts sacrificed their lives so that future generations in Bangladesh could live in a democratic and non-communal atmosphere."[70]

The Basic Structure Principle and the Validity of the Changes

The changes made by the Fifth Amendment to the Constitution cannot be held valid in the light of basic structure principle of Constitution. The Judgement in the *Eighth Amendment* case[71]reaffirmed the doctrine of basic structure, as old as the making of the Constitution as expounded by Chief Justice Marshall in *Marbury vs Madison*.[72] The Appellate Division reaffirmed this principle which had earlier been applied by the Dhaka High Court in *Abdul Haque vs Fazlul Quder Chowdhury*.[73] This decision was upheld by the Pakistan Supreme Court in *Fazlul Quder Chowdhury vs Abdul Haque*.[74]

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[68] Supra note 66, at pp.318-19.

[69] Ahmed, M., Bangladesh: Era of Sheikh Mujibur Rahman, Dhaka, 1983, at p.93.

[70] Supra note 66, at p. 319.

[71] *Anwar Hossain Chowdhury vs Bangladesh*, 1989 BLD (Spl) 1.

[72] 2 L.Ed. 60.

[73] PLD 1963 Dac. 669.

[74] PLD 1963 SC 468.

The *Kesavananda*'s case was the first judicial formulation of the basic structure principle in Indian jurisdiction in its nourishing stage.[75] The issue of basic structure first came to be applied in India, indirectly, in the *Golak Nath*'s case.[76] The validity of the Constitution (24th Amendment) Act, 1971 and the 25th Amendment Act which curtailed the power of judicial review in India was challenged in *Kesavananda Bharati vs State of Kerala*.[77] In this case the Supreme Court of India held that the power of Parliament to amend the Constitution is subject to certain implied and inherent limitations and that Parliament cannot amend those provisions of the Constitution which affect the basic structure or edifice of the Constitution. The next case in which the Indian Supreme Court applied the principle emerging from the *Kesavananda*'s case regarding non-amenability of the basic feature of the Constitution was *Indira Gandhi vs Raj Narayan*.[78] The Supreme Court of India also applied the basic structure principle in *Minerva Mills Ltd. vs Union of India*.[79] The proposition that Parliament cannot amend the Constitution so as to destroy its basic features was again reiterated and applied by the Indian Supreme Court in *Woman Rao vs Union of India*.[80]After passing the acid-test in these cases, the basic structure principle of Constitution has attained its firm footing in Indian constitutional jurisprudence.

The Supreme Court of Bangladesh, similar to the above mentioned Indian decisions, applied the basic structure principle in the *Eighth Amendment* case.[81] In this case, a number of outstanding legal practitioners very efficiently made their submissions to establish the basic structure principle of the Constitution. They submitted that in written Constitutions there are certain provisions, written or implied, which are basic and constitute foundation and structure of the Constitution. The negation of these provisions would negate the Constitution itself and hence cannot be amended. So, any amendment

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75 *Kesavananda Bhratti vs State of Kerala*, AIR 1973 SC 1461; (1973) 4 SCC 225.

76 *Golak Nath vs State of Punjab* AIR 1967 SC 1643.

77 AIR 1973 SC 1461.

78 AIR 1975 SC 2299.

79 AIR 1980 SC 1789.

80 AIR 1980 SC 1789.

81 Supra note 29, at p. 366.

by way of addition, alteration, substitution or repeal which aim to destroy the basic structure of the Constitution is void.[82]

The arguments put forward on behalf of the appellant in the *Eight Amendment* case was that,

> ...the power of amendment of the Constitution under Article 142 is a power under the Constitution and not above and beyond it and is not unlimited power. The concept that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution embodied in the Preamble and Article 7 of the Constitution. Article 7 itself is basic, fundamental and unalterable. It is a question of the word 'amendment' which has to be interpreted in the context and scheme of the whole Constitution. Read with the Preamble and Article 7, it means that there is an implied limitation on the power of amendment and that the basic structure of the Constitution cannot be altered or damaged and that 'amendment' can only make the Constitution more 'complete, perfect or effective.[83]

In the *Eighth Amendment* case Badrul Haider Chowdhury, J. had listed 21 'unique features' of the Constitution all of which he did not elaborate. But he held that some of the said 21 features are the basic features of the Constitution and they may not be amended by the amending power of Parliament. As the amending power is but a power given by the Constitution to Parliament, he accepted the contention of the appellants that the impugned amendment must be tested against Article 7. It is a power within and not outside the Constitution.[84]

Sahabuddin Ahmed, J. in the *Eighth Amendment* case held that the Constitution stands on some fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down. He listed: i) sovereignty belongs to the people; ii) supremacy of the Constitution as the solemn expression of the will of the people; iii) democracy; iv) republican government; v) unitary state; vi) separation of powers; vii) independence of judiciary; and viii) fundamental rights to be the basic structures of the Constitution. He held that these are the structural pillars of the Constitution and they cannot be amended by the

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[82] Supra note 66, at p.324.

[83] Supra note 12, pp.98-9.

[84] Ibid., at p. 100.

amendatory power of the legislature. Amendment will be subject to the retention of the basic structure.[85]

In Indian jurisdiction, the Supreme Court, among others, considered supremacy of the Constitution, secular character of the Constitution, judicial review, and the rule of law as the basic structures of the Constitution.

So, it is evident from the above discussion that the Fifth Amendment clearly undermined the supremacy of the Constitution, destroyed the secular character of the Constitution and amended the Preamble of Constitution which cannot be validly done by a Constitutional Amendment. Hence, the changes to the Constitution by the Fifth Amendment are not tenable.

Second Martial law Regime and the Seventh Amendment

President Major General Ziaur Rahman was assassinated on May 30, 1981. Acting President Mr. Justice Abdus Sattar, nominee of the ruling party BNP, won the ensuing presidential election. After 128 days of the presidential election a military intervention led by Hussain Muhammad Ershad, the then Chief of Army Staff, led to another military take-over.

After President Sattar's accession to power the political, economic and law and order situations were in turmoil. Under pressure from the army for a 'constitutional role' for the army in the state affairs,[86] President Sattar had to resign and called upon the armed forces to take over the state power. The then Chief of Army Staff, took over the state power, promulgated countrywide Martial Law for an indefinite period on March 24, 1982 and himself became the Chief Martial Law Administrator. He removed the members of the Council of Ministers, dissolved the Parliament and suspended the Constitution. Without any

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[85] Ibid., at p.102.

[86] Choudhury, D., supra note 26, has pointed out, at p. 72, that:

> The Army Chief, General Ershad, told Indian reporters on 12 November 1981, that the army did not want any civilian responsibility but he made it clear that: 'What we want is that we must be heard. The government must take our views into consideration'. Ersahd's concept if the army having a share in the country's political affairs was expressed when he bluntly said that the army's role must be institutionlised.

lawful authority and mandate of the Constitution, he thus assumed full powers of the Chief Executive and the head of the government.

By issuing the Proclamation of March 24, 1982 Lieutenant General Hussain Muhammad Ershad placed the country under Martial Law for the second time. He inserted a Schedule to the Proclamation containing a mini-Constitution of his own device. By a later amendment of the Proclamation providing that subject to his Proclamation and the Martial Law Regulations, etc., the country would be governed in accordance with the said Schedule. He consolidated all power to revive the Constitution, which he did in incremental manner from time to time after 1985. All proceedings which were connected with writ petitions under Article 102 of the suspended Constitution were abated.

General Ershad sought the same legitimisation as his predecessor General Ziaur Rahman as he was well conscious about the illegality of his regime. Through rigged and manipulated election, members of third Parliament were elected in 1986. This Parliament gave a seal of validity to the Martial Law regime of Ershad. The 1986 Parliament enacted another amendment to the Fourth Schedule to the Constitution by an addition of a new Paragraph thereto which provided, *inter alia*, that the Proclamation of the 24th March, 1982 and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances and all other laws made during the period between the 24th March, 1982 and the date of commencement of the Constitution (Seventh Amendment) Act, 1986 were thereby ratified and confirmed and declared to had been validly made and would not be called into question in or before any court, tribunal or authority on any ground whatsoever.[87]

Validity of the Second Martial Law Proclamation

It needs to be noted that when President Sattar decided to resign on his own volition he did not do it according to the provisions of the Constitution. The Constitution was in force at the time of relinquishment of office of President by Mr. Sattar. He could step down by writing a resignation letter to the then Vice-President under Article 51(3) or to the Speaker under Article 55(2) of the Constitution in

[87] Paragraph 19, Fourth Schedule, The Constitution of the People's Republic of Bangladesh.

absence of the Vice-President. The Vice-President or the Speaker could have acted as the acting President under Article 55 until a new President was elected to fill such vacancy or until the President resumed his functions. Moreover, if a vacancy occurs in the office of the President, or if the President is unable to discharge the functions on account of absence, illness or any other cause, Parliament was authorised under Article 55(3) to make such provisions as it thinks fit for the discharge of the functions of the President in any contingency not provided for in the Constitution.[88] So, the resignation process of President had been clearly provided for in the Constitution. It also embodied provisions for situations resulting from any vacancy due to absence, illness or any other cause in the office of the President. Thus, the Constitution of Bangladesh embodied provisions to cater for situations that might cause constitutional impasse. But President Sattar at the time of abdication did not comply with the provisions available under the constitutional dispensation.[89] Moreover, he could have proclaimed 'emergency' to cope with the crisis situation, if necessary. By putting the country under emergency, he could have promulgated Martial Law in the case of a failure of the civil administration. However, emergency was not proclaimed. He abdicated arbitrarily and unilaterally without complying with the provisions of the Constitution and without exhausting available constitutional remedies. As a result, a vacuum occurred in the office of the President which was immediately filled by General Ershad who suspended the Constitution, promulgated Martial Law and appointed himself as the Chief Martial Law Administrator.[90]

What was the legal and constitutional authority under which Martial Law was proclaimed and the Constitution suspended? Where did the Chief Martial Administrator derive his authority to perform the

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[88] With the enactment of the Constitution (Twelfth Amendment) Act, 1991 and the resultant change in the form of governance from Presidential to Parliamentary, these Articles relating the power and functions of Presidents have been changed.

[89] Islam, M. R., "The Seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal," vol. 58:3 (1987) The Political Quarterly, p. 316, at p 317.

[90] Ibid., at pp. 317-18.

functions of the President? These are the pertinent questions which require careful examination.

The Commander-in-Chief of the Pakistan Army Yahya Khan promulgated Martial Law and abrogated the 1962 Constitution of Pakistan in 1969. The question of Yahya's authority to promulgate Martial Law and suspend the Constitution and legality of his regime came before the Pakistan Supreme Court in the *Asma Jilani*'s case. It was contended on behalf of Yahya that, the Proclamation of Martial Law by its own intrinsic force gave Yahya the right to revoke the Constitution.

> The Court examined the nature and scope of Martial Law at great length and came to the conclusion that i) the promulgation of Martial Law did not by itself involve the revocation of the Constitution; and ii) the proclamation of Martial Law did not necessarily confer on Yahya the power to repeal the Constitution, which he was bound by his oath to defend. After a through survey of various legal systems of the world, the Court was of opinion that there was no legal system which offered the Commander-in-Chief of the Army the right to proclaim Martial Law.[91]

There is no recognition of Martial Law, as already mentioned, in the Constitution of Bangladesh. If political or economic situation deteriorated or the law and order situation went beyond control, the President of Bangladesh has been empowered to proclaim emergency to cope with the situation. So, it is clear that the then Chief of Army Staff Hussain Muhammad Ershad had no lawful authority to proclaim Martial Law.

Purported Justification of the Second Martial Law Regime

The taking over of power and proclamation of Martial Law by Ershad, as mentioned earlier, cannot be treated as legal under the constitutional dispensation of Bangladesh. So an effort could be made to determine the justification of Ershad's taking over of power under the Kelsenian doctrine of revolutionary legality. Hans Kelsen in his "General Theory of Law and State" presented the legal effects of a revolution in a systematic manner. By 'revolution' Kelsen meant 'successful revolution.' To be successful the old order must have ceased and the new order must have been begun to be efficacious. Then the revolution itself becomes a law creating fact.

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91. Ibid., at p. 318.

> The revolutionary access to power by effecting a coup d'etat is valid under the Kelsenian doctrine of effectiveness. The validity of such a revolutionary act spring not from the annulled or suspended Constitution but from the act itself merely because it is successful and effective. The 'success' of the revolution and the 'effectiveness' of the regime that has seized power through revolution are the conclusive test of jural legitimacy . . . There is, beneath the surface of the doctrine, a common understanding that if a forcible seizure of power is successful and the regime is effective enough to command the allegiance of the inhabitants of the country to conform the new regime, such a revolution itself becomes a law creating source. . . . Therefore, there is no need to validate it by any Act of Parliament or by reference to the Constitution any revolutionary seizure of power which itself is valid and protected by dint of its own success and effectiveness under the Kelsenian doctrine.[92]

The assumption of power and proclamation of Martial Law cannot be held justified under Kelsenian doctrine of efficacy as Ershad did not seize power through a revolution or a coup d'etat. After his failure to control continuous political and economic disorder and law and order situation the President resigned and through an address to the nation urged the need to promulgate Martial Law throughout the country for the 'greater interest of the nation'. To fill up the vacuum Ershad assumed power as the Chief Martial Law Administrator and proclaimed Martial Law. Although Ershad assumed all powers of the government but a civilian was nominated as the President. Moreover, Ershad did not abrogate the Constitution, he suspended it which remained supreme law of the land, though inoperative for the time being. "All these parameters of Ershad's access to power were not strictly relevant to, and did not come well within the purview of, the Kelsenian doctrine."[93]

Purported Justification under the Doctrine of State Necessity

The new or revolutionary government may deviate, under the doctrine of state necessity, from the Constitution according to which the previous government had functioned. It should be borne in mind that each departure of the new government from the Constitution must be justified as a matter of necessity. Inherent principle of this doctrine is that only necessity can justify an extra-constitutional or

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[92] Ibid., at pp 313-14.

[93] Ibid., at p. 315.

unconstitutional act. Logical proposition of the doctrine implies that, out of two evils, the regime opted for the lesser evil so as to mitigate the demand of necessity. It is the jurisdiction of court to decide whether a particular departure is justified on the basis of necessity. If the new regime adopts extra-constitutional or unconstitutional measures, those are only justified when they are taken for the greater interest of the state, people or nation. The new regime is under a legal obligation to establish the fact that the measures were taken to meet the exigency of time. By taking these measures the regime, though it commits an evil, has avoided a greater evil.[94]

The Proclamation of Martial Law on March 24, 1982 claimed that promulgation of Martial Law was necessary for the greater interest of the state and nation. There is no denying the fact that the political, economic and law and order situation were embroiled in a crisis during the short period of President Sattar's rule. Nevertheless, constitutional mechanisms such as promulgation of emergency and deployment of armed forces in aid of the civil administration were available to deal with the worsening situation. Moreover, the overall law and order situation quickly became normal soon after Martial Law was declared. The military did not find any occasion to fire a single shot. Such a scenario provides strong ground for arguing that the above mentioned crisis was created for the time being by General Ershad as a pretext to capture state power. So, taking over state power and proclamation of Martial Law by Ershad can hardly be justified under the doctrine of state necessity as he did it not for the greater interest of the nation but to further the vested interest of military-bureaucrats.

Constitution, Judiciary and Second Martial Law Regime

The Martial Law Proclamation of March 24, 1982 was carefully drafted so that the Constitution and the Martial Law Proclamation would not compete for supremacy with each other. For avoiding any possible complicacy, General Ershad suspended the Constitution. He reserved the power to revive the Constitution incrementally and he did so from 1985. The Supreme Court was debarred from exercising any jurisdiction under Article 102 of the suspended Constitution. The second Martial Law thus quietened the legal front effectively. The only

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[94] Ibid., at p. 320.

case pertaining to the issue of Martial Law during those years was *Bangladesh vs MD. Salimullah*[95]where Ruhul Islam, J. held

> (with) The Proclamation of March 24, 1982 declaring that the whole of Bangladesh shall be under Martial Law and suspending the Constitution of the People's Republic of Bangladesh with immediate effect, both the Divisions of the Supreme Court, namely, the Appellate Division and High Court Division, ceased to derive any power from the Constitution."[96]

On January 15, 1985 Article 102 of the Constitution was revived partially by General Ershad. The High Court Division was empowered to enforce six fundamental rights from that date under Article 102. On November 10, 1986 the Constitution was fully revived. Hence, for the Supreme Court the entire period of second Martial Law was a period of virtual inaction on constitutional issues. The High Court Division was fragmented into 7 places and the Appellate Division had no appeal cases on constitutional matters during this period.[97]

Ratification and Confirmation of Martial Law Regime by Parliament

General Ershad was well conscious about the legal ramification of his Martial Law regime. So, in due course, recourse to constitutional amendment by Parliament was resorted to.

The third Parliament of Bangladesh was constituted through general elections held on May 7, 1986. Allegations of massive rigging and manipulations regarding the election were raised by the opposition political parties. Nevertheless, the third Parliament commenced its function from July 10, 1986. The Parliament in its second session on November 10, 1986 ratified and confirmed, *inter alia*, the Martial Law Proclamation of March 24, 1982 and all actions associated therewith through the Constitution (Seventh Amendment) Act, 1986.

The Martial Law regime of Ershad led it to get an approval of the House of Nation (Parliament). In the absence of such an approval, all activities of the regime would have been nullified and declared illegal with corresponding legal consequences. The regime, accordingly, asked Parliament to ratify and confirm all of its activities before it would lift

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[95] 35 DLR (AD) 1.

[96] Supra note 12, at pp.85-6.

[97] Ibid., at pp. 87-8.

Martial Law. This was accomplished and validated by the Seventh Amendment.

However, it is not clear whether the object of the Seventh Amendment was to amend the Constitution or to indemnify the Martial Law regime:

> During the passage of the Bill, the Constitution remained suspended and a suspended Constitution cannot be amended. Unless the Constitution was fully revived and put into operation there could be no scope to pass any bill under it or to bring any amendment to it. Such an assertion appears to be in conformity with the provision of amendment of the Constitution prescribed in Article 142. Strictly speaking, the Seventh Amendment is not actually an amendment because hardly anything has been amended by it. All that it has done is to validate and indemnify the Martial Law regime of Ershad.[98]

Indemnity Provision of the Constitution and the Seventh Amendment

Bangabandhu Sheikh Mujibur Rahman declared the independence of Bangladesh on March 26, 1971 before he was arrested by the Pakistan Army. A provisional government, established by the Proclamation of Independence on April 10, 1971[99] successfully conducted the liberation war and Bangladesh became independent on December 16, 1971. The Constituent Assembly of Bangladesh took one year to prepare and adopt a Constitution which came into force from 16th December, 1972. In order to avoid any legal vacuum and to maintain the continuity of the governance since March 26, 1971 all activities of the Bangladesh government during the pre-constitutional period were regularised retrospectively. For this purpose some indemnity provisions, namely, Article 150 and Fourth Schedule were embodied in the Constitution. The indemnity provision specifically spells out that, it is applicable only to the period between the 26 day of March, 1971 and the commencement of the Constitution (that is, December 16, 1972).[100]

A close reading of Article 150 and clause 3 of the Fourth Schedule of the Constitution makes it clear that the protective garb of indemnity clauses cover only pre-constitutional activities of Bangladesh Government and, therefore, it was not intended for activities of any

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98 Supra note 89, at pp. 323-24.

99 For text of the Proclamation of Independence, see supra note 12.

100 Paragraph 3(1), Fourth Schedule, The Constitution of the People's Republic of Bangladesh.

government of post-constitutional period. There is no ambiguity in holding that activities of any government subsequent to the commencement of the Constitution do not come within the purview of the indemnity clauses. So, no extra-constitutional or unconstitutional activities of post-constitutional Martial Law regime can validly be indemnified under the Fourth Schedule. It is clear from the language employed that the Fourth Schedule cannot be used in order to provide constitutionality to any Martial Law regime.

As already mentioned, before the Ershad regime, the Fourth Schedule was amended during the Ziaur Rahman regime by adding a new Article 3A by the Proclamation Order No. 1 of 1977, validating various Martial Law Orders, Proclamations, and actions of the regime.[101] The Ziaur Rahman regime also took recourse to the indemnity provision under the Fourth Schedule and put a stamp of legality on the regime and its actions through amendment to the Fourth Schedule by adding Paragraph 18 thereto. The legal and constitutional issues involved in this validation were never publicly debated or judicially determined. In 1986 a repetition of the validation process of Martial Law regime was undertaken as General Ershad sought to legalise his Martial Law regime through amendment to the Fourth Schedule by addition of a new Paragraph 19 thereto.

Similarity between the Fifth and Seventh Amendments

General Ershad followed the procedure of General Ziaur Rahman to legitimise his unconstitutional Martial Law regime. Through a rigged and manipulated election, as already mentioned, the third Parliament was constituted in 1986 when General Ershad was in-charge of the administration of Bangladesh. This Parliament validated the Martial Law regime of Ershad through the Seventh Amendment by following the procedure of the Fifth Amendment. The difference lies in the fact that the Fifth Amendment validated not only the unconstitutional Martial Law regime of Khandaker Moshtaque Ahmed and General Ziaur Rahman, but also the constitutional changes made during that regime by the Martial Law Proclamations. But the Seventh Amendment only validated the Martial Law regime of Ershad. The procedure followed by the two regimes were similar.

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[101] Supra note 82, p.326.

A close reading of the two Amendments makes it clear that the Seventh Amendment followed the pattern of the Fifth Amendment to ratify the actions of Martial Law authorities and it is open to the same objections of undermining the basic structure of the Constitution and has been termed as a fraud on the Constitution.[102] Amir-ul-Islam very correctly observed: " . . . the Fifth and Seventh Amendments ratifying the unconstitutional sections by validating acts . . . are inherently unconstitutional . . . "[103]

SUPREMACY OF THE CONSTITUTION, JUDICIAL REVIEW AND THE AMENDMENTS

In the Constitution of Bangladesh, as mentioned, there is no provision for the imposition of Martial Law under any circumstance, even for the sake of restoring law and order or for national interest. Thus, it is submitted that the declaration of Martial Law in Bangladesh in 1975 was illegal. At that time the usurper did not abrogate the Constitution but allowed the Constitution to operate subject to the Proclamations and Martial Law Regulations and Orders which clearly undermined the supremacy of the Constitution as Constitution cannot be made subservient to any law.

The Fifth Amendment validated the Martial Law regime of General Ziaur Rahman which was intrinsically unconstitutional and it was beyond the power of Parliament to put a stamp of legality to Martial Law regime and its actions. The Fifth Amendment undermined the supremacy of the Constitution and it debarred the judiciary to adjudicate the constitutionality of the Fifth Amendment.

The supremacy of the Constitution has been entrenched by the provision of the Constitution as Article 7 unequivocally declares that the Constitution is the supreme law of the land. If any other law is inconsistent with, or repugnant to, the Constitution, that law shall be void to the extent of inconsistency or repugnancy. So, the clear mandate of the Constitution is that all law making bodies, persons and authorities are enjoined from making laws which would be inconsistent or repugnant to the Constitution. It is, therefore, mandatory for Parliament to make laws in consonance with the Constitution. If

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[102] Supra note 4, at p. 343.

[103] Supra note 45, at p.24.

Parliament makes laws not in compliance with the provisions of the Constitution, those laws would be void to the extent of its inconsistency or repugnancy.

The legislative powers of the Republic have been vested in the Parliament.[104] The Parliament of Bangladesh has to legislate within the boundary erected by the Constitution. If it transgresses the constitutional limit, the judiciary has been empowered to determine whether it has crossed the limit or not. In fact, the judiciary is authorised by the Constitution to determine the constitutionality of any Act passed by the Parliament and the interpretation of the constitutional provisions are exclusively within the domain of the judiciary. A constitutional authority has rightly commented:

> It is difficult to appreciate how a Parliament, whose power to legislate is contingent upon the constitutionality of its legislation, can convert an unconstitutional act into a constitutional one through legislation. ...
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> The Seventh Amendment has not ended merely by validating the Martial Law regime. In a bid to insulate the Amendment from any judicial interference, a saving clause precluding the jurisdictions of any court of law has also been incorporated. ... The enjoyment of such an immunity by Parliament virtually reduces the entire Constitution into an uncoordinated and self-contradictory document. By embodying such a saving clause, Parliament purports to by-pass or override the judicial scrutiny of the constitutionality of the Seventh Amendment. This Act of Parliament surpasses the permissible powers of Parliament which in effect interrupts the appropriate checks and balances between the legislature and the judiciary as envisaged in the Constitution of Bangladesh. The Seventh Amendment is beyond the scope of Article 7 of the Constitution. Any competent court of law may adjudge the constitutionality of the Amendment under Article 7 and declare it as void should it be found inconsistent with, or repugnant to, the Constitution of Bangladesh.[105]

Paragraph 18 was added to the Fourth Schedule of the Constitution by the Fifth Amendment and Paragraph 19 to the same by the Seventh Amendment. Paragraphs 18 and 19 to the Fourth Schedule of the Constitution made the Constitution inoperative regarding those amendments and acts. Paragraphs 18 and 19 destroyed two important

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[104] Article 65(1) of the Constitution of the People's Republic of Bangladesh.

[105] Supra note 89, at p. 327.

basic features of the Constitution, namely, judicial review and the supremacy of the Constitution. So we agree with the proposition that:

> ... a fraud on the Constitution inasmuch as no amendment can be made undermining the supremacy of the Constitution and Parliament had resorted to subterfuge of inserting of a provision in the Constitution declaring patently unconstitutional acts as constitutional and precluding judicial review of those acts. Above all, an amendment declaring actions of mutilating the Constitution and whatever it stands for as constitutional is simply beyond the power of the Parliament under Article 142.[106]

Article 7 of Bangladesh Constitution is clear enough to proclaim the supremacy of the Constitution which cannot be taken away by any constitutional amendment as happened in the case of the Fifth and Seventh Amendments. In the *Eighth Amendment* case Badrul Haider Chowdhury, J. observed:

> Article 7 stands between the Preamble and Article 8 as a statue of liberty, supremacy of law and rule of law and is the pole star of our Constitution which no Parliament can amend because all powers follows from Article 7 . . . amendment is to be tested against Article 7 because the amending power is but a power given by the Constitution to Parliament and although that is a higher power than any other given by the Constitution to Parliament, it is nevertheless a power within and not outside the Constitution.[107]

In the same case Shabuddin Ahmed, J. mentioned, *inter alia,* that the supremacy of the Constitution was the solemn expression of the will of the people and independence of judiciary was the structural pillars of the Constitution. These stand beyond any change by amendatory process. So, it is evident that the Fifth and Seventh Amendments destroyed the supremacy of the Constitution and power of judicial review and from that point of view Parliament did something by these Amendments which it was not empowered to do under Article 142 of the Constitution.

CONCLUSION

The foregoing analysis indicates, first, that on August 15, 1975 Martial Law was declared not to restore law and order or as a response

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[106] Supra note 4, at p.343.

[107] Quoted in supra note 12, at p. 100.

to a national crisis, but Martial Law was declared as a precautionary measure to forestall any possible resistance which might ensue from the brutal killing of Bangabandhu Sheikh Mujibur Rahman with his family members and the seizure of state power by a group of army officers. The army officers probably considered emergency to be inadequate to face any public opposition and promulgated Martial Law to keep the situation under their control. It is noteworthy that Martial Law of 1975 was declared in peace time; the then civil government and civil courts were functioning smoothly and there was no questions of suppressing riot, rebellion or insurrection. Hence, the Martial Law of 1975 cannot be justified under the Common Law doctrine of state necessity. The Martial Law of 1975 does not fulfil the conditions enumerated by the Kelsenian doctrine of revolutionary legality. Under this doctrine a successful revolution or coup d'etat is treated as a law creating fact when the revolutionary authority abrogates the previous legal order or Constitution and replace it by a new one. But the leaders of the 1975 coup d'etat did not abrogate the Constitution of Bangladesh, they allowed the Constitution to operate subject to Martial Law Proclamation. So, the 1975 Martial Law is not justified under the Kelsenian doctrine of efficacy. Moreover, there is no recognition of Martial Law in the Constitution of Bangladesh. Therefore, it is not possible to maintain that the Proclamation of Martial Law in Bangladesh on August 15, 1975 had any legal basis.

Secondly, during the first Martial Law regime the Constitution was amended several times by Martial Law Proclamations which are clearly unconstitutional as the Constitution cannot be amended by any process other than that which is provided in Article 142 of the Constitution. Moreover, a seal of legality had been put on the first Martial Law regime and its actions by the Fifth Amendment. This Amendment undermined the supremacy of the Constitution, destroyed the secular character of the Constitution, changed the Preamble and some of the fundamental principles of the Constitution which is beyond the domains of any amendment. Hence, the Fifth Amendment cannot be considered valid.

Thirdly, in 1982, the then President Sattar by violating the relevant provisions of the Constitution arbitrarily abdicated his constitutional authority. Without any effort to restore the deteriorated political, economic and law and order situation, he urged the need to promulgate Martial Law for the greater interest of the nation. Due to his resignation, a vacuum in the office of the President of Bangladesh was

created which was immediately filled up by General Ershad, the Commander-in-Chief of the armed forces of the country. He proclaimed Martial Law on March 24, 1982 and assumed power initially as the Chief Martial law Administrator and then as the President of Bangladesh. His assumption of power as Chief Martial Law Administrator and President was also without any legal basis. Being issued by an incompetent authority, the Martial Law Proclamation of March 24, 1982 lacked legality. So, all activities of the Martial Law regime of Ershad emanating from the Proclamation were inherently illegal. Parliament has no authority under the Constitution to give a constitutional status to an unconstitutional Martial Law regime by an amendment. Parliament of Bangladesh is not a sovereign law making body. During the passage of legislation it is under a constitutional obligation to remain within the limits enumerated by the Constitution. By passing the Seventh Amendment the Parliament did something which is expressly prohibited by Article 7 of the Constitution and, hence, the Seventh Amendment undermined the supremacy of the Constitution. The Seventh Amendment is also destructive of the spirit of Article 150 and the Fourth Schedule of the Constitution as these were incorporated in the Constitution to validate the activities of the pre-constitutional government to avoid any legal vacuum. The Seventh Amendment also precluded the judiciary from determining the constitutionality of the activities of the Martial Law regime of Ershad and in this way it debarred the judiciary from exercising the power of judicial review, one of the most important basic structure of the Constitution.

In the end, it needs to be conceded that these amendments, despite the problematics of legality as detailed above, are *fait accompli* and legal challenge to the validity of these amendments may open a Pandora's box leading to further confusions, both legal and political.