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THE BEST INTERPRETER OF THE LAW IS CONTINUOUS DEBATE

TESTIMONY

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TESTIMONY

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EDITORIAL

EMERITUS PROFESSOR PHILIP A.THOMAS

Dear Reader,

TESTIMONY, A BI-ANNUAL scholarly law journal focusing on legal issues, is jointly published by Centre for South Asian Studies (UK) and London East Bank College (LEBC). The publication draws its contributions from a cross-section of legal practitioners, judges, law teachers and students. The diverse body of content includes legal commentaries, reviews, analysis, 'notes' and 'comments.' These papers aim to articulate the views of legal specialists with regard to current legal issues and their potential solutions. The journal is broadly based both regarding its content and the academic disciplines that are covered.

The publication aims to contribute to jurisprudence with a revealing insight into civil rights and civil liberties, international law, or human rights, and statutory, regulatory, and public policy issues. Testimony accepts contributions of interest to a wide cross-section of readers.

The reviews of law articles are primarily those which have been influential in the development of legal jurisprudence in the UK and Europe. However, contributions from overseas, particularly south east Asia are welcome. The common law jurisdictions are indeed global and Testimony seeks to reflect that level of outreach of this legal system.

JUDICIAL ACTIVISM TO COMBAT VIOLENCE AGAINST WOMEN AND CHILDREN

JUSTICE MD. IMMAN ALI

JUSTICE MD. IMMAN ALI,

IS A APPELLATE DIVISION JUDGE, BANGLADESH SUPREME COURT.

ABSTRACT:

In order to unravel the true meaning of 'judicial activism' as a philosophy of judicial decision-making the discourse goes beyond the point when the courts do not confine themselves to reasonable interpretations of laws, but instead create law. The author deliberates on judicial activism in litigation as a utilitarian mechanism employed by the courts to ensure justice is delivered according to law, as they would interpret it in the facts and circumstances of the case before them. . If while acting under the forgoing urge to do justice in accordance with law, the judges appear to be 'guilty of judicial activism', then so be it. The author asserts on the utility of 'beneficent activism' as a form of judicial activism that is good for the poor and oppressed, who are otherwise prevented from getting proper and proportional treatment under the law and denied redress due to various hurdles- economic, social, educational etc

As a concept, judicial activism has been in existence for more than a hundred years. However, the meaning has changed over the decades from its earlier pejorative sense to the now more acceptable, and is sometimes considered as a laudable practice. Earlier it was scathingly used to describe decisions which essentially reflected political manipulations. [viz. *Marbury* v. *Madison* (1804)]1. Even as early as 1608, Coke CJ stood up to King James I of England, who claimed absolute power to withdraw a case from the Royal Courts of Justice and to decide it himself. The Chief Justice advised that he could not do so and that, although the King is above man, he was under God and the law. Thus was established the supremacy of the rule of law above arbitrary exercise of power by the Sovereign. This may be termed judicial activism par excellence. However, nowadays the term offers different meanings to different persons. It commands popularity from the quarter benefitted and scorn from others. In the context of judicial pronouncements in Bangladesh, particularly in relation to decisions concerning women and children, it appears to be used as synonymous with judicial pro-activism.

Black's Law Dictionary defines judicial activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their

decisions, usu. with the

Others say, 'judicial activism' is when courts do not confine themselves to reasonable interpretations of laws, but instead create law. Alternatively, judicial activism is when courts do not limit their ruling to the dispute before them, but instead establish a new rule to apply broadly to issues not presented in the specific action. "judicial activism" is when judges substitute their own political opinions for the applicable law, or when judges act like a legislature (legislating from the bench) rather than like a traditional court. In so doing, the court takes for itself the powers of Parliament rather than limiting itself to the powers traditionally given to the judiciary.' In other words *judicial activism* is the term used to describe the actions of judges who go beyond their constitutionally prescribed duties of acting as arbiters in a case, of applying law to the facts of individual cases, and "legislate" from the bench. These judges create new constitutional rights, amend existing ones, or create or amend existing legislation to fit their own notions of societal needs.

By the same token, the nomenclature "activist judge" is used to describe a judge who actively and knowingly subverts, misuses, grossly misinterprets, ignores, or otherwise flaunts the law and or legal precedence due to personal opinion, be that opinion ideological, religious, philosophical, or otherwise.
On the other hand, judicial activism in litigation is a helpful mechanism used by the courts to assert their powers and jurisdiction and to do justice strictly according to law, as they would interpret it in the facts and circumstances of the case before them.

DO JUDGES MAKE LAW?

In the last three decades there has been a phenomenal development in the arena of Public Interest Litigation, particularly in the sphere of Environmental Law. Here

1 Tag Archives: Supreme Court: A novel way of ensuring transparency in the higher judiciary? Accessed 16th October 2012 http://letstalkaboutthelaw.wordpress.com/tag/supreme-court/
Judgment of Chief Justice Marshall of the US Supreme Court who observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is".

again, it cannot be said that this is lawmaking in its true sense. In reality, judges interpret the law, sometimes following the strict letter of the law and at other times looking to the intendment of the Legislature in a way so as to cater for the needs of the populous for whose benefit the law was enacted.

In a recent decision in the case of The State –Versus- Seema Zahur and another, 8 BLT (AD) 69, a petition was filed by a learned advocate under section 561A of the Code of Criminal Procedure, invoking the inherent jurisdiction of the Court, praying for quashing the proceedings of a case pending trial before the Nari-o-Shishu Nirjatan Bishesh Adalat as well as for holding a judicial enquiry. The petitioner being neither the informant nor an accused nor a witness in the case, her locus standi to file the petition was the moot issue before the Appellate Division. After due deliberation, their lordships of the Appellate Division held that the Code of Criminal Procedure having been made applicable by section 23 of the Nari-o-Shishu Nirjatan Bishesh Ain, there was nothing which debars a judicial enquiry as ordered by the High Court Division. With regard to the question of locus standi of the learned advocate to move the High Court Division under section 561A of the Code of Criminal Procedure, their lordships held that the High Court Division in its inherent power may make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This section emphasised that the Supreme Court's High Court Division has the widest jurisdiction to pass orders for ends of justice and for that purpose to entertain applications not contemplated by the Code. Their lordships went on to say that the inherent power of the court is undefined and indefinable. It is well settled that the paramount consideration in exercising power under section 561A of the Code of Criminal Procedure is that such an order will prevent abuse of the process of any court or otherwise it would secure ends of justice. It was held that no illegality and wrong had been committed by the High Court Division in exercising its inherent power which had been initiated by [the learned advocate].

The pertinent question in the light of the above decision is whether by granting locus standi to someone not connected with the case, the court has 'activistically' created new law. I would venture to suggest that this is not so much creating law as expounding the scope of the existing inherent power of the High Court Division.

More relevant to the present context, let us take the example of the law relating to evidence in dealing with cases of rape and other sexual offences. Past decisions of our Supreme Court and those of the Indian Supreme Court tended to require corroboration of the evidence of the prosecutrix. In the case of Khaleque vs. State, 12 DLR (SC) 165, it was held, "... on principle, in a case of this kind where the evidence and condition of the prosecutrix form the only evidence which the court has to go upon, it is necessary in order to sustain a conviction, that it should at least be found that the woman's statement is in accordance with all the probabilities and has all the appearances of having been honestly made." It appears that in that case the court was not convinced about the honesty of the witness, thus requiring corroboration of her evidence. In the subsequent case of Md. Saidur Rahman Neoton and others Vs. The State 13 BLD (AD) 79, it was observed, '... it has long been a rule of practice for insisting corroboration of the statement of the prosecutrix, but if the judge feels that without corroboration in a particular case that conviction can be sustained without independent corroboration, then the judge should give some indication in his judgement that he has/had this rule of caution in his mind and then should proceed to give reasons for considering it unnecessary to require corroboration and for considering that it was safe to convict the accused in a particular case without corroboration.' Their lordships considered a similar view taken by the Indian Supreme Court in Rameswar Vs. The State of Rajasthan 1952 Supreme Court Reports 377. However, in a later case, reported in AIR 1983 (SC) 753 the Supreme Court of India, taking into account the passage of three decades and the increase in the offences against women in India, stated as follows: "in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroborations, as a rule, is adding insult to injury." Their lordships went on to hold that corroboration is wholly unnecessary in the context and profile of Indian society and that the evidence of a victim of a sex offence is entitled to the great weight. In the case of Jahangir Hossain vs. State, 1 BLC 292, Gholam Rabbani, J., after discussing in detail the above decision of the Pakistan and Indian Supreme Courts, as well as another decision of the Indian Supreme Court, where Ahmadi J commented that a prosecutrix of a sex offence cannot be put on par with an accomplice and that she is in fact a victim of the crime, stated emphatically, "We hold conclusively that in a sex offence case there is no legal bar in believing the sole testimony of the prosecutrix. Nay, she must prima facie be believed, except in the rarest of rare cases where she is found unreliable the necessity of corroborative evidence will arise and that the legal custom of insisting on corroboration in every case or alternatively, of stating the reason for waiving such corroboration is not applicable in our court."

In a later decision in the case of Al-Amin and 5 others vs. State, 51 DLR 154, it was held as follows: "Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for a judicial reliance on the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under a

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given circumstances. The rule is not that corroboration is essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable." His lordship, AK Badrul Haque J, who delivered the judgement in the case, went on to say, "One must remain alive to the fact that in a case of rape no self respecting woman especially a college girl would come forward in a court just to make a humiliating statement against her honour and dignity such as involved in the commission of rape upon her. The court must not cling to fossil formula and insist on corroborative testimony, even if, taken as a whole the case spoken to by the victims of sex crimes strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal bigotry."

Can the above cases be said to be paradigms of judicial activism? The answer, arguably, is that they are mere examples of judicial exposition of evidence law, so far as it relates to need for corroboration of a victim of a sex crime. As will be seen from a later decision, the lid was not closed on the issue. In the case of Hossain Shially (Fakir) vs State, 56 DLR 637, following the decision in the case of Mumtaz Ahmad Khan vs. The State, 19 DLR (SC) 259, it was held that the evidence of a prosecutrix in a rape case customarily, being a woman of full age, is not accepted as sufficient, but requires corroboration by independent evidence in order to be believed. This decision maybe contrasted with the decision by the same Judges in the case of Abdus Sobhan Biswas vs State, 54 DLR 556, where the evidence of the rape victim was accepted as sufficient for conviction. It is fair to say that this is a reminder that one of the cardinal principles of justice is that the end result in each case will be determined by the peculiar facts of that case and the quality of the evidence produced.

Many other examples may be cited from which bold statements of judges have set a footprint on the law. I may refer just one such case, namely Harun–or Rashid and another vs State and another, 5 BLC 524, it was observed, following earlier decisions, that corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition of judicial reliance on the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under a given circumstances but not a requirement of law. The notable factor in this case was that the High Court Division upheld the conviction of rape in spite of the fact that the victim could not be found to give evidence during the trial. Reference was made to the Indian Supreme Court decision in the case of State of Karnataka vs. Mahabaleshwar Gourja Naik, AIR 1992 (SC) 2043. In that case the victim of rape had committed suicide.

Similarly the 'Trisha murder case'2 created a stir. In that case some hoodlums chased a girl with ill motive leaving her no choice but to jump into a pond. She did not know how to swim and drowned. Her signals for help were purposely ignored by the accused who watched her drown. They were convicted of murder, their argument that they had no intention to kill her did not hold water since they knowingly allowed her to drown, when her actions in desperately waving her hands in the air commanded their positive action to save her. Rather than help, they stood on the bank of the pond and enjoyed and ensured her death. In this case conviction under section 302/34 of the Penal Code was upheld upon rejecting the argument that the offence should be one under section 304A. In the final assessment, the finding of the court is neither more nor less than a decision upon analysis and scrutiny of the evidence and materials on record.
Thus the conclusion that can be drawn from the above is that through the process of

judicial pronouncements only the creation of a certain degree of sensitisation has been possible. Judicial activism in those cases, if it can be called that, was purely an exposition of the existing legal principles, applied to facts of the case.

However, in the context of the present discussion, one other aspect of the Al-Amin judgment merits attention. After dealing with the factual aspects of the case, their Lordships made several observations with regard to (i) loopholes in the legal provisions concerned in the case, (ii) the plight of rape victims who undergo two crises, one the rape itself and the other, the subsequent investigation and trial, (iii) rape investigations to be conducted by female police officers and rape victims to be medically examined by female doctors, (iv) trial of rape cases to be held in camera for the mental ease and security of the victim who gives evidence in the case, (v) provision for compensation for the victim to be realised from the offender. These matters were specifically mentioned in the judgment, in far greater detail, for the consideration by the government. In addition the court observed the mode to be adopted by the trial court when a victim of a sex crime is cross-examined in order to ensure that she is not put through harassment and humiliation.

The cases mentioned above, like many other similar ones, clearly reflect, not judicial activism, but the Hon'ble Judges' pro-activism. The mindset of the judge in reality indicates that he is not necessarily an "activist judge", but that he is an 'active judge' meaning that he has made an important decision encompassing the whole panoply of the judicial process and procedure relevant to the matter in issue.

2 The State v Mehadi Hasan alias Modern and others 24 BLD (HCD) 497

One other oft-referred example of judicial activism relates to those cases commonly known as 'wife-killing' cases. Again I suggest that those cases simply reflect a correct exposition of section 106 of the Evidence Act. I venture to add that the provision is not in fact restricted to cases of wife-killing. Such restriction would amount to incorrect interpretation of the law. The provision relates to special knowledge which is imputed to the person who is within the vicinity of the victim, to the exclusion of others, i.e. the one who was in the best position to know. He is required to explain how the victim met his/her fate. This is an exception to the rule of burden of proof being on the prosecution to prove the guilt of an accused beyond reasonable doubt. In a relatively recent case3, heard on appeal by the High Court Division, presided over by the author, it was held that where there was no possibility of any outsider entering the house in which the occurrence took place, during the night of the occurrence, the person having dominion over the house, who lived in the same premises, was liable to explain the death of another co-inhabitant. This decision, I believe releases the fetters, if there were any, on the interpretation of section 106 of the Evidence Act, which in our view has general application and is not confined to 'wife-killing cases'.

In a similar vein, I mention the relatively recent decision in the case of The State Vs. Md. Roushan Mondal @ Hashem, BCR 2006 HCD 275. This case highlighted some of the shortcomings of our trial courts in dealing with child offenders. It appears that most of the trial courts are unaware of the provisions of the Children Act, 1974 and have not the faintest idea of how trials under that Act should be conducted. The numerous covenants and conventions concerning the welfare of children in conflict with the law, their trial and the sanction to be imposed upon them after due process, were dealt with in some detail in our judgment and certain recommendations were made suggesting provision of new law incorporating the latest international documents concerning children and also with a view to ironing out some of the anomalies remaining within the system of trials of child offenders.
I may also be forgiven for mentioning an

article, written by the author, published in the Human Rights Magazine 2007.4 The article was written after a division bench of the High Court, presided over by the author, noted serious malfunctioning of the trial system concerning the process and procedures to be followed when dealing with child offenders.5 The article highlights the various stages at which the appellant in a jail appeal suffered due to legal provisions not being followed by the concerned authorities whom he faced during his journey from an allegation being made against him to the final conclusion of his trial ending in his conviction and imprisonment.

In the two above instances we have sought to bring to the fore the provisions laid down in the Children Act 1974, which appeared to be seldom followed in accordance with the mandate of the law and the rules promulgated there under. I would venture to suggest that this is not judicial activism, although it may be termed as judicial pro-activism, in other words rising to the occasion to interpret the law in its proper perspective with a view to redress the misery of the hapless and downtrodden, but at all times remaining within the ambit of the law. It is also a positive attempt to ensure that provisions of law enacted for the benefit of a certain class should be properly and correctly administered in the true light and spirit of the law itself and of the Constitution.
As was said by Chief Justice Marshall of the USA, "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other is treason to the Constitution." To this I would only add in the context of our laws that the laws are made for a purpose and it is our duty to give effect to them.

It is said, "Judges must be sometimes cautious and sometimes bold. Judges must respect both the traditions of the past and the convenience of the present. Judges must reconcile liberty and authority;
the whole and its parts." In our judgments, what we have aimed at is to do justice to the

case and at the same time ensure that failure of justice is avoided, bearing in mind that the right of the citizen, be s/he accused or victim is to be dealt with even-handedly, in accordance with law, affording to him/her all the facilities and benefits provided by the law.

It is our view that the Supreme Court can come to the aid of the hapless and downtrodden and can act, as it has acted in the past, even on news items published in the media. These are signs of a pro-active judiciary working in aid of the mandate of the Constitution to provide proper application of the law in case of weaker and disadvantaged section of the citizenry. An example of this was the report in the newspapers regarding children in prison, which resulted in a suo motu Rule being issued by the High Court Division.

3Death Reference No.66 of 2003, State vs. M.A. Kader and others – Judgment delivered on 29.01.2007 by AKM Fazlur Rahman, J.

4Fundamental Rights of Children: Rights of Youthful Offenders are ensured by the Constitution (2007)
Human Rights Magazine
Human Rights and Peace for Bangladesh (HRPB)
5Jail Appeal No.552 of 2007

Conceptually this is not as 'activistic' as it might appear at first sight. The Constitution by virtue of Article 28(4) permits enactment of discriminatory laws in favour of women and children, for example. The Children Act was enacted in 1974 dealing exclusively with children who come into contact with the law. This law specifically excludes child offenders from the prisons. The suo motu Rule was, therefore, amending a wrong done by incarcerating children, contravening legal provisions, namely the Children Act 1974 and the Constitution. It must be borne in mind that where the Constitution empowers the legislature to discriminate in favour of certain section of the citizenry, then it is all the more incumbent upon judges to ensure that the benefit so enshrined in law, authorised by the Constitution, is given full effect.

As an inherent characteristic of their appointment, many judges across the globe act with more self-restraint, sometimes doggedly adhering to old norms, which is least befitting to the needs of the day. However, judicial activism in its popular sense need not necessarily be the antithesis of self-restraint. In the examples cited above, I believe the judges dealing with cases of violence against women and children as well as those concerning the rights of child offenders, have not been making any new laws, but have propounded the law in its correct spirit and perspective, keeping in mind the subjects whom the laws were enacted to protect and benefit and always bearing in mind the structure of the society, its cultures, mores, difficulties and drawbacks, and above all keeping in view the rule of law. If while acting under the forgoing urge to do justice in accordance with law, the judges appear to be 'guilty of judicial activism', then so be it. This, to my mind, is 'beneficent activism' and not to be decried or sneered at. This type of judicial activism is good for the poor and oppressed, who are otherwise prevented from getting proper and proportional treatment under the law and denied redress due to various hurdles- economic, social, educational etc.

In conclusion, I would say that, what is most necessary to combat violence against women and children and to ensure their rights is to create awareness amongst all actors concerned, namely the accused, victims, lawyers, welfare agencies, NGOs, probation service, police, investigating agencies, doctors, forensic scientists, magistrates and judges, etc., about the provisions of the relevant laws, to sensitise all the persons manning the machinery of justice to the peculiar needs of those persons who come into contact with the law enforcing machinery.

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Tag Archives: Supreme Court: A novel way of ensuring transparency in the higher judiciary? Accessed 16th October 2012 http://letstalkaboutthelaw.wordpress.com/tag/supreme-court/

Judgment of Chief Justice Marshall of the US Supreme Court who observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is".

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Fundamental Rights of Children: Rights of Youthful Offenders are ensured by the Constitution (2007) Human Rights Magazine

Human Rights and Peace for Bangladesh (HRPB)

Jail Appeal No.552 of 2007

Excerpts of the Keynote speech delivered at the Convention of the Bangladesh National Woman Lawyers' Association held at the Bangladesh China Friendship Centre on 2-3 December, 2007]

THE MYTH SURROUNDING THE CLAIM OF SO-CALLED PARLIAMENTARY SOVEREIGNTY

JUSTICE AHM SHAMSUDDIN CHOUDHURY

JUSTICE AHM SHAMSUDDIN CHOUDHURY,

IS A HIGH COURT DIVISION JUDGE, BANGLADESH SUPREME COURT.

Abstract:

The research paper explores the complexities involved in parliamentary sovereignty as it may be contrasted with the doctrines of separation of powers, which limits the legislature's scope often to general law-making, and judicial review, where laws passed by the legislature may be declared invalid in certain circumstances. The discourse cites several parliamentary democracies which may have served as referents for the Appellate Division of the Supreme Court of Bangladesh in effacing the Act of parliament by which 8th amendment was purportedly brought about in the constitution, asserting that the power of Bangladesh parliament is limited.

It is topical amongst politicians in many countries that were previously ruled by British imperialism to purport to portray that their post independence parliaments are also as 'sovereign' as was the imperial parliament. They tend to nurture this view on the basis of the British concept, more precisely, on the Diceyan doctrine.
The core question is -- can a parliament under a written constitution regime be sovereign?

Professor A V Dicey championed this theory and argued that sovereignty of parliament is one of the three distinctive features of the British legal system.

Notwithstanding the developments that followed the passage of the European Communities Act 1973,1 and the House of Lords ruling on the case, ex-parte Factortame, it will be no exaggeration to say that the British parliament remains sovereign. As Lord Reid observed in Pickin v British Railway Board2, any idea that an Act of parliament can be disregarded, is obsolete since the supremacy of parliament was finally demonstrated by the revolution of 1688.
Sovereignty, no doubt, connotes omnipotence: in other words, an ability to act as the postulant wishes. Sovereignty imports untrammelled power, power to act at whim, power to do or undo anything literally possible, power to even act in defiance of logic and reason. As Sir Ivor Jennings stated power to declare a man as a woman and vice versa.

Prof Dicey observed that the British parliament is sovereign because 1) it can pass any law on any subject 2) there is no authority in the realm which can question the validity of an Act of parliament 3) no parliament can bind its successor.

The British Parliament, despite the existence of the European Communities Act 1973, can pass any law it wishes and that, as Lord Reid proclaimed, there is no forum in Britain before which the validity of an Act of parliament can be challenged.
Can such a claim be substantiated in respect to the Parliament in a country with a written constitution? The obvious answer is bound to be in the negative.

It was firmly settled by the US Supreme Court in the tide turning case of Marbury v Madison3 that a parliament under a written constitution cannot pass a law that is repugnant to a provision in the constitution and that if such a parliament purports to do so, the constitutional court can undo such an Act. This theme has been implemented in scores of cases in India, Pakistan, Sri Lanka, Bangladesh, South Africa and many other countries with written constitutions. The Apex Courts of these countries have struck down purported Acts of parliament.

The British parliament's sovereignty is explicable. There is no authority in Britain which is superior to parliament. Parliament is not a creature of patriarch, nor does it owe obedience to, or is bound by any superior law or entrenched provision. So, its power is unbounded, not circumscribed by any dictating provision as Britain does not have an overriding written instrument.

That is not the case where a written constitution reigns supreme. In such a country the constitution is the progenitor of all the organs, authorities of the state. All owe their existence to that written instrument, bound by what that instrument dictates. So a parliament with a written constitution, which is the creation of the constitution, cannot override any provision of the constitution. Its power, as the High Court Division of Bangladesh Supreme Court proclaimed in the 7th Amendment case, the parliament's power in respect to legislation is subject to the express provisions of the constitution.

1 O'Halloran, Anthony (20 Jan 2010) The Dail in the 21st Century (County Dublin: Mercier Press, 2010) 178

2 Winterton, G. , ed., (2007) State Constitutional Landmarks (Sydney: The Federation Press) 382

Sir Ivor Jennings 4stated, 'A written constitution is thus the fundamental law of a country….all public authorities-legislative, administrative and judicial-take their power directly or indirectly from it'. He went on to say, 'Indeed in modern constitutional law it is frequently said that a legislature is sovereign within its power. This is of course, a pure nonsense if sovereignty is supreme power, for there are no powers of a sovereign body; there is only the unlimited power which sovereignty implies.'

KC Whear insists that to give omnipotence to a parliament in a written constitution regime is tantamount to giving the deputy greater importance than his principal5.

A G Marshall explains that where autochthony exists, the resultant document, the constitution is supreme. Marshall argued that supremacy, in the Diceyan sense, cannot have an abode in a written constitution country.

Dr. Durga Das Basu, an authority on Indian constitution, observed, 'A law enacted by legislature cannot transgress or violate the provisions of fundamental law. Thus the parliament under the Indian constitution cannot be said to be sovereign legislature in the Diceyan sense.'6

Prof James Read of the 'Commonwealth Legal Education Association' expounded, 'The supremacy (or even misleadingly 'Sovereignty') of parliament has long been one of the doctrines offered by British Constitutional Lawyers, including Dicey…..In any case, it could not survive transplantation into the political order of a new state established by a written constitution which imposed variety of limitations upon the legislative power….'

Professors AW Bradley and KD Ewing wrote 'The doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limitation on the legislature and entrusts the ordinary courts or a constitutional court to decide whether Acts of the legislature comply with the constitution.'

The Appellate Division of the Supreme Court of Bangladesh in effacing the Act of parliament by which 8th amendment was purportedly brought about in the constitution, asserting that the power of Bangladesh parliament is limited.

Justice U C Banerjee of India made it clear that the Indian parliament was more akin to that of its US counterpart rather that of the UK in that the Indian parliament does not enjoy sovereignty in the sense the British parliament does.

As Mr. Pranab Mukherjee, the newly elected President of India has unequivocally stated, in a written constitution country the sovereignty lies with the constitution.

The erroneous claim that Parliament even in a written constitutional country is sovereign is based on the claim that sovereignty lies with the people and as the parliament is composed of the representatives of the people, it is sovereign. But in thinking so, the claimants ignore the fact that the people have not granted unlimited power to their representatives, but only such powers as are permissible by the constitution which in turn the people have proclaimed by virtue of their sovereign power.

3Tushnet, Mark, ed., (2005) Arguing Marbury v Madison (Stanford, Carlifornia: Stanford University Press)

4Jennings, Ivor (1963) The Law and the Constitution (London: University of London Press)

5In the Supreme Court of Bangladesh High Court Division (Special Original Jurisdiction) Writ Petition No. 696 of 2010 [Online] http://www.supremecourt.gov.bd/scweb/documents/270095_WritPetitionNo7thAmendment.pdf [Accessed 17/10/2012]

6Basu, D.D (1977) Commentary on the Constitution of India: article 19, complete with constitution amendment acts and a critical survey of the 42nd amendment act (Kolkata: S.C Sarkar)

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WHAT FUTURE FOR LEGAL EDUCATION?

STEVEN.VAUGHAN

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Abstract:

The paper engages in a debate surrounding the controls/exemption over the ways lawyers should be educated or trained. The research traces the origin of the debate to the fundamental question raised at the heart of a review (the "Review") announced in November 2010 by three regulators of the legal sector: the Solicitors Regulation Authority (SRA); the Bar Standards Board (or BSB); and ILEX Professional Standards (or IPS).

Say you were given absolute power to dictate the way in which lawyers in England & Wales are educated and trained, from the moment they enter university to the moment they retire. What would you do? This fundamental question is at the heart of a review (the "Review") announced in November 2010 by three regulators of the legal sector: the Solicitors Regulation Authority (SRA) who regulate solicitors; the Bar Standards Board (or BSB) who regulate barristers; and ILEX Professional Standards (or IPS) who regulate legal executives.

The last fundamental review of legal education in England & Wales started in 1967 (reporting back in 1971) and essentially attempted to reconcile the demands of vocational training (the process of 'becoming' a lawyer) with the academic study of law in universities. Skip forward four decades and roughly the same sort of inquiry is likely to form at least part of this Review. However, much has changed since 1967. In particular, modern legal practice looks really very different - many more lawyers; more of them working in the jurisdiction having undertaken their legal education and qualification outside of England & Wales; law firms that come in very different shapes and sizes (from the 'mega' firm of thousands of lawyers via the 'virtual' law firm with no physical headquarters to Alternative Business Structures and outside investment following the Legal Services Act) etc.

The question then is to what extent these changes (and many others) in the legal profession suggest or necessitate changes in legal education and training.

Equally important is the fact that the economics of legal education and training have also altered fundamentally since 1967. Following the Browne review into university funding in England, 'home' students on a three year undergraduate law degree may be faced with £40,000 of debt in fees and maintenance loans. Someone who then goes on to self fund their postgraduate vocational legal training (via the LPC or BPTC) could easily end up with £60,000 of debt in total. What then does this mean for the Review? Calls have come from certain quarters to reduce the length of law degrees and/or to combine undergraduate and vocational legal qualifications. But such reforms, if possible or desirable, are only part of the matter.

The specific areas that the Review will address are not known, though some matters have been of much recent interest and will likely be included. These are discussed later on. Perhaps more important is the ability of those involved the review (myself included) to be able to stand back and see the wood for the trees. What the Review offers is the chance for debate on two core and interlinked questions: what is law for? and what is legal education for? One's views on these questions will very much be a product of where one sits in the world of legal education and training and what one sees as the 'issues' in need of review and reform.

At present, it is impossible to ascribe common views on legal education with any precision to the different interest groups. That is, it is simply not possible to say, "Universities providing undergraduate law degrees think X of legal education and training and providers of the LPC and BPTC think Y". While there have been any number of disparate, individual comments in the media on legal education and training, many of these are based on anecdotal evidence and we lack a sector wide, reliable and robust data set on which to base informed views. We also do not have a full understanding of the opinions of each of the relevant stakeholders (students, academics, vocational course providers, legal practitioners, clients etc).

Happily the Review is set to address both of these matters, through the commissioning of targeted research and the creation of a stakeholder reference group.

Despite the point made above that the Review should be more than a catalogue of separate issues, it is perhaps worth mentioning two specific matters that have gained a good amount of traction in the media. The first goes to a perceived 'over supply' of students with vocational qualifications. The second questions the extent to which undergraduate law degrees prepare students for their vocational training and subsequent qualification.

On the first issue, each year there are a number of students who complete the LPC or BPTC and who are unsuccessful in securing a training contract or pupillage. In this context, certain commentators have talked about law schools 'exploiting' students who have little realistic prospect of becoming a lawyer. Three points are worth making here. The first is that the numbers may not be as bad as they seem (especially as regards those wishing to become solicitors, where a large drop in training contracts seems a temporary corollary of the credit crunch). The second is that a situation of far greater concern (for consumers of legal services) would be one of parity between the numbers completing the LPC or BPTC and the number of jobs available (as some level of oversupply suggests the 'best' graduates are getting the limited number of jobs available). The third is that those applying for the LPC or BPTC are not children and should be able to effectively research employment prospects in the legal sector and then assess their own realistic chances of success.

On the second issue, there are concerns that undergraduate law degrees are too cerebral and do not adequately prepare would-be lawyers for their vocational training and development. While this concern needs to be fully explored, there is a much wider issue at play: what is a university education for? Is there a right in and of itself to a liberal arts education which allows a student to grow as an intellectual person? Or do we believe that law is essentially a vocational subject for which there are a core set of skills and competencies (commercial awareness; legal writing; public speaking and presentation etc) that universities are obliged to inculcate in their students? Whatever one's view, it is questionable how well the academy would respond to attempts to modify or limit its academic freedom. In addition, there may be a somewhat overzealous fixation on undergraduate law degrees at a time when, each year, the majority of those admitted onto the roll as solicitors either do not have a law degree (having undertaken a non-law undergraduate degree and then the GDL) or have been educated outside England & Wales (and completed the Qualified Lawyers Transfer Test).

The Review is set to last two years, with the SRA, BSB and IPS expecting to make findings in the interim. Little at this stage is a given, save that the Review is as challenging as it is important. What is key (and what may prove extremely difficult) is to be confident of a system of legal education and training that is sufficiently flexible and forward looking to meet the needs of lawyers (and consumers of legal services) today and in the years to come.

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MÉNAGE À TROIS OF STATE, CHURCH AND SEX: THE SAME-SEX MARRIAGE DEBATE

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Abstract:

Article 12 of the European Convention on Human Rights ('ECHR'), the international treaty to protect human rights and fundamental freedoms in Europe, raises the question is whether the narrow applicability of Art.12's rights of marriage and family to the heterosexual 'nuclear families' only 'restricts or reduces the right in such a way or to such an extent that the very essence of the right is impaired, so as to be disproportionate to any legitimate aim pursued'? The author addresses the issue which the judges confront: where to draw the line between the equality and dignity of the sexual minorities and the alternative families.

Commencing from Article 12 of the European Convention on Human Rights ('ECHR'), the question of this research is whether the narrow applicability of Art.12's rights of marriage and family to the heterosexual 'nuclear families' only 'restricts or reduces the right in such a way or to such an extent that the very essence of the right is impaired, so as to be disproportionate to any legitimate aim pursued'?1

In Goodridge v Dept. of Public Health, Judge Marshall clarified that 'there are three partners to every civil marriage: two willing spouses and an approving State.'2 Observing the debate of same-sex marriage and the recent call for equal marriage for homosexual couples and civil partnership for heterosexual couples in the United Kingdom, the author proposes that there is a relationship of ménage à trois between State, Church and the same sex couple. It is also proposed that the state and the European Court of Human Rights ('ECtHR') have a positive obligation to balance the interests of the sexual minorities and the opponents of same sex marriage due to their religious belief3. This Ph.D. thesis will thus call for a 21st Century gender neutral interpretation of the right to marry and to found a family in Art.12.

In Schalk and another v Austria4, the ECtHR unanimously rejected a same sex marriage plea from Austria. On its face, it seems like a failure of the Lesbian, Gay, Bisexual and Transsexual ('LGBT') community. Nevertheless, this is the first time that the issue of same sex marriage entering into the ambit of the non-qualified Art.12 which states:

> 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

From the literal reading of Art.12, the subject is limited to 'men and women of marriageable age'. The exercise of Art.12 is subject to the national laws under the scrutiny of proportionality. In the UK, marriage is defined by Lord Penzance in Hyde v Hyde as follows5:

> 'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.6

This common law definition was abandoned by Canada in Halpern et al.7 v Attorney General of Canada et al. On the European level, when the ECHR was drafted, the concept of 'nuclear family' with a heterosexual couple and 2.4 children under the auspice of Christendom was the norm. The UK Household Composition Census 1971 and 2001 indicated that the percentage of married couple has decreased from 90% to 64%; single parenthood has increased from 1% to 10% whilst the rate of divorced parent has increased from 2% to 9%; and the average number of children in a family is now 1.6.8 With regard to religion, Justice Munby observed that 'we now live in a multi-cultural community of many faiths in which all of us can now take pride.'9

Since the enactment of the Civil Partnership Act 2004,10 which is a compromise to keep the same-sex couples from using the name marriage, there are approximately 34,000 same sex families

1Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Hart, Oxford and Portland, Oregon, 2010) 141
2*Hilary Goodridge v Department of Public Health*, Supreme Judicial Court of Massachusetts, 440 Mass. 309 (2003)
3*Minister of Home Affairs and Another v Fourie and Another,* (CCT 60/04) [2005] ZACC 19; 2006(3) BCLR 355 (CC); 2006 (1) SA 524 (CC)
4*Schalk and another v Austria* [2010] ECHR 30141/04.
5*Hyde v Hyde and Woodmansee*, (1865-69) L.R. 1 P. & D. 130

formed according to a 2008[11] survey. The Vatican released a statement that 'allowing children[12] to be adopted by persons living in such [same-sex] unions would actually mean doing violence to these children'. Some considered that the 'nuclear family' concept is in crisis.[13] Some proposed that it is time to reexamine the function, form and law of family and marriage in the 21st Century.[14]

It is proposed that these non-traditional, alternative or 'different families'[15] are not socially different but legally treated differently. By confining marriage and family to the archaic common law definition in Hyde v Hyde and keeping these different families outside of Art.12, it created a sexual caste system and harms the very essence of the marital and familial rights. The 'separate but equal' argument from the same sex marriage camp is an echo to this jurisprudence.[16] A teleological reinterpretation of Art.12 is needed imminently.

In 1979, the ECtHR recognized the right of children born out of wedlock under Art.8 in Marckx v Belgium[17]. In 2002, the famous Goodwin v United Kingdom confirmed the transsexual's right to marry and found a family under Art.12.[18] This proves that the ECHR can be a living instrument in an ever-changing society. Today, gender-neutral marriages are legal in seven European countries, Canada, South Africa and Argentina. The ECtHR is unable to hide behind the veil of margin of appreciation for much longer. The ultimate question for the judges would be where to draw the line between the equality and dignity of the sexual minorities and the alternative families, and the religious belief of some Christians.

The first instance judge Leon Bazile[19] in the 1965 Loving v. Virginia said,

> 'Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'

Forty-five years later, this decision seems to be out of touch on a global scale. In the 21st century, maybe it is worth once again asking ourselves this question, how far can the society go in allowing members of religious communities to define for themselves which laws they will obey and which not.[20]

6 *Ibid.*
7 *Halpern et al. v Attorney General of Canada et al*., (2003) 60 O.R. (3d) 321
8 Fiona William, *Rethinking Families*, (Calouste Gulbenkian Foundation, London, 2005)
9 *Singh v Entry Clearance Officer New Delhi*, [2004] EWCA Civ 1075. Concurring opinion by Justice Munby.
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13 Caroline Wright and Gill Jagger, 'End of century, end of family?: shifting discourses of family "crisis"' in Gill Jagger and Caroline Wright (eds.), *Changing Family Values*, (Routledge, London and New York, 1999) 17
14 Martha Albertson Fineman, *The Autonomy Myth*, (The New Press, New York and London, 2004); also see John Eekelaar and Thandabantu Nhlapo (eds.), *The Changing Family*, (Hart, Oxford, 1998)
15 A term used by Stonewall UK and the International Lesbian and Gay Association
16 *Plessy v Ferguson*, (1896) 163 U.S. 537 and *Brown v Board of Education*, (1954) 347 U.S. 483
17 *Marckx v Belgium*, (1979) 2 EHRR 330.
18 *Goodwin v UK* (2002) 35 EHRR 18
19 *Loving v Virginia*, (1967) 388 U.S. 1
20 *Christian Education South Africa v Minister of Education*, (2000) 9 BHRC 53.

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LEGALITIES INVOLVING CARRIAGE OF GOODS BY SEA

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Abstract:

The Hague Visby Rules scheme solves many of the issues involved in the carriage of goods by sea but not all of them. The new Rotterdam Rules provides a total solution, the research paper argues.

The current legal regime relating to bills of lading is a result of developments that began some two centuries ago. In majority of international sale transactions the bill of lading plays a significant role. As understood commonly, the bill of lading is a contract of carriage between the carrier and the endorsee or the consignee. To determine the rights and liabilities of the parties to the contract the terms contained in the bill of lading are referred to. The provenance of the terms seems to interesting -- "to lade" which means to load a cargo onto a vessel.

The bill of lading is issued by a carrier to a shipper, assenting to the fact that specified goods have been arrived as cargo for conveyance to a named place for delivery to the consignee or endorsee, which is usually identified.

A string of international conventions -- The Hague Rules, the Hague-Visby Rules and the Hamburg Rules which decree on the carrier minimum responsibilities and liabilities that cannot be reduced with appropriate clauses in the contract – apply to most of the bills of lading.
The most prominent of them was the Hague-Visby Rules were a set of international rules for the international carriage of goods by sea. Originally drafted in Brussels in 1924 the Hague-Visby Rules were officially christened as the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading" and after the same was amended by the Brussels Amendments (officially the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading") in 1968, the Rules became known as the Hague-Visby Rules. In 1979 the final amendment was made in the SDR Protocol.

The underpinning of the Hague-Visby Rules is that a carrier has more bargaining power than the shipper; and that to salvage the interests of the shipper/cargo-owner; the law should decree minimum obligations upon the carrier.

Under the English Common law earlier a vessel was strictly accountable for the safe transport of the cargo to its destination and delivery to the designated consignee. The vessel could however disavow this strict liability by incorporating appropriate clauses in contract of carriage.

The rapid rise in ocean traffic witnessed the increased use of exemption clauses in the 19th century. The priority attached to the laissez faire philosophy which facilitated the unbridled freedom in commercial agreements sets out a significant era for English contract law. The English courts emphasized on ensuring that the parties steadfastly kept to the terms of their agreement and were hesitant to intervene in the contract between individuals. Apparently this tolerant attitude helped those individuals who were in a better bargaining position.

Indira Carr (2009) aptly points out the shortfall of the Hague-Visby Rules as follow

> "The vessel owner, who always has had an upperhand in the drafting of the contracts of carriage of goods by sea, hence, the stronger of the contracting parties, unavoidably incorporated all embracing exclusion clauses. Carriers were exempted from liability for loss or damage from perils of the sea, decay, strikes, deviation to unseaworthy ships and their own negligence. The exclusion clauses operated totally in the carrier's favour and goods were carried entirely at the merchant's risk."

The above shortcomings contribute to the obsoleteness of "bill of lading". Particularly Articles 1:15 & 1:16 of the Rotterdam Rules create the new term "transport document".

A bill of lading does no more than figure out that a particular person has the right to possession at the time when delivery is about to be made. Discontentment arises when cargo is discovered to have been lost or vitiated in transit, or delivery is deferred or refused. Since the consignee is not a party to the contract of carriage, the doctrine of privity of contract affirms that a third party is not in a position to enforce the agreement. The most pertinent question is who owns the goods and who holds the risks associated with the carriage and accordingly it would be a matter of concern to the consignee. However, such a thing can be known with a close examination of the terms of all the relevant contracts. The consignor can sue to recover his or her loss in the situations where a consignor has reserved title until payment is made. However, it is to be noted with due regard that if ownership and/or the risk of loss has passed to the consignee, the right to sue may not be clear in contract, although there could be remedies in tort/delict (the issue of risk will have been closely considered to decide who should insure the cargo). As a result, numerous international Conventions and country-specific laws particularly address when a consignee has the necessary right to sue. In order to grant consignee the same rights of action held by the consignor a suitable legal solution is fleshed out from the principle of subrogation.

Earlier British judges, believing in the laissez faire philosophy, were sympathetic to clauses under Hague-Visby Rules. The volume growth of ocean traffic enabled to adduce reasons in support of Britain

1 Indira Carr, *International Trade Law* (Oxford: Routledge, 2009) p 229

maritime interests, hence the laissez faire philosophy stayed on its course.

The US Supreme Court took a contrary view to the liberal British attitude to disclaimers in bills of lading and also, other jurisdictions were at a variance with Britain. For example, the US Supreme Court subjected the exclusion clauses to a number of overriding obligations, such as the obligation to provide a seaworthy vessel and to take due care of the consignment.

The Harter Act in 1893 passed in the US Congress was particularly delivered a decisive blow to this laissez faire philosophy which limited the vessel-owner's freedom of contract and sought to protect the cargo owner.

Yet it was found to be not enough and sooner an international convention was created to redress the imbalance caused by the laissez faire. Further, to this effect the 'Hague Rules' (originally the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 1924) was drafted between 1921 and 1923 and signed by a host of big-ticket trading nations in August 1924. Harter Act served as a red book for Hague Rules as a many of the convention's provisions were modeled on provisions found in the earlier Harter Act. Swinging into action The Hague Rules set a threshold level of liability that could not be contracted out of by the carriers. As a signatory to 'Hague Rules' convention Britain was forced to implement the Hague Rules with the Carriage of Goods by Act 1924.

Indira Carr[2] points out the grey areas of Hague Rules which were vindicated subsequently.

> "Failings of the Hague Rules … surfaced over time as a consequence of litigation and developments in shipping technology. For instance, the defenses and limitation of liability afforded by the Rules did not extend to the servants or agents of the carriers, and the calculation of limitation of liability in terms of packages or units was not sufficiently flexible to accommodate consolidation of cargo in containers. This led to the drafting of the Brussels Protocol which revised the Hague Rules (hereinafter Hague-Visby Rules) in 1968."

UK witnessed the implementation of Hague-Visby Rules with Carriage of Goods by Sea Act 1971 which repealed the earlier Act of 1924. In the case of some signatories the Hague Rules and the Hague-Visby Rules co-existed since the Hague-Visby Rules were not adopted by them. For example, US were under the spell of Hague-Visby Rules.

During an exchange of trade between US and UK a bill of lading issued for goods sent from the US may be subjected to the Hague Rules rather than the Hague-Visby Rules.
Indira Carr[3] reflects on this as follow:

> "The implementing legislation, the Carriage of Goods by Sea Act 1971 to which the Hague-Visby Rules are attached as a schedule, provides in s 1(2) that the Rules shall have the force of law. In other words, the Rules must be treated as if they are a part of directly enacted statute. The consequence of this, according to The Hollandia, is that the parties' intentions are overridden by the provisions of the Rules."

Rotterdam Rules, in actuality the 2008 United Nations Commission for International Trade Law (UNCITRAL) Convention, aims to achieve a legal unification of international transport contracts as flaws in the Hague-Visby Rules were becoming more apparent. Under a unified legal and political framework for maritime carriage of goods Rotterdam Rules deliberate on an evolving and comprehensive code of conduct for governing the rights and obligations of carriers, shippers, and consignees under a contract for door-to-door shipments that involve international sea transport.

This is to say the purpose of the convention is to extend and refurbish the existing international rules and achieve uniformity of admiralty law in the field of maritime carriage, updating and/or replacing many provisions in the Hague Rules, Hague-Visby Rules and Hamburg Rules[4]. The Rotterdam Rules have been prepared in intergovernmental negotiations that lasted for over a decade by the UNCITRAL. On the other hand the Comité Maritime International (CMI) conducted the preparatory work on the Convention at the request of UNCITRAL including a preliminary draft text for the Convention. The signing ceremony was held in Rotterdam from 20 to 23 September 2009.[5]

> The Rules promise to accommodate contemporary trade practices as those treating the carriage of goods by sea

2Indira Carr, *International Trade Law* (Oxford: Routledge, 2009) p 230
3Ibid.,

4"2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the 'Rotterdam Rules'.".http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html (Retrieved on 29 December, 2011)
5Rotterdam Rules, http://www.rotterdamrules.com/en/ (Retrieved on 29 December, 2011)
6Yvonne Baatz *et al*., *The Rotterdam Rules: A Practical Annotation* (Institute of Maritime Law, 2009)

as part of wider commercial transport operations and largely dependent on e-commerce for their businesses for the Rules create the explicit legal basis for the use of electronic transport records. Rotterdam Rules also provide the greater legal assurance for each party's legal position and more emphatically the freedom to extend the Rules by contract to the whole logistics of operation.

Yvonne Baat et al (2010)[6] assert the Rotterdam Rules represent the most comprehensive overhaul of the law of carriage of goods by sea in more than half a century. They focus on all 96 articles of the new Convention and compare them to the text of the Hague-Visby Rules, the instrument currently covering most bills of lading.

Although formed for door-to-door operations, the core of the Rotterdam Rules[7] is still carriage by sea. Further, it can also be said that the liability regime set by the Rules is a mixture of the Hague/Visby and Hamburg Rules, although on some points it differs substantially.[8] The period of responsibility (Art. 12), for instance, was regulated differently by the two previous regimes.[9] However, specific obligations (art. 13 (1)), the duty to provide a seaworthy ship (art. 14) and exonerations from liability (Art. 17 (3)), have been taken from The Hague/Visby Rules with some important changes.[10] In contrast, deck carriage and jurisdiction and arbitration provisions have principally been kept as they are found in the Hamburg Rules[11]. The fault-based liability framework has not undergone any changes.[12]

According to Alexander von Ziegler:[13] 'Rotterdam Rules closes many gaps in the existing international transport regime, thoroughly specifying the relation of transport documents to the rights and obligations between exporters and importers of goods, clarifying the interests of credit and insurance in contracts of carriage and the flexibility with which the Rules have left room for evolving trade practices. The rules certainly have helped to facilitate the existing international transport regime through its clearer and more complete regulation of such elements as the following: allocation of burden of proof; evidentiary value of transport documents and electronic records, including non-negotiable documents and records; freedom of contract in respect of volume contracts; continuous character of the obligation of seaworthiness; bull; limits of liability; rights during transit; recovery of loss of and damage to goods caused by accidents of navigation; jurisdiction and arbitration; role of subcontracted carriers both on sea and inland; role of warehouses, transport terminals and stevedoring companies; risks and contract practices of lenders; interests of freight forwarders, cargo insurers and liability insurers; and bull; prevention of maritime fraud."

Since there are several parties involved in a carriage of goods by sea the Rotterdam Rules introduce the performing party and the maritime performing party.

The performing party was introduced into the Rotterdam Rules not only to include sub-carriers but also all other persons such as terminal operators, stevedores and warehouse keepers.[14] Therefore the performing party includes agents, independent contractors and sub-contractors which are engaged by the carrier to perform any of their activities according to Article 1 (1) (a).[15]
The Hamburg Rules distinguish between the carrier and the actual carrier, Art. 10 Hamburg Rules.[16] The claimant has the possibility to sue the actual carrier directly. The Rotterdam Rules now extend this wording by creating the performing party. However there is no possibility to sue the performing party directly under the Rotterdam Rules. This is left to the applicable national law.[17]

The carrier is liable for the breach of its obligations under the Rotterdam Rules caused by acts or omissions of any performing party (lit. [(a)], the master or crew of the ship (lit. [(b)], employees of the carrier or a performing party (lit. (c)) or any other person that performs any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. Art. 4 (1) which was called a "statutory Humalaya-like protection" protects these persons [18]and provides them the same defenses as the carrier.

The distinction between the "employees of the carrier"[19] and "the master of crew of the ship" was made because it can occur that the master or crew may not be employees of the carrier. That is the case when the ship

7 Sturley, M.F., UNCITRAL, p 255

8Sturley, UNCITRAL, p 255: "proposed changes to existing law are not earth shattering. The new convention is deliberately evolutionary, not revolutionary". For an overview see Baughen, p 143 et seqq. See also D. Rhidian Thomas, An Appraisal of the Liability Regime Established under New UN Convention, (2008) 14 JIML 496; Alexander von Ziegler, The Liability of the Contracting Carrier, (2009) 44 Tex. Int. L.J. 329.

For more information see Berlingieri, Comparative Analysis, p 5-6; Berlingieri, UNCITRAL, p 27; Sturley, UNCITRAL, p 256-257; Baatz/ et al., p 33 et seqq.

9For more information see Berlingieri, UNCITRAL, p 280-281; Mbiah, p 293-294; Baatz/ et al., p 35 et seqq. See also Theodora Nikai, The Fundamental Duties of the Carrier under the Rotterdam Rules, (2008) 14 JIML 512; Stephen Girvin, Exclusions and Limitation of Liability, (2008) 14 JIML 524.

10For more information see Berlingieri, Comparative Analysis, p 43 et seqq.; Berlingieri, UNCITRAL, p 283-284; Sturley, M.F., UNCITRAL, p 258; Mbiah, p 296. See also Yvonne Baatz, Jurisdiction and Arbitration under the Rotterdam Rules, (2008) 14 JIML 608; Chester D. Hooper, Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (2009) 44 Tex. Int. L.J. 417

11Berlingieri, UNCITRAL, p 281; Mbiah, p 289-291

12Ziegler, Alexander von, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (London: Kluwer Law International, 2010)

*13Francesco Berlingieri, "Carrier's Obligations and Liabilities" CMI Yearbook 2007-2008 (**Antwerp, Belgium:** Comite Maritime International, 2007-2008) p 285*

4Document A/CN.9/645, para.59; D.Rhidian Thomas, "An appraisal of the liability regime established under the new UN Convention", (2008) 14 Journal of International Maritime Law 498

is time chartered by the carrier from the ship-owner by means of a time-charter. For a so called bareboat-charter the person that charters the ship has to employ the master and crew. [20]

The maritime performing party is a new "invention" of the Rotterdam Rules. The maritime performing party means a performing person to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, per first sentence Art. 1 (7). [21]

Although the Convention simplifies certain elements to reduce the scope for disputes, on the other hand it provides for a quite lengthy and detailed Convention text, some of which clauses are fairly complex and likely to be the subject of litigation. [22]

Finally the Rotterdam Rules are interpreted as something as follow:[23]

Like most international Conventions, the Rotterdam Rules represent a compromise. For the correct interpretation the notes are essential, the more in terms of proper application in practice.

Following a thorough and detailed analysis of the Rotterdam Rules, ECSA, ICS, BIMCO and WSC have all concluded that this important new regime must be promoted by the industry to avoid the risk of a proliferation of regional cargo liability regulations. However, early ratification of the UNCITRAL Convention by major trading nations, such as EU Member States, will almost certainly give this process critical momentum….In general it can be remarked that most of the significant changes compared to The Hague-Visby rules are to the benefit of cargo owners, although signatory states are allowed to apply declarations in respect of certain options to allow carriers to seek full advantage by the contracting out of provisions, where permissible.

17Theodora Nikaki, "The Statutory Himalaya-type Protection under the Rotterdam Rules: Capable of Filling the Gaps?", Journal of Business Law 2009, 410
18However not the performing party; Nikaki, supra note 43, 420
19Berlingieri, supra note 41, 285
20Rolf Herber, "Haftung nach den Haager Regelin, Haag/Visby-Regeln und Hamburg-Regeln", Transportrecht 1995, 262; supra note 11, p 239
21Rainer Lagoni et al, ed., Recent Developments in the Law of the Sea (Berlin: Reihe: Schriften zum See- und Hafenrecht, 2010) p 190
22Rotterdam Rules, http://www.rotterdamrules.com/en/disputes/ (Retrieved on 29 December, 2011)
23Rotterdam Rules, http://www.rotterdamrules.com/en/interpretation/ (Retrieved on 29 December, 2011)

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FEMINIST LEGAL THEORY FROM ANTI-ESSENTIALIST VIEWPOINT

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Abstract:

The author attempts to situate the feminist legal theory at a postmodern perspectivism. Situating the feminist legal theory in postmodernism leads to postulation that all the apparent realities are merely social constructs and are therefore subject to change. The research puts forward a point-of-view that deconstructs the notions of objectivity and neutrality, affirming that every perspective is socially situated.

It seems appropriate to situate the feminist legal theory at postmodern perspectivism. Such a point-of-view deconstructs the notions of objectivity and neutrality, affirming that every perspective is socially situated. This sits at a variance with anti-essentialist theory such as Niclas Berggren who has identified the essentialist views into two mutually exclusive categories:[1]

(1) Humans have a fixed sexual orientation, determined at birth, and it is that of perfect bisexuality. Social factors are irrelevant both for determining a person's sexual orientations as well as for people's understanding of this concept.

(2) Humans have a fixed sexual orientation, determined at birth, and for the entire population, it is distributed along a continuum, ranging from exclusive heterosexuality to exclusive homosexuality. Social factors are irrelevant both for determining a person's sexual orientation as well as for people's understanding of this concept.

For any particular entity, according to the viewpoint put forward by Radden and Cuyckens (2003, p. 275), there is a host of properties all of which any entity of that kind must possess. As a matter of fact, it can be concluded that all entities can be correctly defined. It can be inferred from this point-of- view; the terms or words should have a single meaning.[2] In common parlance, essentialism is a generalization affirming that particular characteristics possessed by a group are universal, and not contingent on context. 'Man is a social animal' can serve as an essentialist statement.

Anti-essentialist, also known as intersectionalist critiques of feminist, have run counter to the viewpoint that there can be any universal women's voice and have reprobated feminists, as did pagan feminism, chauvinist feminism, or Black feminism, for unreservedly basing their work on the experiences of white, middle class women. The anti-essentialist

1Berggren, Niclas. ? 1 December 2000. Is Social Constructionism and Appealing Construction viewed 13 January, 2012 http://ham.passagen.se/nicb/construct.htm

assignment has been to probe the ways in which ethnicity, race, class, sexual orientation, and other forms of subordination interplay with gender and to uncover the implicit, damaging presumption that have frequently been deployed in feminist theory.

Postmodernism in feminist legal theory is a movement came into being in reaction to modernism, the predisposition in existing culture towards recognising the objective truth. As a result, the postmodernist thought is flies off a tangent from the previously preponderant modernist approaches. In feminist legal theory the "postmodernism" is understood to have its antecedent in the "modernist" scientific state-of-mind of objectivity and the progress linked to the Enlightenment, the Kantian domain.

Situating the feminist legal theory in postmodernism leads to postulation that all the apparent realities are merely social constructs and are therefore subject to change.

Social constructivism is a sociological theory of knowledge that is put into use in the constructivism into social settings, wherein various social groups construct knowledge for one another, jointly giving birth to a culture of shared artefacts with shared meanings, something which is relevant from feminist legal theory viewpoint. According to Lev Vygotsky, when an individual is embedded in a culture of particular type, the individual is learning continuously about how to be a part of that culture on many levels.[3] All by himself Vygotsky arrived at the same conclusions as Piaget with respect to the constructive nature of development. Social constructivism entails into many theories such as behaviourism, constructivism and social constructivism, arising from the work of Jean Piaget's theory of cognitive development which has a bearing on feminist legal theory. Piaget's stage theory, perhaps more popular as constructivism, affirms that the children need to construct a perception of the world for themselves. It certainly can prove to be relevant as the social constructivism extends constructivism by assimilating the role of other actors and culture in development. It is an odd with social learning theory by putting emphasis on interaction over observation.

In the legal discourse it accentuates on the role of power relations, language, and

2Hubert Cuyckens, Thomas Berg, Rene Dirven, Klaus-uwe Panther (eds) 2003. Motivation in language: studies in honor of Günter Radden. John
3Benjamins. p. 275
*Veer, Rene Van Der and Lev Vygotsky, 2008, The development and meaning of psychological distance (NY: Continuum)Wadsworth, Barry J., **2003,***
4**Piaget's Theory Of Cognitive And Affective Development: Foundations Of Constructivism (Boston: **Allyn & Bacon)

motivations in the embodiment of ideas and beliefs. The postmodernism perspective of female legal theory is critical of the use of distinct binary classifications such as male versus female, culpable homicide versus non culpable homicide, white versus black, actus reus (guilty act) versus actus reus (guilty act), mala in se (crimes that are thought to be inherently evil or morally wrong, and thus will be widely regarded as crimes regardless of jurisdiction) versus mala prohibita (offenses that do not have wrongfulness associated with them), and imperial versus colonial. The postmodernism point-of-view asserts realities to be plural and relative, and to be contingent on who the interested parties are and the nature of these interests. Such a perspective affirms that there is no absolute truth and that the way individuals perceive the world is purely subjective. The female legal theory has drawn from a wide array of cultural fields, including history, politics, religion, literary criticism, sociology, linguistics, and anthropology.

In the discourse of the feminist legal theory, the postmodern or anti-essentialist model is certainly the dominant approaches over the three other primary approaches to feminist jurisprudence are: the liberal equality model; the sexual difference model; and the dominance model. Irrespective of which one of the above approaches is the most preferred model each approach provides a unique point-of-view of the legal mechanisms that contribute to female's subordination, and each provides a clear-cut method for changing legal approaches to gender.

Within the framework of postmodern or anti-essentialist model, feminist legal theory has really evolved over the years, and has interacted successfully with other significant theoretical and political-academic movements such as critical race theory, post-structuralism, postmodernism, post colonialism and psychoanalysis. The salient feature of this period of discourse is its theoretical ambition to create a feminist jurisprudence – a common feminist account of legal method and of the substantive development of modern legal orders. Certainly such a development has engendered a critical analysis of not merely the substance but also the conceptual framework of legal rights.

It is to be noted that the contemporary feminist legal theory is an amalgamation of analytic and political-ethical claims. From an analysis perspective, the claim is that sex/gender is a key social structure or axis of social differentiation, and little to be doubted on its ability to characterise and influence the shape of law. The starting point of feminist theory, both politically and ethically, is the assumption that the ways in which sex-gender has fashioned the world, including through law. To put it differently, the sex/gender consists not just in differentiation but in domination, oppression or discrimination. To put it succinctly, the legal sex differentiation,

mostly disadvantages women.

Such a view could be disputed, but according to Nicola Lacey, 'It is political position often combined with an incipient utopianism in legal feminism: its social constructionist methodology, which seeks to identify the historical bases of discrimination in social decision-making and action rather than in biology implies a contingency which opens up radical possibilities for political and social change ... notwithstanding the fact that what has been socially constructed as real sex-role expectations for example are sometimes harder to change than biological or 'natural' features such as the possession of certain sexed physical characteristics.'

In a sharp contrast to the postmodern or anti-essentialist model the liberal equality model operates from within the liberal legal paradigm and usually accepts the liberal values and the rights-based approach to law, though it accounts for the issue with how the liberal framework has operated in practice. This liberal equality model emphasizes on assuring that women are afforded real equality—contravene to the nominal equality usually bestowed on them in the conventional liberal framework—and seeks to attain this either by way of a more thorough application of liberal values to women's experiences or the revision of liberal categories to take gender into account. According to Susan Okin, [6]'A central source of injustice for women these days is that the law, most noticeably in the event of divorce, treats more or less as equals those whom custom, workplace discrimination, and the still conventional division of labour within the family have made very unequal. Central to this socially created in equality are two commonly made but inconsistent presumptions: that women are primarily responsible for the rearing of children; and that serious and committed members of the work force (regardless of class) do not have primary responsibility, or even shared responsibility, for the rearing of children.'
As compared to postmodern or anti-essentialist model and liberal equality model the sexual difference model focuses on the connotation of gender differences and maintains that these differences should not be obscured by the law, but should be taken into account by it. By the virtue of accounting for these differences the feminist legal theory provides adequate remedies for women's situation, which sits at a variance from men's locus.

The sexual difference model is in direct contrast to the sameness account which affirms that women's sameness with men should be accentuated. To the sameness feminist, deploying women's differences in an effort to amass greater rights is ineffectual to that end and places focus on the very characteristics of women that have historically prevented them from attaining equality with men. An appropriate example is the protective laws that were enacted to protect women from certain hazards or imperilment of paid work. The sexual difference model, which has a bearing on these laws which had the effect of curtailing the employment available to women, benefitting the men. Until late 20th century the protective laws were enacted in a galore of US jurisdictions. The rationale for the enactment of the laws was the reason behind the protection of women. It seems to be plausible as women were regarded more vulnerable than men in sweatshops and factories. [7]

A host of followers in women's organizations and unions, concerned that courts in the 1950s would oppose pro-labour legislation, intended to protect whatever such laws were already in place. [8]During early 70s, the Equal Rights Amendment (ERA) to the U.S. Constitution passed the Congress and was proposed to the states for ratification; unions supported the ERA and considered female-only protective laws as against women's interests.[9] Another justification was put forth by an organization which, in 1836, adopted a resolution that said, "Whereas, Labour is a physical and moral injury to women and a competitive menace to men, we recommend legislation to restrict women in industry."[10] The minimum wage was supported except for men because of "widespread agreement that the labour market did not function effectively where women and the family were concerned" and among feminists because women needed to support their own dependents.[11]

The dominance model summarily rejects liberal feminism and asserts that the legal system as a mechanism for the continuation of male dominance. Thus, the model finds a common ground with certain sections of critical legal theory, which also deem the potential for law to act as an instrument for domination.

According to Catherine Mackinnon[12], 'jurisprudence is a theory of the relation between life and law. In life, 'woman' and 'man' are widely experienced as features of being, not constructs of perception, cultural interventions, or forced identities. Gender, in other words, is lived as ontology, not as epistemology. Law actively participates in this transformation of perspective into being. In liberal regimes, law is a particularly potent source

5Lacey, Nicola, Feminist Legal Theory and the Rights of Women
http://www.yale.edu/wff/cbg/pdf/Lacey.pdf Viewed 10 January, 2012

6Okin, Susan Moller and Justice, Gender, 1991 (NY: Basic Books) p 4-5

7Stansell, Christine, The Feminist Promise, op. cit., p. 197
8Stansell, Christine, The Feminist Promise, op. cit., p. 197 n. 52, citing Peterson, The Kennedy Commission, in Tinker, Irene, ed., Women in Washington: Advocates for Public Policy (Beverly Hills, Calif., 1983)
9Stansell, Christine, The Feminist Promise, op. cit., p. 287.
10Grant, Jane, Confession of a Feminist, in The American Mercury, vol. LVII, no. 240, Dec., 1943, pp. 684–691, esp. pp. 688–690 (quotations per p. 689 (italics in Jane Grant's article)).
11Folbre, Nancy, Greed, Lust and Gender, op. cit., p. 276A Mac Kinnon, Catharine, 1991, Toward A Feminist Theory Of The State (Harvard:
12Harvard University Press) pp. 237-239

and badge of legitimacy, and site and cloak of force. The force underpins the legitimacy as the legitimacy conceals the force. When life becomes law in such a system, the transformation is both formal and substantive. It reenters life marked by power. From a feminist perspective, male supremacist jurisprudence erects qualities valued from the male point of view as standards for the proper and actual relation between life and law. Examples include standards for scope of judicial review, norms of judicial restraint, reliance on precedent, separation of powers, and the division between public and private law. Substantive doctrines like standing, justiciability, and state action adopt the same stance. Those with power in civil society, not women, design its norms and institutions, which become the status quo. Those with power, not usually women, write constitutions, which become law's highest standards. Those with power in political systems that women did not design and from which women have been excluded write legislation, which sets ruling values. Then, jurisprudentially, judicial review is said to go beyond its proper scope -- to delegitimate courts and the rule of law itself -- when legal questions are not confined to assessing the formal correspondence between legislation and the constitution, or legislation and social reality, but scrutinize the underlying substance. Lines of precedent fully developed before women were permitted to vote, continued while women were not allowed to learn to read and write, sustained under a reign of sexual terror and abasement and silence and misrepresentation continuing to the present day are considered valid bases for defeating 'unprecedented' interpretations or initiatives from women's point of view. Doctrines of standing suggest that because women's deepest injuries are shared in some way by most or all women, no individual woman is differentially injured enough to be able to sue for women's deepest injuries.'

Catherine MacKinnon essentially postulates sexuality as something key to the dominance. MacKinnon affirms that women's sexuality is socially constructed by male dominance and the sexual domination of women by men is the provenance of the general social subordination of women.

In critical theory, "Postmodernism" refers to a point of departure for works of literature, drama, architecture and design and it begins to influence the interpretation of law.[13] Postmodernism, particularly as an academic movement, can be understood as a reaction to modernism in the Humanities. Whereas modernism was primarily concerned with principles such as identity, unity, authority, and certainty, postmodernism is often associated with difference, plurality, textuality, and skepticism.

These recorded developments in the recent period — reappraisal of the entire Western value system (popular culture's shift from industrial to service economy) that occurred in 1950s and continued till the Social Revolution which peaked in 1968—are captured within the discourse of Postmodernity, [14]as opposed to Postmodernism, a term referring to an opinion or movement. "Postmodernist" describes part of a movement; "Postmodern" places it in the period of time since the 1950s, subsuming its role within the purview of contemporary history.

There is an apparent myth primarily created by the contemporary feminist texts on law that legal feminism is the creation of the late Twentieth Century contravene to the truth that the feminist jurisprudence goes back to many centuries. Strong opinions in support of the same surfaced in the Twentieth Century, which included the arguments for women's rights and equal. The legal and political status resoundingly articulated by Mary Wollstonecraft [15]in the Eighteenth Century and, of course, the suffragists of the Nineteenth and early Twentieth Centuries. Notwithstanding the fact that that liberal and Enlightenment thinking has been linked to an accretion of feminist theories, there is a robust argument for thinking of the feminist tradition as unique in its own right. According to a different viewpoint, a utilitarian way of thinking about feminist critique of modern law is truly its status as an imminent critique of liberalism: as part of the conscience of a liberal order which has been slow to deliver the universalism which it promised.[16]

What probably can be considered the defined moment of feminist movement is second uprising of women in late 1960s and 1970s to give vent to the feminist thought, and in particular stimulated the gradual entry of feminist ideas into mainstream academic discourse. Both sociology and literary studies drew heavily from feminist movement; however, the potential of feminist analysis to transcend the boundaries of already established disciplines led relatively at a faster rate to the founding of particular women-centric programmes and even centres dedicated to women's or gender studies, latter is a disciplinary innovation that was aptly brought about at the cost of keeping feminist issues relatively on the periphery in the learning academy. Nonetheless, the intellectual efforts expend in this era of the women's movement affected not only public consciousness and popular culture

13Historians have generally not used postmodernist approaches in their work, as shown by Sigurdur Gylfi Magnusson, "The Singularization of History: Social History and Microhistory within the Postmodern State of Knowledge," Journal of Social History 2003 36(3): 701-735; Georg G. Iggers, Historiography in the Twentieth-Century: From Scientific Objectivity to the Postmodern Challenge (1997). Many historians (e.g.Perry Anderson) engage with postmodernism, and several philosophers (most prominently, Michel Foucault) often associated with the postmodern movement have made important contributions to history and historiography.

14Paul Michael Lützeler (St. Louis), December 2001 , From Postmodernism to Postcolonialism: On the Interrelation of the Discourses, www.inst.at/trans/11Nr/luetzeler11.htm Viewed 09 January, 2012

but have a bearing on the intellectual agenda a range of issues formerly ignored: the gendered division of labour; questions of pay equity; sexual violence; and sex discrimination.

The legal scholarship associated with the legal jurisprudence took an inordinate time to take a note of these developments, earlier largely ignored, but now a spate of the political and analytic issues raised by the women's movement have had concerns with women's legal and civic status. During the foregoing era the feminist legal scholarship singled out and condemned the non-presence of women and women's issues from the agenda of legal study; disturbing questions such as the way the domestic and sexual violence began to find their inroad into family and criminal law courses and texts; women's assigned position in the economy began to be recognised in labour law; and the probing the sex discrimination law, largely found to be under the civil rights law, found a precarious foothold in legal jurisprudence, vacillating between labour law and civil rights. The saltatorial gambit to include in the curriculum highpoints where women or gender questions were particularly visible soon precipitated to more probing work which identified gender issues in a far expanding range of legal arrangements, with medical law, property laws and pensions law becoming a locus for analysis of 'indirect discrimination' commonly perceived as the existence of arrangements which, though superficially neutral, in fact serve to exclude or disadvantage a disproportionate number of women .[17]

As a result it led to a more radical set of theoretical dialectic, with the feminists of the Oslo school, spearheaded by the late Tove Stang Dahl, founding a centre of women's law and reorganising the very conceptualisation of subjects around women's lives -- birth law, money law, and housewives-law. What underpinned the early feminist approaches was a sharp contrast between sex and gender, with the former perceived as a bodily or biological category, and a latter as the socially constructed meaning of sex.

The distinction between gender and sex soon came under the scanner, and it had a bearing on shifting the political and academic discourse towards an exploration of the pivotal role of law in constructing social meanings of gender. The women and law, which so far had been treated as mutually exclusive categories , hence both

15Mary Wollestonecraft, A Vindication of the Rights of Woman (1792; 1988, ed. Carol Poston, New York, W.W. Norton

16Margaret Thornton, 1990, The Liberal Promise (Oxford: Oxford University Press)

17See for example Susan Atkins, 1984, Brenda Hale and Brenda Hoggett, Women and the Law, (B. Blackwell, Oxford)

categories usually left intact, and seemingly appear to assume that a particular 'women's' perspective could be identified, the 'law and gender' approach postulated the framework of sex/gender divisions as a general category for critical legal analysis. It was breakthrough in the evolution of jurisprudence thinking as it opened up the possibility that law's contribution to the sexing or gendering of its subjects might interact with other social forces, hence constituting multiple female subject positions.[18]

According to Rhode and Gender (1990), the 'law and gender' approach postulated the framework of sex/gender divisions assumed both a powerful, dynamic role for law in the constitution of gender, and, as a result, a wide-ranging and potentially radical law reform agenda.[19]

Furthermore, it opened up the possibility of incorporating sexual orientation in the critical analysis of law's constitution of gender, and of analysing the gendering of men, hence promising finally to explode the myth of sex/gender as exclusively a 'woman problem'.

The radical shift from 'women and law' to 'law and gender' was still condemned for that the shift intimidated to make women, and issues of particular concern to women -- the 'woman-centeredness of feminism' -- perish again just as they had seemed to be gaining a foothold. [20]

Well, what apparently may come across as something insufficiently analysed – the striking difference between feminist writers on law has to do with a mixture of methodology and written style. A relevant example could be Catharine MacKinnon's written style is rhetorical and polemical: her arguments are advanced by striking elisions and rhetorical tropes which are interspersed with more detailed analysis of particular legal institutions.[21]

In Patricia Williams, we also find a genre of rhetoric, but realised through narratives which deliver an analytic or political point obliquely, indirectly.[22] Any of these styles contrast sharply with, for example, the more classically academic style of Ngaire Naffine,[23] whose writing deploys the techniques of analytical legal scholarship and political theory. Moving on, Luce Irigaray writes in a seamlessly metaphorical style, weaving social critique with utopian visions and elliptical, poetic meditations,[24] while Drucilla Cornell moves between each of the techniques of the other four.

These differences are not just a matter of style. The resort to polemical or self-consciously literary forms of expression also reflects the idea that the very conceptual framework of legal scholarship makes it impossible to say certain kinds of things: that the way in which particular intellectual disciplines and discourses have developed makes it impossible to conceptualise certain types of harm or

wrong or to reveal certain kinds of interest or subject position. To take a well-known example, the concept of harassment was developed by MacKinnon[25] to identify a form of abuse of power which fell between a number of existing social and legal concepts such as rape, assault and sex discrimination.

According to Nicola Lacey, [26] 'there was some concern about whether the analytic frame of gender analysis would submerge or displace feminism's traditionally political and ethical concerns in favour of a scientific approach... whether the shift to gender could really make the problem of sex disappear: granted that gender roles are socially constructed (which is not to say easy to change), why had they happened to be ascribed to men and to women in the way they had?'

The periodization of different stages of feminist legal scholarship can never have any conclusive answer, but the third phase in the development of feminist legal scholarship is widely accepted to be the shift towards the 'law and gender' paradigm. Widely acknowledged as the feminist legal theory' the concern has been to reprioritise the political commitments of feminist scholarship, emphasising the combination of analytic and normative/ethical concerns on which feminist work is founded, while holding to a close engagement with particular legal issues and institutions.[27]

During the shaping up of the feminist legal theory the focus always have had been on its methodology. It is old method to bifurcate the legal theories into the internal and the external – theoretical approaches which intend to rationalise and explain the nature of law and legal method from the point of view of legal reasoning or legal practice itself, independent of the theoretical approaches which exist outside legal practices, subjecting them to an analysis from the point of view of a particular social scientific method or from distinctive normative points of view.

In a sharp contrast all these methods, the third perspective is an interpretive method, which the contemporary feminist theory uses as its key instrument.

As a result, Nicola Lacey asserts:[28] 'the feminist legal theories do not merely intend to rationalise legal practices; nor, conversely, do they typically engage in entirely external critique and prescription. Rather, they aspire to produce a critical interpretation of legal practices: an account which at once takes seriously the legal point of view yet which subjects that point of view to critical scrutiny on the basis of both its own professed values and a range of other ethical and political commitments. For this reason among others (notably the political antecedents of the social movements which generated feminist scholarship) feminist legal scholarship is characterised by a particularly intimate linkage between theory and practice: both with a rejection of any strong division between the two, which sometimes in fact implies a certain scepticism about theory; and with an impulse to have effects beyond the academy. Hence feminist theory is firmly grounded in particular legal issues.'

18See Katherine O'Donovan, 1985, Sexual Divisions in Law (London: Weidenfeld and Nicolson)
19See Deborah L. Rhode, Justice and Gender (1989); Regina Graycar and Jenny Morgan, The Hidden Gender of Law (1990); Katherine Bartlett and Rosanne Kennedy (eds.) Feminist Legal Theory (1990)
20 Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 Journal of Law and Society p.351
21A. MacKinnon, Catharine, 1987, Feminism Unmodified:Discourses on Life and Law (Harvard: Harvard University Press)
22Williams, Patricia J., 1991, The Alchemy of Race and Rights (Harvard: Harvard University Press)
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25MacKinnon, Catharine A., 1979, Sexual harassment of working women: a case of sex discrimination (Yale: Yale University Press)
26Lacey, Nicola, Feminist Legal Theory and the Rights of Women [Online] http://www.yale.edu/wff/cbg/pdf/Lacey.pdf [Accessed 10 January, 2012]
27See for example Ngaire Naffine and Rosemary Owens (eds.) Sexing the Subject of Law (1997); Anne Bottomley (ed.) Feminist Perspectives on the Foundational Subjects of Law (1996).
28Lacey, Nicola, Feminist Legal Theory and the Rights of Women [Online] http://www.yale.edu/wff/cbg/pdf/Lacey.pdf [Accessed 10 January, 2012]

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THE CHALLENGES AND REGULATING THE WEB 2.0.

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Abstract:

Since collaborations, cooperation, interactivities and social networkings are the key features of Web 2.0 together these pose formidable legal challenges to regulate user generated content (UGC). The research paper argues for a change in regulation and procedure In order to get the most out of the UGC, as now, it would require the regulator to understand the code-based technologies to control the cyberspace within the provision of law.

You Tube fails to halt the jihad videos"[1]- The Sunday Times headline on 07th of November 2010 brings one of the challenges of user generated content ("UGC") internet Web 2.0. Collaboration, cooperation, interactivity and social networking are the main features of Web 2.0. The central issue of the Web 2.0 is that the users are the publisher, critic, journalist, reviewer, public performer and broadcaster. The power of the user-generated content (UGC) has no boundary for the content; the user can be a journalist, entertainer, reporter, and protester or may simply be raising a voice for justice.[2]

The user-generated content brings enormous energy to the digital life but also faces some challenges. Complication includes pornography, undesirable content, obscenity, defamation, privacy and confidentiality, intellectual property, money laundering,[3] jurisdiction and governance. However, the mobility and storage of data as well as frequent and easy access to data make the web 2.0 very convenient and financially attractive. A full set of paper encyclopaedia costs £995,

whereas a full encyclopaedia can be found in one CD, costs only £60. Access over the Internet costs much less, only around £40.[4]

Formation of contract via online, i.e., e-mail raises the legal problem. The High Court in Fernandes SA v Metha[5] raised two issues concerning this problem. One of them was e-mail did not constitute adequate evidence to make an agreement and there was not an admissible signature on the e-mail. Respecting this issue a direction has been given from the European Union 'Electronic Commerce Directives 2000/31/EC' which articulates: 'Member states' obligation is to remove the obstacle to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law. As regards the second issue concerning the signing of the contract via e-mail, Pelling J. stated his view that a valid signature could not be 'incidental' to the document. He did not address the issue of an automated e-mail with a signature at the end. However, paradoxically people who do not type or sign their e-mail may escape from the contractual liability.[6] An electronic signature may be described as the same as a handwritten signature which identifies the sender of the message[7].

Privacy of information over the Internet is a major issue nowadays. The United Kingdom takes an initiative to control data privacy on the Internet by enacting legislation. The Data Protection Act 1998 implements the Data Protection Directive (95/46/EC) of the European Union. The aim of The Data Protection Act 1998 is to regulate the electronically stored data and its distribution and uses.[8]

The New York Times on October 23, 2000 published an article stating that 21 million Americans visited one of the more than 60,000 sex sites on the web once a month. However, the analysts researched and said that web sex generated at least $1 billion revenue in a year.[9] A recent sex website domain named "sex.com" has been sold $13 million.[10] The problems regarding pornography begin with child pornography. A principle cause of tension has been the interface between art and child pornography laws. Child pornography has led to the questions of whether the law is fuelling a 'moral point'.[11]With reference to this issue, section 4 of the Child Trafficking and Pornography Act 1998 says that if any person having the custody, charge or care of a child allows the child to be used for the production of child pornography, he or she shall commit an offence.[12] Furthermore, it is stated that to knowingly produce, distribution, prints or publish any child pornography or to knowingly import export, sell or show any child pornography shall be an offence.[13]

Digital divide is another challenge of the web. Alan Buckle, Chief Executive of KPMG Consulting said "...I do see the danger of digital divide. It won't be a divide based on geography or on size of company, but between businesses that embrace web-based technologies to transform themselves and their markets, and those that don't see it or who get their strategies wrong. For many of the latter, there won't be a second chance."[14] Law enforcement agencies cannot take action against the cybercriminals unless the countries have specific laws dealing with the cybercriminals activities. The rules and procedures are the prerequisite for investigation as well as the prosecution.[15] In 2000-01, G8 also took a plan of action to communicate these opportunities to each other. However the 'Digital Opportunity Taskforce' did not address cybercrime but focused on how to overcome the 'digital divide.'[16]

Hacking and viruses are dealt with the Computer Misuse Act 1990 but it does not deal with the fraud. Sections 1 and 2 provide that unauthorised access to computer materials and commit or facilitate commission of further offence respectively. A person who makes an untrue statement not to disclose his or her identity and intends to do deception may be guilty of fraud.[17] "...the phenomenon of so-called 'identity theft', where a person's identification details are obtained through various surreptitious methods, obtains and disclose an individual's confidential details."[18]

Copyright, Design and Patent Act, 1988 section 107: copyright infringement is committed - 'In the course of the business' whereas the infringement affects the works of the owner. In Dow Jones v Jameel [19] either individual or collectively court take care the amount of real and substantial tort (Defamation). The supreme court of Finland – "A service provider who had deliberately collaborated with the recipients of the service in order to undertake illegal acts could not benefit from the liability exemptions"[20] contained EU Directives on electronic commerce. [21]Moreover, the Supreme Court stated that

1Times Online (Online)
http://www.timesplus.co.uk/sto/?login=false&url=http://www.thesundaytimes.co.uk/sto/news/uk_news/National/article440026.ece [7th November 2010]
2Dr. C. George & Dr. J. Scerri, 'Web 2.0 and User-Generated Content: legal challenges in the new frontier', (2007), JILT
3A. Murray, 'A Information Technology Law: The Law and Society', (Oxford University Press, Oxford, 2010), p.107
4 I. J. Lloyd, Information Technology Law, 4th ed. (OUP, Oxford, 2004), p.4.
5[2006] EWHC 813 (Ch).
6K. Rogers, 'Signing your e-life away', (2006), New Law Journal, vol. 156, p.833.
7L. Edwards & C. Waelde, Law and the Internet A Framework for electronic Commerce, 2nd ed. (Hart Publications, Oxford, 2000), p .41.8G.
8Spindler & F. Borner (Editor), E-Commerce Law in Europe and the USA, (Springer, Germany, 2001), p. 296-97.
9E. Casey, *Digital Evidence and Computer Crime*, 2nd ed. (Elsevier Press, London, 2004).
10BBC, (Online), http://www.bbc.co.uk/news/technology-11596477 [3rd November 2010]
11S. Ost, *Child Pornography and Sexual Grooming: Legal and Social Responses*, 1st ed. (Cambridge University Press, New York, 2009), p. 103.
12Child Trafficking and Pornography Act 1998, s 4
13Ibid s 5
14S. Courtnage, E-volution Time, (2003), *Company Secretary Review*, issue 23, p. 184.
15M.D. Goodman , (2002) 'The Emerging Consensus on Criminal Conduct in Cyberspace', *Int. Jnl. of Law and Info. Technology,* vol. 10, no. 2, p. 93.
16G8 Digital Opportunity Taskforce (Online) www.mofa.go.jp/policy/economy/it/df0106.html [3rd November 2010]

TESTIMONY

file sharing network co-operate between the administrator and the user which intend and lead to a large scale of infringement.[22]

On the occasion of real space jurisdiction apply on the cyberspace life, that is an - "illegitimate extra-territorial power grab" [23] unjustified and unwise. However, one government cannot claim to control the universal jurisdiction on the basis of local harms.[24] Lawrence Lessig argued that "… the real world is made of atoms, cyberspace of bits; the rule of the atoms don't work very well when applied to bits. Bits don't respect borders; they can't be cabined by borders. They go wherever the net goes, and the net goes everywhere without much limit."[25] So the rules and procedure of the real space are no longer effective in cyberspace.

To get the most of the user content Internet regulating the cyberspace needs new forms of regulation and procedure. Cyberspace is totally operated by the code. If the regulator wants to control Cyberspace it needs to change the code. It could prevent trespass by introducing a password system. Code is a perfect technology to control the cyberspace, as L. Lessig says - 'Law as code is a start to the perfect technology of justice.'[26] Nowadays the cyberspace is an imperfect structure. However, we can hope it will be perfect technology architecture within a very short time. We are now at a primary stage of change.

17Fraud Act, 2006 s. 1 & 2
18C.Reed & J. Angel, *Computer law The Law and Regulation of Information Technology*, 6th ed. (OUP, Oxford, 2007), p. 557.
19[2005] EWCA Civ 75
20P. Honkasalo, 'Criminal proceeding against the administrator of Bit Torrent tracker: Finreactor KKO 2010:47', (2010), *European Intellectual Property Review*, p. 2.
21See http://ec.europa.eu/internal_market/e-commerce/directive_en.htm
22Supra, n. 22.
23D. R. Johnson & D. Post, 'Law and Borders-The Rise of Law in Cyberspace', (1996), *Stan. Law Review,* vol. 48, No. 5, p.1380.
24Ibid at 1390
25L. Lessig, 'The Zones of Cyberspace', Stan. Law. Review, (1996), vol. 48, No.5, 1996, p. 1404.
26Ibid

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L. Lessig, 'The Zones of Cyberspace', *Stan. Law. Review*,(1996), vol. 48, No.5, 1996, p. 1404.

CASE STUDY: 'THE 5TH AMENDMENT JUDGEMENT'

INTRODUCTION:

THE DECISION IN THIS CASE IS POPULARLY NAMED 'THE 5TH AMENDMENT JUDGEMENT' HAS BEEN CONSIDERED ONE OF THE LAND MARK DECISIONS IN FORTY YEARS' LEGAL HISTORY OF BANGLADESH AND GIVEN WEIGHT OF SIGNIFICANT CONSTITUTIONAL IMPORTANCE. THE DECISION ATTRACTED UNPRECEDENTED ATTENTION NOT ONLY FROM THE PEOPLE IN LEGAL ARENA BUT ALSO A CROSS SECTION OF PEOPLE IN BOTH HOME AND ABROAD. THE JUDGES IN THIS LAND MARK CASE CONFRONTED WITH THE DOCTRINE OF NECESSITY AND DECIDED IN FAVOUR OF DEMOCRATIC CONTINUATION IN ANY OR ALL CIRCUMSTANCES. THE JUDGES DECLARED MILITARY RULE IN BANGLADESH (1975-1979), (1982-1986) ILLEGAL AND UNCONSTITUTIONAL FROM ALL ASPECTS AND THE RULERS ARE THE BETRAYERS TO THE STATE. THE MATTER IN THIS CASE ORIGINALLY ARISES FROM AN OWNERSHIP DISPUTE ON A CINEMA HALL (MOON CINEMA HALL). THE DECISION IS NOW BEING TAUGHT IN LAW SCHOOLS AND SEVERAL RESEARCHERS FOUND THE CASE 'NOT FULLY PURITAN' AS IT PARDONED SOME ACTIVITIES AS HISTORICALLY 'CLOSED' AND 'PASSED' AND COMPROMISED WITH THE DOCTRINE, IT HAD THROWN AWAY. THE STUDENTS, TEACHERS, RESEARCHERS AND READERS IN GENERAL MAY FIND THE DECISION USEFUL IN FURTHER DEVELOPMENT OF CONSTITUTIONAL LAW IRRESPECTIVE OF LEGAL JURISDICTIONS ACROSS THE WORLD.

Mr. Justice Md. Tafazzul Islam
Chief Justice
Mr. Justice Mohammad Fazlul Karim
Mr. Justice Md. Abdul Matin
Mr. Justice Bijan Kumar Das
Mr. Justice Md. Muzammel Hossain
Mr. Justice Surendra Kumar Sinha

CIVIL PETITION FOR LEAVE TO APPEAL NOS. 1044 & 1045 OF 2009

(From the judgment and order dated 29TH August passed by the High Court Division in Writ Petition No. 6016 of 2000)

Khondker Delwar Hossain, Secretary, B.N.P. Party (in C.P. No. 1044/09) ... Petitioner
Munshi Ahsan Kabir and others
(in C.P. No. 1045/09) ....Petitioners

=Versus=

Bangladesh Italian Marble Works Ltd., Dhaka and others
(in both the cases) ... Respondents

For the Petitioner
(in C.P. No. 1044/09) :Mr. T. H. Khan, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record

For the Petitioners
(in C.P. No. 1045/09) :Mr. Moudud Ahmed, Senior Advocate,(Mr. Imran A Siddiq with him) instructed by

General, Mr. Khandaker Diliruzzaman, Assistant Attorney General, Mr. Kashifa Hussain, Assistant Attorney General, Mr. Pratikar Chakma, Assistant Attorney General, Mr. Titas Hillol Rema, Assistant Attorney General, with him), instructed by Mr. B. Hossain, Advocate-on-Record

For the Respondent No.5
(in both the cases) :Mr. M.K. Rahman, Additional Attorney General (Mr. Motaher Hossain Sazu, Deputy Attorney General, Mr. Biswajit Debnath, Deputy Attorney General, Mr. S. Rashed Jahangir, Assistant Attorney General and Mr. S.M. Nazumul Haque , Assistant Attorney General with him) instructed by Mrs. Sufia Khatun, Advocate-on-Record

For the Respondent `No.6
(in both the cases) :Mr. Murad Reza, Additional Attorney General, (Ms. Fazilatunassa Bappy, Assistant Attorney General, Ms. Mahfuza Begum, Assistant Attorney General and Ms. Khairunnessa, Assistant Attorney General, instructed by Mr. Giasuddin Ahmed, Advocate-on-Record

For the Respondent No.7
(in both the cases) :Mr. Mahmudul Islam, Senior Advocate, (Mr. AFM Mesbahuddin, Senior Advocate, Mr. Yusuf Hossain Humayun, Advocate, Mr. A.M. Amin Uddin, Advocate, Mr. Abdul Matin Khasru, Advocate, Mr. Sheikh Fazle Noor Tapash, Advocate, Mr. Nurul Islam Sujon, Advocate, Mr. Shahidul Karim Siddiki, Advocate, Mr. S.M. Rezaul Karim,

Advocate and Mr. Momtazuddin Fakir with him), Advocate instructed by Mrs. Mahmuda Begum, Advocate-on-Record

Date of hearing : **The 19th, 21st, 26th, 27th and 28th January, 2010 and 1st February, 2010**

Amendment, as illegal and void and allowing condonations of some of the amendments while refusing some others and also directing the Ministry of Industries, the writ respondent No.1, the proforma respondent No.3 herein, to handover the physical possession of Moon Cinema Hall, 11 Wiseghat Road, Police Station: Kotwali, Dhaka, to the writ petitioner No. 1, the respondent No.1 herein, within 60 (sixty) days.

Facts, in brief, are that the respondent No.1, hereinafter referred to as the company, along with its Managing Director, filed the above writ petition stating, inter alia, that the company was registered with the Joint Stock Companies of the erstwhile East Pakistan as a private limited company in the name and style of Pak Italian Marble Work Limited and in the year 1962 it became the owner of the above Holding No.11, Wise Ghat Road, Dhaka and in the year 1964, it constructed a cinema hall known as Moon Cinema Hall; after liberation of Bangladesh, in or around the last week of December, 1971, some people taking advantage of poor law and order situation prevailing at that time, took over forcible possession of the above Moon Cinema Hall from the staffs of the company and subsequently, by notification being No.186-SI dated December 31, 1971, the management of the Moon Cinema Hall was taken over by the proforma respondent No.3 and the same was handed over to the Management Board purportedly in pursuance of the Acting President's Order No. Sec XI/IM/35/71/17 dated December 30, 1971; then in terms of the order passed by the Department of Trade and Commerce, by an order dated 28.11.1972 passed by the Registrar Joint Stock Companies, Bangladesh, the name of the company was changed to Bangladesh Italian Marble Works Ltd.; then by Notification No. IM-XV-36/72/531 dated 15.12.1972 the respondent No.3, in exercise of the powers under Article 5 of the President's Order No. 16 of 1972, placed the Moon Cinema Hall under the disposal of Bangladesh (Freedom Fighters) Welfare Trust, the writ respondent No.3, the proforma respondent No.5 herein.

Then on April 28, 1972, the company filed an application praying for release of the Moon Cinema Hall whereupon the Sub-Divisional Officer (South), Dhaka, by his order dated 1.12.1972, directed an enquiry and the directors of the company personally appeared before the Officer-in-Charge of the Abandoned Property Cell on 22.10.1973 and after enquiry the authority concerned filed an enquiry report dated 11.9.1974 with the finding that the Moon Cinema Hall was not an abandoned property and thereafter the Sub-Divisional Officer (South) Dhaka, after examining the documents, by his order dated 18.12.1974 placed the matter before the Deputy Commissioner, Dhaka and in due course the Additional Deputy Commissioner, Dhaka by his Memo dated 6.1.1975 recommended release of the said property. But by Memo dated 27.06.1975 the respondent No.3 informed the company that the Moon Cinema Hall is an abandoned property and as such cannot be released. The Company then filed an application on 17.12.1975, before the Member, Advisory Council, in-charge, Ministry of Planning and Industries, praying for release of Moon Cinema Hall but without any result. Then finding no other alternative, the company filed Writ Petition No. 67 of 1976 praying for declaration that the notification dated 31.12.1971 issued by the proforma respondent No.3 taking over Moon Cinema Hall as abandoned property under the Acting President's Order No.1 of 1971 and its subsequent Order dated 27.6.1975 refusing to release Moon Cinema Hall are illegal and without lawful authority. Only the respondent Nos. 3 and the Secretary, Ministry of Industries, the writ respondent No.2, the respondent No.4 herein, contested the Rule by filing an affidavit-in-opposition. The proforma respondent No.5 neither opposed the Rule nor filed an affidavit-in-opposition. After hearing the High Court Division, by judgment and order dated 15.6.1977, declared the impugned notification dated 31.12.1971 as illegal and directed the proforma respondent Nos. 3 and 4 to hand over the possession of Moon Cinema Hall to the company at once.

Then in compliance of the above judgment of the High Court Division, the respondent No.3, by Notification No. ND/(N-1)/4(2)/72/11 Dacca dated 24.8.1977, deleted Moon Cinema Hall from the list published in the Notification dated 31.12.1971 and formally released Moon Cinema Hall in favour of the company with a direction to the respondent No.4 to hand over the physical possession of the same to the representative of the company. In due course, a Magistrate was also deputed to hand over possession of Moon Cinema Hall to the company but the possession could not be handedover because the proforma respondent No.5 refused to give up possession of Moon Cinema Hall to the company on the ground that they, against the above judgment of the High Court Division, has filed Civil Petition No. 291 of 1977 before this Division and obtained an order of stay. In the meantime Abandoned Properties (Supplementary Provisions) Regulation, 1977, hereinafter referred to as Martial Law Regulation No. VII of 1977, having been promulgated on 7.10.1977 prodiving, amongst others, annulment of the above judgement and

order of the High Court Division dated 15. 6. 1977. Then the above civil petition was dismissed as not being pressed.Thereafter the company made several representations to the respondent Nos.3 and 4 requesting

them to hand over of the possession of the Moon Cinema Hall in their favour but the same was refused on the plea that in view of promulgation of MLR VII of 1977 the judgment and order of the High Court Division dated 15.6.1977 passed in Writ Petition No. 67 of 1976 stood annulled and so the said judgment was no longer binding upon them and the said Cinema Hall having vested in the Government, they were not legally bound to deliver the possession of the same to the Company. In the contempt proceedings, which in the meantime commenced at the instance of the company, the proforma respondents having taken similar stand, the company did not press those and those were accordingly discharged.

However, after the withdrawal of Martial Law the company filed Writ Petition No. 802 of 1994 before the High Court Division praying for issuing a Rule Nisi upon the respondent Nos. 3-4 and the proforma respondent No.5 calling upon them to show cause as to why, pursuant to the Gazette Notification No. IND(M-1)/4(2)/72/11 dated 24.8.1977 issued by the respondent No.3 for releasing Moon Cinema Hall and also directing the respondent No.4 to hand over the possession of the same to the company, the respondent Nos. 3-4 and the proforma respondent No.5 should not be directed to make over possession of the Moon Cinema Hall in favour of the company. However, the High Court Division by order dated 7.6.94 rejected the above writ petition summarily holding that the company did not challenge the vires of the Fifth Amendment and further there being inordinate delay of about 15 years it is too late to challenge the vires of the Fifth Amendment specifically in view of the judgment passed in the case of Anwar Hossain Vs. Bangladesh BLD (Suppl.)1 = 41 DLR (AD)165. Being aggrieved the company filed Civil Appeal No. 15 of 1997 but the same was also dismissed by this Division by judgment and order dated 14.7.1999 holding, amongst others, that the publication of the Gazette Notification dated 24.8.77 was not an actual and effective restoration or transfer of the possession of the Moon Cinema Hall by way of delivery of possession to the company or by means similar to delivery of possession and therefore the High Court Division did not commit any illegality in not extending the protection of sub-paragraph (2) of paragraph 6 of Martial Law Regulation No. VII of 1977 to the company and the High Court Division also did not misinterpret the law as laid down in the case of Nasiruddin Vs. Government 32 DLR (AD) (1980) 216 and merely summarized the points stated therein and that with regard to the case of Ehteshamuddin Vs. Bangladesh 33 DLR (AD) (1981) 154 the High Court Division merely considered the effect of the lifting of Martial Law on April 6, 1979 by the Fifth Amendment and only quoted one paragraph from the said judgment and that the above cases also have no relevance with the facts and circumstances of the appeal and further the Fifth Amendment has also not been challenged in the appeal. In the above circumstances, the company, for relief, had to file the above writ petition challenging the vires of the Fifth Amendment.

In the writ petition it was further stated that Khandaker Moshtaque Ahmed by a Proclamation dated August 20, 1975 took over the full powers of the Government and suspended the Constitution with effect from August 15, 1975 and made the Constitution subservient to the above Proclamation and after 82 days he handed over the office of the President of Bangladesh to Justice Abu Sadat Mohammad Sayem, the then Chief Justice of Bangladesh, who upon entering the said office of President on November 6, 1975, assumed the powers of Chief Martial Law Administrator and then he, by the Second Proclamation dated November 8, 1975, made certain amendments in the Proclamation dated August 20, 1975 and then by the Third Proclamation dated November 29, 1976 he handed over the office of Chief Martial Law Administrator to Major General Ziaur Rahman B.U and then on 5.10.1977 Major General Ziaur Rahman promulgated Martial Law Regulation No. VII of 1977, and on April 23, 1977 also promulgated Proclamations (Amendment) Order, 1977, i.e., the Proclamations Order No.1 of 1977, which amongst others, inserted paragraph 3A in the Fourth Schedule to the Constitution purporting to validate the above Proclamations dated August 20, November 8 and 29 of 1975 and also all the Martial Law Regulations, Orders etc made during the period between August 15, 1975 and April 9, 1979, i.e the date of withdrawal of Martial Law and thereafter, by section 2 of the Fifth Amendment, Paragraph 18 was inserted in the Fourth Schedule to the Constitution under the heading 'Ratification and Confirmation' and thus on seizing powers, the Chief Martial Law Administrators purportedly issued decrees known as Proclamations 'subordinating' or 'suspending' the Constitution of the Republic including all those articles of the Constitution which protected the rights of the individuals and provided the guarantees necessary for the maintenance of the rule of law etc. and that the Chief Martial law Administrator had no authority to nullify the Constitution by issuing the above proclamations etc. and that under the Constitution, even in case of grave public danger, it is only the President of the Republic who, in case of his satisfaction and subject to Article 141A, could have suspended only some constitutional guarantees but the Chief Martial Law Administrators, under the above Proclamations, went even further than what the President and /or the Parliament was entitled to do under the Constitution

and further the Chief Martial Law Administrators purportedly subordinated or suspended the very Constitution itself to the Martial Law Proclamtions, Regulaions and Orders which cannot be done either by the President or the Parliament even in grave emergency and further the Parliament under Article 142 of the Constitution has / had no authority / power to "ratify" and "confirm" the act of "subordination' or "suspension" of the Constitution and nullifying all those Articles which provided Supremacy of the Constitution, Rule of Law. Independence of Judiciary and its power of Judicial review and thus destroying the basic structures of the Constitution.

Then the High Court Division on 11.12.2000 issued Rule on the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why taking over the management of 'M/s. Moon Cinema' 11, Wiseghat, Dhaka by / under Notification No. 186-51 dated 31st December, 1971 published in the Bangladesh Gazette, Extraordinary dated 3rd January, 1972 and its placement with respondent No.3 for management by Notification No. IM-XV-36/72/531 dated 15th December, 1972 published in the Bangladesh Gazette Extraordinary dated 4th January, 1973 and all subsequent actions, deeds and documents relating thereto should not be declared to have been made without lawful authority and is of no legal effect and to further show cause as to why purported 'ratification and confirmation' of the Abandoned Properties (Supplementary Provisions) Regulations, 1977 (Martial Law Regulations No. VII of 1977 and Proclamations (Amendment) Order, 1977 (Proclamation Order No.1 of 1977) with regard to insertion of paragraph 3A to the Fourth Schedule of the Constitution by paragraph 18 of the Fourth schedule of the Constitution of the People's Republic of Bangladesh added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) should not be declared to have been made without lawful authority and is of no legal effect and as to why the respondents should not be directed to hand over 'Moon Cinema', 11, Wiseghat Road, Dhaka with its assets and management to the petitioners or such other or further order or orders passed as to this Court may seem fit and proper".

The respondent Nos.3 and 4 opposed the Rule and filed affidavits-in-opposition stating that Moon Cinema Hall is an abandoned property and that no body was found to manage the same and none of the share holders of the company, except two, was found present in Bangladesh at the relevant time and so Moon Cinema Hall was taken over under the Acting President's Order No.1 of 1972 in the interest of the Republic and subsequently under President's Order No. 16 of 1972 it vested in the Government and subsequently it was placed at the disposal of the proforma respondent No.5 which is possessing and managing the same and that by paragraph 18 of the Fourth Schedule to the Constitution all actions taken during the Martial Law period between 15th August and 9th April, 1979 were ratified and declared to have been validly made, done or taken and also providing that the validly of those shall not be called in question in any Court, Tribunal or authority on any ground whatsoever and further in the cases of Halima Khatun V. Bangladesh 30 DLR (SC) (1978) 207, State V. Joynal Abedin 32 DLR (AD) (1980) 110, Nasiruddin's case (supra) and Enteshauddin's case (supra) this Division in no uncertain terms put the Constitution as subservient to the above Martial Law Proclamations, Regulations and Orders etc. and further in Anwar Hossain's case (supra) Justice Shahabuddin Ahmed, even after noticing that by the above Martial Law Proclamations, Regulations and Orders the Constitution was badly mauled in different times, refused to interfere holding that all these structural changes were incorporated in and ratified by the Fifth Amendment and moreover long 15 years have elapsed since Fifth Amendment was passed and none challenged the Fifth Amendment it in the meantime.

The proforma respondent No.5 also opposed the Rule and filed affidavit-in-opposition stating that the writ petition is barred by the principle of res judicata inasmuch as all the relevant issues raised in the writ petition had been finally and conclusively decided in Writ Petition No. 802 of 1994 as well as in Civil Appeal No. 15 of 1997 and that in the wake of two Martial Law periods/regimes the jurisprudence that has emerged in the constitutional history of Bangladesh is that no Court including the Supreme Court has any power to call in question the same in any manner whatsoever and / or declare illegal or void the above Martial Law Proclamations, Regulation and Orders etc and in Halima Khatun's case it was held that there was a 'total ouster of jurisdiction of the Court" and thus this Division put the Constitution in no uncertain terms as subservient to the above Martial Law Proclamations, Regulations and Orders etc and thus the Constitution has lost its character as the supreme law of the country and in Joynal Abedin's case this Division followed the above view and in Ehtaeshamuddin's case this Division went on not only to reiterate the subservience of the Constitution to the above Martial Law Proclamation, Regulations and Orders etc for as long as Martial Law proclaimed / made on August 15, 1975 existed, but also beyond, i.e., after the Constitution was revived and that in Nasiruddin's case this Division also followed Halima Khtun's case but however clarifying that there cannot be any question of abatement of any legal proceedings initiated by an aggrieved person to protect his legal right or interest in the property against which the action taken or the vesting order made is without jurisdiction or coram non judice or is malafide and that except within this narrow compass, all the proceedings coming within the mischief of Martial Law

Regulation No. VII of 1977, shall abate.

Upon hearing the parties, the High Court Division made the Rule absolute and at the end of its judgment the High Court Division summarized its findings as follows:-

1. Bangladesh is a Sovereign Democratic Republic, governed by the Government of laws and not of men.

2. The Constitution of Bangladesh being the embodiment of the will of the Sovereign People of the Republic of Bangladesh,

is the supreme law and all other laws, actions and proceedings, must conform to it and any law or action or proceeding, in whatever form and manner, if made in violation of the Constitution, is void and non est.

3. The Legislature, the Executive and the Judiciary being the three pillars of the Republic created by the Constitution, as such, are bound by its provisions. The Legislature makes the law, the Executive runs the government in accordance with law and the Judiciary ensures the enforcement of the provisions of the Constitution.

4. All functionaries of the Republic and all services of the Republic, namely, Civil Service, Defence Service and all other services, owe its existence to the Constitution and must obey its edicts.

5. State of emergency can only be declared by the President of the Republic on the advice of the Prime Minister, in case of imminent danger to the security or economic life of the Republic.

6. The Constitution stipulates a democratic Republic, run by the elected representatives of the People of Bangladesh and any attempt by any person or group of persons, how high so ever, to usrup an elected government, shall render themselves liable for high treason.

7. A proclamation can be issued to declare an existing law under the Constitution, but not for promulgating a new law or offence or for any other purpose.

8. There is no such law in Bangladesh as Martial Law and there in also no such authority as Martial Law Authority as such and if any person declares Martial Law, he will be liable for high treason against the Republic. Obedience to superior orders is itself no defence.

9. The taking over of the powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15th August, 1975, by Khandaker Mushtaque Ahmed, an usurper, placing Bangladesh under Martial Law and his assumption of the office of the President of Bangladesh, were in clear violation of the Constitution, as such, illegal, without lawful authority and without jurisdiction.

10. The nomination of Mr. Justice Abusadat Mohammad Sayem, as the President of Bangladesh, on November,6, 1975, and his taking over of the Office of President of Bangladesh and his assumption of powers of the Chief Martial Law Administrator and his appointment of the Deputy Chief Martial Law Administrators by the Proclamation issued on November 8,1975, were all in violation of the Constitution.

11. The handing over of the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., by the aforesaid Justice Abusadat Mohammad Sayem, by the Third Proclamation issued on November 29,1976, enabling the said Major General Ziaur Rahman, to exercise all the powers of the Chief Martial Law Administrator, was beyond the ambit of the Constitution.

12. The nomination of Major General Ziaur Rahman, B.U., to become the President of Bangladesh by Justice Abusadat Mohammad Sayem, the assumption of office of the President of Bangladesh by Major General Ziaur Rahman, B.U., were without lawful authority and without jurisdiction.

13. The Referendum Order,1977 (Martial Law Order No.1 of 1977),published in Bangladesh Gazette On 1st May, 1977, is unknown to the Constitution, being made only to ascertain the confidence of the people of Bangladesh in one person, namely, Major General Ziaur Rahgman, B.U.

14. All Proclamations, Martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9,1979, were illegal, void and non est because.

i) Those were made by persons without lawful authority, as such, without jurisdiction.

ii) The Constitution was made subordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders,

iii) Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also.

iv) From August 15, 1975 to April 7, 1979 Bangladesh was ruled not by the representatives of the people but by the usurpers and dictators, as such, during the said period the people and their country, the Republic of Bangladesh, lost its sovereign republic character and was under the subjugation of the dictators.

v) From November 1975 to March, 1979 Bangladesh was without any Parliament and was ruled by the

dictators, as such, lost its democratic character for the said period.

vi) The Proclamations etc. destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism, negation of Rule of law, ouster of the jurisdiction of Court, denial of those constitute seditious offence.

15. Paragraph 3A was illegal,

"Firstly because it sought to validate the Proclamations, MLRs and MLOs which were illegal", and

"Secondly, Paragraph 3A, made by the Proclamation Orders, as such, itself was void".

16. The Parliament may enact any law but subject to the Constitution. The Constitution (Fifth Amendment) Act, 1979 is ultra vires, because:

Firstly, Section 2 of the Constitution (Fifth Amendment) Act, 1979, enacted Paragraph 18, for its insertion in the Fourth Schedule to the Constitution, in order to ratify, confirm and validate the Proclamations, MLRs and MLOs etc. during the period from August 15, 1975 to April 9, 1979. Since those Proclamations, MLRs, MLOs etc., were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.

Secondly, the Proclamations etc. being illegal and constituting offence, its ratification, confirmation and validation, by the Parliament were against common right and reason.

Thirdly, the Constitution was made subordinate and subservient to the Proclamations etc.

Fourthly, those Proclamations etc. destroyed its basic features.

Fifthly, ratification, confirmation and validation do not come within the ambit of 'amendment' in Article 142 of the Constitution.

Sixthly, lack of long title which is a mandatory condition for amendment, made the amendment void.

Seventhly, the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the People of Bangladesh and its Constitution.

17. The Fourth Schedule as envisaged under Article 150 is meant for transitional and temporary provisions, since Paragraph 3A and 18, were neither transitional nor temporary, the insertion of those paragraphs in the Fourth Schedule are beyond the ambit of Article 150 of the Constitution.

18. The turmoil or crisis in the country is no excuse for any violation of the Constitution or its deviation on any pretext. Such turmoil or crisis must be faced and quelled within the ambit of the Constitution and the laws made thereunder, by the concerned authorities, established under the law for such purpose.

19. Violation of the constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate for ever. However, on the necessity of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims, Id quod Alias Non Est Licitum, Necessitas Licitum Facit, salus populi est suprema lex and salus republicae est suprema lex.

20. As such, all acts and things done and actions and proceedings taken during the period from August 15, 1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever.

21. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisons was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble, Article 6, 8, 9, 10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation Order No.IV of 1976, is declared valid and retained.

The High Court Division then concluded as follows:

I) The Constitution (Fifth Amendment) Act, 1979 (Act of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above.ii) The "ratification and confirmation" of the Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No. VII of 1977) and Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977) with regard to insertion of Paragraph 3A to Fourth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act of 1979), is declared to have been made without lawful authority and is of no legal effect.

The High Court Division also directed the proforma respondent No.3 to hand over the physical possession of the Moon Cinema Hall to the company within a period of 60(sixty) days of the receipt of the judgment.

Thus the High Court Division though allowed the condonations of the provisions which annulled the various provisions of the Fourth Amendment and also some other provision, but did not condone of the provisions in respect of the omission / substitutions of the Preambles, Articles 6, 8, 9, 10, 12, 25, 38 and 142 of the original Constitution and no condonation being allowed in respect of the changes of any of the above provisions of the Constitution those were to remain as existed as on August 15 1975. Besides, Article 95, as amended by the Second Proclamation (Seventh Amendment) Order 1976 i.e, the Second Proclamation Order No. IV of 1976, being declared valid, was retained by the High Court Division.

Mr. T. H. Khan, Senior Advocate, the learned counsel appearing for the petitioner in Civil Petition No.1044 of 2009 submitted as follows:-

(a) on coming to power in the year 1996 the Awami League Government, having found that the provisions of the Indemnity Ordinance, 1975, Ordinance No. 1, of 1975, protecting the trial in respect of the assassination of the then President Sk. Mujibur Rahman along with his family, by ousting Courts jurisdiction, was given legal coverage by the Proclamation (Amendment) Order, 1977, Proclamation Order No. 1 of 1977, the Court's jurisdiction was clearly ousted and further the said Proclamation Order No. 1 of 1977 was also given constitutional coverage vide the Fifth Amendment by a legally elected Parliament and thereby totally ousting the Court's jurisdiction for holding any trial of the perpetrators of the crime committed on 15th August, 1975, had to go for new legislation for repealing the said Indemnity Ordinance, 1975 in order to extricate from the embargo as provided in paragraph No. 3A and 18 to the Fourth Schedule to the Constitution and for that purpose enacted repealing Act No. 21 of 1996, by a simple majority, and that the said Act 21 of 1996 was then challenged before the High Court Division on the ground that it ought to have been passed by two third majority instead of simple majority but this contention however was turned down by the High Court Divisions and on appeal this Division by its judgment reported in 18 BLD AD 155 affirmed the above judgment and then only the trial for the said killing commenced but surprisingly even after getting such a clearance from the Appellate Division by the above decision for enacting similar repealing Act, the then Awami League Government did not touch any other single instrument passed during 15th August 1975 to 9th April 1977 including MLR VII of 1977, which having got similar legal coverage, could only be nullified by a repealing legislation and not by any judicial pronouncement and since the embargo regarding entertainment of any question regarding the validity of the promulgation of the said MLR VII of 1977 existed at the time of filing of the present writ petition as well as at the time of pronouncement of its judgment on 29 August 2005 and also till today, the High Court Division had no jurisdiction to entertain the above writ petition and pass judgment thereon and moreover the High Court Division also not only illegally arrogated to themselves the functions of the legislators but also made highly subjective opinionated conjectures and surmises in declaring that the laws from August 15, 1975 to April 9, 1979 were illegal, void and non est.

(b) the High Court Division totally failed to consider that the Appellate Division had already given sanction to MLR VII of 1977 in so many previous decisions such as Halima Khatun's case , Nasiruddin's case, Ehteshamuddin case, (supra), judgment passed in Civil Appeal No. 15 and also in other decisions wherein it was held that when Martial Law if imposed, are

Constitution looses its supremacy and those decisions being binding upon the High Court Division in terms of the provisions of Article 111 of the Constitution and though those decisions were cited before the High Court Division, not only those were ignored but the High Court Division, in a language, which is inconsistent with the civility and decorum of the Court, criticized those decisions.

© Article 101 of the Constitution confers jurisdiction upon the High Court Division and sub clause a(ii) of Clause 2 of Article 102 of the Constitution, delineates the power to the High Court Division and the said sub clause (a)(ii), is subject to and /or controlled by the rider clause as provided in Article 150 of the Constitution and undoubtedly paragraphs 3A and 18 added to the Fourth Schedule to the Constitution by the Proclamation Order 1 of 1977, subsequently ratified by the 5th Amendment of the Constitution are transitional and temporary provisions, which were promulgated out of imperative necessity in order to give continuity and to avoid chaos and confusion and those provisions are clearly a bar in entertaining any writ petition like the present one.

(d) description of "person" given in Article 102(5) of the Constitution having not included the Parliament, it is crystal clear that the Parliament has not been considered as a person and the legislators had never contemplated to equate the Parliament with

a statutory pubic authority and the High Court Division though has been vested with the power to examine the vires of any provisions of any parliamentary enactment but strictly within the letter and spirit of Articles 7 and 26 of the Constitution as has been done in the case of Anwar Hossain (supra) in which it was held that the disintegration of the High Court Division was violative of the unitary structure of country thereby offends against the said provisions,

(e) the learned judges of the High Court Division having declared that the laws from August 15, 1975 to April 9, 1979 were illegal, void and non-est there remained nothing to condone any amendments but ironically some of the non est provisions were condoned and some were not condoned and moreover the High Court Division can not pick and choose the provisions at its sweetwill from the non est provisions to give those legal validity.

(f) undoubtedly the facto and de-jure jurisdiction of legislation laid with the Martial law Authority during the whole Martial Law Regime and also the transitional period until return of democratic system after General Election held in February, 1979 and one must realize that the reality of the situation of the Country at the relevant time and the personal sentiment or likes and dislikes have no role.

(g) the company filed Writ Petition No.6016 of 2000 after 21 years of the enactment of the Fifth Amendment without assigning any reason for this inordinate delay, which is fatal and the company can not at its sweetwill choose his own time to invoke the extraordinary jurisdiction of the High Court Division and that in the mean time the transactions and instruments made by the Martial Law Authority having been ratified by the Fifth Amendment, became past and closed transactions and the whole country, in all its branches, was governed under those instruments without any protest form any quarter including the judiciary and so the writ petition aught to have been rejected on the ground of delay alone.

Mr. Moudud Ahmed, Senior Advocate, the learned counsel appearing for the petitioner in Civil Petition No. 1045 of 2009 submitted as follows:-

(a) the very fact that the judgment of the High Court Division involves interpretation of the Constitution and of great public importance, for complete justice under Article 103 and 104, the petitioners deserve leave as opined by the former Chief Justice Mr. Justice Mostafa Kamal in the report published in Naya Diganha on 14.01.2010,

(b) in terms of the principle as laid down in 32 DLR (AD) 216, 33 DLR (AD) 201, 44 DLR(AD) 154, 207 US 288, the writ petition could be disposed of without declaring the Fifth Amendment illegal and void

(c) The High Court Division also travelled beyond the terms of the Rules which is not permitted as held in 51 DLR AD 172, 60 DLR AD 90 and 18 BLD (AD) 155.

(d) Five Parliaments duly elected by the people in the years 1986, 1988, 1991, 1996 and 2001, have preserved and protected the Fifth Amendment enacted in April 1979 and maintained its continuity and five governments including the judiciary have functioned and discharged their responsibilities under the Fifth Amendment and consequently it has been accepted by the people and accordingly by their acquiescence the Fifth Amendments has become part of the Constitution as observed by Shahabuddin Ahmed CJ in Anwar Hossain's Case (supra).

e) by way of denying condonation of the amendments made in the Preamble; Articles 6, 8, 9, 10, 12, 25; proviso to Article 38 and clause 1A 1B and 1C of Article 142 and paragraphs 3A and 18 to the Fourth Schedule of the Constitution, the High Court Division has acted as a legislature by rewriting the Constitution which could only be done by the Parliament under Article 65 of the Constitution.

(f) the High Court Division has delivered the judgment in violation of Article 111 of the Constitution as will be evident in as much as series of decision of this Division reported in 30 DLR (AD) 207, 32 DLR AD 110 and 216, 33 DLR (AD) 154, 59 DLR (AD) 289, 60 DLR (AD) 57 and 3 BLC (AD) 89 will show that the supremacy of the Constitution does not hold good once it is placed under the proclamation of Martial Law and further from the judgments of this Division passed in 60 DLR (AD) pages respectively 57, 82 and 90, it will appear that the supremacy of Constitution did not hold good even during the recent Emergency where a subordinate legislation like the Emergency Rules were given precedence over the Constitution.

(g) the judgment of this Division is confusing rather than cohesive and it is also irrational, inconsistent and self contradictory as while it has struck down the Fifth Amendment as a whole but on the other hand have condoned some of the amendments and actions at its own choice on a pick and choose basis without any legal grounds. (h)the principles of nationalism, socialism and secularism, identified by the High Court Division as the basic structures of the Constitution have no legal foundation and are contrary to the decision given by the Appellate Division in Anwar Hossain's Case.

(i) the judgment and order of the High

Court Division has been made in violation of the Constitution and without jurisdiction in as much as that in terms of Article 150 of the Constitution anything contained in the Fifth Amendment "shall not be called in question in or before any court, tribunal or authority on any ground whatsoever" and further the definition of 'Court' as provided in Article 152 of the Constitution has been reaffirmed by the Appellate Division in 60 DLR 82 holding that it included the Supreme Court.

Mr. Mahmudul Islam, Senior Advocate, the learned counsel appearing for the respondent No.7 in both the petitions, submitted as follows:-

(a) the submission of the petitioners that the High Court Division ought to have granted certificate suo moto under Article 103 (2) as substantial question of law as to the interpretation of the Constitution is involved in this case has no basis at all because the petitioners, having not required the High Court Division to exercise its discretion in granting or refusing to grant the certificate, can not now complain and that the High Court Division ought to have granted certificate as the High Court Division should not grant certificate without formulating the question of law on which certificate is to be granted and it has been the regular practice to pray for such certificate from the Bar on stating the points of law for which certificate is prayed for and further even though the petitions involve constitutional issues, the petitioners having failed to show any prima facie defect in the judgment necessitating interference and the points raised having been authoritatively decided by the superior courts, the petitioners have failed to make a case for grant of leave to appeal.

(b) the government having withdrawn the appeal and the concerned Ministry not challenging the judgment and the petitioners having taken no grounds challenging the order of the High Court Division directing delivery of the property in question to the respondent No.1, in the instant petitions we are only concerned with question whether the Fifth Amendment ratifying all legislative and executive actions of the Martial Law Authorities between 15th February, 1975 and 5.11.79 is valid and if not whether and to what extent the doctrine of necessity will come into play.

© It is a well-established principle of interpretation of any statute or constitution that in order to ascertain the meaning of any particular provision, the instrument must be read not in isolation but as a whole in its proper context and the context is of two types- internal and external; the internal being the text of the statute including the preamble and whether or not preamble is a part of the Constitution it, constituting a part of the context, has to be taken into consideration in construction of any substantive provision of the Constitution and moreover if the internal context cannot resolve the vagueness, resort may be had to the external context which includes the history leading the enactment of the statute and the proceedings of parliament and the same can be said about interpretation of a Constitution and accordingly for interpretation of our Constitution, concentration should be on the text of the Constitution and then go to history only incidentally, if necessary.

(d) unlike preamble of many other constitutions, the preamble of our Constitution has laid in clear terms the aims and objectives of the Constitution and in no uncertain terms it speaks of representative democracy, rule of law and supremacy of the constitution as the embodiment of the will of the people of Bangladesh and all the provisions that follow have been structured accordingly to achieve these aims and objectives and further a written Constitution in itself is a limitation on the governmental powers resulting in (i) a limited government and (ii) the supremacy of the Constitution.

(e) the past history of constitutional misadventures by the civil and military bureaucrats in Pakistan who never permitted constitutional governments to settle down, the framers of our Constitution felt it necessary to make the declarations in Article 7 of the Constitution which brilliantly comprehends the entire jurisprudence of the constitutional law and constitutionalism in Bangladesh including the supremacy of the Constitution and the decision of Pakistan Supreme Court in Zafar Ali Shah V. General Parvez Mosharaf, PLD 2000 SC 869, is an example which demonstrates the foresight of the framers of our Constitution in making it explicit by incorporating Article 7 what has always been implicit in any written constitution and if Article 7 is read together with the preamble and the fundamental principles of State Policy of Chapter II of the Constitution and if the different provisions of the Constitution are interpreted following the mandate of Article 8(2), there remains no doubt that (i) the supremacy of the Constitution and through its operation the establishment of a representative democratic polity and Rule of Law securing for all the citizens fundamental human rights and freedom are the basic features of the Constitution and together with these (ii) the independence of the judiciary and its the power of judicial review of the executive and legislative actions are also basic features of the

Constitution as without the above, the aims and objectives as formulated would be wishful thinking and it is now well-established that the basic features and structures of the Constitution are beyond the amending power of the Parliament under Article 142 of the Constitution.

(g) the submission of the petitioners that the Parliament being not a person, the High Court Division does not have jurisdiction to declare an Act of Parliament ultra vires has also no basis as since Article 7 of the Constitution declared the Supremacy of the Constitution, there must be some authority to maintain and preserve this supremacy of the Constitution and there can be no doubt that in an entrenched Constitution the judiciary must be that authority and starting from the case of Marbury v. Madison, 1 Cranch 137, there are numerous instances where the superior courts functioning under a written constitution upheld this power of judicial review as would be evident from the contents of the judgment of the High Court Division.

(h) Whenever a new legal order is ushered, the Constitution makes provision to deal with some matters, treating those as "transitional provisions", till the Constitution takes full effect and these provisions are called transitional provisions as the purpose of these provisions will be fulfilled once the government under the Constitution is established and though generally such provisions are kept beyond the pale of judicial review but at the same time no matter is intended to be 24 included in the "transitional provisions" which do not relate to anything during the interregnum period between the date of the Constitution coming into operation and the date of setting up of the government under the provisions of the Constitution but by the Fifth Amendment made in 1979 paragraph 18 was inserted in the schedule of "transitional provisions" only to ratify the otherwise unconstitutional legislative and executive actions of the Martial Law authority and also to preclude judicial review of those actions though those are not "transitional provisions" and so this is simply a fraud on the Constitution and such Fifth Amendment is also patently illegal specially for inserting the provision barring judicial review, another basic feature of the Constitution.

(i) the petitioners submitted that the Fifth Amendment having not being challenged for long time, it must be deemed that Fifth Amendment has been accepted by the people but the legal position is that time does not run in favour of the validity of legislation and if it is ultra vires, it can not gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity as has been held in Grace Brothers Pty Ltd v. The Commonwealth, 72 CLR 269, 289.

(j) simply because the laws made by the Martial Law authority and actions under it were considered by this Division in some cases wherein those were not declared ultra vires, those laws can not attain validity and further it also will be evident that in none of those case, the invalidity of the Fifth Amendment was vouched and so those cases can not operate as precedent for the validity of the Fifth Amendment and accordingly the submission of the petitioners that the earlier decisions touching the actions of the Martial Law authorities provide some binding precedents under Article III of the Constitution upholding the finding that actions of martial Law authorities can not be challenged in the Court is not tenable as in none of those cases the issue of invalidity of the Fifth Amendments was raised much less to speak of the Court's confirming the validity of the fifth Amendment and that in order to apply the provision of Article 111 an issue must raised and deliberated upon and decided before it can operate as a binding precedent as what is binding as a law is the ratio of a decision and not the finding of a fact or the conclusion reached by the Court and furthermore this Division, having the power of review, is not bound by a view earlier taken by this Division and moreover the role of Stare Decisis is insignificant in constitutional interpretation particularly when the earlier view is manifestly wrong and further the observation of the Shahabuddin Ahmed J in Anwar Hossain case to the effect that " In spite of these vital changes from 1975 by destroying some of the basis structures of the Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution" is quite wrong as can be seen from numbers of decisions of the superior Courts Eights and further this statement is simply an obiter dicta as being 25 made while dealing with the Eighth Amendment and the Fifth Amendment was not in issue in Amendment case and the above observation was simply uncalled for and moreover no other Judge having agreed with the said observation, it cannot be treated as ratio decidendi so as to have biding force under Article 111 and that in dealing with ratio decidendi to operate as a precedent of the view Salmond is relevant

(k) an effort has been made to apply the principle of estoppel and acquiescence to prevent the Fifth Amendment from being declared ultra vires but such effort is not tenable in the eye of law because it is a

well-established principle that estoppel cannot be pleaded against or in respect of a Statute, much less to speak of the Constitution and similarly, there cannot be any acquiescence to hold valid an otherwise invalid law.

(l) the doctrine of necessity is applied to condone some of the actions of a usurper as were done in the case of Madzimbamutu V Lardner-Burke (1968) 3 All ER 561 and also in the case of Asma Jilani v. Punjab PLD 1972 (SC 139) and that actions and laws validated by Para 18 of Proclamation Order No.1 of 1977 and the enactment of Para 18 of the Fourth Schedule of the Constitution do not fall within any of the above categories and that as held in the case of Zafar Ali Shah V. General Parvaz Mosharraf the Constitution assigned the function of enactment of law to Parliament and /or its delegate and any law framed or proclaimed by any authority other than Parliament and/or its delegate is violation of the Constitution as no authority except Parliament and/or its delegate can amend the Constitution as mandated by the Constitution under article 142 of the Constitution and at the minimum all those amendment made by the Martial Law authority infringing on the basic features of the constitution namely Supremacy of the Constitution, Rule of Law Independence of Judiciary and its power of Judicial Review

(m) However to avoid anomaly and preserve continuity, Courts have to pass consequential orders as in the Eighth Amendment case the Appellate Division ordered prospective application of the invalidity of the Eighth Amendment and further while declaring any law ultra vires, the Court often applies the doctrine of severability to limit the application of the judicial verdict and this is no legislative act though such a decision modifies or even destroys a legislation and accordingly once the Fifth Amendment is held invalid and beyond the power of parliament to make, only the following can be condoned by the court (a) actions past and closed; (b) actions not derogatory to the rights of the citizens and (c) routine works which even the lawful government would have done.

(n) the petitioners submitted that the High Court Division having found that the property in question is not an abandoned property, it was 26 unnecessary to go on the constitutional issue and to declare the Fifth Amendment unconstitutional ignored and the High Court Division the principle of judicial restraint of not deciding any constitutional issue when an issue involved in the case can justifiably be disposed of on other grounds.But this principle of judicial restraint to avoid decision on constitutional issue is not an invariable rule and it has also been felt necessary that constitutional issues should be resolved as early as possible as for example in the case of Nurul Islam's case 33 DLR (AD) 201 though Kamaluddin Hossain CJ and Shahabuddin J found the compulsory retirement of Dr. Nurul Islam to be vitiated because of mala fidee and refrained from deciding the constitutional issue but the majority judges addressed to the question of violation of the equality clause and decided it and that in the present case though the High Court Division found that the property in question was not an abandoned property, it could not pass any order for the release of the property because of the provisions of MLR VII of 1977 and this Division in C.A. No. 15 of 1997 brought the matter into sharp focus by holding that the validity of the Fifth Amendment has not been challenged in Writ Petition No.802 of 1994 and in this compelling situation the company had to file the present writ petition challenging the vires of the Fifth Amendment and in the facts and circumstances as involved in the present writ petitions it can not be said that the writ petition could be disposed of without deciding the constitutional question

(o) The submission of the petitioners that without declaring the Fifth Amendment invalid in its entirety the Fifth Amendment could have been declared without lawful authority only in so far as the company was concerned has no substance as the matter in issue is such that there is no scope for application of the doctrine of severability as the grounds of violation of the basic features of the Constitution, on which the impugned Fifth Amendment was found invalid, are such that it has to be declared void in its entirety.

(p)The submission of the petitioners that because of the Fourth Amendment, Fifth Amendment had to be made has also no basis as even if the Fourth Amendment was violative of the basic features of the Constitution there was way of challenging it in the Supreme Court as had been successfully done in the case of Eighth Amendment.

Mr. Azmalul Hossain, Q.C, the learned counsel appearing for the respondent No.1 in both the petitions, submitted as follows:-

(a) in a case of this nature, appeals to this Division may be brought with a certificate under the provisions of sub Article (1)(a) of Article.103 or with leave of this Court under sub-article (3) of Article 103(3) of the Constitution and Article 103 does not state the criteria for granting leave and in the case of Ekushey Television

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130 at para 83 and in the case of Bangladesh Bank and another –v- The Administrative Appellate Tribunal, and others, 44 DLR (AD) 239, at para 4 it has been held that the primary threshold or criteria for granting leave is that there had been some "illegality" in the decision of the High Court Division or that there had been some "miscarriage of justice" or that an "evil precedent" has been or will be created and further in the case of Ibrahim –v- Emperor, AIR 1914 PC 155 it has held that the test for granting leave to appeal must be that there are reasonable grounds for sustaining the appeal and those grounds have reasonable prospects of success but in the present petitions the petitioners have not fulfilled this criteria in advancing any of such grounds and mere assertion in the petitions that there are important constitutional points which needs to be considered by this Court is simply not good enough for granting leave.

(b) The background for filing the present writ petition challenging the vires of the Fifth Amendment, dates back when the struggle of the company to free the Moon Cinema Hall started soon after it was taken over and that at first its Managing Director approaching the authorities and having established that Moon Cinema Hall was not an abandoned property sought release of the same and when the property was not released the company filed Writ Petition No.67 of 1976 wherein the High Court Division upon declaring that Moon Cinema Hall is not abandoned property directed the concerned proforma respondents for release Moon Cinema Hall and they took some steps for release but then Moon Cinema Hall was handed over to the proforma respondent No.5 and accordingly the company filed contempt proceedings to enforce the judgment passed in the above writ petition but then Martial Law came whereupon the "period of delinquency" began and MLR VII of 1977 was promulgated specifically providing that even if the Government had unlawfully taken over a property as abandoned the same shall remain as abandoned and any judgments obtained saying otherwise would be ineffective and this directly affected the rights of the company and afterwards by the Fifth Amendment this MLR was purportedly ratified and given effect to and the result was that because of the Fifth Amendment the contempt proceedings failed and the company could not get the fruits of the above judgment and that the "Period of Delinquency" was brought to an end in the year 1991 within the lifting Martial Law and thereafter the company filed the second writ petition being Writ Petition No.802 of 1994 but the same was summarily rejected by the High Court Division on the ground that the power of judicial review of the High Court Division in such cases being taken away by the Fifth Amendment the writ petition was not maintainable and being aggrieved, the company filed C.A. No.15 of 1997 and the company though made an attempt to challenge the vires of the Fifth Amendment therein but failed as the 28 company had not challenged the vires of the Fifth Amendment in the Writ Petition No.802 of 1994 and in the above circumstances to get possession of Moon Cinema Hall the company had to file the present writ petition challenging the vires of the Fifth Amendment and the High Court Division after hearing made the rule absolute holding amongst others that in the present writ petition the issue as to whether the Fifth Amendment was ultra vires the Constitution was raised and that there was clearly a conflict between the right to property as guaranteed under the Constitution and the infringement of this right by the Fifth Amendment.

(c) it was specifically argued before the High Court Division that there is a conflict between the constitutional rights as provided in the Constitution made by the representatives, delegates or agents of the "people" and the Fifth Amendment, an Act of Parliament purporting to take away the said constitutional rights and as held in the case of Marbury –v- Madison, (1803) 5 US 137, the laws made by the "people" take precedence and further where the provisions of the Constitution and a law passed by Parliament were in conflict with each other but were applicable to a particular situation and the Courts had to apply the law, the Courts will always choose the Constitution as the supreme law and reject the law passed by the Parliament or some other body or authority.

(d) the Preamble, as well as Articles 7, 8 and 11 of the Constitution refer to the "people" of Bangladesh and Anowar Hossain's case BLD (Spl. Issue) at para 52, Article 7 as a whole has been held to be basic feature of the Constitution and because of the words "we, the People of Bangladesh" as referred in the Preamble, the message that comes across loud and clear is that under our Constitutional scheme, the sovereignty lies with the "people" of Bangladesh and Article 7(1) which provides that "All powers in Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution" makes this beyond argument and Article 7(2) providing that: "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic .....", also unequivocally supports this obvious proposition therefore, the impact of this

part of Article 7 is that all power in the State belongs to the "people" of Bangladesh and everyone else, every functionary in the state whether constitutional or otherwise is subject to the will of the "people" to whom all power is vested and this proposition will also find support from the 19th Amendment of the Constitution (Sri Lanka) [2003] 4 LRC 290 and Chisholm v Georgia 2 US 419

(e) it therefore follows that "We, the people of Bangladesh" being sovereign with all powers vesting in them, every one else discharging the functions of the Republic is the representative or agent of the "people" and therefore, the executive, the legislature and the judiciary are all representatives and agents of "We, the 29 people of Bangladesh" and are subject to their will and the President, the Prime Minister, Cabinet, Chief Justice, Judges, Attorney General, every one in the armed forces, the administration, the law enforcement authorities are all subservient to the will of "We, the people of Bangladesh" and they having taken their authority to act and are answerable to the people for every action they take and the Constitution sets the limits of everyone's authority and the will of the "people" being enshrined in the Constitution, the basic features of the Constitution cannot be changed and further it is only the other provisions, which are not the basic features, can only be changed in accordance with the provisions of the Constitution.

(f) the will of the people does not contemplate Martial Law or any other laws not made in accordance with the Constitution and the armed forces are subject to the will of the people and their oaths, as provided in section 15(2) of the Army Act 1952, section 17(2) Air Force Act 1953 and section 14 Navy Ordinance 1961, make it plain and they serve the "people" and can never become the masters of the "people" and accordingly Martial Law is unconstitutional and illegal and it is a mischievous device not founded in any law known in Bangladesh and that by Martial Law the whole nation is hijacked by some people with the support of the armed forces and the whole nation goes into a state of siege; it is like that the whole nation and "We, the people of Bangladesh", are taken hostage and further like a hostage-taking situation, the hostage takers themselves recognize that there is a superior law than their weapons which "We, the people" put in their hands to serve us and they recognize that there are two impediments to their taking power or assuming power, first, the Constitution itself and so, they at first start by saying "Notwithstanding anything the Constitution" because they recognize that the Constitution is superior but they choose to brush it aside and it is like a hostage-taking situation when the law enforcers in their uniforms with their guns and cars with red and blue flashing lights encircling the hostage takers and remind them that there is a superior law outside which they must face at some point of time and the second impediment to Martial Law is the Courts of the Republic entrusted with the solemn duty to "preserve, protect and defend the Constitution" and so every Martial Law, immediately upon proclamation seeks to curb the powers of the Court, particularly, the powers of the Constitutional Court under Article 102.

(g) India also went through a "period of delinquency" between 1975 and 1977 during the regime of Indira Gandhi when she tried to stifle the rule of law and that Bangladesh entered its "Period of Delinquency" at its very early age in 1975 and that delinquency continued for a long 16 years and the characteristics or hallmarks of this "period of delinquency" in our country are several: the first
30 noticeable one is the delinquent behaviour comes from all functionaries of the Republic, constitutional or otherwise, more often than not starting with the armed forces obviously, closely followed by the President or the Chief Justice and the other notable hallmark or characteristic of the "Period of Delinquency" is that those entrusted to "preserve, protect and defend" the Constitution miserably failed in their sacred obligations to "preserve, protect and defend" the Constitution and in not less than a dozen cases throughout this period when "We, the people" sought to challenge aspects of Martial Law, this Court miserably failed to do its duty and it coined words like "supra constitutional", "Constitution is eclipsed" and phrases like" " .... Constitution has lost its character as the Supreme law of the country", " ..... no constitutional provision can claim to be sacrosanct and immutable", Constitution .... subordinate to the proclamation ....", Halima Khatuns case, and " ..... the supremacy of the Constitution cannot by any means compete with the Proclamation issued by the Chief Martial Law as in Ehteshamuddins case and "the moment the country is put under Martial Law, ... Constitutional provision .... loses its superior position" as in Haji Joynal Abedin case, to justify Martial Law and these declarations of the law, made during a long period of darkness, fall in the category of "black law" and those must be excised from our jurisprudence now and forever so that no one can ever again even think about overriding "the will of the people" of Bangladesh and all must also ensure that this history never repeats and all must recognize these faults of the past and must rectify them now so that our conscience is

cleared.

(h) the footprints that the "Period of Delinquency" leaves behind are Martial Law Proclamations, Regulations and Orders in the form of black laws and further, the ultimate insult to "We, the people" is the attempt to ratify these black laws by bringing those into the umbrella of the Constitution itself and in the present case the High Court Division recognizing these footprints sought to erase those once for all and since all the parties before the High Court Division agreed that Martial Law is illegal and unconstitutional, this court should not, indeed cannot, grant leave in this case because to do so would be perceived by "the people of Bangladesh" in the way that our highest judiciary is still unable, long after the "Period of Delinquency", to properly and adequately deal with such delinquency and further, it would send the wrong signals to those who wish to circumvent the "will of the people" in the Constitution and that each of our generations must also be taught, educated and informed about those dark days; the easiest way of doing this is to recognize our errors of the past and reflect these sentiments in the judgments of this Court which will ensure preservation of the sovereignty of "We, the people of Bangladesh" forever as a true "pole star".
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(i) the process of amendment of the Constitution could not affect the basis structure of the Constitution and the High Court Division took the view that an amendment of the Constitution cannot legitimize any illegitimate activity and the High Court Division rightly used the Constitution itself, namely, its basic structure as enshrined in various articles and also Articles 142 and 150, to hold the Fifth Amendment ultra vires, illegal and non est. which will find support from the decisions reported in Republic of Fiji –v- Prasad [2001] 2 LRC 743, UDM-vs- South Africa (No.1) [2003] 4 LRC 98, Re: 19th Amendment to the Constitution (Sri Lanka) [2003] 4 LRC 290, Taione-v- Kingdom of Tonga [2005] 4 LRC 661, Njoya and others –vs- AG (Kenva) and others [2004] 4 LRC 559.

(j) the submissions placed by the petitioners that without the Fifth Amendment there will be a legal vacuum and the amendment has given constitutional dispensation and has prevented chaos and confusion has no basis and that in Shariar Rashid's case, 18 BLD(AD) 155, on which the petitioners relied, though one of the judges of this court discussed the need to "ensure constitutional continuity of those acts and things done" during Martial Law but the learned Judge did not state the basis for such need and further it is a reference to the "acts and tings done" during that period by government functionaries, like building roads, and payment against those etc and so it can not be perceived that without the so called ratification, the road will disappear or the payment made will come back to the Government coffers and moreover in any event, these "acts and things done" comes within closed and past transactions have been condoned by the High Court Division and so the fear of chaos and confession is nothing but a baseless fear which does not withstand scrutiny and analysis.

Mr. Taufiq Newaj, Senior Advocate, the learned counsel appearing for the respondent No.2 in both the petitions, mainly emphasizing on the rejection of the doctrine of necessity, submitted as follows:-

(a) by the doctrine of necessity the perpetrator of an unconstitutional act is granted judicial protection not against the "will of the people" as signified through their representatives in the Parliament but also against the laws in force at the time of the unconstitutional act and a so called "successful revolution" invades political sovereignty, and also legal sovereignty as contemplated in the Constitution of Bangladesh and to denude those it renders those meaningless and inoperative wholly or in part and purports to establish the primacy of the executive organ of the State over its other two organs.

(b) even assuming that a "successful revolution" would constitute justification for unconstitutional acts, there was no "successful 32 revolution" in Pakistan where the doctrine was first and then repetitively, invoked to deny the people any expression of their sovereign will after the said so-called "successful revolution" and the so called 'successful revolution' was in fact a failed revolution since it failed forever, including during the continuance of the "revolutionary" Government, to enable the holding of a free and fair election which is a basic constituent of democracy and the Government born out of the so called "successful revolution" sought devious, unwarranted and unknown doctrines of "guided democracy" and "basic democracy" suited to the genius of the people to deny adult franchise to the people and the perpetrator of "successful revolution" also failed to hand over power to a democratic government duly elected as was the case following the general elections held in 1970, and further the perpetrator himself sought to continue to perform the functions of the Republic through attempts to legitimize his unconstitutional assumption of power or intervention by embarking on further

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unconstitutional acts; alternatively the perpetrator committed further Constitutional wrongdoing by handing over the reigns of the State to yet another perpetrator as its successor government and further the reach of the doctrine was so extended that even an expressed will of the people, so expressed through a general election electing their representatives, was disregarded with the effect that there was a collapse of the existing State and moreover it is inescapable that a strict application of the doctrine of necessity would purport to support the use of force by the perpetrator in disregard of fundamental rights, support the use of collective punishment and the killing of a people, in legal parlance, known as genocide upon the people.

(c) the doctrine of necessity provided a misconceived and misplaced juridical and unconstitutional justification for the benefit of the perpetrators of unconstitutional acts seizing the machinery of the State through its executive organ and also provided an invalid basis for undermining the Declaration of Independence of the sovereign people of the Republic of Bangladesh which asserted the will of the people through their representatives in Parliament, the organ vested with political sovereignty in a Republican State, and at the same time unleashed a purported "licence" invokeable at any time to shackle, denude and mutilate people's will and to grant to a person or entity, historically the military, the reigns of the State undermining the historical struggle and the War of Independence fought to assert the right of self-determination of the people as embodied in the Constitution and providing a basis to render meaningless the spirit, sacrifices and achievements proclaimed and recognised in the Preamble to the Constitution and also altering the relationship between the other two organs of State, namely, the Judiciary and the Parliament and also destroying the bedrock of a future by Rule of Law and the dependence of a people and State on its Constitution. 33 **Mr. Mahbubey Alam**, the learned Attorney General, appearing for the respondent Nos. 3-4 in both the petitions, submitted as follows:-

(a) though the Government filed the Civil Petition Nos. 1100 of 2006 and 1320 of 2007 against the impugned judgment but subsequently, finding the same as correct one, did not proceed with the leave petitions and those leave petitions having been dismissed as being not pressed, the petitioners cannot make them substituted in the said leave petitions and further the Government having accepted the said judgment the petitioners, who were not parties at any stage of the proceeding before the High Court Division, cannot file the leave petitions challenging the said judgment specially when they, in the leave petitions filed by them did not take any stand that they were not aware that the present writ petition, was pending before the High Court Division and further they, not having taken any step to challenge the contentions as contained in the writ petition and/or for impleading them as party to the writ petition and did not file any leave petition immediately after the judgment of the High Court Division, the instant leave petitions are not maintainable.

(b) the High Court Division having found Khandaker Mustaq Ahmed, Justice A.S.M. Sayem and General Ziaur Rahman as usurpers and aforesaid findings having not been challenged in the instant leave petitions, the petitioners can not support purported amendments of the Constitution made by userpers by issuing Martial Law Proclamations, Regulations and Orders etc and further General Ziaur Rahman, after being nominated as President by Justice A.S.M. Sayem, an incompetent and unauthorized person, promulgated Proclamation Order No.1 of 1977 on 23.4.1977 and then on 30.5.1977 arranged for alleged Referendum for obtaining so-called confidence of the voters upon him only and not for the purported amendments and the purported amendments made by him having not been referred to the voters by way of Referendum, it cannot be said that general public accepted the said amendments of the Constitution made by him.

(c) in the Constituent Assembly the framers of the Constitution having unanimously decided to incorporate the principle of secularism in the Constitution as one of the basis character of the Constitution, the submission of the petitioners that the secularism is not one of the basis character of the Constitution, can not be accepted.

(d) as required under sub-article a(i) of Article 142 of the Constitution in the Bill of the Fifth Amendment nothing has been mentioned regarding the articles of the Constitution which were to be added, altered, or substituted in place of the existing Articles and thus the Fifth Amendment can not be treated as an Amendment of the Constitution.

(e) there being no provisions in the Constitution for ratification of an earlier purported amendment made by Martial Law Proclamations, Regulations and Orders etc the alleged ratification and confirmation of the alleged amendments purported to have been done from 15th August, 1975 to 6th April, 1979 by the Fifth Amendment is contrary to the provisions of Article 142 of the Constitution.

(f)the purported amendments of the Constitution were made done by Martial Law Proclamations, Regulations, Orders etc and there being no-provision in the Constitution to amend the Constitution in the said manner, the purported amendment of the Constitution has rightly been declared illegal and invalid by the High Court Division .

(g)the Parliament passed the Fifth Amendment during Martial Law and there being no provision in the Constitution for conducting business of the Parliament during Martial Law, the Fifth Amendment passed during Martial Law, can not be treated a valid amendment of the Constitution.

(h)No Referendum having been done before purported addition of sub-article 1A in Article 142 of the Constitution providing for Referendum in case of amendment of the Preamble and Articles, 8, 48, 56 and Article 142 of the Constitution, the amendments in question can not be treated as valid and legal and the High Court Division has rightly treated the said provisions as illegal.

Mr. M.K. Rahman, the learned Additional Attorney General, appearing for the respondent No.5 in both the petitions submits as follows :-

(a) no cause being pending before this Division, the leave petitions filed at the instance of the third party intervener/petitioners, who have no locus standi, can not be entertained specially when no issue of public importance is involved in the case and further no Court certainly will justify the imposition of Martial Law inasmuch as Martial Law does not come within the definition of "Law" as provided in Article 152 of the Constitution and further the declaration of Martial Law is also not mandated by the Constitution and accordingly, for the sake of the supremacy of the Constitution and democratic polity, rule of law and good governance, the judgment of the High Court Division must not be interfered with and as such the leave petitions are liable to be dismissed in limine.

(b) as per the mandate of Article 7 of the Constitution all powers in the Republic belong to the "people" and exercise of those powers on 35 behalf of the "people" shall be effected only under and by the authority of provisions of the Constitution which, as the soleman expression of the will of the people is the supreme law of the Republic and in terms of Articles 7(2) if any other law is inconsistent with provisions of the Constitution that other law shall be void to the extent of the inconsistency and therefore the Fifth Amendment is illegal and void ab-initio.

(c) no amendment to any provision of the Constitution can be made beyond the authority of Article 142 of the Constitution, and accordingly the amendments made to the Preamble and Articles 6, 8, 9, 10, 25, 38 and 142 of the Constitution by Martial Law Proclamations, which is beyond the authority of Article 142, are illegal and invalid.

(d) the Constitution did not empower any authority or power either to impose Martial Law or the Military Rule in the country and further the Parliament having no authority or power to ratify and validate the illegal Martial Law Proclamations, Regulations and Orders etc by amending any provision of the Constitution, the insertion of paragraph 3A and 18 to the Fourth Schedule of the Constitution by the Fifth Amendment is illegal and ultra vires and such the acts of illegal usurpation of power by military junta cannot be given a go-by and / or validating those in the name of "temporary and transitional provisions" under Article 150 of the Constitution.

Mr Murad Reza, the learned Additional Attorney General, appearing for the respondent No.6 in the both the petitions, adopted the arguments of Mr Azmalul Hossain QC, Mr Mamudul Islam and Mr Mahbubey Alam.

As it appears the petitioners were not parties in the writ petition and after passing of the judgment of the High Court Division on 29.8.2005 the Government and the Freedom Fighters Welfare Trust filed Civil Petition Nos. 1100 of 2006 and 1320 of 2007. In those petitions, the petiioners filed two petitions praying for appearing as interveners on 4.3.09 and 24.3.07 respectively. In early 2009, when the government decided that they will not press the leave petitions, the petitioners, prayed for time to file leave petitions and accordingly the matters were adjourned. The petitioners thereupon filed the above leave petitions on 25.5.2009 and thereafter the prayers of the 36 Government and the Freedom Fighters Welfare Association were allowed on 03.01.10. In both the petitions the petitioners stated that the High Court Division by the impugned judgment has stripped the citizens of Bangladesh their identity as "Bangladeshi" and also proceeded in the manner as if secularism is a basic structure of the Constitution although the same is only a fundamental principle of State Policy and further the High Court Division reintroduced Articles 8 and 12 of the original Constitution which did not contain the provisions of absolute faith and trust in Allah and the High Court Division, without any basis, also declared

inclusion of the Article 25(2) as unlawful.
As it appears the respondents opposed the above applications raising the point of delay 1364 days contending that it is only on 4.3.2009 and 26.3.2007, i.e. long after passing of the judgment of the High Court Division on 29.8.2005, the petitioners filed the above applications praying for allowing them to seek leave and since the applications were out of time, they filed applications praying for condonation of delay but in the said applications the space kept for showing the number of the days sought to be condoned, was not filed in and the said space remained completely blank and accordingly the explanations as given in the application for condonation of delay are also not at all satisfactory. We noticed from the judgment of the High Court Division that various constitutional points were raised from the Bar on the point of the power of the Martial Law authority to change the basic features of the Constitution and the High Court Division addressed those point. Accordingly we have decided to her these matters on merit despite the delay. 37 The submission of the petitioners to the effect that substantial question of law and also interpretation of the Constitution being involved the High Court Division ought to have granted certificate under Article 103(2) suo moto, has no substance inasmuch as the petitioners, having not required the High Court Division to exercise its discretion in granting certificate by formulating points of law involving Constitutional issues, cannot now complain and as has been held in the case of Kazi Mokhlesur Rahman V Bangladesh 26 DLR (AD) 44 the High Court Division should not grant certificate without formulating the question of law on which certificate is to be granted and accordingly it has been the regular practice to pray for such certificate from the High Court Division by formulating the points of law on the basis of which certificate is prayed for and / or formulating those points which involved constitutional issues so that on the basis of those the High Court Division may grant certificate.

There is also no substance to the submission of the petitioners that the interpretation of Constitution being involved leave should be granted inasmuch as the points as raised in the leave petitions have already been authoritatively decided by the superior Courts which have been referred to in the judgment of the High Court Division. Further there are decisions in support the submissions made on behalf of the respondents that for granting leave the primary threshold or criteria is that some "miscarriage of justice" has resulted or that an "evil precedent" has been or will be created or that there are reasonable grounds for sustaining the appeal. In the case of Ibrahim –V-Emperor, AIR 1914 PC 155 it was held that the test for granting leave to appeal must be that there are reasonable grounds for sustaining the appeal and 38 those grounds have reasonable prospects of success. In the Case of Ekushey Television Ltd. and others V. Chowdhury Mohammod Hasan and others, 54 DLR (AD) 130, in para 83, it was held that the primary threshold or criteria for granting leave is that there had been some "illegality" in the decision of the High Court Division or that there had been some "miscarriage of justice" or that an "evil precedent" has been or will be created. In the case of Bangladesh Bank and another V. the Administrative Appellate Tribunal and others, 44 DLR (AD) 239, in para 4, similar view was taken holding that this Division has power to interfere in suitable cases where miscarriage of justice, which has occurred, is very wide. However, from the discussions made hereinbelow, it will be evident that the points raised in the leave petitions have already been authoritatively decided by the superior Courts and the High Court Division referring to the relevant portions of the judgments of the superior courts, declared the Fifth Amendment is illegal and void and ultravires the Constitution.

There is also no substance in the submission of the petitioners that the judgment of the High Court Division is beyond the terms of the Rule in as much as the Rule very much depicts that the vires of the Fifth Amendment has been challenged in the writ petition which will be evident from the terms of the Rule issued by the High Court Division as quoted earlier.As it appears the Rule as issued, contained three parts i.e.

(a) Notification dated 31.12.71 in taking over Moon Cinema Hall and Notification dated 15.12.72 placing Moon Cinema Hall with the writ respondent No.3 and subsequent actions deeds and instruments, the taking 39 thereto should not be declared to have been made without legal authority.

(b) further to show cause as to why purported ratification and confirmation of MLR VII of 1977, Proclamation Order No.1 of 1977 with regard to the insertion of Para 3A to the Fourth Schedule of the Constitution by Para 18 of the Fourth Schedule of added by Fifth Amendment Act 1 of 1979 should not be declared to have been made without legal authority and

(c) as to why the respondent should not be directed to hand over Moon Cinema Hall to the writ petition.

Thus it is apparent that the vires of the Fifth

Amendment was very much under challenge in the writ petition as duly reflected in the Rule.

It may be noted here that earlier we did not accept the submissions of the petitioners to the effect that leave should be granted in the present petitions as substantial question of law as well as interpretation of Constitution are involved on holding that the points as raised by the petitioners have already been authoritatively decided by the superior Courts and that the High Court Division referring to those judgements of the superior Courts declared the Fifth Amendment illegal, the relevant portions of the judgement of the High Court Division containing the views of the superior Courts relying on which the Rule was discharged, will be reproduced hereinafter.

It may also be noted here that in the case of Asma Jilani V Government of Punjab, PLD 1972 SC 139 the Pakistan Supreme Court reversed the 40 decision passed in the case of State V. Dosso P.L.D. 1958 (S.C.) 533 but in case of Nusrat Ali Bhutto V. Chief of Army Staff PLD 1977 (SC) 657, Asma Jilani's case was not followed. However, in support of the case of the petitioners the above case of Nusrat Ali Bhutto was referred. As it appears, recently, the Pakistan Supreme Court, sitting in a Constitutional Bench consisting of fourteen judges and headed by Chief Justice Iftikhar Muhammad Choudhury, by judgment and order dated 31 July, 2009 passed in the case of Sindh High Court Bar Association V Federation of Pakistan and others (Constitutional Petition Nos. 8 and 9 of 2009) following Asma Jilani's case, disapproving the above case of Nusrat Ali Bhutto and also the case of Jafar Ali Shah V General Parvez Musharraf PLD 2000 (SC) 869 which followed Nusrat Ali Bhutto's case declared the Provisional Constitutional Order 2007, in short PCO 2007, illegal and unconstitutional and approved Asma Jilani's case. By the above PCO No 1 of 2007, not only new legal order was introduced but the Constitution of Pakistan was also amended by General Parvez Musharraf, the then President of Pakistan. The ratio decidendi of the above judgement will have a serious impact upon all the previous judgements including those passed in the cases of Nusrat Ali Bhutto, Jafar Ali Shah and also others in which Martial Law and constitutional amendments by extra constitutional instruments were justified and validated invoking doctrine of necessity.

Next submission of the petitioners is that the High Court Division having found that the property in question is not an abandoned property, in terms of the principle of judicial restraint of not deciding any constitutional issue when an issue involved in the case can be justifiably be disposed of on other grounds, it was not at all necessary for the High Court Division to enter into on the constitutional issues and to declare the Fifth Amendment unconstitutional. As it appears, the High Court Division was very much aware of the above principle as is evident from its following observations in the judgment:- "In disposing of this Rule, we kept in our mind what A.T.M. Afzal, J. (as his Lordship then was) aptly observed in Anwar Hossain Chowdhury's case 1989 BLD (Spl.)1 at para 491, page 181.

"In answering the ultimate question involved in these cases i.e. scope of the Parliament's power of amendment of the Constitution, the Court's only function is to examine dispassionately the terms of the Constitution and the law without involving itself in any way with all that I have indicated above. Neither politics, nor policy of the government nor personalities have any relevance for examining the power of the Parliament under the Constitution which has to be done purely upon an interpretation of the provisions of the Constitution with the help of legal tools."

We are also conscious of what Kemaluddin Hossain, C.J. observed in Dr. Nurul Islam V. Bangladesh 33 DLR (AD) (1981) 201 at para-1:

" 1 ... ... As regards the constitutionality .....I like to adhere to the well-established self-established self-set rule which says, the Court will not declare a law unconstitutional, if the case in which the question is raised can be properly disposed of in some other way....."

However, the High Court Division having found that after Moon Cinema Hall was taken over, at first the Managing Director of the company, the writ petitioner No. 2, on approaching the relevant authorities established 42 that Moon Cinema Hall was not an abandoned property and then sought release of the same and when Moon Cinema Hall was not released even though it was not found to be an abandoned property, the company filed Writ Petition No.67 of 1976 wherein the High Court Division, after hearing, made the Rule absolute declaring that Moon Cinema Hall was not an abandoned property and directed the government to release Moon Cinema Hall in favour of the company and the Government also took some steps for release of the same but even then Moon Cinema Hall, instead of being released, was handed over to the proforma respondent No.5 and the company then filed contempt proceedings to enforce the

above judgement of the High Court Division and after then Martial Law was declared and under the umbrella of the Proclamatons, Martial Law Regulation No. VII of 1977, was promulgated on October 17, 1977 specifically providing that even if the Government had unlawfully taken over a property as abandoned, the same shall remain as abandoned property and any judgment obtained declaring otherwise would be ineffective and this Martial Law Regulation No. VII of 1977 directly affected the rights of the company and afterwards, by the Fifth Amendment dated April 6, 1979, this Martial Law Regulation No. VII of 1977 was purportedly ratified and given effect to and because of the Fifth Amendment, the contempt proceedings failed and the company could not get the fruits of the above judgment and that after the period of Martial Law was brought to an end on April 9, 1979, the company filed Writ Petition No.802 of 1994 but the same was summarily rejected by the High Court Division on the ground that the power of judicial review of the High Court Division in such cases was taken away by the Fifth Amendment and the company in the above writ petition did 43 not challenge the vires of the Fifth Amendment and then being aggrieved, the company filed C.A. No.15 of 1997 before this Division and made an attempt therein to challenge the vires of the Fifth Amendment but this Division did not entertain the same on the reasonings that the vires of the Act No.1 of 1971 is not under challenge in this appeal. In the above situation the company, to protect its property had no other alternative but to file the present writ petition challenging the vires of the Fifth Amendment and that the issue as to whether the Fifth Amendment was ultra vires the Constitution was duly raised in the above writ petition and that there was clearly a conflict between the right to property as guaranteed under the Constitution and the infringement of this right by the Fifth Amendment.

Further, this principle of judicial restraint is not an invariable rule and the Courts, taking the view that constitutional issues should be resolved as early as possible, decided the constitutional issues. As will be evident that in Dr. Nurul Islam's case (supra) though Kamaluddin Hossain, CJ and Shahabuddin, J (as his Lordship then was) having found the compulsory retirement of Dr. Nurul Islam to be vitiated because of malafide, refrained from deciding the constitutional issue but the majority judges addressed to the constitional question of violation of the equality clause and decided it. Further in the present case, as stated earlier, the High Court Division in Writ Petition No. 67 of 1976 having found that the property in question was not an abandoned property released Moon Cinema Hall but even then it was not handed over to the company in view of the embargo provided in Martial Law Regulation No. VII of 1977 and this Division, earlier in Civil Appeal No. 15 of 1997, brought the matter into sharp focus by dismissing the appeal on the 44 ground that the validity of the Fifth Amendment has not been challenged in Writ Petition No.802 of 1994 and in this compelling situation the company, had no other alternative but to file the present writ petition challenging the vires of the Fifth Amendment and in the facts and circumstances as involved in the present case, it can not be said that the present writ petition could be disposed of without deciding the constitutional question i.e. whether the Fifth Amendment is ultra vires or not.

Before we go to the question as to whether all Proclamations, Martial Law Regulations and Orders promulgated/ made during the period from August 15, 1975 upto April 9, 1979 being promulgated/ made by usurpers are illegal, void and non-est and further the Second Parliaments itself, even by two-third majority, had no power to enact any law which is repugnant to the basic feature of the Constitution and accordingly the Fifth Amendment is ultravires the Constitution, the history leading to the emergence of erstwhile Pakistan on August 14, 1947, the constitutional developments in erstwhile Pakistan, the Proclamation dated April 10, 1971, the emergence of Bangladesh in the map of the globe, the aims and objectives of the Constitution, the supremacy of the Constitution, independence of judiciary and its power of judicial review, the implication of the decisions passed by this Division in the case of Halima Khatoon, Jainal Abedin, Ehteshamuddin and Nasiruddin in view of the provision of Article 111 of the Constitution, estoppel, waiver and acqueisance, resjudicata, implication of the provisions of Article 150 of the Constitution etc will be relevant and as it appears the High Court Division also discussed the above in its judgment. 45 The history, as we find from the judgment of the High Court Division, shows that the glory of independent Bengal faded away and sank in Palassy due to the treachery and betrayal of Mir Jafar Ali Khan Bengali rebels then successfully fought many a battles against British forces. The year of 1857 saw the War of Independence of Sepoys which originated from Bengal. However, Queen Victoria by a Proclamation on November 1, 1858 made India a part of the British Empire and by the Government of India Act 1935, created 11 Provinces and Princely States. It provided governance of those Provinces by the elected representatives of the people. In

1937, A K Fazlul Haque, became the first Prime Minister of the province of Bengal. On March 23, 1940 he moved the famous Lahore Resolution for the establishment of separate states for the Indian muslims. In 1943 Khawaza Nazimuddin became next Prime Minister of Bengal. In 1946, on Pakistan issue, under the leadership of Hussain Shahid Suharwardy the Muslim League secured 116 seats out of 119 and achieved landslide victory in Bengal amongst all the provinces in India. In that view of above it can be said that it was the Bengali Muslims who spearheaded and voted Pakistan into existence for the entire Muslim population of the Indian Subcontinent.

The Dominion of Pakistan formally came into existence on August 14, 1947 and M.A. Jinnah, was elected the first President of the Constituent Assembly of Pakistan. In his inaugural address on September 11, 1947 he outlined basic ideals on which the State of Pakistan was going to flourish which are as follows :

..... The first observation that I would like to make is this: You will no doubt agree with me that the first duty of a Government 46 is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the state.

..... If you change your past and work together in a spirit that everyone of you, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his colour, caste or creed, is first second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.

..... You are free; you are free to go to your temples, you are free to go to your mosques or to any other places or worship in this State of Pakistan. You may belong to any religion or caste or creed- that has nothing to do with the business of the State.

..... Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual , but in the political sense as citizens of the State."

As it appears the above speech echoed Secular State.

Further while addressing a gathering of the Civil officers of Baluchistan on 14 February 1948 M A Jinnah said :

"….. until we finally frame our constitution , which of course, can only be done by the Constituent Assembly; our present provisional Constitution based on the fundamental principles of democracy, not bureaucracy or autocracy or dictatorship, must be worked ……"

As it appear the above speech also echoed that autocracy and dictatorship, thus military rule direct or indirect, is to be shunned.

However, as we have experienced the dreams of the people of the then East Pakistan were soon shattered in no time and the history of Pakistan was ridden with palace clique, deception and disappointment. The people of the then East Pakistan discovered that they were reduced to second class citizens, creation of Pakistan brought them only a change of rulers and for all practical puposes the then East Pakistan became a colony of the then West Pakistan. The process started with the delay in framing the Constitution for Pakistan lthough in India the Constitution was framed and adopted by the Constituent Assembly on November 26 1949. Ultimately when the draft Constitution for Pakistan was ready for approval by the Constituent Assembly in December 1954, the Constituent Assembly itself was dissolved by Golam Mohammad, the then Governor General of Pakistan, who was never a politician and was a bureaucrat and was elected as member of Constitutional Assembly from the quota of East Bengal in June 1948 and retained membership until July 1953. Regarding the past history of constitutional misadventures by the civil and military bureaucrats in Pakistan who never permitted constitutional government to settle down, the High Court Division quoted the view expressed by Yaqub Ali , J., in Asma Jilani's case at page –212 regarding constitutional mishaps which are as follows:-

"Pakistan was faced with innumerable difficulties from the very start. Firstly, ……On the 11th September 1951, Khan Liaqat Ali Khan, the first Prime Minister as assassinated.

w A tussle for grabbing power among persons who held positions of advantage in the Government thereupon ensued and under its weight the foundation of the State started quivering. Eventually Mr. Ghulam Muhammad, an ex-civil servant, who was holding the portfolio of Finance became the Governor-General and Khawaja Nazimuddin as Leader of the majority party in the Constituent Assembly assumed the Office of the Prime Minister.
In April 1953, Mr. Ghulam Muhammad dismissed Khawaja Nazimuddin and his

Cabinet although he commanded clear majority in the Constituent Assembly and made another civil servant Mr. Muhammad Ali Bogra, Pakistan's Ambassador to the United States of America, as the Prime Minister. Among others General Muhammad Ayub Khan,Commander-in-Chief of Pakistan Army, joined his Cabinet as Defence Minister. This was the first constitutional mishap of Pakistan as Governor- General Mr. Ghulam Muhammad was only a constitutional head. He had to act on the advice given to him by the Prime Minister and under the Constitutional Instruments (Indian Independence Act, 48 1947, and the Government of India Act, 1935) he had no legal authority to dismiss the Prime Minister and assume to himself the role of a sovereign. …….

By 1954, the draft of the Constitution based on the Objectives Resolution had been prepared with the assent of the leaders of the various parties in the Constituent Assembly when on the 24th October 1954, Mr. Ghulam Muhammad knowing full well that the draft Constitution was ready, by a Proclamation, dissolved the Constituent Assembly, and placed armed guards outside the Assembly Hall. This was the second great mishap of Pakistan.

The order of the Governor-General was challenged by Maulvi Tamizuddin Khan, President of the Constituent Assembly, in the Chief Court of Sind by a Writ Petition filed under section 223-A of the Government of India Act, 1935, which was added by the Government of India (Amendment) Act, 1954, passed by the Constituent Assembly, on 16th July 1954. It empowered the High Courts to issue Writs of mandamus, certiorari, quo warranto and habeas corpus. The order passed by Mr. Ghulam Muhammad was challenged as unauthorised by the Indian Independence Act or the Government of India Act, void and of no legal effect.

In defence of the Writ Petition, the Governor-General and the Members of the newly-constituted Cabinet, cited as respondents, inter alia pleaded that the Chief Court of Sind had no jurisdiction to Issue a Writ under the Government of India (Amendment) Act, 1954, as it had not received the assent of the Governor General.

A Full Bench of the Chief Court overruled the objection raised by the respondents and held that the order dissolving the Constituent Assembly was illegal and issued a Writ restraining the Governor-General, his newly appointed Cabinet Ministers; their agents and servants from implementing or otherwise giving effect to the Proclamation of 24th October 1954, and from interfering directly or indirectly with the functions of the Constituent Assembly.

The Governor-General and his Ministers thereupon filed an appeal in the Federal Court being Constitutional Appeal 1 of 1955 reiterating the objection that the Government of India (Amendment) Act, 1954, did not become a law as it had not received the assent of the Governor-General.

By a majority judgment delivered by Muhammad Munir, C. J.-the appeal was allowed and the writ petition was dismissed on the finding that since section 223A of the Government of India 49 Act under which the Chief Court of Sind issued the Writ had not received such assent, it was not yet law and, therefore, that Court had no jurisdiction to issue the Writs.

Cornelius, J. (as he then was) differed with this view and recorded a dissenting judgment holding that neither the British soverign nor the Governor-General as such was a part of the Constituent Assembly. The assent of the Governor-General was, therefore, not necessary to give validity to the laws passed by the Constituent Assembly. With great respect to the learned Chief Justice the interpretation placed by him on sections 6 and 8 of the Indian Independence Act, 1947, as a result of which the appeal was allowed, is ex facie erroneous though we do not propose to examine in detail the reason given in the judgment. ……

The question of the validity of section 2 of the Emergency Powers Ordinance, 1955, came up before the Court in the case of one Usif Patel (1) within a few days of the decision in Maulvi Tamizuddin Khan's case. On the short ground that under section 42 of the Government of India Act, 1935, the Governor- General had no power to make by Ordinance any provision as to the Constitution of the country. The Emergency Powers Ordinance IX of 1955 was held to be invalid whereupon the Governor-General made a Special Reference to the Federal Court which was answered on the 16th May 1955. Dealing with the validity of this action the Court expressed the opinion that the Constituent Assembly and not the Constituent Convention as was proposed to be set up by the Governor-General would be competent to exercise all powers conferred by the Indian Independence Act, 1947, and secondly that in the situation presented in the Reference, the Governor-General had during the interim period the power under the common law, special or state necessity of retrospectively validating the laws listed in the Schedule to the Ordinance, 1955, and all those laws now decided

upon by the Constituent Assembly or during the aforesaid period shall be valid and enforced in the same way on which day they purported to have come into force.

Cornelius, J.-as he then was, differed with the opinion of the Court that the Governor-General could on the basis of the State necessity validate the laws which were declared invalid by the Federal Court and opined that there was no provision in the Constitution and no rule of law applicable to the situation, by which the Governor-General can, in the light of the Court's decision in the case of Usif Patel by Proclamation or otherwise, validate laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether temporarily or permanently. 50 In accordance with the opinion given by the Federal Court, a new Constituent Assembly was elected and it eventually succeeded in framing a Constitution which came into force on the 23rd March 1956. ……

A National Assembly was yet to be elected under the 1956- Constitution when Mr. Iskander Mirza who had become the first President by a Proclamation issued on the 7th October 1958, abrogated the Constitution; dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country: General Muhammad Ayub Khan Commander-in-Chief of the Pakistan Army, was appointed as the Chief Administrator of Martial Law. This was the third great mishap which hit Pakistan like a bolt from the blue…….. .....

On the 13th October 1958, Criminal Appeals State v. Dosso and three other connected matters came up for hearing before the Court…….....

Delivering the majority judgment of the Court Munir, C. J. held that as Art 5 of the late Constitution itself had now disappeared from the new Legal Order, the Frontier Crimes Regulation (III of 1901) was by reason of Article IV of the Laws (Continuance in Force) Order, l958, still in force and all proceedings in cases in which the validity of that Regulation had been called in question having abated the convictions of the respondents recorded by the Council-of-Elders was good …… .....

The judgment in State v. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the judgment was delivered on the 23rd October 1958, and he assumed to himself the office of the President. The judgments in the cases Maulvi Tamizuddin Khan; Governor-General Reference 1 of 1955 and The State v. Dosso had profound effect on the constitutional developments in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock. A country which came into being with a written Constitution providing for a parliamentary form of Government with distribution of State power between the Executive, Legislature, and the Judiciary was soon converted into an autocracy and eventually degenerated into military dictatorship. From now onwards people who were the recepients of delegated sovereignty from the Almighty, ceased to have any share in the exercise of the State powers. An all omnipotent sovereign now ruled over the people in similar manner as the alien commander of the army who has conquered a country and his "will" alone regulates the conduct and behaviour of the subjugated populace. Martial Law remained in force till the 7th of June 1962, when in pursuance to a Mandate he had obtained by some kind of 51 referendum Muhammad Ayub Khan gave a Constitution to the country. Under it he himself became the first President; revoked the Proclamation of 7th October 1958 and lifted Martial Law. ……..(page-220)

…… Mr. Iskander Mirza, and Mr. Ayub Khan had joined hands on the night between 7th and 8th October 1958, to overthrow the national legal order unmindful of the fact that by abrogating the 1956-Constitution they were not only committing acts of treason, but were also destroying for ever the agreement reached after 'laborious efforts between the citizens of East Pakistan and citizens of West Pakistan to live together as one Nation. The cessation of East Pakistan thirteen years later is, in my view, directly attributable to this tragic incident…….....

In early 1965 Muhammad Ayub Khan was re-elected as President. The general impression in the country was that the election was rigged. Towards the end of 1968, an agitation started against his despotic rule and the undemocratic Constitution which he had imposed on the country. The agitation gathered momentum every day and was accompanied by wide spread disturbances throughout the country. In February 1969, Muhammad Ayub Khan called a round table conference of political leaders for resolving the political issues which had led to the disturbance. A solution was near insight, when all of a sudden Muhammad Ayub Khan decided to relinquish the office of the President and asked the Defence Forces to …….....

The Mandate given by the outgoing

President to the Commander-in-Chief was thus to fulfill his constitutional responsibilities; to restore law and order; and to carry out his legal duty in this behalf. Muhammad Yahya Khan, Commander-in-Chief, who had taken an oath, that he will be faithful to the Constitution of 1962 and to Pakistan, however, in disregard of his constitutional and legal duty by a Proclamation issued on the 26th March 1969, abrogated the Constitution ; dissolved the National and Provincial assemblies and imposed Martial Law throughout the country. This was the fourth great constitutional mishap which befell Pakistan in less than 16 years.

However as it appears, only a part of the history was reflected in the above portion of the judgment and the unfathomed misery, neglect and discrimination suffered by the people of the then East Pakistan in all spheres 52 of life were not reflected therein. As it appears in 1966 one of the major parties launched a six point constitutional program for economic salvation and autonomy for the then East Pakistan but was not at all heeded to either by Field Marshal Ayub Khan or thereafter by General Yahya Khan. It may be noted here that the economists of the then east Pakistan also protested against the Five Year Development Plan as the same neglected the interest of the people of the then East Pakistan. However, the first general election in earstwhile Pakistan was held in 1970 while by that time as many as four general elections were already held in India although both the countries achieved independence at the same time.

The High Court Division then quoted the following statement of Yaqub Ali, J. in Asma Jilani's case at page.223:

"On the 30th March 1970, Yahya Khan promulgated the Legal Framework Order and under its provisions, elections were held in December 1970, to the National and Provincial Assemblies under the supervision of a Judge of this Court acting as the Chief Election Commissioner. After a good deal of political manoeuvring, the National Assembly was summoned by Muhammad Yahya Khan for the 3rd March 1971. However, shortly before that he postponed the session indefinitely, Awami League, the dominant political party of East Pakistan and who held a clear majority in the National Assembly reacted to this decision very sharply. To meet the situation Military action was taken on the 25th March 1971, which lasted for several months. These strong measures had, however, no effect on the events which were shaping fast in the Eastern Wing. It led to an armed insurrection by Awami League and their supporters."

It also appears that the last sentence of the above quotion i.e. "it led to an armed insurrection by Awami League and their supporter" also does not depict the correct picture. In fact, on 25 March, 1971 the Pakistan army 53 unleashed a reign of terror. The genocide committed by them is one of the worst known in the history. As a result, struggle for political autonomy and economic parity, so long pursued, transformed into war of liberation which started at the dead of night following 25 March, 1971 and indepedence of Bangladesh was proclaimed. It was followed by a formal Proclamation of Independence issued on 10th April, 1971 at Mujibnagar. The war of liberation continued for about nine months and ended on 16 December, 1971 and a nation was ultimately born with blood and tears, and Bangladesh emerged in the map of the globe.

In respect of the above Proclamation of Indepenedence dated 10th April, 1971 B. H. Chowdhury, J (as his Lordship then was) page 1 in Anwar Hossain's case (supra) held as follows:-
"This declaration envisages the following:

(a) Because of the unjust war and genocide by the Pakistani authorities it became "impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution" although General Yahya Khan summoned the elected representatives earlier "to meet on the 3rd March, 1971 for the purpose of framing a Constitution";

(b) The elected representatives duly consitute them self into a Constituent Assembly because of the "mandate given to us by the people of Bangladesh whose will is supreme"

(c) It declared Bangladesh to be sovereign people's Republic in order to ensure "equality, human dignity and social justice.

(d) Bangabandhu Sheikh Mujibur Rahman was declared to be President and Syed Nazrul Islam Vice-President " till such time as a Constitution is framed";

(e) President or in his absence the Vice-President "shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary". It was the presidential system that was envisaged;

f) President or in his absence the Vice-President "shall have the power to summon and adjourn the Constituent Assembly." 54
It will be apparent that from the very beginning the framers of the Constitution dreamt of a democratic form of Government, not a Martial Law

Government or a dictatorship or an autocratic form of Government".

In the above case B. H Choudhury, J at para 47 page 58 also held as follows:

"It will be noticed that the proclamation took notice of the "mandate" for framing a Constitution for the Republic so as to ensure "equality, human dignity and social justice" and a democratic form of Government".

Further, having regard to the past history of constitutional misadventures by the civil and military bureaucrats in Pakistan who never permitted constitutional governments to settle down examples of which have been narrated earlier while narrating the history leading to the emergence independent Bangladesh, the framers of the Constitution felt it necessary to make some declarations in the Preamble, Article 7 and also in some other Articles which brilliantly comprehends the entire jurisprudence of the constitutional law and constitutionalism in Bangladesh including the Supremacy of the Constitution.

Accordingly unlike Preamble of many other countries, the Preamble of our original Constitution has laid down bare in clear terms the aims and objectives of the Constitution and in no uncertain terms it spoke of representative democracy, rule of law, and the supremacy of the Constitution as the embodiment of the will of the people of Bangladesh.

The second, third and fourth paragraph of the Preamble provides the aims and objectives which are as follows:- 55 "Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution; Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation -- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind"
All the provisions that followed have been structured accordingly to achieve those aims and objectives.

Further Article 7 of the Constitution provides as follows:

"7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of this Constitution.
(2) 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 the inconsistency, be void".

As it appears as early as in 1973, in the case of A.T. Mridha V. State 25 DLR (1973) 335, B. H. Chowdhury, J on the concept provided in Artilce 7 held at para-10 page-344:

"In order to build up an egalitarian society for which tremendous sacrifice was made by the youth of this country in the national liberation movement, the Constitution emphasises for building up society free from exploitation of man by man so that people may find the meaning of life. After all, the aim of the Constitution is the aim of human happiness. The Constitution is the supreme law and all laws 56 are to be tested in the touch stone of the Constitution (vide article 7). It is the supreme law because it exists, it exists because the Will of the people is reflected in it."

It also appears that in the case of Md. Shoib V. Government of Bangladesh 27 DLR(1975) 315 on the concept as provided in Article 7 was noticed by D.C. Bhattacharya, J who at para-20, page-325 held as follows:

"In a country run under a written Constitution, the Constitution is the source of all powers of the executive organs, of the State as well as of the other organs, the Constitution having manifested the sovereign will of the people. As it has been made clear in article 7 of the Constitution of the People's Republic of Bangladesh that the Constitution being the solemn expression of the will of the people, is the Supreme law of the Republic and all powers of the Republic and their exercise shall be effected only under, and by the authority of, the Constitution. This is a basic concept on which the modern states have been built up".

In Anwar Hossain's case B.H. Chowdhury J. analysed Article 7 in this manner at para-52, page-60:

52. "On analysis the Article reveals the following:

(a) All powers in the Republic belong to the people. This is the concept of sovereignty of the people. This echoes the words of the proclamation "by the mandate given to us by the people of Bangladesh whose will is supreme".

(b) This exercise on behalf of the people shall be effected only under, and by the authority of this Constitution. Limited government with three organ performing designated functions is envisaged. In the Proclamation it was said the President "shall exercise all the Executive and Legislative powers of the Republic" "till such time as Constitution is framed" and he will "do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government. Hence separation of Powers emerges as a necessary corollary of designated functions;

(c) Supreme Law of the Republic. That points to supremacy of the Constitution because; 57 (d) Any law is void to the extent of inconsistency with the Supreme Law (i.e. the Constitution) which therefore contemplates judiciary;

(e) Supreme Court with plenary judicial power for maintenance of the supremacy of the Constitution".

It also appears that Mustafa Kamal, J. (as his Lordship then was) in Kudrat-E-Elahi Panir V. Bangladesh 44 DLR (AD) (1992) 319, in acknowledging its importance, at para-72, held that Article 7 says that all powers in the Republic belong to the people.
The High Court Division, referring to the Article 7 of the Constitution, held as follows :

"Article 7(1) emphatically proclaims that all powers of the Republic belong to the people and their exercise on their behalf shall be effected only under and by the authority of this Constitution.

Article, 7(2) is equally significant. It proclaimed that the Constitution is the Supreme Law of the Republic being the solemn expression of the will of the people that any other law which is inconsistent with the Constitution that other law shall, to that extent of the inconsistency, be void.
Article-7 is an unique one and is not found in any other Constitution. It emphatically without any ambiguity, declares the supremacy of the Constitution in no uncertain terms".

Thus Article 7 declares the Supremacy of the Constitution as stated in the fourth paragraph of the Preamble and thus is the touch-stone in the construction of the Constitution and provides for undoubted Supremacy of the Constitution. It is also settled that Article 7 is a basic feature of the Constitution.

It also appears the second paragraph of the Preamble of the original Constitution also spells out the high ideals of nationalism, socialism, 58 democracy and secularism which was also reflected in Article 8 of the Constitution. The High Court Division found that our liberation war was fought on those high ideals and those high ideals inspired our heroic people to dedicate themselves and our brave martyrs to sacrifice their lives in the national liberation struggle and those ideals being the basis of our nationhood shall be the fundamental principles of the Constitution.
It also appears that the framers of the Constitution had the foresight to apprehend that this country might not always be served by wise conscientious and true patriotic persons, rather as observed by Justice Davis in Ex Parte Milligan, might sometimes be governed by 'wicked men, ambitious of power, with hatred of liberty and contempt of law' who, in their self-interest, may do away with the above noted high ideals of our martyrs and as such, in their wisdom, spelt out those high ideals both in the Preamble and also in the articles of the Constitution so that those fundamental principles shall remain permanently as the guiding principles and as the ever lasting light house for our Republic.

However, as it appears, the apprehension of the framers of the Constitution proved to be right. In 1975, Martial Law was imposed in the country making the Constitution subvervient to Martial Law Proclamation Regulations and Orders and various provisions of the Constitution was wrecked by the usurpers. We will deal with this matter letter on. Now regarding the supremacy of the Constitution, it is well settled that in the countries which have written Constituition, the Constitution is supreme and further a written constitution is itself a limitation on the power of the government. In this regard the following views were expressed by B. H. Chowdhury, J in Anowar Hossain's case at paragraphs -145-148, pages-83-86:-
"145. It does not need citation of any authority that the power to frame a Constitution is a primary power whereas a power to amend a rigid constitution is a derivative power derived from the Constitution and subject at least to the limitations imposed by the prescribed procedure. Secondly, laws made under a rigid constitution, as also the amendment of such a constitution can be ultra vires if they contravene the limitations put on the law making or amending power by the Constitution, for the Constitution is the

touch stone of validity of the exercise of the powers conferred by it. But no provision of the Constitution can be ultra vires because there is no touch stone outside the Constitution by which the validity of a provision of the Constitution can be judged. (See M. H-Seervai, Constitutional Law of India at page-(1522-23).

146. Professor Baxi while talking about Indian Constitution said that the Supreme Court reiterated that what is supreme is the Constitution; "neither Parliament nor the judiciary is by itself supreme. The amending power is but a power given by the Constitution to Parliament; it is a higher power than any other given to Parliament but nevertheless it is a power within and not outside of, the Constitution ……Article 368 is one part of the Constitution. It is not and cannot be the whole of Constitution". (See Indian Constitution Trends and Issues at Page-123)".

147. Professor K.C. Wheare in Modern Constitutions quoted Alexander Hamilton in the Federalist when he said:

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the Constitution under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master, that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. And he concludes that "the Constitution ought to be preferred to the Statute, the intention of their agents".

148. Professor Wheare further mentioned that once a Constitution is enacted, even when it has been submitted 60 to the people for approval, it binds thereafter not only the institutions which it establishes, but also the people itself. They may amend the Constitution, if at all, only by methods which the Constitution itself provides (Page 89-90). He further says "A Constitution cannot be disobeyed with the same degree of lighteartedness as a Dog Act. It lies at the basis of political order; if it is brought into contempt, disorder and chaos may soon follow" (Page 91)".

B.H. Chowdhury J, on the basis of the above, observed that this nation has learnt its bitter lessons to the consequence of disobedience of the Constitution.
In the above judgment B. H. Chowdhury, J, upholding the supremacy of the Constitution and that our Constitution being a written constitution is also a rigid one, also quoted as follows at paragraphs - 181-182, pages-92-93:

"181. K.C. Wheare says: "Constitutional Government means something more than Government according to terms of a Constitution. It means Government according to rule as opposed to arbitrary Government, it means Government limited by terms of a constitution not Government limited only by the desire and capacity of those who exercise powers". . . . . .
. . . . . .
. . . . . .
"K.C. Wheare observed ..... The real justification of Constitutions, the original idea behind them is that of limiting Government and of requiring those who govern to conform to the law and usage. Most Constitutions as we have been seen do purport to limit the Government "and if in turn a Constitution imposes restriction upon the powers of the institution it must be said" then the courts must decide whether their actions transgress those restrictions and in doing so, the Judge must say what the Constitution means.

The substance of the matter is that while it is the duty of every institution established under the authority of a Constitution and exercising powers granted by Constitution, to keep within the limits of those words, it is the duty of the Court, from the nature of their function to say what these limits are? and that is why courts come to 61 interpret a Constitution". (Page 174, Modern Constitution).

182. E.C.S. Wade and G. Godfrey Phillips in Constitutional and Administrative Law considered the question of the doctrine of legislative supremacy. The authors pointed out that the doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limits upon the legislature and entrusts the ordinary courts whether the acts of the Legislature are in accordance with the Constitution. It is observed:

"In a constitutional system which accepts judicial review of legislation, legislation may be held invalid on a variety of grounds: for example. because it conflicts with the separation of powers where this is a feature of the Constitution, (Liyanage v. R [1967] A.C. 259) or infringe human rights guaranteed by the Constitution, (E.G. Aptheker v. Secretary of State 378 U.S. 500 (1964) (Act of U.S. Congress refusing passports to Communists held a unconstitutional restriction on right to travel) or has not been passed in

accordance with the procedure laid down in the Constitution (Harris v. Minister of Interior 1952(2) S.A. 428)".

In the above case Shahabuddin Ahmed, J at para-272 page-118, also upheld the Supremacy of the Constitution in the following manner:

"In this case we are to interpret a Constitution which is referred to, as the will of the people and supreme law of the land and as such it is a most important instrument. But its preeminance is not derived only from the fact that it is the supreme law of the land; it is pre-eminent because it contains lofty principles and is based on much higher values of human life. On the one hand, it gives out-lines of the State apparatus, on the other hand, it enshrines long cherished hopes and aspirations of the people; it gives guarantees of fundamental rights of a citizen and also makes him aware of his solemn duty to himself, to his fellow citizen and to his country."

Considering the above legal position the High Court Division concluded as follows :
"From a reading of the above Judgments, it would show that no-body denied the supremacy of the Constitution. Even the 62 Attorney General accepted the supremacy of the Constitution, and so also the Court".

It has been argued on behalf of the petitioners that (a) Parliament being a sovereign body and it also does not come within the definition of 'person' as provided in Article 152 of the Constitution, the High Court does not have any jurisdiction to declare an Act of Parliament invalid and (b) while making any judicial review of any Act of Parliament, Articles 7 and 26 are to be followed in letter and spirit.

While discussing the Supremacy of the Constitution earlier we have found that Article 7 having declared the supremacy of the Constitution there must be some authority to maintain and preserve the supremacy of the Constitution and there can be no doubt that in an entrenched constitution judiciary must be that authority. Starting from Marbury V. Madison, (1803) there are numerous instances where the Court functioning under a written constitution upheld this jurisdiction of judicial review of the superior Courts.

The High Court Division discussed this issue in details as follows :
"Article 55(2) of the Constitution of Bangladesh vests the executive power of the Republic on the Prime Minister while under Article 65(1), the legislative powers are vested on the Parliament which is the House of the Nation. Similarly, Article 94(1) provides for the establishment of the Supreme Court of Bangladesh. Article 114 provides for the subordinate courts. These three distinct branches of the Republic commesurate with the Doctrine of the Separation of Powers propounded by Baron Montesquieu. In his De l 'Esprit des Lois (1748), he stressed the importance of the independence of Judiciary :……..

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty…Again, there is no liberty if the power of judiging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the 63 judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, if the same man, or the same body, whether of the nobles or the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes."((Quoted from Hilaire Barnett on Constitutional and Administrative Law, Fourth Edition, 2002). (page-106) …….

The United States of America is the first Republic which appears to have accepted the doctrine of separation of powers in the first three Articles of its Constitution.
In the United States, the Supreme Court in the last years of the 18th century, started to exercise its power of judicial review in deciding the constitutionality of Federal and State laws. In Hylton V. U.S(1796) and in Calder V. Bull(1798), the Court, However, after consideration, upheld the legislation.

In Marbury V. Madison (1803), William Marbury under a provision of the Judiciary Act of 1789, prayed to the Supreme Court for issuing a writ of mandamus, compelling James Madison, the Secretary of State, to deliver him his commission for his appointment as justice of the peace.

Marbury was one of the 'midnight judges', appointed at the last-minute of the tenure of President Adams. The President, however, had acted within constitutional statute and all the appointments were confirmed by the Senate. But unfortunately for Marbury, Thomas Jefferson, the new President, took office on March 4, 1801, before his commission could be delivered to him. It was thereafter never delivered presumably on the direction of the new President.

John Marshall was a Federalist. He actively participated in the American war of Independence. He was appointed as the

Chief Justice of the U. S. Federal Supreme Court by President Adams in early 1801.
The Court found that the Constitution limited the original jurisdiction of the Supreme Court only in two types of cases, namely, the cases affecting the ambassadors and those in which a State shall be a party but in all other cases the Supreme Court shall have appellate jurisdiction, not original. As such, the request of Marbury for mandamus was denied. 64 Normally, the matter would have been ended there but Chief Justice Marshall did not stop there. It was not necessary but he digged further, although, Marbury was only interested in his own commission and not in the least in the vires of the relavant clause of the Judiciary Act of 1789, but Marshall C. J., on examination of the relevant provisions found that a ontradiction did in fact exist between the Constitution and the pertinent provision of the aforesaid Act".

Robert K. Carr tried to visualize the mind-set of Chief Justice Marshall, a great Chief Justice of the Supreme Court of the United States, in its infancy in this manner:

"In other words, Marshall was invoking that power for the first time at just such a moment when the Fathers probably intended it should be exercised. Jefferson had become president and his party had won control of Congress. The opposition had obtained complete control of the political branches of the government. Is it not obvious that from the point of view of the Founding Fathers and the Federalist party the time had come to point out that the Constitution as a higher law did place restraints upon Congress and that the Supreme Court as guardian of the Constitution had power to enforce those restraints?

In Marbury v. Madison we see Chief Justice Marshall suggesting that the Supreme Court was duty-bound as a matter of unescapable principle to enforce the Constitution as a symbol of restraint upon congressional authority through the exercise of its power of Judicial review. ……." (Quoted from Robert K. Carr on 'The Supreme Court and Judicial Review' at page-71).

This is how the review was made two hundred years ago in Marbury V. Madison:
"If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it rises?
This is too extravagant to be maintained……..Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."(Quoted from Professor Noet T. Dowling on the 'Cases on Constitutional Law Fifth Edition, 1954, at pages-95-97).

It will be interesting to note that Marbury was not at all interested in the supremacy of the Constitution or the Supreme Court's power of judicial review. He only made a request for mandamus upon Madison, the Secretary of State, directing him to deliver his commission which was ready in all respect but could not be delivered to him earlier due to paucity of time. But the Supreme Court in course of considering his grievance, very consciously declared invalid an Act of the Congress. This is how the U. S. Supreme Court wields its power of Judicial review of legislative actions.

O. Hood Phillips in his 'Constitutional and Administrative Law', Seventh Edition (1987), explains the mechanism at page-8:

"…..the federal courts have jurisdiction to declare provisions of state constitutions, state legislation and federal legislation repugnant to the Federal Constitution. It is not strictly accurate to say that the Courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist or that an alleged wrong has been committed because a certain statute relied on is unconstitutional."

This was also indicated by A. R. Cornelius, C.J., in Fazlul Quader Chowdhury V. Muhammad Abdul Haque PLD 1963 SC 486, at page-503:

"The duty of interpreting the Constitution is, in a fact a duty of enforcing the provisions of the Constitution in any particular case brought before the Courts in the form of litigation." 66 Hamoodur Rahman, C. J., in dealing with Martial Law provision in Asma Jilani's case held at page -202:

"However, as this question has been raised, regarding the validity of Martial Law Regulation No. 78, I must point out that it follows from what I have said earlier that it was made by an authority whose legal competence we have not been able to recognise on the ground of want of legal authority and the unconstitutional manner

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of arrogation of power."

The moral is clear. If any provision sought to oust the jurisdiction of Court, that provision itself is not law.

As such it is apparent that the Court may consider the constitutionality of any provision in course of a litigation brought before it. Further it is not for the aggrieved persons to plead law but for the Judges to apply the correct provisions of the Constitution and the laws made thereunder and if necessary under the circumstances, is entitled either to uphold any particular statute or to declare it invalid being contradictory to the Constitution so long the Government gets adequate opportunity to support the offending provision if so advised. This is the position in the United States, so also in India and there is no reason why it should be otherwise in Bangladesh.

It may be mentioned here that under our Constitution all the powers and functions of the Republic are vested in the three branches, namely, the Legislature, the Executive and the Judiciary. All these branches, however, owe their existence to the Constitution since it is the embodiment of the will of the people of Bangladesh. It is the people of Bangladesh, who proclaimed that 'We, the people of Bangladesh', deemed that there shall be a Supreme Court for Bangladesh, that is why this Court came into being out of Article 94 67 of the Constitution with all the powers of a High Tribunal as exists in the civilised world.

In this connection a historical episode was narrated by B. H. Chowdhury, J. in Anwar Hossain Chowdhury's case at para-253, page-108 (BLD) :

"253. This judgment will be incomplete if a historical episode is not mentioned. Sir Coke was summoned by King James first to answer why the King could not himself decide cases which has to go before his own court of justice. Sir Coke asserted:
"No King after the conquest assumed himself to give any judgment in any cause whatsoever which concerned the administration of justice within the realm but these are solely determined in the court of justice."

When King said that he thought the law was founded on reasons and that he and others had reasons as well as Judges, Coke answered :

"True it was that God has endowed his Majesty with excellent science and great endowments of nature, but his Majesty was not learned in the law of his realm in England, and causes which concerned the life or inheritance or good or fortune of his subject, are not to be decided by natural reasons, but by the artificial reasons and judgment of the law, which law is an act which requires long study and experience, before that a man can attain the cognizance of it, and the law was the golden metawand one and measure to try the causes of the subject and which protect his Majesty in safety and peace".

About the independence of judiciary and its power of judicial review, B. H. Chowdhury, J., in the above case further observed, quoting Bhagwati, J. and Justice Krishna Iyer, J.at para- 240-241, page-105:

"240. This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J said "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law a meaningful and effective". He 68 said that the Judges must uphold the core principle of the rule of law which says, "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others v. President of India and others A.I.R. 1982 SC at page 152).

241. He further says, "what is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with a activist approach and obligation for accountability, not to any party in power nor to the opposition ……..We need Judges who are alive to the socioeconomic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives (at page 179). He quoted the eloquent words of Justice Krishna Iyer :

"Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure".

Thus there is no hesitation in saying that

these are the words of wisdom handed down to us by the generations of Judges who very politely and meekly from the beginning of the civilisation reminded the monarch that the King is not above the law but under the law. Some of them were beheaded, imprisoned or destroyed but the cherished theme ran like a refrain throughout the pages of the history.

In this part of the world we generally follow the common law principles but Bangladesh has got a written Constitution. This Constitution may be termed as controlled or rigid but in contradistinction to a Federal form of Government, as in the United States, it has a Parliamentary form of Government within limits set by the Constitution. Like the United States, its 69 three grand Departments, 'the Legislature makes, the Executive executes and judiciary construes the law' (Chief Justice Marshall). But the Bangladesh Parliament lacks the omnipotence of the British Parliament while the President is not the executive head like the U. S. President but the Prime Minister is, like Brithsh Prime Minister. However, all the functionaries of the Republic owe their existence, powers and functions to the Constitution. 'We the people of Bangladesh', gave themselves this Constitution which is conceived of as a fundamental or an organic or a Supreme Law rising loftly high above all other laws in the country and Article 7(2) expressly spelt out that any law which is inconsistent with this Constitution, to that extent of the inconsistency, is void. As such, the provisions of the Constitution is the basis on which the vires of all other existing laws and those passed by the Legislature as well as the actions of the Executive, are to be judged by the Supreme Court, under its power of judicial review. This power of judicial review of the Supreme Court of Bangladesh is, similar to those in the United States, Pakistan and in India.

This is how the Legislature, the Executive and the Judiciary functions under the Constitutional scheme in Bangladesh. The Constitution is the undoubted source of all powers and functions of all three grand Departments of the Republic, just like the United States, Pakistan and India. It is true that like the Supreme Courts in the United States or in India, the Supreme Court of Bangladesh has got the power of review of both legislative and executive actions but such power of review would not place the Supreme Court with any higher position to those of the other two Branches of the Republic. The Supreme Court is the creation of the Constitution just like the Legislature and the Executive. But the Constitution endowed the Supreme Court with such 70 power of judicial review and since the Judges of the Supreme Court have taken oath to preserve, protect and defend the Constitution, they are obliged and duty bound to declare and strike down any provision of law which is inconsistent with the Constitution without any fear or favour to any body. This includes the power to declare any provision seeking to oust the jurisdiction of the Court, as ultra vires the Constitution.

Hamoodur Rahman, C. J. explains the legal position thus in State V.
Zia-ur-Rahman PLD 1973 SC 49 at page-70:
"In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do so, because, the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution as a paramount law whenever a legislative enactment comes into conflict with it because, it is its duty to see that the Constitution prevails. It is only when the Legislature fails to keep within its own Constitutional limits, the judiciary steps in to enforce compliance with the Constitution. This is no dubt a delicate task as pointed out in the case of Fazlul Quader Chowdhury v. Shah Nawaz, which has to be performed with great circumspection but it has nevertheless to be performed as a sacred Constitutional duty when other State functionaries disregard the limitations imposed upon them or claim to exercise power which the people have been careful to withhold from them."

His Lordship then considered the powers of the Court in respect of the Constitutional measure at page-71:

"I for my part cannot conceive of a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct a 71 document, if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution. At any rate, the Courts created under the Constitution will not have the power to declare any provision of the constitution itself as being in violation of such a document. If in fact that document contains the expression of the will of the vast majority of the people, then the

remedy for correcting such a violation will lie with the people and not with the judiciary".

Coming back to Bangladesh, Mustafa Kamal, C.J., was emphatic in respect of the independence of Judiciary in Secretary, Ministry of Finance V. Masdar Hossain 2000 (VIII) BLT (AD) 234 where his Lordship held at para 60, pages-263-4:
"60 when Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher Judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course.

This exercise was made by this Court in the case of Kudrat-Elahi Panir Vs. Bangladesh, 44 DLR (AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution."

It is thus clear that the High Court Division has not only the power of judicial review of an Act of Parliament but also has a duty to exercise such power in case of violation of the Constitution. And the High Court Division did it giving reasons.

Next question is whether in view of the provisions of Article 111 of the Constitution, the decisions of this Division passed in the cases of Halima Khatun, Joynal Abedin, Etheshamuddin, and Nasiruddin to the effect that Martial Law proclamations etc. were supra constitutional instruments and as 72 such the Constitution must take a back seat, is binding upon the High Court Division.

Before discussing the above question, let us get a clear picture of the major constitutional developments in erstwhile Pakistan and also in present Pakistan and decision of the Supreme Court of Pakistan regarding Martial Law. Earlier we have quoted the relevant portion of the judgment of Yakub Ali J in Asma Jilani's case in this regard but the same is not that elaborate.
The first major event in this behalf in erstwhile Pakistan was the dissolution of the Constituent Assembly of Pakistan by Governor-General Ghulam Muhammad in 1954, which he did on the following grounds:-

"(1) The Governor-General having considered the political crisis with which the country is faced, has with deep regret some to the conclusion that the constitutional machinery has broken down. He, therefore, has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function.

(2) The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible.
(3) Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted and (4) The security and stability of the country are of paramount importance. All personal sectional and provisional interests must be subordinated to the supreme national interest."

This act of the Governor-General was challenged by Moulvi Tamizuddin Khan, President of the Constituent Assembly, in the Chief Court of Sindh. The Chief Court of Sindh allowed the petition and declared the 73 dissolution of the Assembly as illegal. It was held that the Acts of the Constituent Assembly when it did not function as the Federal legislature did not require the Governor-General's assent. The Federation of Pakistan challenged the judgment of the Sindh Chief Court before the Federal Court. The Federal Court reversed the judgment of the Sindh Chief Court on the ground that the assent of the Governor-General was necessary for the validity of all the laws and the amendments made in the Government of India Act, 1935. The Court held that since section 223A of the Government of India Act under which the Chief Court of Sindh assumed jurisdiction to issue the writs did not receive assent of the Governor-General, it was not yet law, and that, therefore, the Chief Court had no jurisdiction to issue the writs.

However, in his dissenting judgment, Cornelius J, (later CJ) held that there was nothing in section 6(3) of the Indian Independence Act, or to the status of Pakistan as a Dominion which created the obligation that all laws made by the Constituent Assembly of a constitutional nature, required the assent of the Governor-General for their validity and operation. Thus, by majority, the dissolution of the assembly was upheld on a legal ground. As to the merits of the case, it was observed that it was wholly unnecessary to go into the other issues and nothing said in the judgment was to be taken as an expression of opinion on anyone of those issues.

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The next case of constitutional importance was Usif Patel v. Crown (PLD 1955 FC 387). The appellants in that case were proceeded against under the Sindh Control of Goondas Act, 1952. They were declared as goondas were directed to furnish heavy security but they having failed to give security, were confined to prison. Against their detention in prison, they approached 74 the Sind Chief Court by an application under section 491 of the Code of Criminal Procedure, 1898 alleging that their imprisonment was wrongful and prayed that they be set at liberty. Some of the petitioners moved revision petitions under section 17 of the aforesaid Act before the Chief Court.

By means of the Emergency Powers Ordinance, 1955 (Ordinance No. IX of 1955) issued under section 42 of the Government of India Act, 1935 the Governor-General sought to validate all those Acts by indicating his assent with retrospective operation. The ground urged before the Chief Court on which their imprisonment was alleged to be illegal was that the Governor's Act under which action had been taken against them was invalid because it was passed by the Governor in exercise of the powers which were conferred on him by a Proclamation issued by the Governor-General under section 92A of the Government of India Act, 1935, which section had been inserted in the Government of India Act, 1935 by an Order of the Governor-General under section 9 of the Indian Independence Act, 1947. It was contended that this action of the Governor-General was ultra vires the provisions of the aforesaid section 9. The contention was repelled by the Chief Court and the detentions of the petitioners were held legal.

The matter came up in appeal before the Federal Court where the questions requiring determination were as under :-
"(1) Whether the Governor-General could by an Ordinance validate the Indian Independence (Amendment) Act, 1948; and
(2) Whether the Governor-General could give assent to constitutional legislation made by the Constituent Assembly with retrospective effect". 75 It was held that a legislature could not validate an invalid law if it did not possess the power to legislate on the subject to which the invalid law related, the principle governing validation being that validation being itself legislation one could not validate what one could not legislate upon. The essence of a federal legislature was that it was not a sovereign legislature competent to make laws on all matters, in particular it could not, unless specifically empowered by the Constitution, legislate on matters which were assigned by the Constitution to other bodies. Nor was it competent to remove the limitations imposed by the Constitution on its legislative powers. The power of the legislature of the dominion for the purpose of making provision as to the constitution of the Domination could, under subsection (1) of section 8 of the Indian Independence Act, 1947, be exercised only by the Constituent Assembly, and that such power could not be exercised by that Assembly when it functioned as the Federal Legislature within the limits imposed upon it by the Government of India Act, 1935. The Governor-General could not by an Ordinance, repeal any provision of the Indian Independence Act, 1947 or the Government of India Act, 1935 and assume unto himself all powers of legislation.

Since the Amendment Act of 1948 was not presented to the Governor-General for his assent, it did not have the effect of extending the date from 31st March, 1948 to 31st March, 1949 and that since section 92A was added to the Government of India Act, 1935 after 31st March, 1948, it never became a valid provision of that Act. Thus, the Governor-General had no authority to act under section 92A and the Governor derived no power to legislate from a Proclamation under that section. Accordingly, the Sind Goondas Act was 76 ultra vires and no action under it could be taken against the appellants. That being so, it was argued, the detention of the appellants in jail was illegal.

The Federal Court held that the Acts mentioned in the Schedule to the above Order could not be validated by the Governor General under section 42 of the 1935 Act nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly, having already been dissolved by the Governor General by a Proclamation on October 24, 1954 had ceased to function and no legislature competent to validate these Acts was in existence. In conclusion, the court observed as:

"It might have been expected that conformably with the attitude taken before us by the responsible counsel for the Crown the first concern of the Government would have been to bring into existence another representative body to exercise the powers of Constituent Assembly so that all invalid legislation could have been immediately validated by the new body. Such a course would have been consistent with the constitution practice in relation to such a situation. Events, however, show that other counsels have since prevailed. The Ordinance contains no reference to elections, and all that the learned Advocate General can say is that there intended to be

held."

Next case of significant relevance is the Reference H.E. The Governor-General reported in PLD 1955 FC 435. The Federal Court having held in Moulvi Tamizuddin Khan's case that assent of the Governor-General was necessary to all laws passed by the Constituent Assembly, the Governor-General sought to validate such Acts by indicating his ascent, with retrospective operation, by means of the Emergency Powers Ordinance, 1955(Ordinance No, IX of 1955) issued under section 42 of the Government of India Act, 1935. The Federal Court in Usif Patel's case, however, declared that the Acts mentioned in the Schedule to that Ordinance could not be 77 validated under section 42 of the Government of the India Act, 1935, nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly had ceased to function, having already been dissolved by the Governor-General by a Proclamation on 24th October 1954, and no legislature competent to validate these Acts was in existence.

The Governor-General made a reference to the Federal Court under section 213 of the Government of India Act, 1935 asking for the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could, by Order or otherwise, declare that all orders made, decisions taken, and other acts done under those laws, should be valid and enforceable and those laws, which could not without danger to the State be removed from the existing legal system, should be treated as part of the law of the land until the question of their validation was determined by the new Constituent Convention.

The answer returned by the Federal Court (by majority) was that in the situation presented by the Reference, the Governor-General has, during the interim period, the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedules to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation was decided upon by the Constituent Assembly, where, during the aforesaid period, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

In Dosso's case the respondents in one of the appeals were tried by a Jirga (council of elders) under the provisions of the Frontier Crimes 78 Regulation, 1901 (FCR) and convicted and sentenced under different provisions of the Pakistan Penal Code, 1860. They filed applications before the High Court for a writ of habeas corpus and certiorari on the ground that the provisions of the FCR enabling the executive authorities to refer a criminal case to a Council of Elders were void under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1956. The High Court accepted the contention and held that the provisions of FCR could be enforced under subsection (4) of section 1 (ibid) only against Pathans and Baluchis and against such other persons the local government may notify and as this was not a reasonable classification, those provisions were ultra vires Article 5 of the Constitution. The convictions and sentences were set aside, and the respondents were ordered to be treated as under trial prisoners, it being left to the government to refer their cases to a court of law. On appeals filed by the State before the Federal Court against the impugned orders of the High Court, the validity of the exercise of power by the High Court was adjudged in the context of the actions of 7th October, 1958. What happened was that by Proclamation of that data, the President of Pakistan annulled the Constitution of 1956, dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both Provincial Assemblies. Simultaneously, Martial Law was declared throughout the country and Commander-in Chief of the Pakistan Army was appointed as the Chief Martial Law Administrator. Three days later, the President promulgated the Laws (Continuance in Force) order, 1958, the general effect of which was the validation of laws other than the late Constitution, that were in force before Proclamation, and restoration of the jurisdiction of all Courts including 79 the Supreme Court and High Courts. The Order contained the further direction that the country, thereafter to be known as Pakistan and not the Islamic Republic of Pakistan, should be governed as nearly as may be in accordance with the late Constitution.

Under Clause (7) of Article 2 of the Laws (Continuance in Force) Order 1958, all writ petitions pending in High Courts seeking enforcement of fundamental rights stood abated. The Court held that if the Constitution was destroyed by a successful revolution, the validity of the prevalent laws depended upon the will of the new law-creating organ. Therefore, if the new legal order preserved any one or more laws of the old legal order, then a writ would lie for violation of the same. As regards pending applications for writs or writs already issued but which were either sub judice before the Supreme Court or required enforcement, the Court in the light of the Laws (Continuance in Force) Order, 1958 held that excepting the writs issued by the Supreme Court after Proclamation and

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before the promulgation of the Order, no writ or order for a writ issued or made after Proclamation shall have any legal effect unless the writ was issued on the ground that anyone or more of the laws mentioned in Article 4 or any other right kept alive by the new Order had been contravened.

The Supreme Court, on the basis of the theory propounded by Hans Kelsen, accorded legitimacy to the assumption of power by General Ayub Khan holding that coup d'etat was a legitimate means to bring about change in the government and particularly so when the new order brought about by the change had been accepted by the people. It was held that where a Constitution and the national legal order under it was disrupted by an abrupt 80 political change not within the contemplation of the Constitution, then such a change would be a revolution and its legal effect would not only be the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change was brought about. In the result, in accordance with the judgment of the majority, the proceedings for writs in each of these cases were held to have abated. The result was that the directions made and the writs issued by the High Court were set aside. However, in 1972, in Asma Jilani's case, the details of which will be discussed later on, the above view was overruled by Pakiatan Supreme Court.

Now coming to the cases of Halima Khatun, Joynal Abedin, Ehteshamuddin and Nasiruddin where the status of the said Proclamations dated August 15, 1975, November and 29 of 1975 and Martial Law Regulations and Orders have been considered, the High Court Division regarding Halima Khatun's case stated as follows:-

The first is the case of Halima Khatun V. Bangladesh 30 DLR (SC) (1978) 207. In the said case, the legality of the Proclamations etc. was not the issue but inclusion of a property in the list of abandoned properties was challenged in the High Court. The Rule was discharged on the ground that the question as to whether the relevant property was abandoned or not is a disputed question of fact. On appeal question arose before the Appellate Division, whether in view of the provisions of the Abandoned Properties (Supplementary Provisions) Regulation 1977, (MLR No. VII of 1977) the aforesaid writ petition abated. This appeal was decided on January 4,1978. Bangladesh was at that time under Martial Law. After considering the Proclamations, MLRs and MLOs and also the Constitution including Article 7 , Fazle Munim, J. (as his Lordship then was), observed at para-18 :

" ……. what appears from the Proclamation of August 20, 1975 is that with the declaration of Martial Law in Bangladesh on August 15, 1975, Mr. Khondker Moshtaque Ahmed who became the President of Bangladesh assumed full powers of the Government and by Clause (d) and (e) of 81 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. In Clause (h) the power to amend the Proclamation was provided. It may be true that whenever there would be any conflict between the Constitution and the 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 fol1owing 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 the inconsistency be void." Ironically enough, this Article, though 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."

Fazle Munim, J., held that the Constitution of Bangladesh was made subservient and subordinate to the Proclamations, MLRs and MLOs.

According to the High Court Division in view of the above judgment---
"I) Under the Proclamations, the Constitution lost its character as the supreme law of the Republic.
II) The Constitution is subordinate to the Proclamations and the Regulations and Orders made thereunder.
III) Constitution is superior to any law other than a Regulation or Order made under the Proclamation".

Regarding Haji Joynal Abedin's case 32 DLR (AD) (1980)110 the High Court Division stated as follows: 82 In this case a

writ petition was filed challenging the legality of the order of conviction passed by the Special Martial Law Court. The legality of Proclamations etc. was not the issue in that case. The High Court Division declared the said order of conviction and sentence was without lawful authority and of no legal effect.

Leave was granted, inter alia, to consider as to whether in view of the Proclamation dated August 20, 1975, the High Court Division acted within its jurisdiction in issuing the writ.

After tracing the history of the Proclamation of Martial Law, declared on August 20, 1975 at page-16 and 17 of the Report, Ruhul Islam, J, held at para-18, page- 122 :

"From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a 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 Regulation or orders and other 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 Regulation. ……."

Ruhul Islam J, then at para-19: page-122-23 held:

"……..So long the Constitution is in force as the supreme law of the country, any act done or proceeding taken by a person purporting to function in connection with the affairs of the Republic or of a local authority may be made the subject matter of review by High Court in exercise of its writ jurisdiction. The moment the country is put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position".

Ruhul Islam, J. very specifically spelt out that the Constitution was reduced to a position subordinate to the Proclamations, MLRs and MLOs. 83 This opinion of the Appellate Division was given on Decembers 20, 1978. At that time the country was under Martial Law".

According to the High Court Division by the above judgment ….

I) The Constitution was reduced to a position subordinate to the Proclamation.

II) The unamended unsuspended Constitutional provisions were allowed to continue subject to the Proclamations and MLRs and MLOs.

III) The Constitution was amended from time to time by issuing Proclamations.

IV) The moment the country is put under Martial Law, the Constitution looses its superior position".

Regarding the next case i.e. the case of Kh. Ehteshamuddin Ahmed V, Bangladesh, 33 DLR (AD)(1981) 154 the High Court Division held as folows:-

In this case a writ petition was filed challenging the proceedings in passing the Judgment and Order of conviction passed by the Special Martial Law Court. The Proclamation etc. were not challenged. The High Court Division summarily rejected the writ petition by an order dated June, 13, 1979, on the ground of ouster of jurisdiction by MLR 1 of 1975.

By this time, Proclamations were revoked and the Martial Law was withdrawn.

Leave was granted, inter alia, to consider as to whether the proceeding of the Special Martial Law Court could be examined by the High Court Division after passing of the Fifth Amendment of the Constitution.

In this case, the vires of the Fifth Amendment was not challenged. This position was admitted by the learned Advocates of both the sides, the Court considered the legality of the proceedings before the Special Martial Law Court when the country was under Martial Law. The Judgement of the Appellate Division was given on March 27, 1980.

At that time although Martial Law was withdrawn still its dark shadows apparently loomed large over the country and its 84 Constitution, as found by the Court. His Lordship Ruhul Islam. J., in considering Article-7, held at para-16 page-163:

"It is true that Article 7 (2) declares the Constitution as the Supreme Law of the Republic and if any other law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void, but the supremacy of the Constitution cannot by any means compete with the Proclamation issued by the Chief Martial Law".

His Lordship then at Para -18 page-163 held :

"18. In that case, on the question of High Court's power under the Constitution to issue writ against the Martial Law Authority or Martial Law Courts, this Division has given the answer that the High Courts being creature under the Constitution with the Proclamation of Martial Law and the Constitution allowed to remain operative subject to the

Proclamation and Martial Law Regulation, it loses its superior power to issue writ against the Martial Law Authority or Martial Law Courts.……"
His Lordship then at para-25, page-166 further held:

"25.Before I proceed further it may be mentioned that in the present case neither the authority of the person who proclaimed Martial Law nor the vires of the Martial Law Regulation was or could be challenged at the bar excepting arguing on the question of supremacy of the Constitution over the Proclamations and Martial Law Regulations. Since the authority of the Chief Martial Law Administrator is not challenged and the vires of the relevant Martial Law Regulation is also not challenged, I do not find any good reason for making reference to Asma Jilani's case".

The comment of the High Court Division on the above judgment is that the Appellate Division found :
"I) The Constitution continued subject to the Proclamations.

ii) The Supremacy of the Constitution cannot by any means compete with the Proclamation. iii) The Chief Martial Law Administrator would not be deemed to be a person holding an office of profit in the service of the People's Republic of Bangladesh.

iv) The High Court lost its superior power to issue writ against the Martial Law Authority or Martial Law Courts".
"From the above Judgment it is apparent that even after lifting of the Martial Law, its provisions remained supreme and on the face of the MLRs, the Constitution was relegated even further to the back-seat. Although at that time the Martial Law was not there but even then the Constitution was read subject to the Martial Law and was made to recoil on the face of the bare shadow of the MLRs".

"It is apparent from the above Judgment that the effect of the Proclamation was that the Constitution is supreme only when the Martial Law is not near by and even long after the lifting of the Martial Law, on the face of its bare shadow, the Constitution with its 'supremacy' becomes a worthless sheaf of papers. Whether we like it or not the status of the Constitution was reduced to such an ignoble shambles by the Proclamations, the MLRs and the MLOs which would have blushed even Henry VIII or Louis XIV. During the reign of Henry VIII in the 16th Century, the Proclamations were issued by the King but in pursuance of an Act of Parliament and no prerogative right to issue proclamation was allowed even to the King of England by the Chief Justice Coke four hundred years ago in 1610.

Regarding Nasiruddin's case 32 DLR (AD) (1980) 216, the High Court Division found as follows:

This case was decided on 14.4.1980. It is also in respect of an abandoned property. It modified the effect of the decision of the earlier Halima Khatun's case to some extent but the observations of Fazle Munim, J., in respect of the status of Martial Law vis-à-vis the Constitution made in the said 86 decision, remained unaltered. Kamaluddin Hossain, C. J., however, held at para-10, page 221:

"It is to be observed that when an authority is vested with a jurisdiction to do certain acts and in the exercise of that jurisdiction he does it wrongly or irregularly the action can be said to be done within the purported exercise of his jurisdiction. But an act which is manifestly without jurisdiction, such as the property which not being an abandoned property within the meaning of Presidenual Order 16 of 1972 is declared to be so, or in case of judicial or quasi judicial act which is coram non judice, the use of the expression 'purported exercise' in the validating clause of Fifth Amendment of the Constitution cannot give such act the protection from challenge, it being ultra vires. It is true mala fide act is also not protected, but then mala fide is to be pleaded with particulars constituting such mala fide and established by cogent materials before the Court."
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.....
In this connection it should also be noted that the case of Kh. Ehteshamnddin Ahmed V. Bangladesh, 33 DLR (AD) (1981) 154 was decided on 27.3.1980 and the case of Nasiruddin V. Government of Bangladesh 32 DLR (AD) (1980) 216 was decided on 14.4.1980. Both the cases were decided after the Fifth Amendment was passed on April 6, 1979, by the Second Parliament.
A question although was not raised but yet may arise that since those two cases were decided after the enactment of the Fifth Amendment whether it can be said that the Appellate Division approved the Fifth Amendment, at least impliedly? However, it is not, since the vires of the Fifth Amendment was not under challenge in any of those two appeals, even indirectly. The issues involved in those two cases were no where near the Fifth Amendment.
In Ehteshamuddin's case the issues were:
"i) Whether the proceedings of the Special Martial Law Court could be examined after the enactment of the Fifth Amendment and the Proclamation made on April, 7, 1979 by the 87 CMLA, withdrawing the Martial

Law and revoking the earlier Proclamations.

ii) The extent of protection given under the Fifth Amendment.

iii) Whether the decision of the Government can be called in question under Article 102 of the Constitution despite the Proclamation of April 6, 1979".

It is thus apparent that the vires of the Fifth Amendment to the Constitution was not under challenge in any of the above cases. This is also admitted by the learned Additional Attorney General and also the learned Advocate for the respondent no. 3. Besides, at paragraph-25 of the Judgment it is categorically stated that neither the authority of the person who proclaimed Martial Law nor the vires of the Martial Law Regulations was challenged in the said case. In Nasiruddin's case, the issue was whether the writ abated, in view of sub-paragraph (1) of paragraph 5 read with paragraph 4 of Martial Law Regulation No. VII of 1977. This case has got no nexus with the Fifth Amendment.

As it appears the High Court Division also stated that similar question as to validity of Martial Law was also faced by Hamoodur Rahman, C.J. in Asma Jilani's case wherein his Lordship considering the case of Muhammad Ismail V. The State, PLD 1969 SC 241 in which the judgment was delivered again by himself, and also the case of Mia Fazal Ahmed V. The State PLD 1969 SC 241 held that in those cases no question was raised as to the validly of the Martial Law Order or of the Provisional Constitution Order and therefore it is incorrect to say that the Supreme Court had given any legal recognition to the regime of General Yahya Khan. 88 We are also of the view that simply because the laws made by the Martial Law Authorities and actions taken under it were considered by this Division in the cases of Halima Khatun, Joynal Abedin, Enteshamuddin and Nasiruddin and in those cases Martial Law being not declared ultra vires the Constitution, those laws will not attain validity. Further, as pointed out earlier, in none of those case, the invalidity of the Fifth Amendment was challenged and so those cases can not operate as precedent for the validity of the Fifth Amendment. Accordingly there is no substance to the submission of the petitioners that the decisions in the above cases touching the actions of the Martial Law authorities provide some binding precedents under Article 111 of the Constitution and so the actions of martial Law authorities can not be challenged in the Court. In order to apply the provision of Article 111 an issue must be raised and deliberated upon and decided before it can operate as a binding precedent. Further what is binding as a law is the ratio of a decision and not the finding of a fact or the conclusion reached by the Court as held in the case of Dalbir Singh V. India, AIR 1979 1384. Moreover, as held in the case of Bangladesh V. Mizanur Rahman, 52 DLR (AD) 149 this Division having the power of review is not bound by a view earlier taken by this Division.

Further the role of stare decisis in constitutional interpretation is also very insignificant particularly when the earlier decision is manifestly wrong. In this regard in Asma Jilani's case (supra) at page 139, 168-169, the Chief Justice quoted with approval, the statement in Corpus Juris Secumdum which is as follows; 89 "The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict with the provisions of the state Constitution".

As regards the stare decisis, Halsburys Laws of England states as follows:

"In general the House of Lords will not overrule a long established course of decisions except in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. The same considerations do not apply where the decision, although followed, had been frequently questioned and doubted. In such a case it may be overruled by any Court of superior jurisdiction. When old authorities are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, it is the duty of the House of Lords to overrule them".

Further this doctrine of precedent, however, cannot control questions involving the construction and interpretation of the Constitution or at least does not apply with the same force to the decisions on constitutional questions as to other decisions. Even though the previous decisions will not be entirely disregarded and may, in case of doubt, control the views of the Court.

Henry J. Abrahams in his "The Judicial Process" quoted Douglas J of the US Supreme Court saying that

"a judge looking a constitutional decision may have compulsions to revere past history and accept what was once written; but he remembers above all also that it is the "Constitution which he swore to support and defend, not the gloss which his predecessor may have put on it".

In dealing with ratio decidendi to operate as a precedent, Salmond in jurisprudence 12th Edition page 183 observed:-

"Where there are several different

judgments, as in a case on appeal, the ratio must be ascertained from the judgments of those in favour of the final decision. A dissenting judgment, valuable and important though it may be, cannot count as part of the ratio, for it played no part in the court's reaching their decision. It may happen in an 90 appeal court that all the judges concur in the decision but each one gives different reasons for it. In such a case one can only follow the advice of Lord Dunedin, who said that if it is not clear what the ratio decidendi was, then it is no part of a later tribunal's duty to spell out with great difficultly a ratio decidendi in order to be bound by it."

The petitioners, relying on the views of Shahabuddin Ahmed, J expressed in Anwar Hossain's case to the effect that in spite of these vital changes from 1975 by destroying some of the basis structures of the Constitution nobody challenged them in Court after revival of the Constitution and consequently they were accepted by the people and by their acquiescence have become part of the Constitution, submitted that in view of the principle of acquiescence the writ petition is not maintainable.

However, the above view does not depict the correct law as can be seen from the number of decisions cited hereinabove and secondly this statement is simply an obiter diclum as it was made while dealing with the Eighth Amendment and the Fifth Amendment was not in issue in the above decision and the observation was also uncalled for and thirdly, no other judges in the said case agreed with the said observation and as such it cannot be treated as ratio decidendi so as to have binding force under article 111. It may be noted here that four learned judges heard the appeal and out of them only M H Rahman, J. concurred with Shahabuddin J's decision that Eight Amendment was unconstitutional and not with the above quoted observation of Shahabuddin J regarding Fifth Amendment.

The next submission of the petitioners that the Fifth Amendment have been accepted by the people and so it cannot be challenged in view of the principle of waiver and acquiescence by delay. 91 In this regard the High Court Division held as follows :

"Let us now consider the contention that whether the vires of the Martial Law Proclamation etc. and the Fifth Amendment, has become barred by waiver and acquiescence, due to long delay in challenging those provisions. It was further contended that this delay shows that the people of Bangladesh had already accepted the Fifth Amendment, ratifying the Martial Law Proclamations etc. This proposition is anything but correct. Conclusions or inferences based on the facts and circumstances may vary with the change of social out-look or political situation but what is legally wrong remains wrong for ever.

Similarly, if there is a violation of law, it remains a violation for all time to come with consequential and inevitable results. The law of adverse possession has got no application in case of unconstitutional acts and events. One must not loose sight that the Constitution is supreme and every person in the Republic, be he is a servant of the Republic or an ordinary citizen, owe his unquestionable, unqualified and absolute loyalty to the Constitution. Any attempt to deface the Constitution or to make it subservient tantamounts to the offence of sedition of worst kind. The Fifth Amendment sought to legalize such offences committed by the Martial Law Authorities and the learned the Advocates for the respondents submitted that it cannot be questioned, because those Proclamations etc. were made by the Martial Law Authorities, that the Fifth Amendment itself provided that the ratification, confirmation and the validation of those Proclamations etc. and the actions taken thereon cannot be questioned before any Court, that it is beyond question because no body challenged those in all these years, as such, deemed to be waived or acquiesced. Those arguments are neither legal nor logical. Those arguments would not have been accepted even before the Star Chamber not to speak in the dawn of 21st century.

Further, the answer in this respect has been aptly given by Denning L.J in Oacker V Packer (1953)2 All ER 127 at page – 129 H
" What is the argument on the other side ? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall 92 never get anywhere .The law will stand still while the rest of the world goes on, and that will be bad for both".

Accordingly, we are also of the view that it is far, far better thing that we do now, what should be done in the interest of justice, even it was not done earlier.

We have already held that making of the Constitution subordinate and subservient to the Martial Law Proclamations, Regulations and Orders are absolutely illegal, void and non-est in the eye of law. So any attempt to legalise this illegality in any manner or method and by any Authority or Institution, how high so ever, is also void and non-est and remains so for

ever.

Further, if the Constitution is wronged, it is a grave offence of unfathomed enormity committed against each and every citizens of the Republic. It is a continuing and recurring wrong committed against the Republic itself. It remains a wrong against future generations of citizens. As such, there cannot be any plea of waiver or acquiescence in respect of unconstitutionality of a provision or an Act of Parliament.

As stated earlier the United States of America during its long and eventful history, also passed through many a turbulent periods but none of its amendments was made for anything but further advancement of civilization and humanity but not to legalize illegal acts. Its purpose is not to engineer or as a device to hide the illegal activities of usurpers or dictators but for achieving further improvements, further refinements of the constitutional position of the citizens of a Republic. This is the true spirit for amendment of a Constitution, the supreme law of the Republic. If the Court finds that the amendment is affected for a collateral and illegal purpose, the Court will not 93 be slow to declare it so in exercise of its high constitutional duties ordained upon it. There is no law of limitation in challenging an unconstitutional action, conduct, behaviour or acts. In such a situation, the cause of action is recurring till such acts are judicially considered. Constitutional questions are of utmost national as well as of legal interest and mere collateral observation does not carry much of an importance than a bare passing remark without any conviction.

In the case of Lois P-Myers V. United States 272 US 52 (1926) the Tenure of Office Act of 1867 and an Act of Congress of 1876, were declared invalid after more than 50 years after its enactment.

In the case of Proprietary Articles Trade Association V. Attorney General of Canada 1931 All ER 277 PC, the vires of Combines Investigation Act (1927) and Section 498 of the Criminal Code (1927) were under challenge. In considering the question, Lord Atkin for the Board held at page-280A:

"Their Lordships entertain no doubt that time alone will not validate an Act which, when challenged, is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment."

In the case of Grace Brothers Proprietary Limited V. The Commonwealth (1946) 72 C.L.R 269, the validity of the land Acquisition Acts 1906-1936 were challenged. In deciding the issue in the High Court of Australia, Dixon J. held at page- 289:

"……..the plaintiffs next proceed to impugn the validity of the Lands Acquisition Act 1906-1936 itself. Time does not run in favour of the validity of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. At best, lateness in an attack 94 upon the constitutionality of a statute is but a reason for exercising special caution in examining the arguments by which the attack is supported."

In the case of Frederick Walz V. Tax Commission of New York 25 L Ed 2d 697 (397 US 664) (1970), grant of property tax exemptions under the New York Constitution, to religions organizations were challenged on the ground of violation of First Amendment of U.S. Federal Constitution. In deciding the issue, Chief Justice Burger held at para – 12, page – 706: "[12] It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it".

In the case of Motor General Traders V. State of Andhra Pradesh AIR 1984 SC 121, in considering the validity of section 32(b) of A.P. Buildings Control Act of violative at Article 14 of the Constitution of India, Venkataramiah, J., held at para –24:

"24. It is argued that since the impugned provision has been in existence for over twenty three years and its validity has once been upheld by the High Court, this Court should not pronounce upon its validity at this late stage. There are two answers to this proposition. First, the very fact that nearly twenty three years are over from the date of the enactment of the impugned provision and the discrimination is allowed to be continued unjustifiably for such a long time is a ground of attack in these case.…….The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a statute is not a reason for exercising special caution in examining the arguments by which the attack is supported" (See W. A. Wvnes: 'Legislative, Executive and Judicial

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Powers in Australia', Fifth Edition, p. 33). We are constrained to pronounce upon the validity of the impugned provision at this late stage.....because the garb of constitutionality which it may have possessed earlier become 95 worn out and its unconstitutionality is now brought to a successful challenge."

These well reasoned decisions only confirm our view that the plea of waiver or acquiescence is no ground in considering the of vires of a constitutional amendment or for that matter any law. Validity of an Act of Parliament effecting an amendment of the Constitution is to be considered on its own merit as to whether such an amendment violates the Constitution itself even on a remote manner or not, but delay in challenging any such amendment, on its own, is not a valid objection to such a challenge.

Rgarding the submission of the petitioners that the Appellate Division in Anwar Hossain's case already refused to consider the past amendments of the Constitution which affected the basis structure of the Constitution, the High Court held as follows:

"Referring to an observation of Shahabuddin Ahmed, J.(as his Lordship then was), Mr. Akhtar Imam, Advocate, on behalf of the respondent no. 3, submitted that the Appellate Division in Anwar Hossain Chowdhury's case already refused to consider the past amendments of the Constitution which had admittedly destroyed the basic structure of the Constitution, as such, the learned Advocate submitted that it is now too late in the day after a delay of about 26 years since the Constitution (Fifth Amendment) Act was passed, to challenge its vires in view of the above decision of the Appellate Division.

The learned Advocate in effect wanted to impress upon us that the vires of the Constitution (Fifth Amendment) Act, 1979, had already been duly considered by the Appellate Division in the case of Anwar Hossain Chowdhury etc. V. Bangladesh 1989 BLD (Spl.) 1 and since the Court found on the basis of the decision in Golak Nath's case that the said constitutional amendment was accepted by the people of Bangladesh and became part of the Constitution by general acquiescence, the legality of the said Constitution (Fifth Amendment) Act, cannot now be re-opened all over again.

These contentions raised on behalf of the respondents, on the face of it have no legs to stand on. These contentions are 96 fallacious, misconceived and have no substance. However, we shall deal with these contentions in some details to repel any confusion in these regards.

The main plank of the above noted arguments are based on an observation of Shahabuddin Ahmed, J., in the case of Anwar Hossain Chowdhury etc. V. Bangladesh 1989 BLD (Spl.) 1. The said observations were made at para-332 of his Lordship's Judgment:

"In spite of these vital changes from 1975 by destroying some of the basic structures of the Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution. In the case of Golak Nath, the Indian Supreme Court found three past amendments of their Constitution invalid on the ground of alteration of the basic structures, but refrained from declaring them void in order prevent chaos in the national life and applied the Doctrine of Prospective Invalidation for the future. In our case also the past amendments which were not challenged have become part of the constitution by general acquiescence. But the fact that basic structures of the Constitution were changed in the past cannot be, and is not, accepted as a valid ground to answer the challenge to future amendment of this nature, that is, the Impugned Amendment may be challenged on the ground that it has altered the basic structure of the Constitution."

On the basis of this observation, the learned Advocates for the respondents stoutly submitted that the Fifth Amendment has been accepted by the people of Bangladesh by acquiescence and is now part of the Constitution, so also Martial Law culture and jurisprudence and cannot now its validity be challenged all over again. The learned Advocates argued these contentions on the basis of the decision of the Supreme Court of India in the case of Golak Nath V. State of Punjab AIR 1967 SC 1643 but without at all appreciating the context and perspective of the said decision, as such, it is necessary to recapitulate the said decision and its background.

In Kesavananda Bharat's case, AIR, (SC) Sikri, C.J.explained the matter at para-487 as follows:

"In this connection I may deal with the argument that the device of Art. 31B and the Ninth Schedule has up till now been upheld by this Court and it is now too late to impeach it. But the point now raised before us has never been raised and 97 debated before. As Lord Atkin observed in Proprietary Articles Trade Association v. Attorney-General for Canada, 1931 AC

310 at "Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultravires ; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment.

If any further authority is needed, I may refer to Attorney-General for Australia v. The Queen and the Boilermakers' Society of Australia, 1957 AC 288 at p. 328. The Judicial Committee, while considering the question whether certain sections of the Conciliation and Arbitration Act, 1904-1952 were ultra vires inasmuch as the Commonwealth Court of Conciliation and Arbitration had been invested with the executive powers along with the judicial powers, referred to the point why for a quarter of century no litigant had attacked the validity of this obviously illegitimate union, and observed :

"Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so for a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment."

M. H. Rahman, J., in Anwar Hossain's case at para 442 referring to the self-same submission of the learned Attorney General answered as follows:-

"442. After referring to the various past amendment particularly the Fourth Amendment, the learned Attorney General has submitted that the Constitution has undergone so many radical changes with regard to the Preamble, powers of the President and several other important matters that the doctrine of basic structure merely evokes anamazement why if it is such an important principles of law (and it had already been propounded by the Indian Supreme Court in 1973) it was not invoked earlier in this Court. I find no force in this contention. Because the principle was not invoked in the past the Court cannot be precluded now from considering it."

Under the circumstances, the contentions of the learned Advocates for the respondents that the Fifth Amendment had already been accepted by the people of Bangladesh by acquiescence, have got no substance. 98 Regarding the question of res judicata it appears that the order dated 7.6.1994 passed by the High Court Division in Writ Petition No. 802 of 1994 and the Judgment dated 5.7.1999 passed by the Appellate Division in Civil Appeal No. 15 of 1997 also show that the Constitution (Fifth Amendment) Act, 1979, was not judicially considered earlier. As such, there is no reason as to why we would not consider not only the legality of the Martial Law Proclamations etc. but also its legalization, ratification, confirmation and validation by inserting paragraph 18 in the Fourth Schedule to the Constitution by virtue of Section 2 of the Constitution (Fifth Amendment) Act, 1979, specially when the Rule was issued in that manner and form.

An effort has also been made by the petitioners to apply the principle of estoppel and acquiescence to prevent the Fifth Amendment from being declared ultra vires but it is a well-established principle that estoppel cannot be pleaded against or in respect of a statute, much less to speak of the Constitution. Similarly, there cannot be any acquiescence to hold valid an otherwise invalid law.

The learned counsel of the petitioners submitted that Article 150 of the Constitution provides a bar upon the High Court Division to entertain writ in respect of transitional or temporary provision.

Article 150 reads as follows :

…….....

English Text is:-

"150. The transitional and temporary provisions set out in the Fourth Schedule shall have effect notwithstanding any other provisions of this Constitution."

In this regard the High Court Division held as follows:- 99 Article 150 of the Constitution provides that transitional and temporary provisions would be set out in the Fourth schedule. This provision finds its place almost at the end of the Constitution. It is preceded by Article 149, the saving clauses for the existing laws and followed by three other Articles, namely, Article 151, which deals with the repeal of certain President's Orders, Article 152 narrates the interpretations of various words and Article 153 provides the date of commencement of the Constitution, its citation and authenticity.

In pursuance to the above Article in the Constitution, various transitional and temporary provisions were set out in details in the Fourth Schedule to the Constitution.

The heading of the Fourth Schedule reads as 'শন্তিকালীন' and 'অস্'য়ী' বিধানবলী. Its English version is 'Transitional and temporary provisions'.

Both Article 150 and heading of the Fourth Schedule show that the said Article, as well as the Fourth schedule, as set out in pursuance to Article 150, deals with transitional interim measures. A brief examination of the provisions originally

contained in the Fourth Schedule with its English text, would make it clear.

Then the High Court Division after quoting paragraph Nos.1 -17 of the Fourth Schedule further held as follows:

……....

"These are provided in pursuance to Article 150. These provisions| were necessary to protect various laws, actions and decisions, made, taken or pronounced since the declaration of Independence on March 26, 1971.

Jurisprudentially, the necessity for provisions for transitional and temporary provisions cannot be ignored. The provisions are generally made for the purpose of transition from the old legal order to a new one to ensure continuity of the legality of the new State. As such, of necessity, these provisions were made so that no legal vacuum occurs during the period from the time when a new nation came into existence till a Constitution of the said nation is framed. Obviously these provisions by its very nature, character and purpose, are of transitional and also of temporary status and ambit. The facts, circumstances and incidents leading to the making of those interim measures were necessary for the smooth transition and continuance of the functions of the young Republic of Bangladesh as a legal entity 100 of a Republic. Those interim measures were a legal necessity and could not be avoided.

As such, the purpose of Article 150 is limited upto the commencement of the Constitution and of any period mentioned in the Fourth Schedule. The ambit of this Article can not be extended beyond the commencement of the Constitution or any period mentioned in the Fourth Schedule. In this regard we must keep in view the words 'transitional' and 'temporary' appearing in Article 150. In the Bengali text of the Article 150 words 'শান্তিকালীন' and 'অস্থায়ী' are used. The ordinary dictionary meaning of the word ''শান্তিকালীন, according to the Bengali Dictionary, published by Bangla Academy, 6th Edition, March, 2005, is 'অবস্থা পরিবর্তনের সময়' and the meaning of the word 'অস্থায়ী' are 'অল্পকাল স্থায়ী, 'ক্ষণস্থায়ী, ¯স্থায়ী নয় এমন, সাময়িক. Similarly, the meaning of the word 'transition' according to The Oxford Dictionary and Thesaurus, Edited by Sara Tulloch, 1997, is 'a passing or change from one place, state, condition, etc., to another (an age of transition). According to The Chambers Dictionary, Deluxe Edition, Indian Edition, 1993, the meaning of the word 'transition' is passage from one place, state, stage, style or subject to another.

……
……
……

From these words it is so very clear that the purpose of Article 150 of the Constitutions only to protect various provisions, functions of different functionaries and all other actions taken since the declaration of independence and till the commencement of the Constitution. As such, the purpose of Article 150 is limited apparently only for that period and for a specific purpose.

……
……

It is very true that the Parliament by following the procedure mentioned in Article 142, may add any provision in the Constitution so long its basic structure is not disturbed but Article 150 is a special provision. It deals with only the transitional and temporary provisions prior to the commencement of the Constitution. This provision cannot be used to enlarge the Fourth Schedule, by addition of the provisions which related to the period after the commencement of the Constitution. If necessary, the Parliament may add any provision to the Constitution by way of amendment, without, however, changing its basic character but cannot enlarge the Fourth Schedule by adding any provision which is not a provision made during 'শন্িকালীন' ('transitional') which ended with the enactment and commencement of the Constitution on December 16, 1972. During the period between August 15, 1975 to April 9, 1979, the Constitution was made subordinate and subservient to the Martial Law Proclamations etc. The provisions of the Constitution was changed at the whims and caprices of the usurpers and dictators. We have already found that during the said period democracy was replaced by dictatorship and since November 1975, on the dissolution of the National Assembly, Bangladesh lost its republican character. Besides, Bangladesh can not even be considered independent during the said period. Earlier, it was conquered by the British Rulers, thereafter it was under the domination of the West Pakistanis. But this time, for all practical purposes, Bangladesh was conquered not by any foreign invaders but by Bengali speaking Martial Law Authorities.

Article 150 is certainly not meant to be abused by the usurpers for post facto legalization of their illegal and illegitimate activities which were beyond the ambit of the Constitution. As a matter of fact, realizing that all the Martial Law Proclamations etc. were un-constitutional, they sought to make those legal by incorporating those provisions as part of the Constitution. But the Fourth Schedule is not meant for dumping ground for illegal

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provisions. Rather, what is wrong and illegal remains so for all time to come. Besides, no one can take advantage of his own wrongs.

The Constitution is a sacred document, because it is the embodiment of the will of the people of Bangladesh. It is not to be treated as a log book of Martial rules.

It appears that Paragraph 3A and 18 to the Fourth Schedule, sought to ratify, confirm, validate and legalise all illegal and illegitimate provisions of Martial Law Proclamations, Martial Law Regulations and Martial Law Orders. Those Provisions and the actions taken thereon in violation of the Constitution, were not only illegal but seditious acts on the part of the Martial Law Authorities, as such, by any stretch of imagination, those provisions and the actions taken thereon come within the ambit of the word 'গতিকালীন' or 'transitional'. As such, those unconstitutional provisions were wrongly and illegally thrust in to the Fourth Schedule presumably in the garb of transitional and temporary provisions and thereby a fraud has been committed on the Constitution by such amendments." 102 We are of the view that the High Court Division unnecessarily dealt with Article 150 of the Constitution. As it appears paragraphs 21 and 22 as included in the Fourth Schedule are the results of the Eleventh and Twelfeth Amendment which were enacted in order to strike down remaining portion of the provisions of the Fourth and Fifth Amendment. As will be discussed later on in details, the Fifth Amendment which ratified and validated paragraphs 3A and 18, is ultravires because it ratified and validated the Martial Law Proclamations, Regulations and Orders made by the authorities not recognized by the Constitution and Article 142 thereof. Since paragraphs 21 to 22 of the Fourth Schedule were accomodated in order to protect the Eleventh and Twelveth Amendments by way of insertion of para 21 and 22 in the Fourth Schedule, therefore all observations made by the High Court Division regarding Article 150 and Fourth Schedule and also the findings thereof, are hearby expunged.

It was submitted by the petitioners that identification of the principles of nationalism, socialism and seclularism by the High Court Division as the basic structures of the Constitution has no legal foundation and the same are contrary to the decision given by the Appellate Division in Anowar Hossain's case.

As it appears the High Court Division prepared a chart showing the paragraphs of original Preamble and Articles 6, 8, 9, 10, 12, 25, 38 and 142 of the Constitution and also the amended versions of those after enactments of the Fifth Amendment. The above chart along with other particulars as given by the High Court Division are reproduced below: 103

"Before we discuss the above, as already stated the Praclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977) (Annexure-L-1 to the writ petition), replaced many of the paragraphs in the Preamble and in various provisions of the Constitution. The Proclamation was published in Bangladesh Gazette Extraordinary on April 23, 1977. This Proclamation made the following changes in the Constitution, amongst others":

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
1. First Paragraph of the Preamble:	1. First Paragraph of the Preamble:
We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;	We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through [a historic war for national independence], established the independent, sovereign People's Republic of Bangladesh;

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
2. Second Paragraph of the Preamble:	2. Second Paragraph of the Preamble:
Pledging that the high ideals of nationalism, socialism, democracy and secularism which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the constitution;	Pledging that the high ideals of absolute trust and faith in the almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicated themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence, shall be the fundamental principles of the Constitution;
3. Article-6:	3. Article-6:
Citizenship of Bangladesh shall be determined and regulated by law; citizens of Bangladesh shall be known as Bangalees.	(1) The citizenship of Bangladesh shall be determined and regulated by law. (2) The citizens of Bangladesh shall be known as Bangladeshis.
4. Article-8:	4. Article-8:
(1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy. (2) The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and	(1) The principles of absolute trust and faith in the almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy. (1A)Absolute trust and faith in the Almighty Allah shall be the basis of all actions.] (2) The principles set out in this Part shall

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
of the other laws of Bangladesh and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.	be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitute and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially
5. Article-9:	5. Article-9:
The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Banglaee nationalism.	The State shall encourage local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women.
6. Article-10:	6. Article-8:
A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.	Steps shall be taken to ensure participation of women in al spheres of national life.
7. Article-12:	7. Article-12 was deleted.
The principle of secularism shall be realized by the examination of-	
(a) communalism in all its forms;	

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
(b) the granting by the State of political status in favour of any religion; © the abuse of religion for political purposes; any discrimination against, or persecution of, persons practicing a particular religion.	
8. Clause 2 of Article-25 was not there.	8. Article-25: [(2) The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity.]
9. Article-38: Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order: Provide that no person shall have the right to form, or be a member or otherwise taken part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose.	9. Article-38: Every citizen shall have the right to rorm associations or unions, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
10 Article-42: (2) A law made under clause (1) shall provide for the acquisition, nationalization or requisition with or without compensation, and in a case where it provides for compensation shall fix the amount or specify the principles on which, and the manner in which , the compensation is to be assessed and paid; but no such law shall be called in question in any Court on the ground that it does not provide for compensation or that any provision in respect of such compensation is not adequate.	10. Article-42: (2) a law made under clause (1) shall provide for the acquisition, nationalization or requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which the compensation is to be assessed and paid; but no such law shall be called in question in any Court on the ground that any provision in respect of such compensation is not adequate.

thereon since August 15, 1975, till revocation of the Proclamations and the withdrawal of the Martial Law.

All the above changes were made in the English text of the Constitution but the original Bengali version of the Constitution remained as it was. The Bengali version of those and other and further changes in the Constitution were made by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978). Section 2, Clause (3) reads as follows:

"2. Amendment of the Second Proclamation. In the Proclamation of the 8th November, 1975.

.....

.....

.....

(3) after clause (gc), the following new clause shall be inserted, namely:

"(gd) the provisions of the Bengali text of the Constitution shall be amended in the manner specified in the Second Schedule to this Proclamation;"

Earlier, some minor changes were made in Article 142 by the Constitution (Second Amendment) Act, 1973 but subsequently Article 142 and the Bengali version of

Article 38 were also changed by the above Second Proclamation Order No. IV of 1978.

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
1| প্রস্ত্মাবনার প্রথম অনুচ্ছেদঃ	১| প্রস্ত্মাবনার প্রথম অনুচ্ছেদঃ
আমরা, বাংলাদেশের জনগণ, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষনা করিয়া জাতীয় মুক্তির জন্য ঐতিহাসিক সংগ্রামের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতন্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি|	আমরা, বাংলাদেশের জনগণ, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষনা করিয়া জাতীয় স্বাধীনতার জন্য ঐতিহাসিক সংগ্রামের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতন্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি|
2| প্রস্ত্মাবনার দ্বিতীয় অনুচ্ছেদঃ	2| প্রস্ত্মাবনার দ্বিতীয় অনুচ্ছেদঃ
আমরা অংগীকার করিতেছি যে,যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় মুক্তিসংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল-জাতীয়তাবাদ, সমাজতন্ত্র , গণতন্ত্র ও ধর্মনিরপেক্ষতারসেই সকল আদর্শ এই সংবিধানের মুল নীতি হইবেঃ	আমরা অংগীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় স্বাধীনতার জন্য যুদ্ধে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল সর্বশক্তিমান আল্লাহর উপর পুর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গণতন্ত্র এবং সমাজতন্ত্র অর্থ্যাৎ অর্থনৈতিক ও সামাজিক সুবিচারের সেই সকল আদর্শ এই সংবিধানের মুলনীতি হইবেঃ
3| অনুচ্ছেদ -৬ঃ	3| অনুচ্ছেদ -৬ঃ
বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নাগরিকত্ব নির্ধারিত ও নিয়ন্ত্রিত হইবে; বাংলাদেশের নাগরিকগণ বাংগালী বলিয়া পরিচিত হইবেন|	(১) বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নির্ধারিত ও নিয়ন্ত্রিত হইবে|
4| অনুচ্ছেদ -৮ঃ	৪| অনুচ্ছেদ -৮ঃ
(১) জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও	(১) সর্ব-শক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও

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ধর্মনিরপেক্ষতা-এই নীতিসমূহ এবং তৎসহ এই নীতসমুহ হইতে উদ্ভূত এই ভাগে বর্ণিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূল নীতি বলিয়া পরিগণিত হইবে|	বিশ্বাস, জাতীয়তাবাদ, গণতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচার - এই নীতি সমুহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভুত এইভাবে বর্ণিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূলনীতি বলিয়া পরিগণিত হইবে|
(২) এইভাগে বর্ণিত নীতিসমূহ বাংলাদেশ-পরিচালনার মূলসূত্র হইবে, আইন প্রণয়ণকালে রাষ্ট্র তাহা প্রয়োগ করিবেন, এই সংবিধান ও বাংলাদেশের অন্যান্য আইনের ব্যাখ্যাদানের ক্ষেত্রে তাহা নির্দেশক হইবে, তবে এই সকল নীতি সকল আদালতের মাধ্যমে বলবযোগ্য হইবে না|	(১ক) সর্ব-শক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাসহ হইবে যাবতীয় কার্যালীর ভিত্তি| (২) এই ভাগে বর্ণিত নীতিসমূহ বাংলাদেশ-পরিচালনার মূলসূত্র হইবে, আইন-প্রণয়নকালে রাষ্ট্র তাহা প্রয়োগ করিবেন, এই সংবিধান ও বাংলাদেশের অন্যান্য আইনের ব্যাখ্যাদানেরক্ষেত্রে তাহা নির্দেশক হইবে এবং তাহা রাষ্ট্র ও নাগরিকদের কার্যের ভিত্তি হইবে, তবে এই সকল নীতি আদালতের মাধ্যমে বলবৎযোগ্য হইবে না|
৫| অনুচ্ছেদ-৯ঃ	৫| অনুচ্ছেদ-৯ঃ
ভাষাগত ও সংস্কৃতিগত একক সত্তাবিশিষ্টযে বাঙালী জাতি ঐক্যবদ্ধ ও সংকল্পবদ্ধ সংগ্রাম করিয়া জাতীয় মুক্তিযুদ্ধের মাধ্যমে বাংলাদেশের স্বাধীনতা ও সার্বভৌমত্ব অর্জন করিয়াছেন, সেই বাঙালী জাতির ঐকা ও সংহতি হইবে বাঙালী জাতীয়তাবাদের ভিত্তি|	রাষ্ট্র সংশ্লিষ্ট এলাকার প্রতিনিধিগণ সমন্বয়ে গঠিত স্থানীয় শাসন সংস্ত প্রতিষ্ঠান সমূহকে উৎসাহ দান করিবেন এবং এই সকল প্রতিষ্ঠানসমূহকে উৎসাহ দান করিবেন এবং এই সকল প্রতিষ্ঠানসমূহকে কৃষক, শ্রমিক এবং মহিলাদিগকে যথাসম্ভব বিশেষ প্রতিনিধিত্ব দেওয়া হবে|
৬| অনুচ্ছেদ-১০ঃ	৬| অনুচ্ছেদ-১০ঃ
মানুষের উপর মানুষের শোধন হইতে মুক্ত ন্যায়ানুগ ও সাম্যবাদী সমাজলাভ নিশ্চিত করিবার উদ্দেশ্যে সমাজতান্ত্রিক অর্থনৈতিক বাবস্া প্রতিষ্ঠা করা হইবে|	জাতীয় জীবনের সর্বস্ত্মরে মহিলাদের অংশগ্রহন নিশ্চিত করিবার ব্যবস্া গ্রহন করা হইবে|

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৭| অনুচ্ছেদ-১২ঃ ধর্মনিরপেক্ষতার নীতি বাস্ত্মবায়নের জন্য (ক) সর্বপ্রকার সাম্প্রদায়িকতা, (খ) রাষ্ট্র কর্তৃক কোন ধর্মকে রাজনৈতিক মর্যাদাদান, (গ) রাজনৈতিক উদ্দেশ্যে ধর্মের অপব্যবহার, (ঘ) কোন বিশেষ ধর্মপালনকারী ব্যক্তির প্রতি বৈষম্য বা তাঁহার উপর নিপীড়ণ বিলোপ করা হইবে|	৭| অনুচ্ছেদ-১২ঃ বিলুপ্ত|
৮| অনুচ্ছেদ-২৫ঃ (২) অনুপস্থিত|	৮| অনুচ্ছেদ-২৫ঃ (১)..... (২) রাষ্ট্র ইসলামী সংহতির ভিত্তিতে মুসলিমদেশ সমূহের মধ্যে ভ্রাতৃত্ব সম্পর্ক সংহত, সংরক্ষণ এবং জোরদার করিতে সচেষ্ট হইবেন|
৯| অনুচ্ছেদ-৩৮ঃ জনশৃংখলা ও নৈতিকতার স্বার্থে আইনের দ্বারা আরোপিত মুক্তি সংগত বাধানিষেধ সাপেক্ষে সমিতি বা সংঘ গঠন করিবার অধিকার প্রত্যেক নাগরিকের থাকিবে| তবে শর্ত থাকে যে, রাজনৈতিক উদ্দেশ্যসম্পন্ড বা লক্ষ্যানুসারী কোন সাম্প্রদায়িক সমিতি বা সংঘ কিংবা অনুরুপ উদ্দেশ্য বা লক্ষ্যানুসারী ধর্মীয় নামযুক্ত বা ধর্মভিত্তিক অন্যকোন সমিতি বা সংঘ গঠন করিবার বা তাহার সদস্য হইবার বা অন্যকোন প্রকারে তাহার তৎপরতায় অংশ গ্রহন করিবার অধিকার কোন ব্যক্তির থাকিবে না|	৯| অনুচ্ছেদ-৩৮ঃ জনশৃখলা ও নৈতিকতার স্বার্থে আইনের দ্বারা আরোপিত যুক্তিসংগত বাধানিষেধ - সাপেক্ষে সমিতি বা সঙ্গ গঠন করিবার অধিকার প্রত্যেক নাগরিকের থাকিবেঃ
১০| অনুচ্ছেদ-৪২ঃ (২) এই অনুচ্ছেদের (১) দফার অধীন প্রণীত আইনে ক্ষতিপূরণে বাধ্যতামুলকভাবে গ্রহন, রাষ্ট্রায়ত্তকরণ বা	১০| অনুচ্ছেদ-৪২ঃ (২) এই অনুচ্ছেদের (১) দফার অধীন প্রণীত আইনে ক্ষতিপূরণসহ বাধ্যতামূলকভাবে গ্রহণ,

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দখলের বিধান করা হইবে এবং কোন ক্ষেত্রে ক্ষতিপূরণের বিধান করা হইলে তাহার পরিমান নির্ধারণ কিংবা অনুরুপ ক্ষতিপূরণ নির্ণয় ও প্রদানের নীতি ও পদ্ধতি নির্দিষ্ট করা হইবে, তবে অনুরুপ কোন অইনে ক্ষতিপূরণের বিধান করা হয় নাই বলিয়া কিংবা ক্ষতিপূরণের বিধান অপর্যাপ্ত হইয়াছে বলিয়া সেই আইন সম্পর্কে কোন আদালতে কোন প্রশড়ব উত্থাপন করা যাইবে না|	রাষ্ট্রায়ত্তকরণ বা দখলের বিধান করা হইবে এবং ক্ষতিপূরণের পরিমাণ নির্ধারণ, কিংবা ক্ষতিপূরণ নির্ণয় বা প্রদানের নীতি ও পদ্ধতি নির্দিষ্ট করা হইবে, তবে অনুরুপ কোন আইনে ক্ষতিপূরণের বিধান অপর্যাপ্ত হইয়াছে বলিয়া সেই আইন সম্পর্কে কোন আদালতে কোন প্রশড়ব উত্থাপন করা যাইবে না|
১১| অনুচ্ছেদ-১৪২ঃ (১) এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও (ক) সংসদের আইন দ্বারা এই সংবিধানের কোন বিধান সংশোধিত হইতে পারিবেঃ তবে শর্ত থাকে যে, (অ) অনুরুপ সংশোধনীর জন্য আনীত কোন বিলের সম্পূনই শিরনামায় এই সংবিধানেরকোন বিধান সংশোধন করা হইবে বলিয়া স্প ষ্টরুপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহন করা হইবে না; (আ) সচসদেরমোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরুপকোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্হাপিত হইবে না; (খ) উপরিউক্ত উপায়েকোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্হাপিত হইলে উপস্হাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তাহা করিতে অসমর্থ হইলে উক্তমেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে| (খ) এই অনুচ্ছেদের অধীন প্রণীত কোন	১১| অনুচ্ছেদ-১৪২ঃ (১) এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও (ক) সংসদের আইন দ্বারা এই সংবিধানের কোন বিধান সংযোজন, পরিবর্তন, প্রতিস্াপন বা রহিতকরণের দ্বারা সংশোধিত হইতে পারিবেঃ (অ) অনুরুপ (সংশোধনীর) জন্য আনীত কোন বিলের সম্পূর্ন শিরনামায় এই সংবিধানের কোন বিধান সংশোধন করা হইবে বলিয়া স্প ষ্টরুপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহন করা হইবে না; (আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরুপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্াপিত হইবে না; (খ) উপরিউক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্াপিত হইলে উপস্াপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে|

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সংশোধনের ক্ষেত্রে ২৬ অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না|	(১ক) (১) দফায় যাহা বলা হইয়াছে, তাহা সত্বেও এই সংবিধানের প্রস্তাবনার অথবা ৮, ৪৮, বা ৫৬ অনুচ্ছেদ অথবা এই অনুচ্ছেদের কোন বিধানাবলীর সংশোধনের ব্যবস্া রহিয়াছে এইরুপ কোন বিল উপরি-উক্ত উপায়ে গ্রহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট উপস্াপিত হইলে উপস্াপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন কি করিবেন না এই প্রশড়বটি গণভোটে প্রেরণের ব্যবস্া করিবেন| (১খ) এই অনুচ্ছেদের অধীন গণ-ভোট সংসদ নির্বাচনের জন্য প্রস্তুতকৃত ভোটার তালিকাভূক্ত ব্যক্তিগণের মধ্যে নির্বাচন কমিশন কর্তৃক আইনের দ্বারা নির্ধারিত মেয়াদের মধ্যে ও পদ্ধতিতে পরিচালিত হইবে| (১গ)এই অনুচ্ছেদের অধীন কোন বিল সম্পর্কে পরিচালিত গণ-ভোটের ফলাফল যেদিন ঘোষিত হয় সেই দিন- (অ) প্রদত্ত সমুদয় ভোটের সংখ্যাগরিষ্ঠ ভোট উক্ত বিলে সম্মতিদানের পক্ষে প্রদান করা হইয়া থাকিলে, রাষ্ট্রপতি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে, অথবা (আ) প্রদত্ত সমুদয় ভোটের সংখ্যাগরিষ্ঠ ভোট উক্ত বিলে সম্মতিদানের পক্ষে প্রদান করা না হইয়া থাকিলে, রাষ্ট্রপতি বিলটিতে সম্মতিদানে বিরত রহিয়াছেন বলিয়া গণ্য হইবে| (১ঘ) (১গ) দফার কোন কিছুই মন্ত্রিসভা বা সংসদের উপর আস্া আ আনাস্া বলিয়া গণ্য হইবে না| (২) এই অনুচ্ছেদের অধীন প্রণীত কোন সংশোধনের ক্ষেত্রে ২৬ অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না|

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
12. Article-142: Notwithstanding anything contianed in this Constitution – (a) any provision thereof may amended by way of addition, alteration, substitution or repeal by Act of Parliament: Provided that- (i) no Bill for such amendment shall be allowed to proceed unless the longtitle there expressly states that it will amend a provision of the Constitution; (ii) no such Bill shall be presented to the President for assentunless it is passed by the votes of not less than two-thirds of the total number of members of Parliament; (b) When a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.	12. Article-142: Notwithstanding anything contained in the Constitution- (a) any provision thereof may be amended by way of addition, alteration, substitution or reprel by Act of Parliament: Provided that- (i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution; (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament. (b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill,and if he fails so to do he shall be deemed to have assented to it on the expiration of that period. (IA) Notwithstanding anything contained in clause (I), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble or any

ORIGINAL CONSTITUTION	PROCLAMATIONS (AMENDMENT) ORDER, 1977
	provisions of articles 8,48 [or] 56 or this article, is presented to the President for assent, the President, shall, within the period of seven days after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to. (IB) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoralroll prepared for the purpose of election to {Parliament. (IC) On the day on which the result of the referendum conducted in relation in a Bill under this article is declared, the President shall be deemed to have- (a) assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assemed to; or (b) withheld assent therefrom, if the majority of the total votes cast are not in favour of the Bill being assented to. [(ID)] Nothing in clause (IC) shall be deemed to be an expression of confidence or no-confidence in the Cabinet or Parliament.]

Regarding the inclusion of the words "BISMILLAH" the High Court Division stated as follows:

The words, commas and brackets 'BISMILLAH-AR-RAHMAN-AR-RAHIM (In the name of Allah, the Beneficent, the Merciful) were inserted before the word 'PREAMBLE' by the above Order. 112

The High Court Division then, regarding the first paragraph of the preamble held that in the first paragraph of the preamble in the original Constitution the words 'a historic war for national independence' were substituted for the original words 'a historic struggle for national liberation'

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Regarding the original second paragraph of the Preamble and its amended version, which have been shown in the above chart, the High Court Division held that a plain reading comparing the original Preamble with the amended one would unmistakably show certain basic changes as the original Preamble clearly show that one of the four fundamental basis of our nation-hood and inspiration of liberation was "secularism" but the amended Preamble, specially the second paragraph, show that 'secularism' was omitted from the Preamble thus changing the basic character of the Constitution.

The High Court Division then quoting the provisions of original Article 8(1) and its amended version and sub Article (1A) of the same as shown in the above chart, held as follows

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It is true that partition was made, more or less on the basis of religion but India declared itself as a secular nation. Mr. Mohammad Ali Jinnah, the first Governor General of Pakistan, although in his first speech made on September 11, 1947, hinted that in Pakistan people of all religion would be equal without any religious discrimination but its first Constitution, made in 1956, declared the country as the Islamic Republic of Pakistan. The Constitution of 1962 made no difference. Pakistan, since the death of its first Governor General, reduced itself into a theoeratic nation as happened in medieval Europe.

But the high ideals of equality and fraternity so very gloriously enshrined in Islam could not spare the majority population of the erstwhile East Pakistan from total discrimination in all spheres of the State without any exception. The erstwhile East Pakistan was treated as a colony of West Pakistan and when voice was raised praying for at least near equal treatment, steam roller of oppression was

perpetrated on the people of the Eastern wing. After a long 23 years, the first general election in Pakistan was held in 1970 with one of the objects, to frame a Constitution. The National Assembly was scheduled to be convened at Dhaka on March 3, 1971, but General Yahya Khan, the President and CMLA postponed the Assembly, forcing the country into turmoil. Thereafter, on the night following March 25, 1971, General Yahya Khan and his military government unleashed the worst genocide in the history of mankind on the unarmed people of the erstwhile East Pakistan, and the 'valient' armed forces of Pakistan brutally killed millions. The vast majority of the people of this part of the world are God-fearing Muslims but their religion could not even save the fellow Muslims from being persecuted, killed and raped and their belongings being plundered and all ironically in the name of Islam.

Of necessity and being forced, the unarmed simple minded Bangalees of the then East Pakistan took up arms and rose against the tyranny for their survival. After liberation, such oppression and persecution on the Bangalee population was very much fresh in their minds. They were determined to establish an independent sovereign nation based on the democratic principles of equality and social justice where nobody will be discriminated on the ground of religion.

As such, the framers of the Constitution, from their earlier bitter experience during the liberation war, gave effect to the above lofty ideals of our martyrs which were reflected in the Preamble and Article 8(1) and other provisions of our Constitution.Those are the basic structures of the Constitution which were changed on replacement of the provisions of the original Preamble and Article 8(1) by the Proclamation Order No. 1 of 1977 and Second Proclamation Order No. IV of 1978, but such replacements changed the secular character of the Republic of Bangladesh into a theocratic State.

In this connection it should be remembered that the purpose of a Constitution is not to describe the tenets of a particular religion but is an Instrument creating the high institutions of the Republic and its relationship with its people. A Constitution upholds and guarantees such dignity to the people of the Republic with its own rights and also its obligations to the Republic in a broader sense but the religion of a particular section or sections of people shall neither required to be highlighted nor be interfered with in an ideal and model democratic form of Republic. The Constitution of such a Republic would never contain or refer to a particular faith but would leave such faculties with the people themselves. Bangladesh was dreamt of as a secular country and came into being as a secular country, as such, its Constitution was framed on that ideal, but any change from such a basis would constitute a change of the basic structure of the Constitution.

Such belief would reside with the people in accordance with their free will and shall never be interfered with, either by the State or any section of the population, however majority they may be. Such a secular concept would be inhibited in a modern democratic Constitution unless, of course, it is a theocratic State.

According to Thomas Paine, the purpose of the Constitution is :

"A Constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right…….A constitution is a thing antecedent to a government; and a government is only the creature of a constitution." (1792) (Quoted from Hilaire Barnett on Constitutional And administrative Law, Fourth Edition, 2002, Page-7).

According to O. Hood Phillips, the purpose of the Constitution is :

"The constitution of a state in the abstract sense is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen. A "Constitution" in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained."(Quoted from O. Hood Phillips' Constitutional and Administrative Law, Seventh Edition, 1987, at page-5).

From the discussions made above on the concept of written Constitution it would appear that this instrument is predominantly for the purpose of regulating the rights and obligations of the people vis-à-vis the State and vice versa but it has got nothing to do with the religious beliefs of its people.

Bangladesh came into being with the basic concepts of nationalism, socialism, democracy and secularism. As such, its Constitution was framed with those ideals in view. It was never intended to be a theocratic State. Rather, it was one of the major reasons for the Bangalees for their costly struggle for liberation.

In this connection it should be noted that the obligation of the State, in this respect, is to ensure that all persons in the Country can perform their respective religious functions. Besides, the State is to ensure

that no discrimination is made between the followers of one religion over the other.

The High Court Division also referred the case of S. R. Bommai V. Union of India AIR 1994 SC 1918 wherein the addition of "Socialist" and "Secularism" the Constitution of India in the year 1976 was considered. Ahmedi, J. (as his Lordship then was) in considering secularism as one of the basic structures of the Constitution observed at para – 28:

"Notwithstanding the fact that the words 'Socialist', and 'Secular'were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our Constitutional philosophy……By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the Nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion etc., but permitted special treatment for Scheduled Castes and Tribes, vide Arts. 15 and 16. Art. 25 next provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Art. 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion. ……State's revenue cannot be utilised for the promotion and maintenance of any religion or religious group that secularism is a basic feature of our Constitution……" (Page-1951-52)

In considering the concept of secularism, Sawant, J., held at para -88:
"These contention inevitably invite us to discuss the concept of secularism as accepted by our Constitution. Our Constitution does not prohibit the practice of any religion either privately or publicly . ……Under Articles 14, 15 and 16, the Constitution prohibits discrimination against any citizen on the ground of his religion and guarantees equal protection of law and equal opportunity of public employment.(Page- 2000) …….These provisions by implication prohibit the establishment of a theocratic State and prevent the State either indentifying itself with of favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations.(Page–2000),……"
K. Ramaswamy, J., quoting Dr. S. Radhakrishnan and Mahtma Gandhi, explained the concept of secularism as a basic feature of Constitution of India, at para –124:

"124. ……The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. I am respectfully in agreement with our brethern Sawant and Jeevan Reddy, JJ. In this respect. Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure all its people socio-economic needs essential for man's excellence and of moral well being, fulfillment of material prosperity and political justice." (Page–2019 -20)
Shahabuddin Ahmed, J. in Anwar Hossain Chowdhury's case evaluates Constitution in this manner at para-272, page-118:
"On the one hand, it gives out-lines of the state apparatus, and aspirations of the people; it gives guarantees of fundamental rights of a citizen and also makes him aware of his solemn duty to himself, to his fellow citizen and to his country."

No wonder his Lordship did not see any role of religion in the Constitution itself. As such, from the discussions made above, it is very clear that the Proclamations Order No. 1 of 1977 and the Second Proclamation Order No. IV of 1978, by making omitting secularism, one of the State policey from the Constitution, destroyed one of the basis of our struggle for freedom and also changed the basic character of the Republic as enshrined in the Preamble as well as in Article 8(1) of the Constitution. 1

The High Court Division then quoting original Aticle 6 of the Constitution and its amended version as shown in the above chart held as follows:
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The inhabitants of this part of the world irrespective of their cast, creed and religion were known as Bangalees from time immemorial. In their lighter moments they laugh as a Bangalee, in their despair they cry as a Bangalee, they record their feelings in Bangla, their history, their philosophy, their culture, their literature are all in Bangla.These finer features of life and intellects gave them an identity as a race in India for more than thousand years. This was so recorded in the memoirs of Hiuen Tsang, Ibn Batuta and many other travellers. Even during the reign of Emperor Akbar, this part of his empire was known as 'Sube Bangla'. As such, this identity as a Bangalee was not a mere illusion or frivolous idiosyncrasy but has a

definit character which separated them from other races in Pakistan. The identity of Punjabees, Pathans etc might have faded away in their new identity as Pakistanes but the Bangalees consciously kept their separate entity in their culture and literature inspite of their Pakistani citizenship. This was their pride. Their such entity as Bangalee blooms in their weal and woe. This sentiment may not have strict legal value but this very sentiment of Bangalee nationalism paved the way to the ultimate independent Bangladesh which has a very definite legal existence. As such, no body, how high so ever, must not ignore or undervalue the words 'Bangla' or 'Bangalee' because since 1952, beginning with the martyrs of language movement, thousands of Bangalees gave their lives for their right not only to speak Bangla but also to live as such Bangalee. It is their basic right and very naturally, their Constitution recognised it.

Since this unwanted change of identity from 'Bangalee' to 'Bangladeshi' does not commensurate with our national entity, this amendment goes to the root of our Bangalee nationalism".

The High Court Division then quoting the provisions of original Articles 6 and 9 of the Constitution and amended version of the same as shown in the above chart found that this concept of Bangalee nationalism as provided in original Article 6 was further expounded and explained in the original Article 9 of our Constitutin.

The High Court Division held :-

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This provision glorified our concept of Bangalee nationalism. The framers of the Constitution in their wisdom, thought it necessary to specifically spell out the basis of Bangalee nationalism in the Constitution itself. There may be many reasons for it. One reason may be that from time immemorial, this part of the world which is known as Bengal during British regime was continuously invaded by Shok, Hun, Pathans, Moguls and lastly by the English. As such, the Bangalees although retained their entity through their literature and cultural heritage but always governed by the people other than Bangalees. That is one of the reasons, Bengal voted so much in favour Muslim League in 1946 election on the Pakistan issue but even after independence from British yoke, in no time, their enthusiasm got a jolt when Mr. Jinnah declared at Dhaka in 1948 that Urdu would be the only state-language of Pakistan. This was followed by a long history of conspiracies to cripple the majority East Pakistan economically, politically and also to destroy their cultural heritage and above all their pride the Bangalee Nationalism but instead, with the rise of oppression, Bangali nationalism got new exuberance. The Pakistani Military Janta instead of settling the issues politically unleashed the worst genocide in the history of mankind. One of their prime objectives was to destroy and sweep away our Bangalee nationalism from root, once for all and make the Bangalees a hundred percent Pakistani. In order to achieve such an ill-advised end they did not only hesitate to kill millions of innocent Bangalees and plunder their belongings but also did their best to change their identity as Bangalee.

In this historical context, the framers of the Constitution in their anxiety, specifically spelt out the basis of Bangalee nationalism in the Constitution so that there should not be any confusion about their entity as Bangalee. Because, they had apprehensions like Justice Davies that this country may not always 'have wise and humane rulers…… wicked men, ambitious of power, with, hatred of liberty and contempt of law, may fill the place……."

Our history shows that their anxiety was not for nothing but was painfully correct because inspite of Article 7 of the Constitution , as stated earlier, the usurpers by declaring Martial Law seized the State Power. General Ziaur Rahman by Proclamations Order No. 1 of 1977 and the Second Proclamation Order No. IV of 1978, deleted Article-9 altogether, containing the basis of Bangali nationalism. This portion of the Proclamation Order did exactly what the Pakistani Military Janta wanted to do in Bangladesh in 1971. The similarity of intentions is so stark that it makes one start with surprise.

We fail to understand why Article 9 had to be repealed completely and possibly in order to camouflage the repealed Article, it was substituted with a new one which has no nexus with Bangalee nationalism.

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The substituted Article 9 is in respect of promotion of local Government institutions but Articles 11, 59 and 60 adequately provided for such institutions, as such, this substitution was unnecessary. The new provision, however important it may appear but cannot delete the basis of our Banglaee nationalism, contained in original Article 9, for which the people of Bangladesh fought for liberation and martyrs made their supreme sacrifices. The original Article 9 glorified our Bangalee

Nation-hood, possibly for the first time in our history, in recognition of such nation-hood, the Constitution emblemed it as one its basic structures but its deletion by a Proclamation Order constituted a betrayal to the freedom fighters and the three million martyrs and an insult to our Nation-hood".

The High Court Division then quoting the provision of original Article 10 of the Constitution and its amended version as shown in the above chart held that original Article 10, being one of the fundamental ideals on which the struggle for national liberation was fought, was spelt out in the Constitution as one of its basic structures and the amended provision provides for participation of women in national life but this is already well provided for in Article 28, as such, this substitution was unnecessary and redundant.

The High Court Division also held This substituted provision has no nexus with the original provision which spelt out establishment of a socialistic economic system and exploitation free society for Bangladesh. The people of Bangladesh dreamt of such a society for ages. In order to establish such an idealistic society the people of Bangladesh gave their lives. As such, the provision containing such idealism, very rightly found its place in the Constitution as one of the fundamental principles of State Policy. This being one of the basis for our struggle for liberation, this provision was one of the basic structures of the Constitution.

Without going into the merit of the substituted Article 10, we admit that we do not find any plausible reason to delete such a glorious provision for the salvation of fellow human being.

Then regarding Articles 9 and 10 the High Court Division held as follows:-

We have a shrewed suspicion that the substituted Article-9 and Article- 10 were incorporated in the Constitution only as an excuse for deleting the original provisions because both the substituted provisions are well provided for. Article-11 read with Articles 59 and 60 covers the substituted Article-9 while Article-28 takes care of the substituted Article-10.

In this connection, it should be remembered that a provision in the Constitution gives only the basic law with wide ideas and the Parliament enacts laws to give effect to those ideas. If we examine the substituted Article-9 and Article-10 it would appear that Article-11 read with Article 59 and 60 and Article-28 serves the purposes of those two substituted provisions very well and as a matter of fact those two Articles are redundant and apparently were substituted only to camouflage the originalArticle-9 and the original Article-10 which were two basic features of our Constitution.

The High Court Division then quoting the original provision of Article 12 of the Constitution as shown in the above chart, which was omitted from the Constitution by the Proclamation Order No. 1 of 1977, held as follows:

……

……

This provision of secularism explained and expounded in Article 12, is one of the most important and unique basic features of the Constitution. Secularism means both religious tolerance as well as religious freedom. It envisages equal treatment to all irrespective of caste, creed or religion but the State must not show any form of tilt or leaning lowards any particular religion either directly or even remotely. It requires maintenance of strict neutrality on the part of the State in the matters of different religions professed by various communities in the State. The State must not seen to be favouring any particular religion, rather, ensure protection to the followers of all faiths without any discrimination including even to an atheist. This is what it means by the principle of secularism.

Secularism was one of the ideals for which the struggle for liberation was fought and own and the framers of the Constitution in their wisdom in order to dispel any confusion, upheld and protect the said ideal of secularism as spelt it out in Article-12 of the Constitution as one of the fundamental principles of State Policy. Indeed this was one of the most important basic features of the Constitution. But the said basic feature of the Constitution was deleted by the Proclamation Order No. 1 of 1977 and the Second Proclamation Order No. IV of 1978 and thereby sought to change the secular character of the Republic of Bangladesh as enshrined in the original Constitution".

The High Court Division then quoting the provision of original Article 25 of the Constitution and its amended version as shown in the above chart held as follows:

……

……

……

This clause-2 is redundant. The original Article-25 itself provides for promotion of international peace, security and solidarity amongst all the nations including of course, the Muslim countries, in accordance with the charter of the United Nations. As such, its endeavor to foster further relations amongst only with the Muslim countries based on Islamic

solidarity, as stated in the added clause-2, can only be explained by its leaning towards becoming an Islamic Republic from a Secular Republic and thereby destroying its one of the most important and significant basic feature of our Constitution, namely, secularism".

The High Court Division then quoting the original Aricle 38 of the Constitution and its proviso as shown in the above chart, which was one of the fundamental rights, and the omission of the above proviso by the Second Proclamation (Sixth Amendment) Order 1976 held as follows:

With the same object to destroy the secular character of the Republic and its Constitution, the proviso to Article-38 was omitted by the Second Proclamation (Sixth Amendment) Order, 1976 (Second Proclamation Order No. III of 1976).

……
… … … … … … … .
……
…….

The above noted proviso to Article-38 was meant to protect the secular character of the Republic of Bangladesh in spite of one's fundamental right to form an association as envisaged in Article-38, but the above proviso was omitted by the Second Proclamation Order No. III of 1976, made by Justice Abusadat Mohammad Sayem, a nominated President of Bangladesh and CMLA. Since the secular character of the Republic was one of the objectives of the struggle for liberation, the omission of the aforesaid provision from the Constitution, as a bid or devise to change its such basic character, tantamounts to changing of the basic feature of the Constitution.

The High Court Division then concluded as follows:

We have discussed above the various provisions of the Constitution. Those provisions were not only the basic features of the Constitution but were also the ideals for the struggle for liberation, the corner stone of our Constitution. Those ideals were the basis for the birth of the Republic of Bangladesh. But those basic features of the Constitution were changed by the various Martial Law Proclamations.

Those Martial Law Proclamation Orders of 1975, 1976 and 1977 were incorporated in the Fourth Schedule to the Constitution by its amendment as Paragraph 3A. The English versions of the provisions discussed above were changed, deleted and modified by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977). The Bengali versions of those very provisions were subsequently added, deleted or amended by The Second Proclamations (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

In pursuance to the above Order the original Bengali text of the part of the Preamble, Articles 6, 8, 9, 10, 12, 25(2) and the Proviso to Article-38 were amended on the false pretext of persistent demand to repeal the undemocratic provisions although the aforesaid provisions are all the glorious basic features of the Constitution and had no nexus with the Fourth Amendment. All these changes of the basic structures of the Constitution were sought to be ratified, confirmed and validated by the Fifth Amendment apparently by playing fraud upon the members of the Second Parliament.

The pretexts to amend the Constitution in the above manner in the garb of repealing the undemocratic provisions of the Constitution incorporated therein by the Constitution (Fourth Amendment) Act, 1975, was altogether misconceived. Firstly because the Fourth Amendment of the Constitution, whatever its political merits or demerits, it was brought about by the representatives of the people by an overwhelming majority members of a sovereign Parliament. Secondly, however undemocratic, the Fourth Amendment may appear to an army commander, the amendment of the Constitution, could not be made even by the President or the CMLA or any person, how high so ever, but only by a Parliament. Thirdly, Major General Ziaur Rahman being an usurper to the Office of the President and in the Office of the legally non-existent Chief Martial Law Administrator, had no authority to change the Constitution. As an Officer of the Defence Services, he took oath to protect the Constitution of Bangladesh, but instead, on April 23, 1977, only two days after assuming the office of President, he illegally and without any lawful authority amended the various provisions of the Constitution which were the fundamental basis for the struggle for liberation, by the Proclamation Order No. 1 of 1977 and the Second Proclamation Order No. IV of 1978, and made the secular Republic of Bangladesh, a theocratic State, thereby the cause of the liberation War of Bangladesh was betrayed.

By virtue of the above two Proclamation Orders all the Proclamations, MLRs and MLOs were validated and were entered in the Fourth Schedule to the Constitution as paragraph 3A and 6B while paragraph 6A was inserted there earlier by Second Proclamation Order No. IV of 1976. Since it was known that in the face of the Constitution, those amendments would be void ab initio, as such, amendment of the Constitution itself was made in a bid to validate those Proclamations etc. by the

Fifth Amendment.

As it appears the High Court Division gave detail reasons for not condoning the omission of secularism as was provided in original preamble, Articles 8(1), 12 and other connected changes made in the Constitution in this regard. The High Court Division similarly did not also condone the substitution of Articles 6, 8(1), 9 and other connected Articles of the original Constitution which dealt with nationalism, socialism and connected matters.
From the contents of the proceeding of the Constitutional Assembly it appears that for days elaborate discussion was made in respect of secularism, nationalism and socialism and then those were incorporated at Chapter 11 of our Constitution which contained the fundamental principles of State Policy.

As will be evident from the case of S.R. Bommai Vs. Union of India (supra) which we have dismissed earlier, in the original Constitution of India enacted in the year 1949 there was no mention of secularism and socialism. Then in the year 1976 "socialist" and "secular" were incorporated in the Constitution of India by the 42th Amendment. In this regard in the above case Ramasyem, J held as follows:

"124. ……The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. I am respectfully in agreement with our brethern Sawant and Jeevan Reddy, JJ. In this respect. Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure all its people socio-economic needs essential for man's excellence and of moral well being, fulfillment of material prosperity and political justice." (Page–2019 -20) We, while deciding the power of the Court of judicial review, found that the High Court Division has the jurisdiction to decide as to whether any act or legislative measure made by any authority not competent to do so and / or such act or legislative measure made / done otherwise than in accordance with the procedure prescribed by the Constitution and / or are repugnant to the provisions of Constitution. As would be discussed lateron in details, by Proclamations (Amendment) Order No. 1 of 1977 (Proclamation Order No. 1 of 1977) and by Second Proclamation (Fifteenth Amendment) Order 1978 (Second Proclamation Order No. IV of 1978) omission of secularism and substitution of Articles 6 and 10 by the authorities not competent to promulgate / make those and by those Orders Constitution was also changed in the manner not prescribed by the Constitution and accordingly those Orders are illegal, void and non est, Preamble and the relevant provisions of the Constitution in respect of secularism, nationalism and socialism, as existed on August 15, 1975, will revive. However in respect of nationalism, as to be discussed later on, we are inclined to condone the substituted provision of Article 6.

Regarding nationalism though we expressed the view that being political issue, Parliament is to take decision in this regard, but if in place of "Bangladeshi" the word 'Bangalee' is substituted in terms of the judgment and order of the High Court Division, then all passports, identity cards, nationality certificates issued by the Government and other prescribed authorities, certificates issued by educational institutions, visa forms and other related documents of the government will have to be changed, reprinted or reissued. Moreover the Bangladeshi nationals who will return to Bangladesh as well as those travelling abroad will also face serious complications with the immigration authorities abroad. Apart from the above and other hackles and harassments, this change of the nationality would also cost millions from the public exchequer. So for wider public interest the substituted Article 6 is to be retained. Now the question is whether all the legislative measures i.e the Proclamations, Martial Law Regulations and Orders, were promulgated / made during the period from 15 August, 1975 upto April 9, 1979 by legally constituted authority or by usurpers and if by usurper whether those legislative measures were illegal, void and non east and whether the Second Parliament, itself, even by two third majority, could pass any law repugnant to the Constitution and whether the Fifth Amendment is ultravires the Constitution.

As it appears the grounds on which the Fifth Amendment was challenged before the High Court Division are that
(a) Khandoker Mushtaq Ahmed, Justice A. S.M. Sayem and General Ziaur Rahman having no authority to assume the post of President and Chief Martial Law Administrators and accordingly are usurpers and
(b) Fifth Amendment negates and is also repugnant to the basis feature of the Constitution.
Regarding the point of usurpers it was argued as follows:

I) On the murder of Bangabandhu Shiekh Mujibur Rahman, President of the People's Republic of Bangladesh, on August 15, 1975, Khandaker Mushtaque Ahmed in total violation of the Constitution, illegally seized the office of President of Bangladesh, as such, he was an usurper.

II) He had no authority to function as the President, as such, the Proclamation of Martial Law on August 20, 1975, and his tenure as the purported President for 82(eighty-two) days was illegal.

III) The assumption of office of a President of Bangladesh by the then Chief Justice of Bangladesh on November 6, 1975 and the assumption of powers of the Chief Martial Law Administrator by the Second Proclamation issued on November 08, 1975 was in total disregard of the Constitution.

IV) Appointment of Major General Ziaur Rahman, as the Chief Martial Administrator by the Third Proclamation issued on November 29, 1976, was made, beyond the ambit and in total disregard of the Constitution.

V) Appointment of Major General Ziaur Rahman as the President of Bangladesh on April 21, 1977, was made in violation and in total disregard of the Constitution.

VI) As such, all the Martial Law Proclamations, Martial Law

Regulations including the Martial Law Regulation No. VII of 1977 and the Martial Law Orders, were made by the usurpers of the office of President in violation and in total disregard of the Constitution , as such, illegal, void ab initio and nonest in the eye of law.

As it appears to decide the above issues, at first, the High Court Division referred to the Proclamations dated 20 August 1975, 8 November 1975 and 29 November 1975 and also different Martial Law Regulations and Orders.

The first is the **"Proclamation"** dated 20th August, 1975 which proclaimed as follows:

"Whereas I, Khandaker Moshtaque Ahmed, with the help and mercy of the Almighty Allah and relying upon the blessings of the people, have taken over all and full powers of the Government of the People's Republic of Bangladesh with effect from the morning of the 15th August, 1975.

And whereas I placed, on the morning of the 15th August, 1975 the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh;

And whereas, with effect from the morning of the 15th August, 1975, I have suspended the provisions of article 48, in so far as it relates of election of the President of Bangladesh, and article 55 of the Constitution of the People's Republic of Bangladesh, and modified the provisions of article 148 thereof and form I of the Third Schedule thereto to the effect that the oath of office of the President of Bangladesh shall be administered by the Chief Justice of Bangladesh and that the president may enter upon office before he takes the oath;

Now, thereof, I, Khandaker Moshtaque Ahmed, in exercise of all powers enabling me in this behalf, do hereby declare that-
(a) I have assumed and entered upon the office of the President of Bangladesh with effect from the morning of the 15th August, 1975;
(b) I may make, from time to time, Martial Law Regulations and Orders-
(I) providing for setting up Special Courts or Tribunals for the trial and punishment of any offence under such Regulations or Orders or for contravention thereof, and of offences under any other law;
ii) prescribing penalties for offences under such Regulations or Orders or for contravention thereof and special penalties for offences under any other law;
(iii) empowering any Court or Tribunal to try and punish any offence under such Regulation or Order or the contravention thereof;
(iv) barring the jurisdiction of any Court or Tribunal from trying any offence specified in such Regulations or Orders;
(c) I may rescind the declaration of Martial Law made on the morning of the 15th August, 1975, at any time, either in respect of the whole of Bangladesh or any part thereof, and may again place the whole of Bangladesh or any part thereof under Martial Law by a fresh declaration;
(d) this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force;
(e) the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof, continue to remain in force;
(f) all Acts, Ordinance, President's Orders and other Orders,
Proclamations rules, regulations, bye-laws, notifications and other legal instruments in force on the morning of the 15th August, 1975, shall continue to remain in force until repealed, revoked or amended ;
(g) no Court, including the Supreme Court, or tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order made by me in pursuance thereof, or any declaration made by or under this Proclamation, or

mentioned in this Proclamation to have been made, or anything done or any action taken by or under this Proclamation, or mentioned in this Proclamation to have been done or taken, or anything done or any action taken by or under any Martial Law Regulation or Order made by me in pursuance of this Proclamation ;
(h) I may, by order notified in the official Gazette, amend this Proclamation.

In respect of this Proclamtion the comments of the High Court Division are as follows:-
"……
……..

(i) "Certain provisions of the Constitution were suspended and modified, (ii) The Proclamation and Martial Law Regulations and Orders became effective inspite of the Constitution or other laws

(iii) The Constitution remained enforced but subject to the Proclamation, Martial Law Regulations and Orders
(iv) No Court including the Supreme Court would have any power to call in question the Proclamation, Martial Law Regulations or Orders".

On considerations of the above noted Proclamations it appears that

(i) "Khondokar Mustaque Ahmed had no lawful authority to seize the office of the President of Bangladesh, as such, he was an usurper

(ii) He had no authority to suspend any provision of the

Constitution

(iii) He had no authority to make any Proclamation, Martial Law Regulation or Order, beyond the ambit of the Constitution

(iv) He destroyed the supremacy of the Constitution by making it subject to the Proclamation, Martial Law Regulation and Order

(v) He ousted the jurisdiction of the Supreme Court, one of the three pillars of the State

(vi) The Proclamations etc. were made non justifiable before the Court of law as such the concept of the rule of law was destroyed".

Then came the **"Proclamation"** dated the 8th November, 1975 which proclaimed as follws:
Whereas the whole of Bangladesh has been under Martial Law since the 15th day of August, 1975;

And whereas Khandaker Moshtaque Ahmed, who placed the country under Martial Law, has made over the Office of President of Bangladesh to me and I have entered upon that Office on the 6th day of November, 1975;

And whereas in the interest of peace, order, security, progress, Keep in force the Martial Law proclaimed on the 15th August, 1975;
And whereas for the effective enforcement of Martial Law it has become necessary for me to assume the powers of Chief Martial Law Administrator and to appoint Deputy Chief Martial Law Administrators and to make some modifications in the Proclamation of the 20th August, 1975;

Now, therefore, I, Mr. Justice Abusadat Mohammad Sayem, President of Bangladesh, do hereby assume the powers of Chief Martial Law Administrator and appoint the Chief of Army Staff, Major General Ziaur Rahman B.U. Psc; the Chief of Naval Staff,Commodore M.H. Khan, P.S.N., B.N. , and the Chief of Air Staff, Air Vice Marshal M.G. Tawab, S.J. S.Bt. PSA, BAF., as Deputy Chief Martial Law Administrator and declare that

" (a) Martial Law Regulations and Orders shall be made by the Chief Martial Law Administrator;

(b) all Martial Law Regulations and Orders in force immediately before this Proclamation shall be deemed to have been made by the Chief Martial Law Administrator and shall continue to remain in force until amended or repealed by the Chief Martial Law Administrator;
(c) Parliament shall stand dissolved and be deemed to be so dissolved with effect from the 6th day of November, 1975, and general elections of Members of Parliament shall be held before the end of February, 1977;
(d) the persons holding office as Vice-President, Speaker, Deputy Speaker, Ministers, Ministers of State, Deputy Ministers and Whips, Immediately before this Proclamation, shall be deemed to have ceased to hold
office with effect from the 6th day of November, 1975;
(e) an Ordinance promulgated by the President shall not be subject to the limitation as to its duration prescribed in the Constitution of the People's Republic of Bangladesh
(hereinafter referred as the Constitution);
(f) the provisions of Article 48 of the Constitution shall remain suspended until further order;
(g) Part VIA of the Constitution shall stand omitted;
(h) the Chief Martial Law Administrator may appoint Zonal or Sub-Martial Law

Administrators;
(i) I may, by order notified in the official Gazette, amend this Proclamation;
(j) this Proclamation shall be a part of the Proclamation of the 20th August, 1975, and the Proclamation of the 20th August, 1975, shall have effect as modified by this Proclamation".
The High Court Division found that some of its salient features are as follows :
(I) Mr Justice Abu Sadat Mohammed Sayem entered upon the Office of the President on 6 November ,1975 131
(ii) He assumed the Office of the Chief Martial Law Administrator (CMLA) and appointed three Deputy Chief Martial Law Administrators (DCMLA)
(iii) Parliamnt was dissolved with effect from 6 November, 1975.
(iv) Part VI –A of the Constitution was omitted

(v) The Proclaimation dated 8 November, 1975 modified the Proclaimation dated 20 August, 1975 and became its part

On consideration of the above proclaimations it appeared to the High Court Division that;

(i) "Justice Abu Sadat Mohammed Sayem, the Chief Justice of Bangladesh had no authority to enter into the Office of the President of Bangladesh and to assume the power of CMLA , which was beyond the ambit of the Constitution

(ii) He had no lawful authority to dissolve the Parliament

(iii) Bangladesh was ruled for the next three and a half years without any Parliament, as such, lost its Republican character for the said period.

(iv) He had no lawful authority to suspend any provision or any part of the Constitution

(v) He had no lawful authority to make any Proclamation, Martial Law Regulation or Order.

(vi) Justice Abu Sadat Mohammed Sayem violated the Constitution of Bangladesh

(vii) He acted as a usurper in entering the Office of the President and in assuming the powers of CMLA"

The next is **the Second Proclamation (Third Amendment) Order, 1975 (Second Proclamation Order No.III of 1975) dated December 31, 1975**

As it appears by the above Order amongst others by inserting clause (gb) to the Proclamation dated November 8, 1975, the Bangladesh Collaborator's (Special Tribunals) Order 1972 (P.O No 8 of 1972), was omitted from the First Schedule to the Constitution.

The next is **the Second Proclamation (Sixth Amendment) Order, 1976 (Second Proclamation Order No.III of 1976) dated May 4th 1976**
As it appears by the above order, amongst others, by inserting clause (eb) to the Proclamation dated November 8, 1975, the proviso to Article 38 of the Constitution which is in respect of freedom of association other than in the name or on the basis of any religion as its basis or purpose, was omitted.

The next is **the Second Proclamation (Seventh Amendment) Order**, **1976. (Second Proclamation Order No IV of 1976) dated May 4 1976.**

It may be noted here that in the original Constitution Article 44 provided as follows:-

"44(1) The right to move the Supreme Court, in accordance with clause (I) of Article 102, for the enforcement of the rights conferred by this part, is guaranteed.
(2) Without prejudice to the powers of the Supmreme Court under Article 102, Parliament may by law empower any other Court, within the local limits of its jurisidiction, to exercise all or any of those powers".
But by Fourth Amendment sub article (1) of Article 102 was omitted and Article 44 was substituted as follows:-

"Parliament may be law establish a Constitutional Court, tribunal or commission for the enforcement of foundamental rights"

By the above Order 1976, amongst others, some amendments were made to the proclamation dated November 8, 1975 predominantly restoring original Article 44 as it existed before the Fourth Amendment but however without restoring sub Article (1) of Article 102 and the above Order also established separate "Supreme Court" and the "High Court" along with other incidental changes. As it appears by Order dated August 11, 1976 the above changes came into effect on and from August 13, 1976. Then came **The Political Parties Regulation, 1976 (Martial Law Regulation No. XXII of 1976) dated July 28, 1976**
The above Regulation repealed the Political Parties Act 1962 (Act III of 1962) and Political Parties (Prohibition) Ordinance 1975 (XLVI of 1975).

Then came the **Third Proclamation** dated 29th November, 1976 which proclaimed as follows:-

"Whereas I, Abusadat Mohammad Sayem, President of Bangladesh and Chief Martial Law Administrator, assumed, by the Proclamation of the 8th November, 1975, the powers of the Chief Martial Law Administrator and appointed the Chiefs of Staff of the Army, Navy and Air Force as Deputy Chief Martial Law Administrators; And whereas I do now feel that it is in the national interest that the powers of the Chief Martial Law Administrator should be exercised by Major General Ziaur Rahman B.U., psc., the Chief of Army Staff; Now, therefore, in exercise of all powers enabling me in this be and in modification of the provisions of the Proclamations of the 20th August, 1975, and 8th November, 1975, I, Abusat Mohammad Sayem, resident of Bangladesh, do hereby hand over the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., psc., who shall hereafter exercise all the powers of Chief Martial Law Administrator including the powers—

(a) to appoint new Deputy Chief Martial Law Administrators, Zonal Martial Law Administrators, and Sub-Zonal Martial Law Administrators,
(b) to amend the Proclamations of the 20th August, 1975, 8th November, 1975 and This Proclamation,
(c) to make Martial Law Regulations and Orders, and (d) to do any other act or thing or to take any other action as he deems necessary in the national interest or for the enforcement of Martial Law".

The views of the High Court Division in respect of the above order is as follows:

"By the Third Proclamation dated November 29, 1976.

(a) "Justice A.S.M. Sayem handed over the office of CMLA to Major General Ziaur Rahman BU. PSC.

(b) The Major General Ziaur Rahman, B.U. PSC would exercise all the powers of CMLA with powers amongst others to amend the Proclamations dated 20.8.75, 8.11.76 and 29.11.76."

The next is the **Court's Jurisdiction (Restriction) Regulation, 1977 (Martial Law Regulation No.1 of 1977)** dated March 9, 1977.

By the above Regulation restrictions were imposed upon the power of High Court to make interim orders and restrictions were also imposed upon the power of other Courts to pass temporary or interim injunction.

The next is **the Order dated 21. 4. 1977,** published in the Bangladesh Gazette Extra Ordinary on April 21, 1977**.**

The above Order disclosed that on being nominated under clause (aa) of the Proclamation dated 20.8.1975, Justice Abu Sadat Mohammad Sayem assumed the Office of the President but the High Court Division as it appears found that previously Justice Abu Sadat Mohammad Sayem, by Proclamation dated November 8, 1976, assumed the position of only the Chief Martial Law Administrator and he nominated General Ziaur Rahman to be the President of Bangladesh in that capacity.

The next is **the Proclamations (Amendment) Order 1977**, i.e **Proclamation Order No. 1 of 1977** dated April 23, 1977. By this Order, as described in details later on BISMILLAH-AR-RAHMAN-AR-RAHIM was inserted above the Preamble of the Constitution and the second and fourth paragraphs of the Preamble as well as Articles 6, 8, 9, 10, 12, 25, 38 and 141 of the Constitution were drastically changed and furher paragraph 3A was inserted in the Fourth Schedule of the Constitution.

The High Court Division found that by it:-
"a) The Second and Third Proclamations were changed.
b) Basic features of the Constitution were changed.
c) In the Fourth Schedule of the Constitution, after paragraph 3, a new paragraph, namely paragraph 3A was inserted in order to validate the proclamations, MLRs, MLOs etc, including the amendments of the Constitution which amongst others, provided that:
i) The Proclamations etc and the acts taken thereon were validated and those cannot be questioned before any Court.
ii) All amendments of the Constitution were sought to be validly made.
iii) The Proclamations MLRs and MLOs, were to be treated as the Acts of Parliament."

The next is **the Referendum Order, 1977 (Martial Law Order No.1 of 1977)** dated 1st May, 1977.

According to the High Court Division the above Order provided that to ascertain the confidence of the people in General Ziaur Rahman, a countrywide referendum was to be held on May 30, 1977 on the basis of direct adult franchise. The above Referendum was conceived and conducted under the MLO No.1 of 1977 and
"a) This was done in order to ascertain the confidence of the voters in President Major General Ziaur Rahman,
b) This kind of referendum is unknown to

the Constitution, or any law of the land". The next is **the Abandoned Properties (Supplementary Provisions) Regulations, 1977 (Martial Law Regulation No. VII of 1977)**, dated 17th October, 1977.

As it appears the above Regulation, amonst others, provided that even if the Government had unlawfully taken over a property as abandoned, the same shall remain as abandoned and any jugment declaring otherwise would be ineffective.
The next is **the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977),** dated 27th November, 1977**.**

As it appears by the above Order, amonsgt others, sub Article (1) of Article 102 was restored to its original position along with incidental amendmetns and the Supreme Court was again made to consist of the "Appellate Division" and the "High Court Division" with effect from December 1 of 1977 and in Article 44 the words "High Court" was substituted by the words "High Court Division". As stated earlier, by Second Proclamation (seventh Amendment) Order, 1976, separate Courts such a "Supreme Court" and "High Court" were set up with effect from 13th August, 1976.

The next is **the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978)** dated 8th December, 1978.

The Preamble of the above Order shows that the object of the above Order was only to replace the remaining portion of the undemoratic provisions of the Constituion incorporated by the Fourth Amendment. But this is not correct. It may be noted that earlier by Proclamation Order No.1 of 1977 changes were made only in the English Text of some amendents of the Constitution and the Bengali Text of those amendments remained as it is. By this Order similar changes were made in the Bengali Text. Further, changes were also made by inserting Sub Article (1A), (1B) and (1C) in Article 142 of the Constitution providing that for amendment of the preamble or any provisions of Articles 8, 48, 56, 58, 80, 92A or this sub Article (1A), referandam to be held. Further Articles 92A and 145A were also inserted giving the President wider powers.

Regarding the submission of the petitioners that because of the Fourth Amendment, Fifth Amendment had to be made has also no substance. Assuming that Fourth Amendment was violative of the basic features of the Constitution, there was no challenge of the Fourth Amendment in the Supreme Court as were done in the case of the Eighth Amendment as well as in the present case.

The High Court Division held that though in the Preamble of the above Order the object as shown was to replace the remaining portion of the undemocratic provisions incorporated in the Constitution by the Fourth Amendment, but many of the provisions incorporated by the Fourth Amendment have aready been dismantled by Martial Law Regulations. Moreover by the above Order not only the office of the President with all the powers provided by the Fourth Amendment were kept very much intact but by inserting Article 92A, undemoratc provisions, the Parliament was made subservient to the President for all practical purposes with the view that in an unlikely event, even if the Parliament fails to make grants or to pass the budget under Articles 89 and 90, or refuses or reduces the demands for grants, under the above Article 92A the President, without any worries about the funds, could dissolve the Parliament at his pleasure. In this way the then President of Bangladesh by the above Order of 1978 became the most powerful Chief Executive virtually without any checks and balance either from the Parliament or from any body else. However, the above Article 92A was omitted by the Twelfth Amendment by which though the Parliamentary system of Government was restored, but the supervisory power of the Supreme Court over the subordinate judiciary, as was given in Article 116 of the original Constitution, was not restored and it remained with the Executive. Further many provisions of the Fourth Amendment have not yet been disturbed, as if, those being pieces of democratic principle were required to be kept intact.

Then while the Parliament was already in session and The Constitution (Fifth Amendment) Act, 1979 which is under challenge, had already been enacted and was published in Bangladesh Gazette on April 6, 1979, by **The Proclamation Dated April 6, 1979** which was published in the Banglaesh Gazette Extraordinary on 7th April, 1979**.** This was the last proclamation issued by the Chief Martial Law Administrator by which Martial Law was revoked with effect from 8 pm of April, 6, 1979.

As it appears in the above Proclamation dated April 6, 1979 the reasons for imposing Martial Law are as follows :
" WHEREAS in the interest of peace, order, security, progress, prosperity and development of the country the whole of Bangladesh was placed under Martial Law on 15 August, 1975." But as it appears in the Preamble of the Proclamation dated 20th August, 1978 no indication of any grave situation was given. The Parliament was

very much in existence as on 15.8.75 and further in view of the death of the then President, the then Vice President was to take the charge of the President till a new President was elected. As such how the situation for declaring Martial Law as indicated above arose on August 15, 1975 ? Further in the above Order the reason for revoking the Martial Law was given as follows :

" AND, WHEREAS the situation in the country in all respect has since improved, and all other authorities and institution in the country may now properly function in accordance with the Constitution and the law."

But however clause (O) of the above proclamation the following unusal power was given to the President:-

"(O) the President may, for the purpose of removing any difficulty that may arise in giving effect to any provision of this Proclamation make, by order, such provisions as he deems necessary or expedient and every such order shall have effect notwithstanding anything contained in the Constitution or in any other law for the time being in force."

Considering the above clause (O), the High Court Division held that the above proclamation sought to subordinate the Constitution as clause (O) of the above Proclamation provided that the President may make any order "notwithstanding anything contained in the Constitution" though till the above Proclamation the President did not have any such power and thus this Proclamation bestowed 'Supra Constitutional' power on the then President of Bangladesh. Regarding the legality of the Proclamations dated August 20, 1975, November 8, 1975 and November 29, 1975, the High Court Division stated as follows :

"During ancient times proclamations were a source of law in England. King Henry the VIII (1509–1547) used to assert his power to make laws by way of proclamations. By the Statute of 1539, the King could legislate by Proclamations without Parliament. This Act was, however, repealed during the reign of Edward VI (1547–1553). Still Mary I (1553–1558) and Elizabeth I (1558–1603) used proclamations, but much less frequently than their father.

In those ancient days the Monarchs used to rule by divine right but by 17th century it was established that the source of the Regal power was the common law of the land.
King James I asked Sir Edward Coke, Chief Justice of the Kings Bench, his opinion about the right of the Kings to issue proclamations. To his such query, Chief Justice Coke, Chief Justice Fleming, Chief Baron Tanfield and Baron Altham delivered their opinion thus:

"The King cannot create any offence which was not an offence before, for then he may alter the law of the land in his proclamation in some high point…..The law of England is divided into three parts: the common law, statute law, and custom; but the King's proclamation is none of these…..The King has no prerogative but that which the law of the land allows him." (Reported in 2 State Tr 726, Quoted from Halsbury's Laws of England, Fourth Edition, Vol. 8, note-3 to Para-1099).

Their such bold opinion four hundred years ago in 1610 could give a check to the arbitrary exercise of power by the Crown, but four hundred years later, the learned Additional Attorney General of Bangladesh, contended that the Judges of the Supreme Court of Bangladesh, are not entitled to say so in respect of the Fifth Amendment Act, since there was an ouster clause.

Halsbury's Laws of England (Fourth Edition Vol. 8) describes Royal proclamations in this manner:

"1098. Use of proclamations. Proclamations may be legally used to call attention to the provisions of existing laws, or to make or alter regulations over which the Crown has a discretionary authority, either at common law or by statute. Thus, the Crown may by proclamation summon or dissolve Parliament, declare war or peace, and promulgate blockades and lay embargoes on shipping in time of war……
1099. Restrictions on proclamations. Under the general rule which restrains the Crown from legislating apart from Parliament, it is well-settled law that the Sovereign's proclamation, unless authorized in that behalf by statute, cannot enact any new law, or make provisions contrary to old ones……."
In modern times, the purpose of a Royal proclamation was confined and restricted to notify the existing law but can neither make law nor abrogate any .....
.....
But by proclamations, laws cannot be made and in all the Constitutions of the civilized world the power to legislate is always with the concerned legislative body or authority as spelt out in the respective Constitutions.

The Proclamation dated August 20, 1975 was made by Khandaker Moshtaque Ahmed, a Minister in the Cabinet of the Government of Bangladesh. As a Minister, he had specific functions under the

Constitution but by any stretch of imagination, it did not authorize him to seize the office of President of Bangladesh. No authority or legal provision has been mentioned in the Proclamation justifying his such assumption of power.

It appears that on the early morning of August 15, 1975, Khandaker Moshtaque Ahmed merrily changed the Constitution of Bangladesh and seized the office of President although without any legal authority. All the other Commanding Officers of the Armed Forces readily declared their allegiance to the new 'President' and his 'Government' apparently without any protest although on their commission as officers, they all took oath to be faithful to Bangladesh and its Constitution and bear true allegiance to the President The 'reign' of Khandaker Moshtaque Ahmed lasted for 82 (eighty two) days. On November 6, 1975 he handed over the office of President of Bangladesh to Justice Abusadat Mohammad Sayem. The history and the reasons which led Khandaker Moshtaque Ahmed to abdicate in favour of Justice Sayem were not explained to us with any details. All we could gather from the submissions made by the learned Advocates and their written arguments that there was a coup and a counter coup during the first week of November, 1975, the chain of command in the army in Dhaka Cantonment broke down, large sections of army personnel revolted leading to the whole-sale killing of a large number of officers of the army. Colonel Taher rescued Major General Ziaur Rahman, the Chief of Army Staff, from his residence in the cantonment.

This narration of the events may not be absolutely accurate but the real facts may never be known and in any case not very necessary for deciding the legal issues involved in this rule but stated only as a sequel leading to the assumption of office of President by Justice Sayem. But how and what chain of events led the Chief Justice of Bangladesh to become not only the President of Bangladesh but also the Chief Martial Law Administrator (CMLA), is far from clear. But in any case he was there as the President of Bangladesh and the CMLA as apparent from the Proclamation dated November 8, 1975.

The office of CMLA is a relic from the past. In the erstwhile Pakistan, General Ayub Khan was appointed CMLA by the Proclamation dated October 7, 1958 and again General Yahya Khan declared himself as the CMLA on March 25, 1969.
Earlier, although Martial Law was clamped on the country since August 15, 1975 but apparently no Martial Law Administrator was appointed but this time Justice Sayem by the Proclamation dated November 8, 1975, made some modifications in the earlier proclamation and also appointed the Chief of Army Staff, Major General Ziaur Rahman B.U. PSC; the Chief of Naval Staff, Commodore M.H.Khan, P.S.N., B.N. and the Chief of Air Staff, Air Vice Martial M.G.Tawab SJ., S.Bt., PSA, BAF, as Deputy Chief Martial Law Administrators.
Justice Sayem remained CMLA till November 29, 1976 and resigned from the office of President on April 21, 1977. During this time, a huge number of MLRs and MLOs were issued. Besides, various provisions of the Constitution were amended from time to time by amendment of the Second Proclamation. On our query as to how and under what law Justice Sayem, the Chief Justice of Bangladesh, could take over as the President of

Bangladesh and also assumed the powers of CMLA, the learned Additional Attorney General was without any answer.

We ourselves tried to probe but could not find any. The Constitution or any other law did not provide so. Besides, the concept of Martial Law is totally absent in our Constitution or in any other law or jurisprudence. The Constitution, the supreme law of the country, does not provide it nor any other law of our country. There is no place or office of CMLA in our jurisprudence. Obviously, the then Chief Justice of Bangladesh, completely ignored these legal realities for reasons best known to him but for that reason his taking over as the President of Bangladesh and assumption of the powers of CMLA would not become legal. Even a Chief Justice is not above the law.
.....

As such, he was a usurper to the office of President of Bangladesh and his assumption of the powers of CMLA, a legaly non-existent office, was void and non-est in the eye of law. Consequently, all his subsequentl actions taken by way of amendment of the Proclamation dated November 8, 1975 MLRs, MLOs and Ordinance, issued from time to time being beyond the ambit of the Constitution, were also all illegal, void ab initio and non est.
In due course, Justice Sayem by the Third Proclamation, handed over the office of Martial Law Administrator to Major General Ziaur Rahman, B.U., to act as the CMLA.

Subsequently, Justice Sayem nominated Major General Ziaur Rahman,B.U. to be the President of Bangladesh and also handed over the office of President to him.
From the Order dated April 21, 1977, we could learn that Justice Sayem became President of Bangladesh on being

nominated by Khondaker Mushtaque Ahmed. Justice Sayem similarly nominated Major General Ziaur Rahman, B.U. as the next President of Bangladesh.

The office of President has been created by Article 48 of the Constitution. The qualification and election to the office of President has been stipulated in the said provision. But there is no provision for nomination to the office of President in the entire Constitution. From the language of the Order dated April 21, 1977, it appears that this provision of nomination was added by clause (aa) to the First Proclamation by subsequent amendment. It is amazing that when even a chairman of a Union Council has to be elected and can not be nominated, nomination could be made to the highest office of the Republic and even that was done by a Proclamation. This is a disgrace and insult to the Nation-hood of Bangladesh. But this insult was ratified by the Second Parliament in the Constitution (Fifth Amendment) Act.

We have already stated above that a proclamation is not a law and by proclamation neither a law can be made nor a law can be abrogated not to speak of the provisions of the Constitution. As such, the First Proclamation along with clause aa is non-est in the eye of law and the nominations of both Justice Sayem and Major General Ziaur Rahman as President were in total violation of the Constitution, without jurisdiction and without lawful authority".

Next question is whether the situation as it existed on August 15, 1975 necessitated the imposition of Martial Law.In this regard it may be noted that in earstwhile Pakistan, at first, Martial Law was imposed on October 7, 1958 by Iskandar Mirza, the then President, and thereafter on March 26, 1969 Martial Law was imposed by General Yahia Khan and in both occassion some pretexts were raised for declaring Martial Laws. But while imposing Martial Law on August 15, 1975 and also while issuing the Proclamation dated August 20, 1975 Khandaker Mustaque Ahmed did not raise any such pretext. While discussing the Proclamation dated April 6, 1979 we have already stated that on August 15, 1975 the Parliament was very much in existence and Vice-President was also available. Accordingly in view of the killing of the then President, the constitutional machinery should have automatically come into effect and the Vice President should have taken over as Acting President until fresh election was held for the choice of a successor. The political machinery would then have moved according to the Constitution and the Parliament could have taken steps to resolve the crisis if Khandaker Mushtaq Ahmed had not, by Proclamation dated August 20, 1975, suspended the provision of Article 48 of the Constitution so far it related to the election of the President and likewise Justice Abu Sadat Mohammad Sayem, to whom Khondaker Mushtaq Ahmed allegedly handed over the power of the President, had not dissolved the Parliament by Proclamation dated November 8, 1975. Accordingly Khandaker Mustaq Ahmed, Justice Abu Sadat Mohammad Sayem and subsequently Major General Ziaur Rahman, to whom Justice Abusadat Mohammad Sayem handed over the Office of the President / Chief Martial Law Administrators in unconstitutional way, also did not allow the constitutional machinery to come into effect and on usurping the power of the Government started issuing all kinds of Proclamations, Martial Law Regulations and Orders.

Regarding this the High Court Division observed as follows:

If we look back to the history we would find that the Civil War of 1861 in the United States threatened its very existence as one nation. It engulfed the entire country. War went on in almost every where in the country with bleak prospect for survival of the States as united with their Constitution. Nobody could blame the President of the United States or others in that precarious and catastrophic situation if the Constitution of the country was pushed to the back-seat due to the said extreme emergency but even in that critical situation the citizens of the North upheld the high ideals of democratic principles and did not at all compromise and give in to the inhuman demands of the Southerners, for allowing slavery in the country in violation of the principles of liberty and equality, as enshrined in the Constitution, rather, they held the Constitution high above everything and fought with their lives to free the slaves in vindication of the rights guaranteed under the Constitution. Although there was serious controversy all over the country on the issue of slavery but even in such a trying moment, no proclamation declaring Martial Law was made. Instead, their lawfully elected President gave this message to the Congress on July 4, 1861, on the out break of the Civil War:

"It presents to the whole family of man the question whether a constitutional republic or democracy-a government of the people by the same people- can or cannot maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in numbers to control administration according to organic law in any case, can always, upon the pretences made in this case or any other pretences, or arbitrarily without any pretence, break up their

government and thus practically put an end to free government upon the earth. It forces us to ask: 'Is there, in all republics, this inherent and fatal weakness ? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" (Quoted from K.C. Wheare: Modern Constitutions, Second Edition, 1966, page-142).

Even the Supreme Court did not relent in that horrendous situation when the battles were fought everywhere but upheld the Constitution. In the case of Ex Parte Milligan (1866), Justice Davis, in delivering its opinion of the Court held: "This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had, fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

…….....

.....Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."…… (Quoted from Professor John P. Frank on ; Cases And Marterials on Constitutional Law (1952 Revision) at page 263-64) .

Regarding the other point as to whether Fifth Amendment negates the Constitution and repugnant to the basic feature of the Constitution, it was argued before the High Court Division that the provisions for amendment of the Constitution is provided for in Article 142 and amendment can be done only in the manner provided therein and since the Fifth Amendment validating all illegal acts of the usurpers under the cover of Martial Law, not only changed the basic structure as well as the character of the Constitution in its totality but rather uprooted the Constitution and as such, in the eye of law, it was no amendment but destruction of the Constitution altogether. As such Fifth Amendment is ultra vires the Constitution.

The High Court Division held as follows:-
"Major General Ziaur Rahman, B.U. being appointed as the Chief of Army Staff on the August 22, 1975, by Khandaker Moshtaque Ahmed, was still in the active service in the Republic of Bangladesh, when he entered the office of the President. It should be noted that by virtue of his office as President, the Supreme Command of the defence services, of Bangladesh was vested in him but at the same time he was a servant of the Republic as the Chief of Army Staff".

It should also be noted that in pursuance to the Order dated April 21, 1977, Major General Ziaur Rahman, B.U. must have taken the following oath before entering the office of President:

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.....

...
The English text is :
"1.The President.-An oath (or affirmation) in the following form shall be administered by the Chief Justice. (after amendment by Khondaker Moshtaque Ahmed by his Proclamation dated August 20, 1975):
"I, ……., do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of President of
Bangladesh according to law :
That I will bear true faith and allegiance to Bangladesh:
That I will preserve, protect and defend the Constitution:

And that I will do right to all manner of people according to law, without fear or favour, affection or ill will. …..…."
But only 2(two) days later, on April 23, 1977, by the Proclamations (Amendment) Order, 1977 (Proclamation Order No.1 of 1977) (Annexure-L-1), extensive changes by way of amendment was made which not only changed the Constitution but defaced it beyond recognition.

Besides, Paragraph 3A was inserted after Paragraph 3 in the Fourth Schedule to the Constitution to validate the transitional and temporary provisions made since the declaration of independence on March 26, 1971 till 16th December, 1972, when the Constitution became effective. But this

paragraph 3A was added to validate all the proclamations made since August 20, 1975 with amendments and all other acts, actions, MLRs and MLOs and proceedings taken thereunder till the date when the Martial Law would be withdrawn.

The High Court Division regarding the changes made by the above Proclamations dated August 20, 1975, November 8, 1975, and November 29, 1976 concluded as follows:-

ii) Votes of not less than two-thirds of the total number of members of Parliament is required to amend a provision of the Constitution. No Parliament was in existence, on the said date on April 23, 1977,but without following the above noted procedure, as stipulated in Article 142, the changes in various provisions of the Constitution were made by the above noted Proclamation Order.

iii) The above noted insertion and substitution of provisions, among others, made in the Constitution, changed its basic character, as such, could not even be done by the two-thirds of the total number of members of the Parliament.

iv) The Constitution was made subservient to the Proclamations, MLRs and MLOs.

This is no amendment of the Constitution even in the plain eyes, but destruction of the basic character of the Constitution by a Proclamation Order issued by the CMLA. But the Second Parliament ratified and validated the said Proclamation. Order No.1 of 1977 by the Fifth Amendment. Not only the Proclamations but also Martial Law Regulations and Martial Law Order made under the various Proclamations, were also ratified and validated.

Under the above noted Proclamations, a couple of hundred MLRs and MLOs were made from time to time to suit the needs of the usurpers, since the promulgation of the Martial Law on August 20, 1975, till it was withdrawn on April 7, 1979. All those MLRs and MLOs were also ratified and validated by the Fifth Amendment, passed on April 6, 1979".

We have already discussed as to how our Constitution is supreme and under the Constitution all the powers and functions of the Republic are vested in the three organs of the Government, namely, Legislature, Executive and Judiciary and since all these organs owe their existence to the Constitution, which is the embodiment of the will of the people as held by the superior Courts, the basic features of the Constitution cannot be changed by Proclamations, Martial Law Regulations or Orders.

From the analysis of Proclamations, MLRs and MLOs and the findings of our Apex Court as stated above, it is crystal clear that the Constitution was made subordinate and subservient to the Proclamations dated August 20, 1975, November 8, 1975 and November 29, 1976 and the Martial Law Regulations and Martial Law Orders made thereunder and as such those are ultra vires the Constitution. There is no provision in the Constitution which is 'Supra Constitutional' or to put it mildly, 'Extra Constitutional'. All laws or provisions and actions taken thereon must, without any exception, conform to the Constitution. Any law or provision, which is beyond the ambit of the Constitution, is ultra vires and void and as such non-est in the eye of law. The doubtless supremacy of the Constitution is far above all institutions, functionaries and services it created.

The High Court Division also narrated the submission of the learned Counsel of the proforma respondent No.5 which is as follows:

"Mr. Akhter Imam, Advocate, however, in support of Martial Law, contended that in our country a Martial Law culture or Martial Law jurisprudence has been evolved. He based his argument partly on the book 'Bangladesh Constitution: Trends And Issues' by Justice Mustafa Kamal. The learned Advocate, read extensively from the said book and argued that whether we like it or not we can neither avoid nor overlook the long shadows of Marshals. They are there and it is better to acknowledge them.

The High Court Divison answered the above submission as follows:

"We have given our utmost consideration to the above submission of Mr. Akhter Imam but found no substance. Rather we must acknowledge that we no longer live in the era of Henry VIII, Lois XIV or even Napoleon Bonaparte, whose words were law. But we live in the 21st century. Now the voice of the people, however feeble, is the first as well as the last word. Their will is the supreme law. The Constitution guarantees it, so also the Court and every body must follow this principle without any exception, in this Twenty First Century".

The High Court Division after considering all the aspects concluded as follows:-

"There is no existence of Martial Law Authorities or Martial Law Proclamations, Regulations or Order in our Constitution or any of the laws of the land. Those authorities or proclamations are quite foreign to our jurisprudence. Still those proclamations etc were imposed on the people of Bangladesh. Those have got no legal basis. Those are illegal and imposed by force. The people are constrained to accept it for the time being, not out of attraction to its legality but out of fear. As

such it has no legal acceptance. …….".

"In the instant case, the solemn Constitution of Bangladesh were freely changed by the Proclamations, MLRs and MLOs, issued by the self-appointed or nominated Presidents and CMLAs, in their whims and caprices. The learned Additional Attorney General although did not support Justice Sayem but half –heartedly attempted to justify the actions taken by Khondaker Moshtaque Ahmed and Major General Ziaur Rahman, B,U. psc. but when we specifically asked him to show us any Constitutional or legal provision in justification of the seizure of State – Power of the Republic , he was without any answer although he mumbled from time to time about the Fourth Amendment".

"The election of the Second Parliament was conducted in February, 1979, during Martial Law. At that time, Lieutenant General Ziaur Rahman, B.U., psc., was the President and the Chief Martial Law Administrator.

The Constitution (Fifth Amendment) Act, 1979, was passed on April 6, 1979, legalizing all the Proclamations, Martial Law Regulations, Martial Law Orders and the actions taken thereon, some of which are mentioned above. Any common man of ordinary prudence would say that the enormity of illegality sought to be legalized by this Act, would have shocked the Chief Justice Coke so much so that it would have left him dumb instead of saying that 'when an Act of Parliament is against right and reason, or repugnant …….the common law will control it and adjudge that Act to be void'. Perhaps, it would also leave the Chief Justice Hamoodur Rahman, out of his comprehension, if he would found that 'after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country', an army commander can have the audacity to change the Constitution beyond recognition and transfiguring a secular Bangladesh into a theocratic State. Perhaps the U.S. Supreme Court would have kept mum instead of holding that the guarantee of due process bars Congress from enactments that 'shock the sense of fair play'.

But what duty is cast upon us. It is ordained that we must not and appreciate the facts and the law in its proper perspective.
We have done so. We must hold and declare that this Constitution (Fifth Amendment) Act, 1979, is not law". Further as we have already stated while dealing with the principle of the supremacy of the Constitution, the will of the people does not contemplate Martial Law or any other laws not made in accordance with the Constitution. The armed forces are also subject to the will of the people and their oaths as provided in section 15(2) of the Army Act 1952, section 17(2) of the Air Force Act 1953 and section 14 of the Navy Ordinance 1961, make it plain. They serve the "people" and can never become the masters of the "people". Accordingly Martial Law is unconstitutional and illegal and it is a mischievous device not founded in any law known in Bangladesh and by Martial Law the whole nation is hijacked by some people with the support of the armed forces and the whole nation goes into a state of siege; it is like that the whole nation and "We, the people of Bangladesh", are taken hostage and further like a hostage-taking situation, the hostage takers themselves recognize that there is a superior law than their weapons which "We, the people" put in their hands to serve us and they recognize that there are two impediments to their taking over power or assuming power, first, the Constitution itself and so they, at first, start by saying "Notwithstanding anything in the Constitution" because they recognize that the Constitution is superior but they choose to brush it aside. The second impediment to Martial Law is the Superior Court of the Republic entrusted with the solemn duty to "preserve, protect and defend the Constitution" and so every Martial Law, immediately upon Proclamation seeks to curb the powers of the Court, particularly, the powers of the Constitutional Court.

According to the spirit of the Preamble and also Article 7 of the Constitution the military rule, direct or indirect, is to be shunned once for all. Let it be made clear that military rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever. Military rule is against the dignity, honour and glory of the nation that it achieved after great sacrifice; it is against the dignity and honour of the people of Bangladesh who are committed to uphold the sovereignty and integrity of the nation by all means; it is also against the honour of each and every soldier of the Armed Forces who are oath bound to bear true faith and allegiance to Bangladesh and uphold the constitution, which embodies the will of the people, honestly and faithfully serve Bangladesh in their respective services and also see that the Constitution is upheld, it is not kept in suspension or abrogated, it is not subverted, it is not mutilated, and to say the least it is not held in abeyance and it is not amended by an authority not competent to do so under the Constitution.

It may be mentioned here that the power to amend the Constitution is an onerous task assigned to the Parliament, which represents the will of the people through their chosen representatives. It is to be

carried out in accordance with the procedure prescribed in Article 142 of the Constitution and by no other means, in no other manner and by no one else. Suspending the Constitution in the first place, and then making amendments in it by one man by the stroke of his pen, that is to say in a manner not envisaged or permitted by the Constitution, are mutilation and/or subversion of the Constitution simpliciter and no sanctity is attached to such amendments per se. Indeed, the Constitution is an organic whole and a living document meant for all times to come.

In the cases of A. T. Mridha and Anwar Hossain this Division held that there is no existence of Martial Law or the Martial Law Proclamations, Regulations or Orders in our Constitution or any of the laws of the land. Those authorities or the Proclamation etc. are quite foreign to our jurisprudence. Still those Proclamations etc. were imposed on the people of Bangladesh. Those have got no legal basis. Those are illegal and imposed by force. The people are constrained to accept it for the time being, not out of attraction or its legality but out of fear.

Further, the Parliament though may amend the Constitution under Article 142 but cannot make the Constitution subservient to any other Proclamations etc. or cannot disgrace it in any manner since the Constitution is the embodiment and solemn expression of the will of the people of Bangladesh, attained through the supreme sacrifice of nearly three million martyrs. Further the Parliament, by amendment of the Constitution can not legitimize any illegitimate activity.

Accordingly, keeping the Constitution in suspension and/or making amendments therein by any authority not mentioned in the Constitution otherwise than in accordance with the procedure prescribed in the Constitution itself, is tantamount to mutilating, and / or subverting the Constitution. The Parliament can not ratify and validate those unconstitutional acts of usurpers as the Parliament is not supreme over everything else like the Parliament of the United Kingdom, rather it is independent of other organs of the State, but it certainly operates within certain parameters under the Constitution.

As it appears our country entered its "period of delinquency" at its very early Part in 1975 and that delinquency continued for long 16 years, Martial Law fall in the category of "black law" and the treatment of Martial Law by the Court, was mostly based on Dosso's case (supra). Accordingly the ghost of Dosso's case should be given a go bye from our jurisprudence forever so that no one can ever again even think about overriding "the will of the people" of Bangladesh and all must also ensure that this history never repeats and all must recognize these faults of the past and must rectify them so that our conscience remains clear.

The footprints that the "period of delinquency" leaves behind are Martial Law Proclamations, Regulations and Orders in the form of black laws and the ultimate insult to "We, the people" is the attempt to ratify these black laws by bringing those into the umbrella of the Constitution itself. In the present case the High Court Division recognizing these footprints sought to erase those once for all and since all the parties before the High Court Division agreed that the Constitution is supreme, obvious the result is that Martial Law is illegal and unconstitutional. So this Court should not, indeed cannot, grant leave in these petitions because to do so would be perceived by "the people of Bangladesh" in the way that our highest judiciary is still unable, long after the "period of delinquency", to properly and adequately deal with such delinquency and further, it would send wrong signals to those who wish to circumvent the "will of the people" in the Constitution and that each of our generations must also be taught, educated and informed about those dark days; the easiest way of doing this is to recognize our errors of the past and reflect these sentiments in the judgments of this Court which will ensure preservation of the sovereignty of "We, the people of Bangladesh" forever as a true "pole star".

Accordingly we hold that since the Constitution is the Supreme law of the land and the Martial Law Proclamations, Regulations and Orders promulgated / made by the usurpers, being illegal, void and non-est in the eye of law, could not be ratified or confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or orders.

Moreover the Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of judiciary and its power of judicial review.

As such we hold that the Fifth Amendment is also illegal and void and the High Court Division rightly declared the same as repugnant, illegal and ultra vires the Constitution.

Since we have declared that Martial Law Proclamations, Regulations and Orders etc., are illegal, void and non east and the Fifth Amendment is also ultravires the Constitution question will arise as to whether to prevent chaos and confusion and to avoid anomaly and to preserve continuity, the actions and the legislative measures taken during Martial Law period needs to be condoned / cured by the principles of doctrine of necessity.

As it appears that this doctrine of necessity is applied to condone some of the actions of an usurper, but not all. In Madzimbamutu v. Lardner-Burke (1968) 3 All ER 561, 579 Lord Pearce, in his dissenting judgment, termed the doctrine of condonation as doctrine of implied mandate and observed :-

"I accept the existence of the principle that act done by those actually in control without lawful validity may be recognized as valid or acted on by the courts, with certain limitations, namely, (a) so far as they are directed to and reasonably required for ordinary running of the State; and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution; and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign. This is tantamount to a test of public policy."

But since there are limits to the application of such doctrine of necessity, in occasions, the Parliament to come out of this position, resorted to the private law contrivance of ratification of unauthorized actions of agents by principals. But there is an inherent limitation even in respect of such ratification as life can not be given to a prohibited transaction by ratification. Again by the device of ratification the Parliament or any authority can not increase its authority. It can ratify only those actions of others which it can lawfully do. Thus parliament can not, by resorting to the device of ratification, ratify and render valid an amendment which, itself, can not do because the same will lead to the infringement of the basic features of the Constitution.

Regarding doctrine of necesity and condonation in Asma Jilani's case Hamoodur Rahman CJ. held as follows:
"I too am of the opinion that recourse has to be taken to the doctrine of necessary where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. In my humble opinion this doctrine can be involved in aid only after the court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then the question arises as to how many of his acts legislative or otherwise should be condoned or maintained notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization. Applying this test I would condone (1) all transactions which are past and closed for no useful purpose can be served by reopening them (2) all acts and legislative measures which are in accordance with or could have been made under the abrogated constitution or the previous legal order (3) all acts which tend to advance or promote the good of the people (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to establishment of in our case the objectives mentioned in the Objectives Resolution of 1954. I would not however condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to the legitimate objectives. I would not condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity".
However, the High Court Division found that item (2) as referred above, on conversion, means that any act or legislative measure, which is not in accordance with or could not have been made under the Constitution, can not be held valid by applying the doctrine of necessity and that Hamoodur Rahman CJ was speaking at a time when Pakistan was far away from accepting the doctrine of basic structure and therefore he could speak of condoning legislative actions which, at that time, the National Assembly had the competence to pass. Pakistan Supreme Court, towards the end of the twentieth century, leaned towards the doctrine of basic structure and the doctrine of basic structure was accepted as late in the year 2000 in the case of Zafar Ali Shah (Supra).
The High Court Division then regarding the doctrine of necessity and condonation expressed its view as follows:
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"But in order to avoid confusion, legal or otherwise and also to keep continuity of the sovereignty and legal norm of the Republic, we have next to consider as to whether the legislative acts purported to be done by those illegal and void Proclamations etc. during the period from August 15, 1975 to April 9, 1979, can be condoned, by invoking the doctrine of " State necessity"
But it does not mean that for the sake of continuity of the sovereignty of the State, the Constitution has to be soiled with

illegalities, rather, the perpetrators of such illegalities should be suitably punished and condemned so that in future no adventurist, no usurper, would have the audacity to defy the people, their Constitution, their Government, established by them with their consent.

If we hark back to history, we would see that after Restoration in 1660, Charles II became King of England with effect from January 1649, the day when his father, Charles I was beheaded, in order to keep the lawful continuity of the Realm but not the continuity of the illegal administration of the Commonwealth.

The moral is, no premium can be given to any body for violation of the Constitution for any reason and for any consideration. What is illegal and wrong must always be condemned as illegal and wrong till eternity. In the present context, the illegality and gravest wrong was committed against the People_fs Republic of Bangladesh and its people as a whole. This doctrine of State necessity is no magic wand. It does not make an illegal act a legal one. But the Court in exceptional circumstances, in order to avert the resultant evil of illegal legislations, may condone such illegality on the greater interest of the community in general but on condition that those acts could have been legally done at least by the proper authority.

This doctrine of State necessity was possibly applied for the first time in this sub-continent in Pakistan in the Reference by His Excellency the Governor General in Special Reference No.1 of 1955 (PLD 1955 FC 435). This Reference was made under section 213 of the Government of India Act, 1935. It shows how Ghulam Muhammad, the Governor General of Pakistan was caught in his own palace clique but was rescued by an over-anxious Supreme Court by reincarnating a long forgotten doctrine of State necessity. The Hon'ble Chief Justice looked for help in the 13th century Bracton digged deep into the early Middle Ages for Kings prerogatives and the maxims, such as, Id Quod Alias Non Est Licitum, Necessitas Licitum Facit (that which otherwise is not lawful, necessity makes lawful), salus populi Suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law). His Lordship referred to Chitty' s exposition and Maitland's discussion on the Monarchy in England in late 17th century. His Lordship thereafter referred to the summing up of Lord Mansfield, to the Jury in the proceedings against George Stratton and then held at pages 485-6:

The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is bone bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chittyfs statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful……. the indispensable condition being that the exercise of that power is always subject to the legislative authority of parliament, to be exercised ex post facto…….The emergency legislative power, however, cannot extend to matters which are not the product of the necessity, as for instance, changes in the constitution which are not directly referable to the emergency. But what the Hon'ble Chief Justice decided to ignore was that the Governor General himself brought disaster upon the entire country by dissolving the Constituent Assembly earlier in October 1954 when the Prime Minister had already set the date for adopting the Constitution for Pakistan in December, 1954. That itself was a violation of the Independence Act, 1947 and a treasonous act against the people of Pakistan. With great respect, the Governor General ought not to have allowed to take advantage of his own grievious wrong against Pakistan. As a matter of fact, that was the beginning of the end. Besides, the Hon'ble Chief Justice also forgot that only a few months back in the case of Federation of Pakistan V. Moulvi Tamizuddin Khan PLD 1955 FC 240, his Lordship refused to interfere even in case of a real disaster brought about, again by the Governor General in dissolving the Constituent Assembly.

In that case the above Chief Justice held at page . 299:

It has been suggested by the learned Judges of the Sind Chief Court and has also been vehemently urged before us that if the view that I take on the question of assent be correct, the result would be disastrous because the entire legislation passed by the Constiuent Assembly, and the acts done and orders passed under it will in that case have to be held to be void. …….I am quite clear in my mind that we are not concerned with theconsequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under section (3) of section 3 needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by

assuming for itself the posititon of an irremovable Legislature to what straits it has brought the country. Unless any rule of estoppel require us to pronounce merely purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constiution or to the country to set right the position in any way it may be open to them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule estoppel stands in the way of a clear pronouncement.

This stoic and stout stand like that of a 16th Century Common Law Judge was taken by Munir, C.J., when the dissolution of the Constituent Assembly was challenged but the same Chief Justice became full of equity when the Governor General was caught in his own game because of his earlier dissolution of the Constituent Assembly. It appears that the Hon'ble Chief Justice was more concerned and worried about the difficulties of the Governor General who was supposed to be only a titular head, than the Constituent Assembly, the institution which represented the people of Pakistan but was dissolved by the Governor General which augmented the constitutional crisis. With great respect, it appears that the Hon'ble Chief Justice of Pakistan held a double standard in protecting the interest of the Governor General than that of the Constituent Assembly. He refused to invoke the doctrine of necessity but upheld the dissolution of the Constituent Assembly which by then was ready with the Constitution for Pakistan but invoked the said very doctrine in aid of the Governor General to steer him clear out of the constitutional crisis, created by himself, by twisting and bending the legal provisions even calling upon the seven hundred years old maxims.

However, Cornelius, J., in Tamizuddin Khan's case dissented and at page- 358 held as follows:

"I place the Constituent Assembly above the Governor General, the chief Executive of the State, for two reasons, firstly that the Constituent Assembly was a sovereign body, and secondly because the statutes under and in accordance with which the Governor-General was required to function, were within the competence of the Constituent Assembly to amend....
It should be noted that earlier to the Governor Generals Reference No.1, in the case of Usif Patel V. Crown PLD 1955 FC-387, decided on April 12, 1955, on behalf of an unanimous Supreme Court, Munir C.J. held at page -392:

The rule hardly requires any explanation, much less emphasis, that a Legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates, the principle governing validation being that validation being itself legislation you cannot validate what you cannot legislate upon. Therefore if the Federal Legislature, in the absence of a provision expressly authorizing it to do so, was incompetent to amend the Indian Independence Act or the Government of India Act, the Governor-General possessing no larger powers than those of the Federal Legislature was equally incompetent to amend either of those Acts by an Ordinance. Under the Independence Act the authority competent to legislate on constitutional matters being the Constituent Assembly, it is that Assembly alone which can amend those Acts. The learned Advocate-General alleges that the Constituent Assembly has been dissolved and that therefore validating powers cannot be exercised by that Assembly. In Mr. Tamizuddin Khan's case, we did not consider it necessary to decide the question whether the Constituent Assembly was lawfully dissolved but assuming that it was, the effect of the dissolution can certainly not be the transfer of its powers to the Governor-General. The Governor-General can give or withhold his assent to the legislation of the Constituent Assembly but he himself is not the Constituent Assembly and on its disappearance he can neither claim powers which he never possessed nor claim to succeed to the powers of that Assembly. His Lordship further held at page-396:

"This Court held in Mr. Tamizuddin Khan's case that the Constituent Assembly was not a sovereign body. But that did not mean that if the Assembly was not a sovereign body the Governor-General was".
But in this connection, the opinion of De Smith is pertinent:

"It is clear ……. that the leading Pakistan decision in 1955 was a not very well disguised act of political judgment. By the normal canons of construction, what the Governor-General had done was null and void. But the judges steered between Scylla and Charybdis and chose what seemed to them to be the least of evils. Quoted from Leslie Wolf- Phillips: Constitutional Legitimacy at page- 11)".
This is how the doctrine of necessity made its appearance in order to salvage what was left of the normal constitutional process in Pakistan at that time in 1955.
The High Court Division further held as follows:

In the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139, Hamoodur Rahman, C.J., held at page-204-5: Reverting now to question of the legality of the Presidential Order No.3 of 1969 and the Martial Law Regulation No.78 of 1971 it follows from the reasons given earlier that they were both made by an incompetent authority and, therefore; lacked the attribute of legitimacy which is one of the

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essential characteristics of a valid law. The Presidential Order No.3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Provisional Constitution Order itself amend the Constiution so as to take away the jurisdiction conferred upon the High Courts under Article 98 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist.

This does not, however, dispose of the case, for, we are again presented by the learned Attorney-General with the argument that a greater chaos might result by the acceptance of this principle of legitimacy. He has reminded the Court of the grave consequences that followed when in Moulvi Tamuzuddin Khan's case a similar argument was spurned by the Federal Court and disaster brought in. I am not unmindful of the grave responsibility that rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law. …… This is a difficult question to decide and although I have for my guidance the example of our own Federal Court, which in Governor-General's Reference No.1 of 1955 invoked the maxim of salus populi suprema lex to create some kind of an order out of chaos. I would like to proceed with great caution, for, I find it difficult to legitimize what I am convinced is illegitimate….."

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Then in the above case the Hon'ble Chief Justice fell back on the doctrine of necessity and held at page-206-7 the contents of which we have already stated earlier. Then regarding the case of Nusrat Bhutto, on which the petitioners relied in which Pakistan Supreme Court did not follow Asma Jilani's case and gave approve to the inposition of Martial Law invoking doctrine of necessity, the High Court Division held as follows:

It appears, that the Supreme Court of Pakistan accepted the explanation given by General Mohammad Ziaul Haq for the Army's intervention and validated such intervention and the imposition of Martial Law invoking the doctrine of State necessity.In doing so the learned Judges resorted to the Holy Quran also, in justification for suspension of the Constitution and dissolution of the National and Provincial Assemblies. In this respect they were satisfied with the explanations given by the Army Chief of Staff. This was a U-turn of the Supreme Court from its earlier stand in the cases of Asma Jilani and Ziaur Rahman.

The High Court Division further held as follows:-

……As Judges, our only tools are the Constitution, the laws made or adopted under it and the facts presented before us. We are bound by these instruments and we are to follow it. The plea of State necessity shall have to be considered within the bounds of these instruments and not without those. That is how we read Grotius and Lord Pearce in Madzimbamuto. But Grotius or Lord Mansfield in Stratton's case (1779) or Lord Pearce, did not dream of breaking any law or giving legitimacy to an illegality, far less making the Constitution, the supreme law of any country, subservient to the commands of any Army General, whose only source of power is through the muzzle of a gun although all the Generals in any country seize power in the name of the people and on the plea of lack of democracy in the country with a solemn promise to restore it in no time, as if the democracy can be handed down to the people in a well packed multi-coloured gift box.

Democracy is a way of life. It cannot be begotten over-night. It cannot be handed down in a silver platter. It has to be earned. It has to be owned. The world history is replete with stories of people, ordinary people who fought for their rights in different names in different countries, but the cry for liberty, the cry for equality, the cry for fraternity were reverbrated in the same manner from horizon to horizon. This sense of liberty made us independent from the yoke of the British rule in 1947 and the same sense of liberty pushed us through the war of liberation in 1971 and brought Bangladesh into existence. But the proclamation of Martial Law is altogether the negation of the said spirit of liberty and independence. In this connection we would recall what was said in the case of Shamima Sultana Seema V. Government of Bangladesh 2LG (2005) 194 at para-123:

It should be remembered that the ingrained spirit of the Constitution is its intrinsic power. It is its soul. The Constitution of a country is its source of power. It is invaluablewith its such soul. It strives a nation to move forward. But if the said spirit is lost, the Constitution becomes a mere stale and hollow instrument without its such life and force. It becomes a dead letter. The United Kingdom, although does not have any written Constitution but has got the spirit of the Constitution and that is why the people of that country can feel proud of their democracy but there are countries with Constitutions, written and amended many a times but without the said spirit, the democracy remains a mirage".

The High Court Division further held as follows:

We have already discussed earlier that the English text of various portion of the Preamble, Article 6, Article 8, Article 9, Article 10 and Article 25 were altogether changed or replaced while Article 12 was completely omitted by the Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977). This was published in Bangladesh Gazette Extra-ordinary on April 23, 1977.Besides other changes, a new paragraph with the heading, 3A. validation of certain Proclamations, etc. was inserted after paragraph 3 in the Fourth schedule to the Constitution. The English text of the proviso to article 38 was omitted by the Second Proclamation (Sixth Amendment) Order 1976 (Second Proclamation Order No. III of 1976). The Bengali text of the above noted all the changes were made by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978). Besides, clauses 1A, 1B and 1C were added to Article 142 of the Constitution by the above Order No. IV of 1978. These changes were of fundamental in nature and changed the very basis of our war for liberation and also defaced the Constitution altogether. The very endeavour to change the basic features of the Constitution by the Martial Law Proclamations was illegal, void and non est in the eye of law. By the said Martial law Proclamations, the secular Bangladesh was transformed into a theocratic State and thereby not only changed one of the most basic and fundamental features of the Constitution but also betrayed one of the dominant cause for the war of liberation of Bangladesh.

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The Proclamations (Second Amendment) Order, 1975, dated November 6, 1975, was made, inserting clause (aa) in the Proclamation dated August 20, 1975, providing for nomination of any person as President.

The Proclamation dated November 8, 1975, omitted Part VI A of the Constitution (added by the Fourth Amendment).

The Second Proclamation (Sixth Amendment) Order, 1976 (Second Proclamation Order No. III of 1976), omitted the following proviso of the original Article 38:

"Provided that no person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose".

The Bengali version of the above Proviso was omitted subsequently by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) 2nd Schedule.

The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976), repealed most of the changes brought about by the (Fourth Amendment) Act, 1975, save and accept Chapters I and II of the Part IV of the Constitution, keeping the Presidential form of Government, introduced earlier by the Fourth Amendment. The Second Proclamation Order No. IV of 1976 came into force with effect from 13.8.1976. The Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977) (Annexure-L-1 to the writ petition), replaced many of the paragraphs in the Preamble and in various provisions of the Constitution. The Proclamation was published in Bangladesh Gazette Extraordinary on April 23, 1977. This Proclamation made changes in First and Second Preamble, Articles 6, 8, 9, 10, 12, 38, and 142 of the Constitution which has been stated earlier .

"Excepting Article 42, these are the basic changes in the structure of the Constitution and cannot even be done by the Parliament itself, and as such, the question of ratification, confirmation or validation of those changes does not arise.

Besides, by the above noted Proclamation, by the amendment of Article 6, our identity of thousand years as Bangalee was changed into Bangladeshis. Since the said change was made by a Martial Law Proclamation, it was without jurisdiction and non-est in the eye of law, as such, there was nothing to ratify confirm or validate by the subsequent Act of Parliament.

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Under the circumstances, we deny condonation of both Bengali and English texts of the following provisions made in the Constitution by the various Proclamations :

1) The Amendments made in the Preamble of the Constitution
2) Article 6.
3) Article 8.
4) Article 9
5) Article 10
6) Article 12
7) Article 25.
8) Proviso to Article 38
9) Clauses 1A, 1B and 1C to Article 142.
10) Paragraph 3A to the Fourth Schedule to the Constitution.

For retaining Article 95 the High Court Division stated as follows:

It may be reiterated that by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order

No. IV of 1976), several changes were made with effect from 13.8.1977 in the Constitution as it stood after the Fourth Amendment. One of such changes was in respect of Article 95 of the Constitution. This provision is in respect of appointment of Judges in the Supreme Court. Article 95 in the original Constitution reads as follows : 95. (1) The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice.

(2).....

The Constitution (Fourth Amendment) Act, 1975, changed clause (1) of Article 95 in the following manner :

95.(1) The Chief Justice and other Judges shall be appointed by the President…….

Article 95(1) was again amended by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) with effect from August 13, 1976, in the following manner:

95. Appointment of Supreme Court Judges,-(1) The Chief Justice of the Supreme Court shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice…..…

This version commensurate with the Article 95 in the original unamended Constitution.

But by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) again changed Article 95(1) of the Constitution in the following manner:

95. Appointment of Judges- (i) The Chief Justice and other Judges shall be appointed by the President……..

This form of Article 95(1) is exactly the same as made in the Fourth Amendment.

This Order containing Article 95 in this form came into force on 1.12.1977 and remains so in the Constitution till date in view of the Fifth Amendment, without further change". This Second Proclamation (Tenth Amendment) Order 1977 (Second Proclamation Order No. 1 of 1977) containing the latest version of Article 95 was sought to be protected amongst others firstly by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977), by inserting Paragraph 3A in the Fourth Schedule to the Constitution. This was published in the Bangladesh Gazette Extraordinary on 23.4.1977. Secondly, by insertion of Paragraph 18 in the Fourth Schedule by the Constitution (Fifth Amendment) Act, 1979.

Since we have decided that we would approve and condone the amendments made in the Constitution which would repeal the various provisions of the Constitution (Fourth Amendment) Act, 1975, we do not condone the amendment of clause (1) of Article 95 by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) which commensurates with Article 95(1) as made in the Fourth Amendment along with its English Text.

This would amount to revival of Article 95(1) as amended by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976)

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Then the High Court Division concluded as follows:

We provisionally condone the various provisions of the Proclamations with amendments as appended to the book, namely, the Constitution of the People Republic of Bangladesh; published by the Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh, as modified upto 31st May, 2000, save and except those mentioned above. But since we have declared the Constitution (Fifth Amendment) Act, 1979, ultravires to the Constitution, the vires of the rest of the provisions of the Proclamations not considered herein, remain justifiable before the Court. However, all the acts and proceedings taken thereon, although were not considered yet, are condoned as past and closed transactions.

We have held earlier held in general that there was no legal existence of Martial Law and consequently of no Martial Law Authorities, as such, all Proclamations etc. were illegal, void ab initio and non est in the eye of law. This we have held strictly in accordance with the dictates of the Constitution, the supreme law to which all the Institutions including the Judiciary owe its existence. We are bound to declare what have to be declared, in vindication of our oath taken in accordance with the Constitution, otherwise, we ourselves would be violating the Constitution and the oath taken to protect the Constitution and thereby betraying the Nation. We had no other alternative, rather, we are obliged to act strictly in accordance with the provisions of the Constitution.

The learned Advocates for the petitioners raised the possibility of chaos or confusion that may arise if we declare the said Proclamations, MLRs and MLOs and the acts taken thereunder as illegal, void ab initio and non est. We are not unmindful of such an apprehension although unlikely but we have no iota of doubts about the illegalities of those Proclamations etc. What is wrong and illegal shall remain so for ever. There cannot be any acquiescence in case of an illegality. It remains illegal for all time to come. A Court of Law cannot extend benefit to the perpetrators of the

illegalities by declaring it legitimate. It remains illegitimate till eternity. The seizure of power by Khandaker Moshtaque Ahmed and his band of renegades, definitely constituted offences and shall remain so forever. No law can legitimize their actions and transactions. The Martial Law Authorities in imposing Martial Law behaved like an alien force conquering Bangladesh all over again, thereby transforming themselves as usurpers, plain and simple.

Be that as it may, although it is very true that illegalities would not make such continuance as a legal one but in order to protect the country from irreparable evils flowing from convulsions of apprehended chaos and confusion and in bringing the country back to the road map devised by its Constitution, recourse to the doctrine of necessity in the paramount interest of the nation becomes imperative. In such a situation, while holding the Proclamations etc. as illegal and void ab initio, we provisionally condone the Ordinances, and provisions of the various Proclamations, MLRs and MLOs save and except those are specifically denied above, on the age old principles, such as, Id quod Alias Non Est LIcitum, Necessitas Licitum Facit (That which otherwise is not lawful, necessity makes lawful), Salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law).

In this connection it may again be reminded that those Proclamations etc. were not made by the Parliament but by the usurpers and dictators. To them, we would use Thomas Fullers warning sounded over 300 years ago: **Be you ever so high, the law is above you.** (Quoted from the Judgment of Lord Dennings M. R., in Gouriet V. Union of Post Office Workers (1977) 1 QB 729 at page-762). Fiat justitia, ruat caelum.

Regarding condonation, the High Court Division, in paragraphs 18-21 of the summary, held as follows:-

"18. The turmoil or crisis in the country is no excuse for any violation of the constitution or its deviation on any pretext. Such turmoil or crisis must be faced and quelled within the ambit of the Constitution and the laws made thereunder, by the concerned authorities, established under the law for such purpose.

19. Violation of the Constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate for ever, however, on the necessary of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims. Id quod Alias Non Est Licitum. Necessitas Licitum Facit, salus populi est suprema lex and salus republicae est suprema lex.

20. As such, all acts and things done and actions and proceedings taken during the period from August 15, 1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever.
21. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble Article 6, 8, 9, 10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation Order No. IV of 1976, is declared valid and retained."

As it appears, the High Court Division accepted the doctrine of condonation as was done in Asma Jilani's case and in order to avoid chaos and confusion in the society and preserve continuity condoned all acts and thins and proceedings taken during the period from August 15, 1975 to April 9, 1979 as past and closed transactions and in para 21 of its summery the High Court Division condoned all the provisions which deleted the various provisions of the Fourth Amendemnt.
As it appears, by the Fourth Amendment, amongst others,

(1) In place of Parliamentary system, Presidential system was introduced by substituting chapter I and II of Part IV of the Constitution.

(2) The impeachment and removal of the President was made tougher.

(3) The power of the Parliament was reduced by amending Article 80.
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(4) The power of the High Court Division to enforce fundamental rights was curtailed by substituting Article 44.

(5) The independence of judiciary was curtailed by amending Article 95.

(6) One-party political system was introduced by adding part VIA in the Constitution.

It also appears that by the Fifth Amendment, amonsgt others, the following changes were made.

(1) Omission of Part VIA of the Constitution dealing with one party system as introduced by the Fourth Amendment. The above omission was made by Proclamation dated 8th November of 1975.

(2) Partial restoration of the independence of judiciary (Article 95 and 116) as made by the Second Proclamation (Seventh Amendment) Order 1976. Indepence of judiciary was curtailed by the Fourth Amendment.

(3) Restoration of the jurisdiction of the High Court Division to enforce fundamental rights as was provided in original Articles 44 and 102 of the Constitution. The same was made by the Second Proclamation (Seventh Amendment) Order 1976.

(4) Insertion of the provision of Supreme Judicial Council in respect of security of tenure of the judges of the Supreme Court (Article 96). The same was made by Proclamation Order No.1 of 1977.

(5) Abolition of the provision of absolute veto power of the President as introduced by the Fourth Amendment (Article 80). The same was made by the Second Proclamation (Fifteenth Amendment) Order 1978.

Constitution. The same was made by Second Proclamation Order (Fifteenth Ahmed) 1978 by inserting sub-articles (1A), (1B) and (1C) in Article 142.

(7) The insertion of the words "Bismillahir Rahmanir Rahim" at the beginning of the Constitution i.e. above the Preamble.

(8) Amending the original Article 6 of the Constitution which provided that the citizens of Bangladesh would be known as 'Bangalees' by the substituted Article 6 providing that citizens of Bangladesh would be known as 'Bangladeshis'. Further original Article 9 of the Constitution, which provided for unity and solidarity of the Bengalee nation, was also substituted by a new Article providing promoting local governmental institution. The same was done by Proclamation Order No.1 of 1977.

(9) Omission of secularism as was provided in original Article 8(1) of the Constitution which declared that the principles of nationalism, socialism, democracy and secularism shall constitute the fundamental principles of State Policy; addition of the words "the principle of absolute trust and faith in the Almighty Allah" in Article 8(1) and also the insertion of a new sub article (1A) containing the words "Absolute trust and faith in the Almighty Allah shall be the basis of all actions" after amended Article 8(1). The above was made by Proclamation Order No.1 of 1977.

(10) Giving new explanation to "Socialism" as mentioned in original Article 8(1), one of four major fundamental principles of State Policy, to the effect that socialism would mean only economic and social justice.

(11) Substitution of original Article 10 of the Constitution which guaranteed democracy and human rights by a new Article providing "Participation of women in national life" which has no nexus with the original Article 9.

(12) Omission of the proviso to Article 38 from the original Constitution which provided as follows:- "Provided that no person shall have the right to form, of be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose." The same was made by the Second Proclamation (Sixth Amendment) Order 1976.

(13) Addition of new Article 92A giving the President the power to expend public moneys in certain cases even without the approval of the Parliament. The said Article 92A was inserted in the Constitution by the Second Proclamation (Fifteenth Amendment) Order 1978.

(14) Inserting of another new Article 145A providing that all international treaties would be submitted to the President who should cause them to be laid before Parliament by second proclamation. The said Article 145A was inserted in the Constitution by the Second Proclamation (Fifteenth Amendment) Order 1978.

(15) Amendment of Article 58 of the Constitution providing that four-fifth of the total number of ministers should be taken from among the members of Parliament and that the President would appoint as Prime Minister a member of parliament who appeared to him to command the support of the

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majority of the members of parliament. The same was made by the Second Proclamation (Fifteenth Amendment) Order 1978.

A question has been raised as to whether the High Court Division can exercise the "legislative power" by way of condonation. But it is now settled to avoid anomaly and also to preserve continuity, the Courts have to pass consequential orders. No exception can be taken to it. Illustrations of such judicial power may be found in the Eighth Amendment case wherein the Appellant Division ordered prospective application of the invalidity of the Eighth Amendment. Further while declaring any law ultra vires, the Court often applies the doctrine of severability to limit the application of the judicial verdict. This is no legislative act though such a decision modifies or even destroys a legislation.

Now regarding the modifications of the judgment and order of the High Court Division it may be noted that earlier to avoid the hardship that the poeple may suffer, we are inclined to condone the substituted provision of Article 6 of the Constitution. We have also expunged the findings of the High Court Division made in respect of Article 150 of the Constitution and the Fourth Schedule taking in view of the subsequent development.

The other modifications that we want to make are in respect of the following provisions of the Constitution As it appears Part III of the Constitution enumerates a host of fundamental rights in which the framers of the Constitution made the right to move the Supreme Court of Bangladesh for enforcement of fundamental rights itself a fundamental right. But as discussed earlier, the same was substituted by the Fourth Amendment providing that the "Parliament may by law establish a Constitutional Court, Tribunal or Commission for the enforcement of the rights conferred by this part". But the English Text of this Article was substituted by the Second Proclamation (Seventh Amendment) Order, 1976 and the Second Proclamation (Tenth Amendment) Order, 1977 and the Bengali Text was substituted by the Second Proclamation (Fifteenth Amendment) Order, 1978 and by these amendments the original Article 44 was restored. As a result a citizen of Bangladesh is entitled to move the High Court Division under Article 102 for the enforcement of the rights conferred in Part III. This substitution of Article 44, no doubt, was designed to advance rule of law and the welfare of the people and accordingly it needs to be retained for the interest of justice.

It also appears that the provision of Article 96 as existed in the Constitution on August 15, 1975 provided that a Judge of the Supreme Court of Bangladesh may be removed from the office by the President on the ground of "misbehaviour or incapacity". However clauses (2), (3), (4), (5), (6) and (7) of Article 96 were substituted by the Second Proclamation (Tenth Amendment) Order, 1977 providing the procedure for removal of a Judge of the Supreme Court of Bangladesh by the Supreme Judicial Council in the manner provided therein instead of earlier method of removal. This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned.

Earlier while discussing the different Proclamations, Martial Law Regulations and Orders we found that under the Constitution of 1972 the High Court Division, under original Article 102(1), had powers to pass necessary orders to enforce fundamental rights. It may be noted here that this power of the High Court Division is not discretionary and whenever an authority acts illegally or commits an error of law or a citizen's fundamental right is violated, the remedy under this article can be availed of. This sub-article (1) of Article 102 though was deleted by the Fourth Amendment has been restored by the Second Proclamation (Tenth Amendment) Order, 1977. The above restoration of sub-article (1) of Article 102, being beneficial, should be condoned for the wider public interest.

It also appears that Part VIA of the Constitution under the heading 'THE NATIONAL PARTY' incorporating Article 117A was added by the Fourth Amendment. However in a democratic system the existence of different political parties and their participation in the parliamentary election cannot be denied because such participation would flourish the democracy in the country. Further this Article 117A is also inconsistent with Articles 37, 38, 39 of the Constitution. However this provision has been deleted by the Proclamation dated 8th November, 1975. Accordingly this portion of the above Proclamation needs to be condoned.

As it appears Article 95 of the Constitution, relates to the appointment of the Judges of the Supreme Court of Bangladesh. The above Article 95 as it stood after the amendment made by the Second Proclamation (Seventh Amendment) Order, 1976 has been retained by the High Court Division. The above Order, amongst others, changed Article 95 of the Constitution relating to the appointment of Judges of the Supreme Court. This amendment of Article 95 commensurate

with the Original Article 95 which existed before the enactment of the Fourth Amendment wherein there was provision for the appointment of the Judges by the President "after consultation with the Chief Justice". But this consultative provision as provided by Second Proclamation (Seventh Amendment Order 1977) was deleted by the Second Proclamation (Tenth Amendment) Order, 1977. Accordingly, after the amendment of the amended Article 95 by the Second Proclamation (Tenth Amendment) Order,1977, Article 95 as amended by the Second Proclamation Order No. IV of 1976, did no longer exist, and therefore, it was not ratified or validated or confirmed by the Fifth Amendment. Accordingly this Article 95 as amended by the Second Proclamation Order No. IV of 1976 could not be legally condoned by the High Court Division as it was not in force on the day the Fifth Amendment was passed. Moreso, a repealed provision can not be legally retained and/or validated by the Court. So Article 95 will remain as it existed on August 15, 1975. However, in view of the declarations given in the Judges case (Supra) declaring that convention of consultaion being, a Constitutional imperative, is binding upon everybody. Accordingly this retention of substitued Article 95 will have no bearing on the matter of consultation.

However, before concluding we would like to mention that our decision will remain incomplete if we do not mention the present state of the judiciary in the Constitution.

As it appears Mustafa Kamal, CJ was emphatic in respect of the independence of the judiciary in Secretary of Finance V Masdar Hossain 2000(VIII) BLT (AD) 234 wherein he held in para 44, page 257 – 258 as follows: "44. The independence of the judiciary, as affirmed and declared by Articles 94 (4) and 116A , is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provision of the Constitution. It is true that this independence, as emphasized by the learned Attorney General , is subject to the provision of the Constitution, but we find no provision in the Constitution which curtails, demolishes to otherwise abridges this independence……"

However we are of the view that the words, "but we find no provision in the Constitution which curtails, demolishes or otherwise abridges this independence" do not depict the actual picture because unless Articles 115 and 116 are restored to their original position, independence of judiciary will not be fully achieved.

In this regard, Matin, J. in Judges Case 17 BLT (AD) 231 observed as follows:

"it is true that "consultation" was considered in the light of Article 116 of the Constitution but never the less the same principle all the more applies in the matter of appointment of Judges of the Supreme Court under Articles 95 and 98 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate courts and minus the consultation and primacy the separation of judiciary from executive will be empty words……."

It was further observed:-

"we agree, with approval, with Justice Bhagvati and add further that although Article 22 has been implemented to a great extent through the judgement of this Court in Masdar Hossains's case but until and unless the unamended Articles 115 and 116 of the Constitution are restored vesting the control of the subordinate judiciary in the Supreme Court, the separation of judiciary will remain a distant cry and a music of the distant drum" It may be noted here that among the twelve directions given in Masdar Hossain's case one was to the effect that Parliament will in its wisdom take necessary steps regarding this aspect of independence of judiciary.

It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible. Before we conclude, we would like to quote the following: "The greatest of all the means …….for ensuring the stability of Constitution-but which is now a days generally neglected is the education of citizens in the spirit of the Constitution ……To live by the rule of the Constitution ought not to be regarded as slavery, but rather as salvation." (Artistotle's Politics (335-322 BC) pp 233-34"

We would also quote the following passage from the conclusion in an essay on Noni Palkivala in …….. "Democracy, Human rights and Rule of Law" edited by Venkat Iyer , 2000 regarding the "Period of Deliquency" in India in 1975 -1977 :

Despite the traumatic events of 1995 – 1977, the lessons of that emergency have now, alas, also been forgotten by a vast majority of Indian citizenery. It is said that people do not realize the benefits of freedom until they are lost. Twenty five years have passed and a new generation of Indians is not even aware of what happened during those eventful months.

It is essential that if India is to preserve her democratic freedom, each generation must

be taught, educated and informed about those dark days. Every Indian needs to renew and refresh himself at the springs of freedom.

We will simply echo those words by replacing the period and the word India with Bangladesh. We emphasize each of our generation must be taught, educated and informed about those dark days: the easiest way of doing this is to recognize our errors of the past and reflect this sentiments in our judgment. This will ensure that the sovereignty of "we, the people of Bangladesh" is preserved forever as a " pole star". We are of the view that in the spirit of the Preamble and also Article 7 of the Constitution the Military Rule, direct or indirect, is to be shunned once for all. Let it be made clear that Military Rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever as the same is against the dignity, honour and glory of the nation that it achieved after great sacrifice; it is against the dignity and honour of the people of Bangladesh who are committed to uphold the sovereignty and integrity of the nation by all means; it is also against the honour of each and every soldier of the Armed Forces who are oath bound to bear true faith and allegiance to Bangladesh and uphold the Constitution which embodies the will of the people, honestly and faithfully to serve Bangladesh in their respective services and also see that the Constitution is upheld, it is not kept in suspension, abrogated, it is not subverted, it is not mutilated, and to say the least it is not held in abeyance and it is not amended by any authority not competent to do so under the Constitution.

Accordingly though the petitions involve Constitutional issues, leave, as prayed for, can not be granted as the points raised in the leave petitions have been authoritatively decided by superior Courts as have been reflected in the judgment of the High Court Division.

We, therefore, sum up as under:

1. Both the leave petitions are dismissed;

2. The judgment of the High Court Division is approved subject to the following modifications:-

(a) All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved; 3. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:

(a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;

(b) the actions not derogatory to the rights of the citizens;

(c) all acts during that period which tend to advance or promote the welfare of the people;

(d) all routine works done during the above period which even the lawful government could have done.

(e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;

(ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.

(iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;

(iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No.IV of 1978) so far it relates to substituting Bengali text of Article 44; (v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and

(f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution.

While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure for ever.

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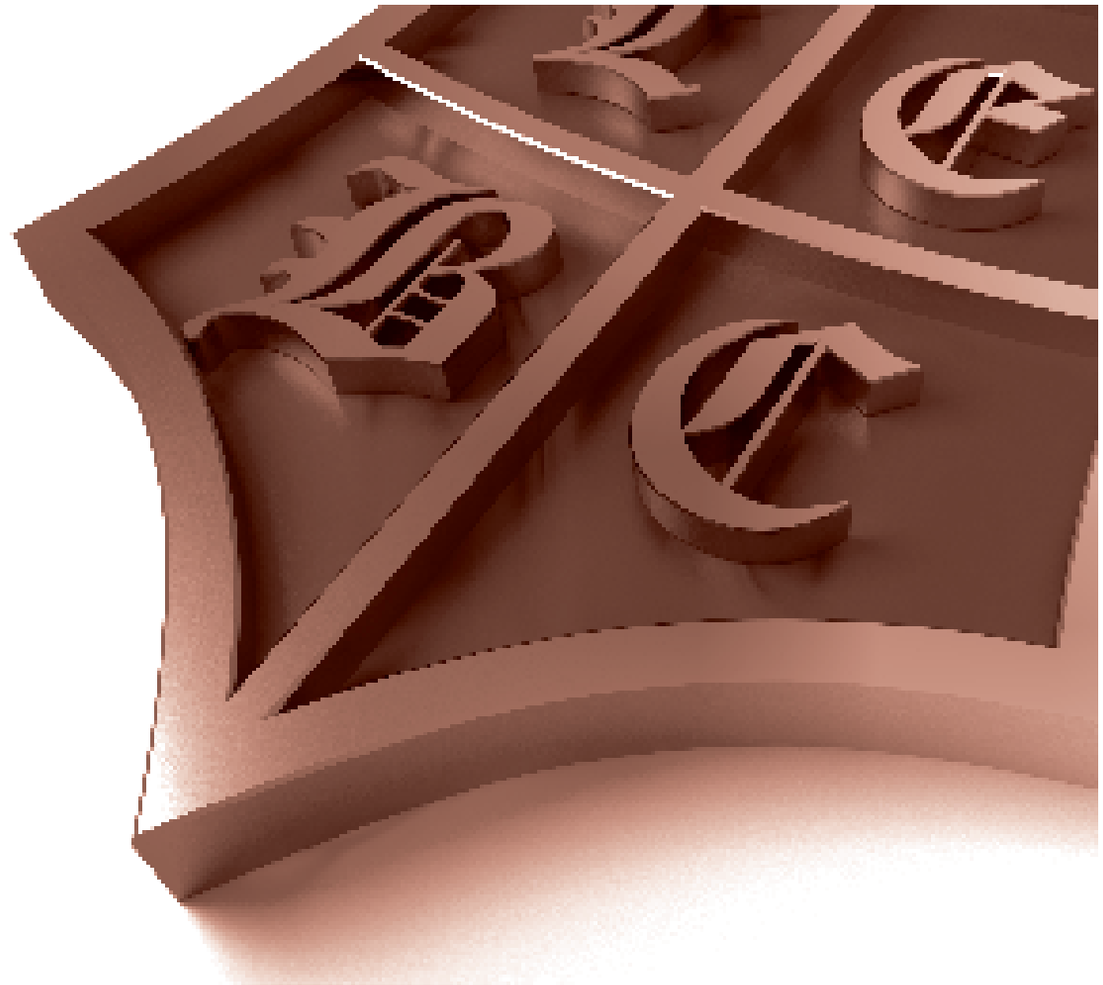

"We do not claim to be able to change the world, we just change the people and then they change the world"

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