IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6016 OF 2000

IN THE MATTER OF :

An application under Article 102 of the Constitution of the People's Republic Bangladesh;

-A N D-

IN THE MATTER OF :

Bangladesh Italian Marble Works Limited

...Petitioner

-Versus-

Government of Bangladesh and others

...Respondents.

Mr. Ajmalul Hossain with
Mr. A.B.M. Siddiqur Rahman Khan and
Ms. Nighat Sultana Nabi, Advocates
... For the Petitioner
Mr. Fida M. Kamal, Additional Attorney General and
Mr. A.H.M. Mushfiqur Rahman, Deputy Attorney General.
... For the Respondent No.1
None … For the Respondent No. 2.
Mr. Akhter Imam with
Mr. Syed Mamun Mahbub and
Mr. Jinnat Ali, Advocates
....For the Respondent No.3
Dr. Rafiqur Rahman, Advocate
… Amicus Curiae
Heard on: The 4th, 27th April, 23rd May, 17th,18th, 23rd and 24th July, 2005.

Judgment on: The 29th August, 2005.

Present:
Mr. Justice A.B.M. Khairul Haque
And
Mr. Justice A.T.M. Fazle Kabir

A.B.M. Khairul Haque,J.-

PART I : Back-ground History :

This case has a long and a chequered history. One Pak Italian Marble

Works Limited, a private limited company, registered with the Joint Stock Companies of the erstwhile East Pakistan, became owner of the premises at holding No. 11, Wise Ghat, Police Station, Kotwali, Dhaka, in 1962.The said company, on taking loans from Industrial Development Bank, constructed a cinema hall known as Moon Cinema Hall in 1964. After liberation of Bangladesh, some people taking advantage of poor law and order situation prevailing at that time, took forcible possession of the said cinema hall in or about the last week of December, 1971, from the staff of the company.

Subsequently, by a notification being Notification No. 186-SI dated December 31, 1971, published in Bangladesh Gazette Extra-Ordinary on January 3, 1972, the management of the Moon Cinema House was taken over with effect from the said date of notification, by the Ministry of Industries and it was made over to the Management Board, purportedly in pursuance of the Acting President's Order No. Sec XI/1M/35/71/17 dated December 30, 1971 (Annexure-E). In the meantime, under order of the Department of Trade and Commerce , Government of Bangladesh, the name of the company was changed to Bangladesh Italian Marble Works Ltd. by an order dated 28.11.1972, passed by the Registrar, Joint Stock Companies, Bangladesh (Annexure-A). This company is the petitioner no.1, while the Petitioner no. 2 is its Managing Director. The Moon Cinema hall is an asset of the petitioner-company.

By a notification being Notification No. IM-XV-36/72/531 dated 15.12.1972, published in Bangladesh Gazette on 4.1.1973, the Moon Cinema, among others, were placed under the disposal of Bangladesh (Freedom Fighters) Welfare Trust, the respondent no.3, in exercise of the powers under Article 5 of the President's Order No.16 of 1972(Annexure-F).

Earlier the petitioner no. 2 filed an application on April 28, 1972, praying for release of his property, namely, the Moon Mansion at 11, Wise Ghat Road. In due course, the Sub-Divisional Officer (South), Dhaka, by his order dated 1.12.1972, directed an enquiry. The Directors of the company personally appeared before the

Officer-in-charge of the Abandoned Property Cell on 22.10.1973. The enquiry report dated 11.9.1974 in the order-sheet (Annexure-G), show that the concerned property was not an abandoned property. The S.D.O. also examined the documents and by his order dated 18.12.1974 placed it before the Deputy Commissioner. The Additional Deputy Commissioner, by his memo dated 6.1.1975 (Annexure-G-1) to the Ministry of Information and Broadcasting, recommended release of the said property. But by the memo dated 27.6.1975 (Annexure-G-2), the Ministry of Industries, Government of Bangladesh, the respondent no.1, informed the petitioner no.2 that the property is an abandoned property and as such, cannot be released. The petitioner no.2, however, filed another application on17.12.1975, before the Member, Advisory Council, in charge, Ministry of Planning and Industries, praying for release of the property (Annexure-H) but without any response.

As such, finding no other alternative, the petitioners filed a writ petition being Writ Petition No. 67 of 1976, praying for declaration that the notification dated 31.12.1971 of the Government of Bangladesh, taking over certain properties as abandoned property under the Acting President's Order No. 1 of 1971 and their subsequent Order dated 27.6.1975, refusing to release the property under section 15 of the President's Order No. 16 of 1972, was illegal and without lawful authority. Although the Government of Bangladesh and the Secretary, Ministry of Industries, the respondent nos. 1 and 2, contested the Rule by filing an affidavit in opposition but the respondent no.3 did not. After hearing, the High Court Division, by its Judgment dated 15.6.1977 (Annexure-I) declared the impugned notification of the respondents, taking over the Cinema house in question as an abandoned property, as illegal and directed handing over the vacant possession of the property to the petitioner at once.

In due course, the Ministry of Industries, the respondent no.1, in compliance of the Judgment and Order passed by the High Court Division, by a Notification being No. ND/(N-1)/4(2)/72/11 Dacca dated 24.8.1977, deleted the Moon

Cinema, 11, Wiseghat Road, Dhaka, from the list published in the Notification dated 31.12.1971 and the notification dated 15.12.1972. The cinema hall was also formally released in favour of the petitioner company with a direction on the Secretary, respondent no.3, to hand over the physical possession of the said Moon Cinema Hall to its representative, (Annexure-J). The said notification dated 24.8.1977 was also published in Bangladesh Gazette on 1.9.1977 (Annexure-J-1). In due course, a Magistrate was also depnded to hand-over possession to the petitioners but the Chairman and the Secretary of the Freedom Fighter Welfare Trust, refused to give up possession of the property.

In the meantime, the respondent no.3 filed a Civil Petition for Special Leave to Appeal No.291 of 1977 before the Appellate Division and obtained an order of stay of the Judgment and order dated 15.6.1977, passed by the High Court Division in Writ Petition no.67 of 1976. But during the pendency of the said Civil Petition, Martial Law Regulation No. VII of 1977, was promulgated on 7.10.1977. On 20.1.1978, the Civil Petition for Special Leave to Appeal was dismissed as not being pressed.

Thereafter the petitioner no.2 made several representations to respondents for making over the possession of the Moon Cinema Hall in favour of the petitioner –company but the respondents maintained that in view of the Martial Law Regulation No.VII of 1977, the judgment and order of the High Court Division in Writ Petition No.67 of 1976, is not binding upon them and they were not legally bound to deliver possession of the said Cinema Hall. In the contempt proceedings also the respondents took the plea that because of the promulgation of MLR No.VII of 1977 on 7.10.1977, the Judgment in Writ Petition No.67 of 1976 stood annulled and ceased to have any effect and the property in question remained vested in the Government. Ultimately, at the hearing of the contempt Rules on 4.4.1994, the petitioner no.1 did not press those which were accordingly discharged.

Thereafter the petitioners moved another writ petition being Writ Petition No.802 of 1994, praying for Rule Nisi upon the respondents to show cause as to why they should not be directed to make over possession of the Moon Cinema Hall, at 11, Wise Ghat , Dhaka, in favour of the petitioners, in pursuance to the Gazette Notification No. IND (M-1)/ 4(2)/72/11 dated 24.8.1977, issued by the respondent no.1. The High Court Division referring to the decision of the Appellate Division in the case of Anwar Hossain Chowdhury etc. V. Bangladesh and others BLD 1989 (Spl)1, rejected the said writ petition summarily by its order dated 7.6.1994 (Annexure-K-1).

On appeal, the Civil Appeal No. 15 of 1997, was also dismissed by the Appellate Division by its Judgment dated 14.7.1999 (Annexure-K).

PART II : The Present Writ Petition :

The present writ petition traced the history leading to the enactment of the Fifth Amendment. It is stated in the petition that Khandaker Moshtaque Ahmed took over all and full powers of the Government of the People's Republic of Bangladesh by a proclamation dated August 20, 1975 and suspended the Constitution of the People's Republic of Bangladesh with effect from August 15, 1975 and made the Constitution subservient to the Proclamation, Martial Law Regulations and Martial Law Orders. After 82 days, the said Khandaker Moshtaque Ahmed, handed over the office of President of Bangladesh, in favour of Mr. Justice Abusadat Mohammad Sayem, the Chief Justice of Bangladesh. He upon entering the said office of President on November 6, 1975, assumed the powers of Chief Martial Law Administrator and made certain amendments in the proclamation dated August 20,1975, by a Second Proclamation issued on November 8, 1975. In due course, by a Third Proclamation issued on November 29, 1976, Mr. Justice Abusadat Mohammad Sayem handed, over the Office of Martial Law Administrator in favour of Major General Ziaur Rahman, BU.psc., to exercise all the powers of the Chief Martial Law Administrator. The Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation

No.VII of 1977) was promulgated on October, 5, 1977 by Major General Ziaur Rahman, BU, Chief Martial Administrator. This was published in the Bangladesh Gazette, Extraordinary on October7,1977 (Annexure-L). The Proclamations (Amendment) Order, 1977 (Proclamation Order No.1 of 1977) was promulgated on April 23, 1977 (Annexure-L-1). This Proclamation, among others, inserted paragraph 3A in the Fourth Schedule to the Constitution. The said paragraph purported to validate the Proclamations, all Martial Law Regulations, Martial Law Orders and all other laws made during the period between August 15, 1975 and the date of revocation of the said Proclamations and the withdrawal of Martial Law (both days inclusive). It is further stated in the petition that thereafter the Constitution (Fifth Amendment) Act, 1979 (Act No.1 of 1979) was enacted. The said Act inserted paragraph 18 in the Fourth schedule to the Constitution. Paragraph 37 to 39 of the petition reads as follows:

> "37. Thereafter by the Constitution (Fifth Amendment) Act, 1997 (Act 1 of 1979) Paragraph 18 was inserted in the 4th Schedule of the Constitution under the rubric of "Ratification and Confirmation" which ran as follows :
>
> "18. All Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law orders and other laws made during the period between the 15th August 1975, and the 9th April 1979 (both days inclusive) all amendments additions, modifications, substitutions and omissions made in this Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken by any person or authority during the said period in exercise of the powers derived or purported to have been derived from any such Proclamation, Martial Law Regulation, Martial Law order or any other law, or in execution of or in compliance with any order made or sentence passed by any Court, tribunal or authority in the exercise or purported of such powers, are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be called

in question in or before any court, tribunal or authority on any whatsoever".

38. It is respectfully submitted that on seizure of power, the Chief Martial Law Administrator purportedly issued decrees known as Proclamations of Martial Law "subordinating" or "suspending" the Constitution of the Republic including all those Articles of the Constitution which protect the rights of the individuals and provide the guarantees necessary for the maintenance of the rule of law. That the Chief Martial Law Administrator had of course no authority to nullify the Constitution; that even in case of grave public danger the President of the Republic under the Constitution in case of his satisfaction and subject to Article 141A, could have suspended some Constitutional guarantees but the Chief Martial Law Administrator under the Proclamations went even further than the President and the Parliament were entitled to go under the Constitution of the Republic, in that he purportedly subordinated or suspended the Constitution itself which cannot be subordinated or suspended either by the President or the Parliament even in a grave emergency.

39. It is respectfully submitted that the Parliament has/had no authority /power (Art 142) to "ratify" and "confirm" the act of "subordination" or "suspension" of the Constitution with all those Articles which provide supremacy of the Constitution, independence of judiciary and rule of law and other basic structures as the Parliament has/had no power to subordinate or to suspend the Constitution in any manner; that it is respectfully submitted that when the Parliament does not derive any authority under Article 142 to act in derogation of the Constitution, so it cannot "ratify" or "confirm" any such "acts", "deeds" or "actions" in derogation of the Constitution; that the Parliament having no such authority could not be said to have ratified acts, deeds and actions of the Chief Martial Law Administrator that go against the supremacy of the Constitution, independence of the judiciary, rule of law and other basic structures of the Constitution."

PART III : The Rule:

This writ petition was moved on 11.12.2000 and the Rule was issued in 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. 1M-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/Regulation, 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."

PART IV : The Case Of The Respondents:

The Rule was opposed on behalf of the Government of Bangladesh, respondent no.1 and Bangladesh (Freedom Fighter) Welfare Trust, the respondent no.3 by filing their respective affidavits in opposition. The affidavit filed on behalf of the

respondent no.1 was sworn on 3.2.2002 denying all material allegations. The case of the respondent no.1 have been stated, inter alia, in paragraphs 7 and 12 of the said affidavit read as follows:

> "7. That the statements made in paragraph 7, 8, 9, 10 and 11 of Writ Petition are not true in toto hence, denied. In reply to those statements it is stated that property in question is an abandoned property, and none of the share holders of the company except too were found present in Bangladesh at the relevant time nor was any body found to manage the property, namely the Cinema Hall in the circumstances. In the circumstances the property was acquired under the Acting President's Order of Bangladesh (Taking over and Control and Management of Industrial and commercial Concern order, 1972 (Acting President's order No. 1 of 1972). Thus, the Government of the People's Republic of Bangladesh took over the control and management of the property in question under the Provision of the said acting President's Order 1 of 1972 in the interest of the Republic and subsequently under President's order No. 16 of 1972 and the said property automatically vested in the Governmental subsequently it was placed at the disposal of Bangladesh Freedom Fighter's Welfare Trust, a statutory Corporation, Respondent No. 3 and the said welfare trust is possessing and managing the same till date.
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> 12. That in reply to the statements made in paragraph 31-44 of Writ Petition it is submitted that as per paragraph 18 of the 4th schedule of the Constitution all actions taken during the martial law period were valid between the 5th August and 9th April, 1979 and confirmed and declared to have been made done or taken and shall not be called in question in any court, Tribunal or authority on any ground whatsoever.
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> Moreover, in the case of Khandker Ehteshamuddin Ahmed-v- Bangledesh 33 DLR (AD) 154 whether decision of the Martial law court was open to challenge in Writ Jurisdiction

of the High Court Division after lifting of the martial law from the Country as martial law as lifted No. 6-4-1997 known as 5th Amendment of the Constitution and observed as follows:-

"This Division has expressed the opinion on that such decisions or orders passed by the martial law court of any authority under such regulation during the martial law period are protected from being challenged under the Writ Jurisdiction of the High Court Division except in case of want of jurisdiction or Coram non judice or malafide".

"It may also be pointed out that with the lifting of Martial law the provision of paragraph 6 of Article 3(A) of the fourth schedule of Constitution which provides that revocation of the proclamation or withdrawal of martial law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal

In this respect their Lordships of the Appellate Division in the case reported in Nasiruddin-Vs-Govt of the People's Republic of Bangladesh 32 DLR (AD) 216 observed as follows:-

"Apart from the general principles of law which says that repeal does not review any things under repealed enactment, in the 4th schedule of the Constitution, Article 3A clause (6) clearly provides that revocation of the said proclamation and withdrawal of martial law shall not review or restore any right or privilege which was not existing at the time of such revocation and withdrawal. Thereafter, if prior to the withdrawal of all proclamations and martial law regu1ations of 06.04.1979, any proceedings had abated in terms of the provisions of M.L.T. VII of 1977 they cannot be revived."

With regard to the Fifth Amendment of the Constitution, it is stated in paragraph 13 of the affidavit in opposition as follows:

"13. In reply to the statements that 5th Amendment of the Constitution (Act 1 of 1979) ratifying the Martial Law

Regulation No. VII of 1977 destroyed the supremacy of the Constitution which is a basic feature of the Constitution. In Anawere Hossain Chowdhury - V.- Bangladesh reported in 41 DLR (AD) 165 wherein Justice Shahabuddin Ahmed after noticing that by martial law proclamation order the constitution was badly mauled to times, held that all these structural changes were incorporated in and ratified by the Constitution Fifth Amendment Act, 1979 and observed as follows:-

"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 alternation of the basic structures but refrained from declaring them void in order to ptevent choaos 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 asnswer 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 structures of the Constitution." In the case of Anwar Hossain Chowdhury our Appellate Division refused to consider past Amendments of the constitution which have destroyed its basic structures. It is now too late in the day, delay of about 20 (Twenty) years since the constitution Fifth amendment Act was passed, to challenge the vires of the constitution 5th Amendment Act in view of the judgment of the Appellate Division."

The affidavit filed on behalf of the respondent no.3, was sworn on 14.1.2002, denying all material allegations. It is stated in paragraph 3 that the instant

Writ Petition is barred by res judicata as all the relevant issues raised in the petition had been finally and conclusively decided in the Writ Petition No.802 of 1994 and Civil Appeal No.15 of 1997, that the petitioners suppressed the fact that they filed a review petition in the Appellate Division of the Supreme Court of Bangladesh, being Civil Review Petition No.6 of 2000 against the said Judgment of the Appellate Division which was still pending for disposal. The case of the respondent no.3 has been narrated in paragraph 4,6-8 as follows:

> "4. That the statements made in paragraph 31 of the Petition are by way of submissions to the Hon'ble Court but are misconceived and erroneous submissions and hence liable to be rejected. It is submitted that the Martial Law Regulations, inter alia, and all orders made, acts and thing done and actions and proceedings taken or purported to have been made, done or taken by any person or authority the period from 15th August, 1975 and 9th April 1979 in exercise of the powers derived or purported to have been derived from any such Martial Law Regulations or inexecution of or in compliance with any order made by any authority in the exercise or purported exercise of such powers are ratified and confirmed and are declared to have been validity made, done or taken and shall not be called in question in or before any Court, tribunal or authority on any ground whatsoever, as per paragraph 18 of the Fouth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) section 2."

Paragraph 6 highlighted the Martial Law jurisprudence in this manner:

> "6. That the submissions made in paragraph 38 of the Petition are also not tenable in the light of the Martial Law Jurisprudence that has emerged in the wake of two Martial Law periods/regimes in the constitutional history of Bangladesh. No Court including the Supreme Court has any power to call in question in any manner whatsoever or declare illegal or void the proclamation or any Regulation or order and it was held by the Supreme Court in Halima Khatun's case reported in 30 DLR

(SC) 207 that there was a "total ouster of jurisdiction of this Court" and the Appellate Division put the Constitution in no uncertain terms as subservient to the Proclamation: Under the Proclamation the Constitution has lost its character as the Supreme law of the Country". State V- Haji Joynal Abedin reported in 32 DLR (AD) 110 followed the above view. In Khandker Ehtaeshamuddin Ahamed's case reported in 33 DLR (AD) 154, the Appellate Division merely took note of the theory of revolutionary legality (State Vs. Dosso reported in 11 DLR (SC) 1 and the doctrine of state necessity (Begum Nusrat Bhutto Vs. The Chief of Army Staff and the Federation of Pakistan reported in PLD 1977(SC) 657, there being no challenge to the imposition of Martial Law in Bangladesh, and went on not only to reiterate the subservience of the Constitution to the Proclamation etc. for as long as Martial Law of 1975 existed but also beyond, after the Constitution was revived following the lifting of Martial Law in view of paragraph 18 added to the Fourth Schedule to the Constitution by the Constitution (5th Amendment) Act, 1979. In Nasir Uddin's case reported in 32 DLR (AD) 216, the Appellate Division clarified their earlier decisiouun made in Halima Khatun's case as follows "In Halima Khatun's case, the decision is that if any action of taking over or vesting of a property comes within the mischief of Martial Law Regulation VII of 1977, any proceedings seeking to challenge the taking over or vesting of such property shall abate. The further observations that requires to be made is that abatement of the proceedings will follow in such cases, except where the taking over or vesting is without jurisdiction or coram non judice or if it is mala fide and, in such circumstances such action or order is not protected under the said Regulation. With this clarification in Halima Khatun's case and in conformity of the two decision set out, is to be held that there cannot be any question of abatement of any legal proceedings taken by an aggrieved person to protect his legal right or interest in the property against which action has been taken or vesting order made which is without jurisdiction or coram non juidice or is malafide. Except within this narrow

compass, the proceedings coming within the mischief of MLR VII of 1977 shall abate." It was clearly decided by the Appellate Division in Civil Appeal No. 15 of 1997 that the above decisions reported in 32 DLR (AD) 216 and 33 DLR (AD) 154 are not applicable or attracted or relevant to the facts and circumstances of the present case.

7. That the statements/submissions made in paragraph 39 and 40 of the Petition are also not tenable for the reasons stated hereinabove. It is submitted that the basic and consistent trend of decisions of the Supreme Court regarding the subservience of the Constitution to the Martial Law continues to be the dominant judicial view and the Constitution (Fifth Amendment) Act 1979 (Act No.1 of 1979) giving a blanket cover to Martial Law Proclamations, Regulations etc did not improve matters even after the lifting of Martial Law and restoration of the Constitution, except for the aforesaid modifications.

8**.** That the statements/ submissions made in paragraphs 41 of the Petition are also not tenable for reasons stated hereinabove. It is reiterated that actions taken under MLR No. VII of 1977 are protected by the Constitution (Fifth Amendment) Act, 1979 (Act No. 11 of 1979) and the Constitutional protection/coverage continues even after the withdrawal of Martial Law, as per judicial pronouncements of the Supreme Court of Bangladesh referred to hereinabove. It is submitted that the vires of the said Act No. 1 of 1979 is not under challenge in this petition, if it is at all possible to challenge it now after about 22 years and that also in case of a past and closed transaction."

PART V : Fixation For Hearing :

It appears that the Rule in this matter was issued on 11.12.2000 and it was ready for hearing as regards service on 17.5.2001. This matter was mentioned before this Bench on 11.5.2004 and was taken up for hearing on 2.4.2005, but on the prayer of Ms. Nighat Sultana Nabi, Advocate for the petitioner, the hearing was adjourned for two days. The case was heard in part on 4.4.2005 but was adjourned till

25.4.2005. At about that time we ascertained that the Civil Review Petition No. 6 of 2000 pending before the Appellate Division, had already been dismissed for default on 23.10.2002. On 27.4.2005, the case was again heard in part but was adjourned to 15.5.2005. We also, on that occasion, requested the learned Attorney General of Bangladesh, to assist us since the matter involved constitutional questions of utmost importance. On 23.5.2005, we heard the case at length but on the prayers made on behalf of all the parties, the hearing was again adjourned till 25.6.2005. The hearing of the case resumed on 17.7.2005 and continued for several days. The arguments were concluded on 24.7.2005.

Initially, Ms. Nighat Sultana Nabi, Advocate, appeared on behalf of the petitioners, thereafter, Mr. Ajmalul Hossain, QC and Advocate, appeared with Mr. A.B.M. Siddiqur Rahman Khan, Advocate, on behalf of the petitioners. Mr. Fida M. Kamal, the Additional Attorney General appeared with Mr. A.H.M. Mushfiqur Rahman, Deputy Attorney General, on behalf of the Government of Bangladesh, the respondent no. 1 and Mr. Akhter Imam, Advocate, appeared with Md. Kalim Ullah Mazumder, Advocates, on behalf of Bangladesh (freedom Fighters) welfare Trust, the respondent no.3. On our request, Dr. Rafiqur Rahman, Advocate, assisted us as amicus curiae.

PART VI : Arguments On Behalf Of The Petitioners :

Mr. Ajmalul Hossain, the learned Advocate appearing on behalf of the petitioners submitted that the enquiry conducted as early as on 11.9.1974 found the property not an abandoned one (Annexure-G series). The High Court Division in Writ Petition No. 67 of 1976 also found by its Judgment dated 15.6.1976 (Annexure-I) that the property was not an abandoned property. Accordingly, the Government also formally released the property by the notification dated 24.8.1977 (Annexures-J and J-1) and directed the respondent no.3 to hand over the physical possession of the case-property in favour of the petitioners but was not complied with, that in the meantime Martial Law Regulation VII of 1977 being promulgated, the said Judgment of the High

Court Division purported to be abated and on that plea, the respondent no.3 refused to abide by the directions of the High Court Division.

Tracing the history of the case since 1972, the learned Advocate submitted that earlier the Writ Petition No. 802 of 1994 and the Civil Appeal No. 15 of 1997 were dismissed mainly on the ground that the Fifth Amendment of the Constitution was not challenged in that writ petition, as such, this time legality of the Martial Law Proclamations, Martial Law Regulutions and the Martial Law Orders, its ratification, confirmation and validation by the Constitution (Fifth Amendment) Act and the legality of the Fifth Amendment, all had been challenged mainly on the grounds inter alia :

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.

VII) Provision for amendment of the Constitution is provided for in Article 142 and can only be done in the manner provided therein but since the Fifth Amendment validated all illegal acts of the usurpers, under the clout of Martial Law, not only changing the basic structure as well as the character of the Constitution in its totality but rather, uprooted the Constitution, it was no amendment in the eye of law, but destruction of the Constitution altogether, as such, ultra vires to the Constitution.

The learned Advocate cited a large number of decisions from home and abroad in support of his arguments.

PART VII : Arguments On Behalf Of The Respondents :

Mr. Fida M. Kamal, the learned Additional Attorney General, Government of Bangladesh, did not dispute the facts leading to the enlistment of the property as an abandoned one, as found by the learned Judges in their Judgment dated June 15, 1977, in the Writ Petition No. 67 of 1976. He even did not dispute the declaration given in that writ petition and its subsequent release from the list of the abandoned properties.

He submitted that on the promulgation of The abandoned Properties (Supplementary Provisions) Regulation, 1977 (MLR VII of 1977) on October 7, 1977, the Judgment dated June 15, 1977, passed by the High Court Division, stood annulled and had no effect. It remained so annulled even after lifting of the Martial Law on April 7, 1979, in view of validation of all Martial Law Proclamations, Martial Law Regulations and Martial Law Orders, by the Constitution (Fifth Amendment) Act, 1979. In support of his such contentions, he relied on and read extensively line by line and page by page, from the book titled ‘Bangladesh Constitution: Trends and Issues’ written by Justice Mustafa Kamal, former Chief Justice of Bangladesh. This book is a

compilation of the lectures given by Justice Mustafa Kamal, delivered in the Kamini Kumar Dutta Memorial Law Lecture in 1994. At that time, his Lordship was a Judge in the Appellate Division. The summary of the initial arguments put forward by the learned Additional Attorney General are as follows:

The Martial Law Proclamations, the Martial Law Regulations, the Martial Law Orders and other laws passed during the period from August 15, 1975 to April 9, 1979, were ratified, confirmed and declared to have been validly made, by the Constitution (Fifth Amendment) Act, 1979, as such, cannot now be re-opened.

When asked as to how the Fifth Amendment could ratify the Martial Law Proclamations, MLRs and MLOs when those not only suspended the Constitution, the supreme law of the land, but also admittedly it was made subservient to those provisions, the learned Additional Attorney General, apathetically replied that since the Parliament enacted the Amendment, those became ratified, confirmed and valid.

When notice of the learned Additional Attorney General was brought to the argument that those Proclamations, MLRs and MLOs not only changed the basic character of the Constitution but also defaced it beyond recognition and since the Fifth Amendment admittedly ratified all those provisions and thereby made those part of the Constitution, the Fifth Amendment itself is ultra vires to the Constitution, he replied that the said Amendment itself did not make any change or deface the Constitution, it only ratified and confirmed the earlier Proclamations etc. and the actions taken thereon, as such, the Fifth Amendment was validly enacted.

We also asked the learned Additional Attorney General as to the necessity of the Proclamations of Martial Law and he replied that because of the Fourth Amendment which changed the basic structure of the Constitution, the First Proclamation became necessary but when we enquired whether there was any opposition against the said amendment, he answered that 2 or 3 members of Parliament opposed it. He, however, admitted that there were 300(three hundred) members of Parliament. We again asked as

to whether the said Fourth Amendment of the Constitution had ever been challenged before any Court, he answered that it was not to his knowledge.

We pointed out to the learned Additional Attorney General that if today some armed and fanatic groups of persons, having a different kind of political philosophy, in defiance and in violation of our Constitution, conspire and attempt to over-throw the elected Government of our country and establish their own kind of government, would he support such an abortive attempt, the learned Additional Attorney General promptly snapped 'most certainly not'. Then, we threw our next question 'how could you then support such a naked seizure of power, with the collaboration of a group of serving and retired army officers, by the Proclamation dated August 20, 1975, which itself did not put forward any such plea that the taking of such power was necessary because of the enactment of the Fourth Amendment, that obviously such a belated plea raised now, is a product of afterthought, that besides, since admittedly the Fourth Amendment, whatever might be its merits or demerits, was enacted admittedly by a over-whelming majority in the Parliament. The learned Additional Attorney General was without any reply.

Next we enquired under what provision of the Constitution, Khandaker Moshtaque Ahmed handed over the office of President of Bangladesh to Justice Abusadat Mohammed Sayem, the then Chief Justice of Bangladesh and the legality of the Proclamation issued on November 8, 1975, dissolving the Parliament, among others, the learned Additional Attorney General, could only reply that the said Proclamation and the actions taken under it, were ratified by the Fifth Amendment.

Likewise, we enquired about the legality of the assumption of the powers of Chief Martial Law Administrator by Justice Sayem and thereafter how by the Proclamation issued on November 29, 1976, he transferred such powers in favour of Major General Ziaur Rahman, B. U., PSC and his subsequent nomination as the President of Bangladesh, by a Notification dated April 21, 1977, although at that time,

as the Chief of Army Staff, Major General Ziaur Rahman B.U., PSC was a salaried officer under the defence services of the Government of Bangladesh.

We also enquired about the legality of the Referendum Order, 1977 (Martial Law Order No. 1 of 1977), for holding a referendum in respect of Major General Ziaur Rahman B.U., who might have his own interest in proving himself but what interest of the people of Bangladesh was served in spending money for the personal aggrandizement of one person.

We further enquired under what provision of the Constitution Justice Sayem and Major General Ziaur Rahman B.U., PSC., amended the Constitution of Bangladesh, from time to time, which Charls I or even Lord General Oliver Cromwell could not do without the Parliament.

In reply to these and many other quaries, the learned Additional Attorney General, could not show any provision in the Constitution or any law made thereunder or even the Army Act, to justify any of the above noted proclamations, MLRs and MLOs and many others but he again and again fell back on the ratification of those provisions by the Fifth Amendment as if the said Constitution (Fifth Amendment) Act, 1979, held all the answers and remedies in its bosom and no legal justification is required about those Proclamations etc. made since August 15, 1975 to April 9, 1979.

Mr. Akhter Imam, the learned Advocate appearing on behalf of Bangladesh (Freedom Fighters) Welfare Trust, the respondent no. 3, did not dispute or argue on the finding of facts in the earlier Writ Petition No. 67 of 1976. Rather, he developed a new kind of jurisprudence which he termed as Martial Law Jurisprudence in the back-ground of two Martial Law regimes in our country. He upheld the validity of the subservience of the Constitution to the Martial Law Proclamations, MLRs, MLOs and other Orders and actions taken during the period from August 15, 1975 to April 9, 1979, as ratified by the Constitution (Fifth Amendment) Act, 1979 which were made part of the Constitution by inserting paragraph 18 in the Fourth Schedule to the

Constitution, as in the case of the Proclamations etc, the learned Advocate argued, made during the period form March 24, 1982 to 1986, were validated by the Constitution (Seventh Amendment) Act, 1986.

When we pointed out that the legality of Seventh Amendment is not the issue before us, the learned Advocate contended that the said Seventh Amendment was made exactly for the same purpose and in the same manner, the Fifth Amendment was made, in order to ratify the Proclamations etc. made during the relevant Martial Law periods which he asserted, were the examples of his Martial Law Jurisprudence. The learned Advocate vigorously argued that since all the Proclamations etc. were ratified and confirmed by the provisions of the Fifth Amendment, the legality of those Proclamations etc. cannot be challenged or called in question before any Court including the Supreme Court, in any manner, as spelt out therein.

Like the learned Additional Attorney General, Mr. Akhter Imam, Advocate, relied on the above noted book, namely, 'Bangladesh Constitution: Trends and Issues'. He also read line by line and page by page from the said book in support of his various contentions.

The summary of the contentions raised by Mr. Akhter Imam, Advocate, are as follows:

i) Since the Martial Law Proclamations, MLRs and MLOs were ratified by the Constitution (Fifth Amendment) Act, 1979 and became part of the Constitution as paragraph 18 of the Fourth Schedule by the said Amendment, its legality and those of the Proclamations etc. cannot be called in question in the Supreme Court, as spelt out therein.

ii) The legality of the Proclamations etc. cannot be challenged after a long lapse of 26 (twenty six) years, specially

when the rights of various parties were created during this long period.

iii) The present writ petition is barred by res-judicata.

We asked the learned Advocate as to whether the Constitution is the supreme law of this Republic. He readily agreed but hastened to add that such supremacy is subject to the Martial Law Proclamations, Martial Law Regulations and Martial Law Orders since those Proclamations etc. including its supremacy over the Constitution was ratified and confirmed by the Fifth Amendment. He also candidly pointed out that since Fifth Amendment, inserting paragraph 18 to the Fourth Schedule of the Constitution, was enacted by the Parliament, its legality cannot be challenged in this Court as spelt out specifically therein and since this amendment cannot be challenged, the legality of the various Proclamations etc. issued since August 1975 to April 1979, cannot also be challenged.

We observed in this respect but not with much surprise that both the learned Additional Attorney General and the learned Advocate for the respondent no. 3, were careful to avoid answering the questions on the legality of the Proclamations, MLRs and MLOs, issued since August 1975 to April 1979, rather, both of them did their utmost to highlight and uphold the Constitution (Fifth Amendment) Act, 1979, as the justification for all those Proclamations etc. We, however, examined the legality not only of those Proclamations, MLRs and MLOs made available to us by the learned Advocates but also the Fifth Amendment itself which purported to legalise those Proclamations etc issued between August 1975 to April 1979.

PART VIII : Arguments On Behalf Of Amicus Curiae :

On our request, Dr. Rafiqur Rahman, Advocate, appeared in this case as amicus curiae. The summary of his submissions are as follows:

i) The Constitution is the supreme law of the land and all Institutions and

functionaries of the Republic are its creatures and all laws must conform not only to the letters but also to the spirit of the Constitution.

ii) Khandaker Moshtaque Ahmed had no Constitutional or legal authority to assume the Office of President of Bangladesh on August 15, 1975 or to issue a Proclamation on August 20, 1975.

iii) Justice Sayem had no authority under the Constitution to assume the office of President and the powers of Chief Martial Law Administrator.

iv) Major General Ziaur Rahman B.U., PSC, had no authority under the Constitution, to assume the powers of the CMLA and subsequently to become the President.

v) Supremacy of the Constitution is its basic feature but the Proclamations, MLRs and MLOs issued from time to time, made the Constitution its subservient and destroyed the said basic feature of the Constitution, as such, the Parliament which is itself a creation of the Constitution, cannot validly ratify those Proclamations etc. which destroyed the basic feature of the Constitution.

vi) Proper procedure was not followed as envisaged in Article 142 of the Constitution, in enacting the Fifth Amendment.

vii) A violation of the Constitution remains invalid for all time to come without any limitation and a wrongful act can perpetuate only further wrongs.

viii) The plea of res-judicata is misconceived since the Writ Petition No. 802 of 1994 was rejected summarily. Besides, admittedly neither the Proclamations etc. nor the Fifth Amendment of the Constitution, were challenged in the said Writ Perition.

In reply to holding out the Fourth Amendment as the justification for Proclamation of Martial Law in Bangladesh, Dr. Rahman said that Fourth Amendment

was made by a sovereign Parliament with almost 100% per cent votes in its favour while the Martial Law Proclamations etc., were made by the usurpers and in total violation of the Constitution, as such, the Martial Law Proclamations, MLRs and MLOs were out and out illegal and that there cannot be any comparison between the Fourth Amendment and the Proclamations.

PART IX :Deliberations – Prelimineries :

We have heard the learned Advocates on behalf of the petitioners, the respondent no.1, the respondent no.3 and also the learned amicus curiae. Perused the petition and the affidavits-in-opposition filed on behalf of the respondents.

Before we commence our discussions, we remind ourselves the 8th verse of Sura 'Tin' of the Holy Quran :

> "Is not God The wisest of Judges?
> (Translation by A. Yusuf Ali Published By Amana Corporation Maryland, USA.).

We also remind ourselves the Oath of Office we solemnly swear on our elevation to the Bench which is as follows :

> "আমি ----------সুপ্রীম কোর্টের হাইকোর্ট বিভাগের বিচারক নিযুক্ত হইয়া সশ্রদ্ধচিত্তে শপথ (বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-অনুযায়ী ও বিশ্বস্ততার সহিত আমার পদের কর্তব্য পালন করিব;
> আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষন করিব;
> আমি বাংলাদেশের সংবিধান ও আইনের রক্ষণ, সমর্থন ও নিরাপত্তা বিধান করিব;
> এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-অনুযায়ী যথাবিহিত আচরণ করিব।"
> (The underlinings are mine)

The English text is :

> "1....., having been appointed Judge of the High Court Division of the Supreme Court do

solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law:

That will bear true faith and allegiance to Bangladesh:

That I will preserve, protect and defend the Constitution and the laws of Bangladesh:

And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will." (The underlinings are mine).

Besides, we remind ourselves paragraph 4 of the pre-amble of the Constitution which reads as follows :

"আমরা দৃঢ়ভাবে ঘোষণা করিতেছি যে, আমরা যাহাতে স্বাধীন সত্তায় সমৃদ্ধি লাভ করিতে পারি এবং মানবজাতির প্রগতিশীল আশা-আকাংখার সহিত সংগতি রক্ষা করিয়া আন্তর্জাতিক শান্তি ও সহযোগিতার ক্ষেত্রে পূর্ণ ভূমিকা পালন করিতে পারি, সেই জন্য বাংলাদেশের জনগণের অভিপ্রায়ের অভিব্যক্তিস্বরুপ এই সংবিধানের প্রাধান্য অক্ষুন্ন রাখা এবং ইহার রক্ষণ, সমর্থন ও নিরাপত্তা বিধান আমাদের পবিত্র কর্তব্য " (The underlinings are mine).

Its English version is as follows :

"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 con-operation in keeping with the progressive aspirations of mankind;" (The underlinings are mine).

We also remind ourselves the lofty ideals enshrined in Article 7 of the Constitution.

This Article is the touch-stone of our Constitution as held in the case of A. T. Mridha.

Keeping these provisions in view, amongst others, we would consider the case of the respective parties.

PART X : History :

But first we would narrate in brief the history leading to the liberation of Bangladesh.

The glory of independent Bengal faded away and sank in the afternoon of June 23, 1757 at Lakkhabag, a huge estate of mango garden near Palassy, for the next 190 years, due to treachery and betrayal of Mir Jafar Ali Khan, Commander in Chief of Nabab Sirajuddoula. However, the British Rule under the East India Company in Bengal and in other parts of India were never free from troubles and the Bengali rebels successfully fought many a battles against the British forces during the Second half of the 18th Century. 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. The Indian National Congress was established in 1885 at Bombay while Muslim League was established in 1906 at Dhaka. In 1930, Surya Sen formed Indian Republican Army and raided the armoury at Chittagong.

In 1935, Government of India Act, created 11 (eleven) Provinces and Princely States. It provided for governance of those provinces by the elected representatives of the people. In 1937, in accordance with the provisions of the Government of India Act, 1935, A.K.Fazlul Haque became the first Prime Minister of Bengal. On March 23, 1940, he moved the famous Lahore Resolution for the establishment of separate States for the Indian Muslims. In 1943, Khawaja Nazimuddin became the next Prime Minister of Bengal. In 1946, on Pakistan Issue, under the leadership of Hossain Shahid Suhrawardy, Muslim League secured 116 seats out of 119 and achieved a land-slide victory in Bengal amongst all the provinces in India. In that view of the matter, it can be said that it was the Bengali Muslims who spear-headed and

voted Pakistan into existence for the entire Muslim population of the Indian sub-continent. After obtaining over-whelming majority, Hossain Shahid Suhrawardy became the last Prime Minister of undivided Bengal in 1946.

In early 1947, H.S.Suhrawardy made a proposal for an independent undivided Bengal before Lord Mountbaten, the Viceroy of India. He was supported by Abul Hashim and Sarat Chandra Bose but were opposed by Mahtama Gandhi and Shayma Prashad Mukharjee. Mohammad Ali Jinnah supported the idea of independent Bengal provided it joined Pakistan. On the other hand, Jawharlal Nehru also supported the idea provided it joined the Indian Union. Ultimately it yielded nothing.

In the meantime, Indian Independence Act, 1947 was enacted on July 18, 1947, creating two independent Dominions, namely, Pakistan and India but the dream for an independent Bengal faded away in the euphoria of Pakistan.

The Dominion of Pakistan formally came into existence on August 14, 1947 and Mohammad Ali Jinnah was elected the first President of the Constituent Assembly of Pakistan. In his inaugural address on September 11, 1947, he outlined the basic ideals on which the state of Pakistan was going to flourish. He said :

> "..... 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 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." (The underlingings are mine).

But the dreams of the Bangalees were shattered in no time and the history of Pakistan was writ with palace clique, deception and disappointment. Very soon the Bangalees in East Pakistan discovered that they are reduced into second class citizen. Creation of Pakistan brought them only a change of ruler, for all practical purposes, the East Pakistan became a colony of West Pakistan. The process started with the delay in framing the Constitution for Pakistan although in India, Constitution was framed and adopted by their Constituent Assembly in 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 Ghulam Muhammad, the Governor General of Pakistan.

Ghulam Muhammad was never a politician. He was a bureaucrat, a member of the Indian Audits and Accounts Service. But like many if not most, because of the creation of Pakisatan, could rise to become the Governor General of Pakistan but only to destroy the fabrics of a new nation in contradistinction to its neighbouring Republic. It may surprise many that Ghulam Muhammad was elected as a member of the Constituent Assembly from the quota of East Bengal in June 1948 and retained his membership until July, 1953.

This is how the constitutional mishaps in Pakistan since 1953 was viewed by Yaqub Ali , J., in Asma Jilani V. Government of Punjab PLD 1972 SC 139 at page –212 and onwards:

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

Minister,……was ssassinated. 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, 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 Inddia 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.

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 Aministrator 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 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." (The underlinings are mine).

This was, however, only a part of the story. The unfathomed misery, neglect and discrimination suffered by the Bengali speaking Pakistani citizens in all spheres of life were not reflected here. In 1966 one of the major parties launched a six point constitutional programme for economic salvations and autonomy for the then East Pakistan but not at all heeded to either by Field Marshal Ayub Khan or thereafter by General Yahya Khan. However, the first general election in 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.

In quoting further from the Judgment of Yaqub Ali, J., in Asma Jilani 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 surrection by Awami League and their supporters."

PART XI : A Nation Was Born :

It may be noted that a general election was held in December, 1970 throughout the erstwhile Pakistan. Its pre-dominant purpose was to frame a Constitution for the entire Pakistan. The National Assembly was due to be convened on March 3, 1971 but it was indefinitely postponed on March 1, 1971. This postponement of holding of the National Assembly had serious repercussions all over Pakistan specially in the erstwhile East Pakistan.

The rest was history. It was a history of human tragedy. It was a history of human misery. It was a history how unarmed, docile, peace loving and soft speaking Bangalees, when pushed to the wall, rose as a nation and drove away the valiant Pakistan army from Bangladesh as the Athenians routed the army of Daraus in the battle of Marathan in 492 B.C.

By March 7, 1971 the flag of Bangladesh was flying all over the country save and except the cantonments. On the late evening of March 25,1971 the Pakistan army unleashed a reign of terror and launched history's one of the most brutal and bloodiest attack and massacred thousands of unarmed Bangalees. The genocide perpetrated by the Pakistani rulers upon the Bangalees is compared only to the masacre of Baghdad by Holagu Khan in 1258 and the massacre of Delhi by Nadir Shah in 1739. This reign of terror and one of the worst genocide in the history of mankind continued for the next nine months and ended with the deliberate and diabolical murders of the best sons of our soil on December 13-14, 1971.

With the declaration of independence of Bangladesh at the dead of night following March 25, 1971, a Nation was born with blood and tears. The Bangalees armed themselves and started to put up resistance all over the then East Pakistan which was initially spear headed by the Bengali speaking Officers and men of the then East Pakistan Rifles, the Bengali units of the Pakistan army and the police force till the exile Government of Bangladesh formed its army under the over-all command of Colonel (later General) M.A. G. Osmany.

We have narrated the back-ground history, to some extent, leading to the commencement of our liberation war in order to highlight and honour the emotional and moral values of our liberation war and the high ideals for which our three million martyrs sacrificed their lives.

On April 10, 1971, the independence of Bangladesh was formally proclaimed at Mujibnagar. This is the first constitutional document. It heralded the birth of Bangladesh on and from March 26, 1971 as a Sovereign People's Republic.

This Proclamation of Independence was given the force of law by the Provisional Constitution of Bangladesh Order, 1972.

On the same day on April 10, 1971, Laws Continuance Enforcement Order was also made.

This was a provisional arrangement. It provided for continuance of the existing laws in force in Bangladesh on March 25, 1971. It also provided for an oath of allegiance to Bangladesh for all government officials of Bangladesh.

PART XII : Liberation :

The War of liberation continued for nearly 9(nine) months and ended on December 16, 1971, with the surrender of Pakistan army. Bangladesh own its independence at the cost nearly 3(three) million martyrs. The flag of Pakistan was lowered in Bangladesh for all time to come and the Glory of Bangladesh was raised and

flew high above the horizon proudly and gracefully beating against the wind. Our national anthem was played and the Bangalee nation wept and solemnly pledged that they would never forget their martyrs, rather, they would uphold their dreams, their ideals, their visions.

When we re-live this proud moment of our Nation-hood, we cannot but help thinking with Charles Dickens :

"It was the best of times
It is the worst of times
It was the age of wisdom
It was the age of foolishness
It was the epoch of belief
It was the epoch of incredulity
It was the spring of hope
It was the winter of despair" (abridged).

We have narrated the earlier history leading to the liberation of Bangladesh but not without a purpose. Because, it is always true that 'a page of history is worth a volume of logic' (Justice Holmes). We only wanted to highlight the long history of our struggle for independence from the British yoke and thereafter our frustration for such discrimination under the naked domination of the West Pakistani Rulers. We wanted to impress how our self-respect was trampled and insulted in every turn, leading us to our struggle for autonomy which was transformed into a war of liberation.

PART XIII : Enactment of the Constitution:

Now going back to the genesis of our Constitutional history. After independence, the Constitutent Assembly of Bangladesh was created by the Constituent Assembly of Bangladesh Order, 1972 (P.O. No. 22 of 1972), on March 22, 1972. The said Constituent Assembly consisted of the elected representatives of this country, elected both in the National Assembly and also in the Provincial Assembly in the elections held in December, 1970 and in January, 1971, in the erstwhile East Pakistan.

This Constituent Assembly completed its task in a remarkably short period of time and framed the Constitution of the People's Republic of Bangladesh on November 04, 1972. The Constitution commenced on and from December 16, 1972. Having thus fulfilled its functions as the Constituent Assembly, on the commencement of the Constitution it stood dissolved. This was recorded at paragraph 1 of the Fourth Schedule to the Constitution.

It may be mentioned here that this new nation plunged into a disaster and a constitutional crisis when in the early morning of August 15, 1975, the President of Bangladesh with his family members were brutally killed by a section of army officers and Khandaker Moshtaque Ahmed in conspiracy with them seized the office of the President of Bangladesh. Bangladesh was ruled by Martial Law Proclamations for nearly the next 4(four) years. The said whole period of Martial Law was sought to be validated firstly by the Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977) and secondly by the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979).

PART XIV : Law:

As such, before we consider what Martial Law means, we would try to understand the concept of 'law' first.

Thurman Arnold in his article 'The Symbols of government' (1935) observed :

> "Obviously, 'law' can never be defined. With equal obviousness, however, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition……Hence the verbal expenditure necessary in the upkeep of the ideal of 'law' is colossal and never ending. The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational world is constantly approaching rationality…." (Quoted from

Loyds Introduction to Jurisprudence, sixth Edition, 1994 page 47).

Professor George Whitecross Paton after considering works of a number of authorities since ancient Greek philosophers approached the concept of 'law' in this manner :

> "Law may shortly be described in terms of a legal order tacitly or formally accepted by a community. It consists of the body of rules which are seen to operate as binding rules in that community, backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured to enable the system or set of rules to continue to be seen as binding in nature."
> (Quoted from G.W. Paton on 'A text book of Jurisprudence', Fourth Edition 1972 at page-97).

Earlier, Sir John Salmond in his 'Treatise on Jurisprudence' (7th Edition, 1924) approached the concept of 'law' thus :

> "All law, he argued, is not made by the legislature. In England much of it is made by the law courts. But all law. However made, is recognized and administered by the courts and no rules are recognized and administered by the courts which are not rules of law. <u>It is therefore to the courts and not to the legislature that we must go in order to ascertain the true nature of the law. Accordingly, he defined law as the body of principles recognized and applied by the state in the administration of justice, as the rules recognized and acted on by courts of justice.</u>"
> (The underlingings are mine).(Quoted from Salmond on Jurisprudence, Twelfth Edition, 1966, page-36).

In his book 'The Concept of Law' Professor H.L.A.Hart, treated the pathology of Legal System in this way : P-117 to 118 :

> "Evidence for the existence of a legal system must therefore be drawn from two different sectors of social life. The

normal, unproblematic case where we can say confidently that a legal system exists, is just one where it is clear that the two sectors are congruent in their respective typical concerns with the law. Crudely put, the facts are, that the rules recognized as valid at the official level are generally obeyed. Sometimes, however, the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts. The variety of ways in which this may happen belongs to the pathology of legal systems; for they represent a breakdown in the complex congruent practice which is referred to when we make the external statement of fact that a legal system exists. There is here a partial failure of what is presupposed whenever, from within the particular system, we make internal statements of law. Such a breakdown may be the product of different disturbing factors. 'Revolution,' where rival claims to govern are made from within the group, is only one case, and though this will always involve the breach of some of the laws of the existing system, it may entail only the legally unauthorized substitution of a new set of individuals as officials, and not a new constitution of legal system. Enemy occupation, where a rival claim to govern without authority under the existing system comes from without, is another case; and the simple breakdown of ordered legal control in the face of anarchy or banditry without political pretensions to govern is yet another.

In each of these cases there may be half-way stages during which the courts function, either on the territory or in exile, and still use the criteria of legal validity of the old once firmly established system; but these orders are ineffective in the territory. The stage at which it is right to say in such cases that the legal system has finally ceased to exist is a thing not susceptible of any exact determination. Plainly, if there is some considerable chance of a restoration or if the disturbance of the established system is an incident in a general war of which the issue is still uncertain, no unqualified assertion that it has ceased to exist would be warranted. This is so just because the statement

that a legal system exists is of a sufficiently broad and general type to allow for interruptions; it is not verified or falsified by what happens in short spaces of time." (The underlinings are mine).

Under the American Realism, the view of O.W. Holmes is as follows:

"Take the fundamental question,What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (The underlinings are mine). (Quoted from Lloyd's Introduction to Jurisprudence at page-670).

In the case of Asma Jilani V. Government of the Punjab PLD 1972 SC 139, a question of nature, scope and content of law was raised on behalf of one of the appellants. Hamoodur Rahman, C. J. dealt with the question in this manner at page – 159:

"The task of a Judge in the circumstances, is not an easy one. But is it necessary for him to define law ? Law itself is not a legal concept, for, what is law is really a theoretical question. Conclusions of law do not depend upon the definition of law nor are legal judgments based on definitions of law and, in fact, as Sir Iver Jennings has said in his Article on the Institutional Theory published in Modern Theories of Law, Oxford University Press, 1933 (page 83) "the task which many writers on jurisprudence attempt to fulfill in defining law is a futile one", for, according to him, "law has no definition except in a particular context."

> So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer is made by a person or authority legally competent to make laws and the law is capable of being enforced by the legal machinery. This, in my view, brings in the notion both of legitimacy and efficacy.

In referring to Jurisprudence, his Lordship further held :

> "The thesis of Dias is thus the same as that now adopted by the learned counsel; namely, that "the legality of the law-constitutive medium only comes about when the Courts accept, or are made to accept it."

In the above noted case, Yaqub Ali, J. also considered what the law is in order to determine whether the Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances by General Yahya Khan, may be recognized by the Courts. It should be noted in this connection that law was not defined in the Constitution of Pakistan of 1962.Yaqub Ali, J., traveled, the world of Jurisprudence to find the real face of 'law'.

We quote some of the observations of Yaqub Ali, J., as follows;

> "In introduction to "Law in the Making" C.K. Allen mentions two antithetic conceptions of growth of law: (i) law is which is imposed by a sovereign will; and (ii) law which develops within society of its own vitality. He criticizes Austin who defined "law" as the will of the sovereign and points out that whatever be the constitutional instrument which secures observance and enforcement of law –and some sanction of this kind is certainly indispensable –there is no historical justification for the view that this power always and necessarily be a determinate, "human superior" which at the same time creates all law. It is impossible in every form of society governed by law to disengage and personify a "sovereign" as thus understood, with the artificial precision which Hobbs and Austin assume…….Dugit's definition is as follows:
>
> "Men live together in groups and societies; they are

dependent upon, solidarist with, one another. They have common needs which they can satisfy only by a common life; and, at the same time, they have different needs the satisfaction of which they assure by the exchange of reciprocal services. The progress of humanity is assured by the continuous growth, in both directions, of individual activity. Man, so placed in society, has the obligation to realize this progress, because in so doing he realizes himself.

From the imminent force of things, therefore, there arises a rule of conduct which we may postulate as a rule of law."

Roscoe Pound states that more than one reason led American realists which define law in terms of judicial process. One is the central position of the Court in the Anglo-American legal syetem and the concrete character of a legal precept in that system as a product of the Courts rather than of the universities. Again, economic determinism and psychological realism lead to scrutiny of the work of individual Judges, and skeptical relativism leads to discounting of norms and rules and authoritative guides to determination. Certainly the judicial process (to which today we must add the administrative process) is something of which a theory of the subject-matter of jurisprudence must take account……

In "A Grammar of Politics" Laski adds : "To those for whom law is a simple command, legal by virtue of the source from which it comes, it is not likely that such complexities as these will be popular, We are urging that law is, in truth, not the will of the State, but that from which the will of the State derives whatever moral authority it may possess…..It assumes that the rationale of obedience is in all the intricate facts of social organization and in no one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is important in law is not the fact of command, but the end at which that command aims and the way it achieves the end. It sees society, not as a pyramid in which the State sits crowned upon

> the summit, but as a system of co-operating interests through which, and in which, the individual finds his scheme of values. It argues that each individual scheme so found gives to the law whatever of moral rightness it contains. "And" Any other view is seeking to invest coercive authority with ethical content on grounds which analysis shows to be simply the fact of the power to coerce. That power may how its way to success, but it does not, by the fact of the victory, become a moral agent. We argue, rather, that our rules of conduct are justified only as what they are in working induces our allegiance to them."

Yaqub Ali, J. himself explained why he had to explore so much of abstract jurisprudence in his Judgment, at page – 235 :

> "I have burdened this order with different theories of law not only for the purpose of finding out the essential qualities of law, but also because during the last thirteen years or more we have so much gone astray from the rule of law that not only the common man, but the lawyers and Judges alike need to refresh their minds about the true import and form of law."

And then his Lordship gave his own view on law :

> "The preponderant view appears to be that law is not the will of a sovereign. Law is a body of principles called-rules or norms-recognized and applied by the State in the administration of justice as rules recognized and acted upon by the Courts of justice. It must have the contents and form of law. It should contain one or more elements on which the different theories of law are based, and give expression to the will of the people whose conduct and behaviour the law is going to regulate. The will of the people is nowadays often expressed through the medium of Legislature comprising of the chosen representatives of the people. The will of a single man howsoever laudable or sordid is a behest or a command, but is certainly not law as understood in juristic sense." (The underelininings are mine).

I also quoted extensively from various books on Jurisprudence in order to explore the wide horizon of law to understand the concept of 'No Law' because even after advent of so much of civilization and philosophy, we still confuse ourselves between what is 'law' and what is the 'dearth of law' so much so that very often the supreme law of the land is being pushed out and obliterated by some shadow which does not even come within the definition of 'law' as defined in our Constitution.

Although 'Law' was not defined in the 1962 Constitution of Pakistan but our Constitution defines law as follows :

> "'law' means any Act, Ordinance, Order, Rule, Regulation, Bye-law, Notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh."

It is apparent that 'law' as defined in Article 152 of the Constitution of Bangladesh, does not include Proclamations or Martial Law Regulations or Martial Law Orders.

PART XV : The Parliament–Historical Growth :

Before we enter into discussions on the vires of the Fifth Amendment validating the Martial Law Proclamations and many others, let us first consider the legislative powers of the Parliament.

Parliament has been established by Article 65 of the Constitution. The legislative powers of the Republic has been vested in this body which is acclaimed as the House of the Nation in the Constitution. But before we discuss about the legal concept of our Parliament, let us look at the British Parliament first.

Professor A.V. Dicey, in his celebrated treatise 'Introduction To The Study Of The Law Of The Constitution' (Tenth Edition, 1959), views Parliamentary Sovereignty in this manner at pages 39-40 :

> "The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions…….
>
> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set side the legislation of Parliament." (The underlinings are mine).

The history of this omnipotent Parliament dates back to nearly one thousand years. Long before the Norman conquest in 1066, there used to be the meetings of the 'wise'. These meetings performed the functions of the Teutonic national assembly known as Witenagemot. After the Norman conquest, the meeting of the wise was replaced by the Curia Regis. From time to time, the feudal great councils was attended not only by the tenants-in-chief but also the under-tenants on summons from the King. In April, 1275, Edward I summoned his first general parliament at Westminister and the Statute of Westminister was executed. In the 23rd year of his reign in 1295, Edward I was in serious difficulties. There was rebellion of the Welsh, war with Scotland was continuing, the French fleet reached the English Coast and landed at Dover. Under this critical condition, the King felt that he require the support of the entire nation by way of their common counsel and adequate grant of an aid. He accordingly summoned a Parliament to meet at Westminister in November, 1295. This was for the first time the national parliament was attended by the barons and knights, the burgesses and the clergy.

This great assembly, however, did not form a single body but each of the three bodies discussed and voted seperately. They also made proportional grants in favour of the King. The great assemblies of 1275 and 1295 in the fullness of time became the modern English Parliament which is the model for parliamentary system of Government of many a countries all over the globe.

In those assemblies germane was the principle of democracy which was taking root in England though very slowly but surely, more than seven hundred years ago. The principle of democracy was no doubt in a crude form but it started to bloom and the people of England themselves were the centre piece. There the people brought the revolutionary ideas of Hobbs, Locke into actual practice in the national politics. It is they who protected their rights and liberty against all onslaughts from time immemorial.

On the concept of law and the Constitution Sir Ivor Jennings, in his treatise 'Cabinet Government' Third Edition, 1969, expressed the real sentiment of the English people at page-1-2 :

> "……..With us, 'the law' is not an emanation from authorities set up or provided for by a written and formal document. It consists of the legislation of Parliament and the rules extracted from the decisions of judicial authorities. The powers of these bodies and the relations between them are the product of history. The constitutional authorities have claimed and have exercised law-making functions and the people has acquiesced in their exercise. Revolution has helped to determine constitutional powers; but no revolution has produced a permanent written constitution. It has produced, instead, the recognition of a rule that Parliament can legislate as it pleases and that what Parliament enacts is law. ……..
>
> Neither the Cabinet nor the office of Prime Minister was established by legislation, nor has either been recognized by the courts of law.……These persons are under no legal obligation to obey, but they do obey. There is a whole complex of rules outside 'the law',……They are called by various names, but are now commonly referred to as 'constitutional conventions". (The underlinings are mine).

In early 17th century, the supremacy of the Parliament was not even achieved. At that period of time both the Parliament and the Judiciary was fighting against the supremacy of the divine right of the King to rule his subjects and also with his prerogatives which were sought to be expanded during the reign of James I and

Charles I with the active support of many a jurist of that age. Besides, the Star Chamber was there. The said Court was infamous for extracting confessions by torture, sometimes at the behest of the Crown. At that time Judges used to serve at the pleasure of the Kings and often they used to be dismissed as Coke C. J., himself was dismissed in 1617.

But the Bill of Rights, 1689, made all the difference. It dispelled all confusions and emphatically declared the supremacy of Parliament. Its terms altered the balance of power in favour of the Parliament instead of the Crown. From then on the Courts in England accepted an Act of Parliament as valid. This Act has been followed by the Act of Settlement, 1700. This among others, provided for the security of tenure for the judiciary during good behaviour. This Act ended the power of the Crown to dismiss the judges at his will. From then on the judges of the Superior Courts could not be removed short of impeachment. This is how the independence of judiciary was achieved three hundred years ago. The judiciary in its turn ensured the supremacy of the Parliament by judicial pronouncements.

But inspite of the apparent supremacy of the Parliament there was always an inbuilt limitation inherent in the system itself. Leslie Stephens explains the point :

> "……..It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social conditions, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue eyed babies should be murdered, the preservation of blue eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it." (The underlinings are mine).[Quoted from Hilaire Barnett: Constitutional And Administrative Law, Fourth Edition, 2002 Page 196]

Again, in the case of R.V.H.M. Treasury ex parte Smedley (1985)1 All E R 589, the challenge was with regard to the payment from the Consolidated Fund, without express parliamentary approval. Sir John Donaldson MR held :

> "…....Before considering Mr. Smedley"s objections …… I think that I should say a word about the respective roles of Parliament and the courts. Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes . It therefore behoves the courts to be over sensitive to the paramount need to refrain from trespassing on the province of Parliament or, so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing on the province of the courts……. It is the function of Parliament to legislate and legislation is necessarily in written form. It is the function of the courts to construe and interpret that legislation. Putting it in popular language, it is for Parliament to make the laws and for the courts to tell the nation, including members, of both Houses of Parliament, what those laws mean…… . At the present moment, there is no Order in Council to which Mr. Smedley can object as being unauthorized. ……. In many , and possibly most, circumstances the proper course would undoubtedly be for the courts to invite the applicant to renew his application if and when an order was made, but in some circumstances an expression of view on questions of law which would arise for decision if Parliament were to approve a draft may be of service not only to the parties, but also to each House of Parliament itself. This course was adopted in R v Electricity Comrs, ex P London Electricity Joint Committee Co (1920) Ltd. (1924) I KB 171 , (1923) All ER Rep 150 . In that case an inquiry was in progress, the cost of which would have been wholly wasted if, thereafter, the minister and Parliament had approved the scheme

> only to be told at that late stage that the scheme was ultra vires. (The underlinings are mine).

Still the Courts in its anxiety to dispense justice finds ways and means to do exactly what it thinks that the Parliament intends to do. In the language of H.W.R. Wade at page -418 :

> "The Courts may presume the Parliament , when it grants powers , intends them to be exercised in a right and proper way. Since Parliament is very unlikely to make provision to the contrary, this allows considerable scope for the courts to devise a set of canons of fair administrative procedure, suitable to the needs of the time". (The underlinings are mine).(Quoted from H.W.R. Wade: 'Administrative Law' Fifth Edition, 1982).

PART XVI : The Constitution : Legal Concept :

In contradistinction to United Kingdom with unwritten Constitution, there exists in the United States of America, separation of powers, on the basis of a written Constitution.

The Constitution, however, does not itself spell out the concept of separation of powers but the relevant provisions of the Constitution show such separation of powers.

As a matter of fact the concept of separation of powers as propounded predominantly by Baron Montesquieu was put into actual practice through the Constitution of the United States. Montesquieu observed in De l Esprit des Lois (1748) as follows :-

> "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 judging 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 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 enacting laws, that of executing public affairs, and that of trying crimes or Individual causes." (Quoted from Hilaire Barnett: (Constitutional and Administrative Law, Fourth Edition, 2002, at page-106).

In any State, there are three essential bodies namely, the legislature, the Executive and the Judiciary. The legislature legislates to cater the needs of the society, the executive runs the administration in accordance with the laws made by the legislature while the Judiciary upholds the Constitution and the laws of the country and ensure that the other two great bodies of the State function within the bounds of the Constitution and the laws made there under. It is desirable that there should be a clear demarcation in those three bodies in their respective functions so that none of those bodies can act arbitrarily, rather, each one of those bodies keeps the other within its legal bounds. This system of checks and balances between the three institutions of the State is the essence of the doctrine of Seperation of Powers.

The Republic of the United States is based on constitutional democracy with Seperation of Powers. It put the theory of Montesquieu into actual practice. The framers of the Constitution took all possible care that the powers of the Republic is not concentrated in one hand or in one Institution. Although this doctrine was applied in the later part of the 18th century but as a matter of fact Aristotle (384–322 BC) identified the three elements of the State in his famous treatise 'The Politics'.

James Madison in the Federalist Papers published in 1787-88 explained the above Principle as embodied in the U.S. Constitution in this manner :

> "The constitution of Massachusetts has observed a sufficient, though less pointed caution, in expressing this fundamental article of liberty. It declares, 'that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the

> legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them' This declaration corresponds precisely with the doctrine of Montesquieu……. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very constitution to which it is prefixed, a partial mixture of powers has been admitted……(Quoted from Peter Woll on 'American Government',1962 at Page-8).

In the United States, its Constitution assumed the central position. All three major organs of the State owe its existence to the Constitution and revolve round it. All legislative and executive functions must conform to the Constitution, otherwise, the judiciary in exercise of its role as the defendar of the Constitution would declare such actions as ultra vires to the Constitution.

Similar is the position in Bangladesh . It has a Constitution which is controlled and rigid in character. Like the United States, all three great Departments owe its existence to the Constitution. In this Rule we are concerned with the legality of ratification and confirmation of the Proclamations etc.in pursuance of insertion of Paragraph 18 to the Fourth Schedule to the Constitution by Section 2 of the Constitution (Fifth Amendment) Act, 1979. As such, we are to consider first, what is a Constitution, its role and impact on the Republic, and then the Parliament, one of the three Institutions, created by the Constitution, and the extent of its power to amend the said Constitution.

Professor K.C.Wheare, in his celebrated book: 'Modern Constitution', Second Edition, 1966 at pages-1-5 explains Constitution in this manner:

> The word 'constitution' is commonly used in at least two senses in any ordinary discussion of political affairs. First of all it is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government. …….What is more, this selection is almost

invariably a selection of legal rules only. 'The Constitution', then, for most countries in the world, is a selection of the Legal rules which govern the government of that country and which have been embodied in a document.

Perhaps the most famous example of a Constitution in this sense is the Constitution of the United States of America…….The Americans in 1787 declared: 'We, the people of the United States……. do ordain and establish this Constitution for the United States of America Since that time the practice of having a written document containing the principles of governmental organization has become well established and Constitution has come to have this meaning. ……..

"What is more, in the United States, if an act of Congress or on act of any state legislature or of any other rule-making authority in the country, conflicts with the terms of the Constitution, it is void."

Professor Wheare traced the origin of the Constitution in this manner at page-6

"If we investigate the origins of modern Constitutions, we find that practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned. The desire or need for a fresh start arose either because, as in the United States, some neighbouring Communities wished to unite together under a new government; or because, as in Austria or Hungary or Czechoslovakia after 1918, Communities had been released from an Empire as the result of a war and were now free to govern themselves; or because, as in France in 1789 or the U.S.S.R. in 1917, a revolution had made a break with the past and a new form of government on new principles was desired; or because, as in Germany after 1918 or in France in 1875 or in 1946, defeat in war had broken the continuity of government and a fresh start was needed after the war. The circumstances in which a break with the past and the need for a fresh start come about vary from country to country, but in almost every case in modern times, countries have a Constitution for the very simple

> and elementary reason that they wanted, for some reason, to begin again and so they put down in writing the main outline, at least,of their proposed system of government. This has been the practice certainly since 1787 when the American Constitution was drafted. and as the years passed no doubt imitation and the force of example have led all countries to think it necessary to have a Constitution."

Regarding supremacy of the Constitution and the limitation on its amendment, Professior Wheare stated at page-7.

> "The nature of the limitation to be imposed on a government, and therefore the degree to which a Constitution will be supreme over a government, depends upon the objects which the framers of the Constitution wish to safeguard. In the first place they may want to do no more than ensure that the Constitution is not altered casually or carelessly or by subterfuge or implication; they may want to secure that this important document is not lightly tampered with, but solemnly, with due notice and deliberation, consciously amended. In that case it is legitimate to require some special process of constitutional amendment-say that the legislature may amend the Constitution only by a two-thirds majority or after a general election or perhaps upon three months' notice.

In almost all the countries the Constitution is glorified as the supreme law of the country in contradistinction to the other laws enacted by the legislative authorities of the country. This superior position of the Constitution in contradistinction to other enactments passed by the legislatures has been lucidly explained by John Marshall, the Chief Justice of the Supreme Court of the United States, more than two hundred years ago in the case of Marbury V. Madison in 1803 :

> "The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize

certain principles, supposed to have been long and well established, to decide it.

……The Powers of the legislature are defined and limited and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation. Committed to writing, if this limits may at any time be passed by those intended to be restrained? The distinction between a government with limit and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act .

……..Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void.

……It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitution. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits, may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the constitution. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

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 arises?

This is too extravagant to be maintained.

…….It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself its first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

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." (The underlinings are mine) (Quoted from Cases and Materials on Constitutional Law By Professor John P. Frank, 1952).

This logical argument of Chief Justice John Marshall as propounded above is being accepted all over the globe because it is the Constitution which establishes the Institutions of the State with limitations upon its functions, as such, those limitations must be enforced along with its powers. Those Institutions are supreme, no doubt, so long those remain within the bounds spelt out in the Constitution. The irresistible conclusion is that the supremacy of the Constitution is inherent in it and must be given priority over all other laws.

Besides, the sovereignty of the State lies with the 'People' and the Constitution has been drawn up by the representatives of the people as the embodiment of their will. Since the sovereingnty of the nation lies with its people, so also its will. As such, of necessity, the Constitution is the supreme law of the State as the embodiment of the will of the people. The Government being a mere agent of the 'People', the laws made by it, must conform to the Constitution as agent and trustee for and on behalf of the people. The concept of the supremacy of the 'People' as the supreme law giver has been recognized for the first time in the United States when they ratified their own Constitution in 1787 and by and by with almost all countries of the world with democratic sprits ingrained in their Constitutions. Even in those countries where democracy exists only in form and not in its true spirit, still the rulers govern their countries although in an autocratic and feudalistic fashion but ironically again in the name of the 'People' who has, in fact, no part in the Government but in abusing their name their rulers 'govern' instead of 'serve' them.

The modern republican form of democratic government is based on the concept of the rights of the people to govern themselves through their own elected representatives. Those representatives are the agents of the people. They govern the

country for and on behalf of the people at large. But those very ordinary people are the owners of the country and their such superiority is recognized in the Constitution.

The ultimate superiority of the 'People' was aptly stated by Alexander Hamilton in the Federalist in this manner:

> "There is no position which depends on clearer principles than that very act of a delegated authority, contrary to the tenor of the commission 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 than the deputy is greater that his principal; that the servant is above his master, that the representatives of the people are superior to the people themselves; that man acting by virtue of powers may do not only what their powers do not authorize, but what they forbid…….the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents.' (Quoted from K. C. Wheare on Modern Constitutions at page - 60). (The underlinings are mine).

It can be recalled what Justice Stanely Mathews emphatically stated more then six score years ago with regard to the sovereignty of the people in the case of Yick Wo V. Peter Hopkins(1885) 118 U.S. 356 (book 30 Law Ed) (370):

> "When we consider the nature and the theory of our institution of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power . It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body the authority of final decision, and, in many cases of mere

> administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions are secure maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the Government of the Commonwealth "may be a Government of laws and not of men". For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In this connection Article 3 of Fourth French Republic is worth reading on this point. It says:

> "National sovereignty " belongs to the French people. No section of the people nor any individual may assume its exercise. The people exercise it in constitutional matters by the vote of their representatives and by the referendum. In all other matters they exercise it through their deputies in the National Assembly, elected by universal, equal, direct and secret suffrage.(Quoted from K.C. Wheare on 'Modern Constitutions' at page -62). (The underlinings are mine).

It appears that in this manner a Constitution after its enactment bind every body in the State as the supreme law of the Republic. It binds and regulates not only the Institutions of the State which it creates but also the very 'People' of the Republic. It may, no doubt, be amended but only by the special procedure and manner spelt out in the Constitution itself. Besides, such amendment can only be made by the proper authority as enjoined in the Constitution but not by any other person or group of persons how high or powerful or mighty they may appear to be, rather, it is to be,

remembered that the Constitution is superior and greater and its shadow is much taller and higher than even any of those mortals.

Pakistan and India became independent in 1947. Although India framed its Constitution promptly in 1950 but Pakistan has rather a turbulent constitutional history. Its first Constitution was framed in 1956 after much hustle and tussle. But this was abrogated in 2(two) years in 1958. Martial Law was proclaimed and the armed forces took upon themselves the task of saviours of the nation.

In 1962, its second Constitution was framed. This Constitution was also abrogated in 1969. However, following its first general election in 1970, when the army rulers refused to convene the National Assembly, the Bangalees in the erstwhile East Pakistan, declared their Independence, leaving the West Pakistan on its own which is now the Pakistan. In 1973, another Constitution was made there. However, the supremacy of the Constitution was also upheld by the judiciary in Pakistan from time to time, atleast in theory.

Upholding the supremacy of the Constitution, Hamoodur Rahman ,J, (as his Lordship then was), quoting Cooley , in the case of Fazlur Quader Chowdhury V. Mohammad Abdul Hoque PLD-1963 SC 486, held at page-535:

> "A Constitution", says Cooley in his Treatise on Constitutional Limitations is "the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised." The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rules for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power

> can, therefore, be claimed by any functionary which is not to be found within the four corners of the Constitution nor can anyone transgress the limits therein specified." (The underlinings are mine).

By way of example his Lordship held as follows at page-534-35 :

> "It is no doubt true that the Constitution was enacted by the President, as stated in the Preamble, in exercise of the Mandate given to him by the people of Pakistan. But once the Constitution had been enacted, he became under Article 226 (1) read with Article 227 (1) the first President of Pakistan under the Constitution, and, after he had taken the oath of office under the Constitution to act faithfully in accordance with the Constitution and to preserve, protect and defend the Constitution, his powers became circumscribed by the provisions of the Constitution and he could do no more than what the Constitution empowered him to do." (The underlinings are mine).

In India, the Constitution was framed in 1949. Although, it was amended from time to time by the proper authority as enjoined in its Constitution but it was neither abrogated nor suspended by any 'Supra-Constitutional authority'. No wonder democracy in its real spirit has taken sure and pronounced roots in India.

The judiciary also performs its functions in defending and upholding the Constitution as is required of them. The Supreme Court of India upheld the supremacy of the Constitution in no uncertain terms in many of its decisions . In the case of Golak Nath V. State of Punjab AIR 1967 SC 1643. K. Subba Rao C,J, held at para-15, Page-1655:

> "The Objective sought to be achieved by the Constitution is declared in sonorous terms in its preamble which reads:
>
> "We the people of India have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, liberty, equality and fraternity."

> It contains in a nutshell, its ideals and its aspirations. The preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution. The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land. The rule of law under the Constitution has a glorious content. It embodies the modern concept of law evolved over the centuries…..It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights and the balancing wheel between the rights, subject to social control.."(The underlinings are mine).

The Indian Supreme Court also recognizes the superiority and permanence of the Constitutional provisions. In the above noted Golak Nath's case Subba Rao C.J held Para-44, Page-1666 :

> "There is an essential distinction between Constitution and Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society."(The underlinings are mine).

The above discussions on the constitutional positions in the United Kingdom, the United States, and India, show that in the United Kingdom the supremacy of the Parliament at West Minister is firmly established, after a long struggle with the enactment of the Bill of Rights, 1689. The independence of judiciary was achieved in the Act of Settlement, 1700. The laws as passed by the Parliament and as interpreted by the judiciary, are of Universal application in the United Kingdom and all are bound by

those laws. The Constitutional Conventions, although are not laws but are the main plank and bullworks of the Constitution of the United Kingdom.

On the other hand, the United States of America, has a rigid Constitution. Inpursuance to the provisions of this Instrument all three major Institutions came into being. The Legislature, the Executive and the Judiciary, all works within the ambit of the Constitution. In the United States, the Constitution is Supreme and all the Institutions are bound by it. Any law made by the Legislature or any action taken by the Executive, in derogation to the Constitution, becomes void to that extent.

Similar is the Constitutional position in India. It has also a rigid Constitution which is the supreme law and all other laws and the Institutions must conform to it.

PART XVII : The Constitution of Bangladesh :

We have made a detailed discussions above on the concept of Constitution and its supremacy because the issues involved in this Rule is with regard to the Constitution of Bangladesh vis-à-vis the Proclamations and its legality or validity.

Keeping in view the above noted legal position as discussed above let us now consider the Constitution of Bangladesh. It begins with the Preamble.

It may be reiterated that the independence of Bangladesh was declared on the night following 25th March, 1971 and independence was achieved on 16th December, 1971. Within less than one year, the Constitution of Bangladesh, was made on November 4, 1972. It was definitely a great feat by any standard.

PART XVII (A) : Preamble of the Constitution :

The Constitution starts with the Preamble.

Let us first look at the original Preamble of our Constitution.

The Preamble is divided in five paragraphs. In the first paragraph, it stated how Bangladesh came into being. In the second paragraph it stated the fundamental basis of the nation-hood of Bangladesh. In the third-paragraph, it spelt out

the lofty ideals and the ultimate goal of the state for its citizens. The fourth paragraph affirms that it is the sacred duty of the people of Bangladesh to maintain the supremacy of the Constitution. The fifth paragraph proclaimed the adoption of the Constitution by the people of Bangladesh.

This preamble may be compared with the Magna Carta or the preamble of the Bill of Rights, 1689.

It embodies and proclaimed in emphatical terms our historical war of liberation, our aims, objects, ideals and the ultimate goals in establishing the People's Republic of Bangladesh.

The preamble sets out the ideological aspirations of the people of Bangladesh. The essential features of the grand concepts spelt out in the Preamble are delineated and studded in various provisions of the Constitution.

This preamble is the key and the silver gate to our sacred Constitution. It is comparable only to the preamble of the Constitution of the United States of America but as a matter of fact its impact is deeper and wider.

In this connection it should be noted that from earlier days preamble in a statute in England was regarded with great importance. It is treated as guides to its construction. It gives an idea about the back-ground purport, objects and subject-matter of the Act in question.

It also gives the scope of the statute in short.

Lord Halsbury L.C. in Income Tax Commissioners V. Pemsel (1891) AC 531 approved the observation of Dyer C.J. in Stowel V. Lord Zouch, made in respect of preamble that it is a key to open the minds of the makers of the Act (at page-543).

In considering the Betting Act, 1853, A.L. Smith L.J., observed in the case of Powell V. Kempton Park Racecoure Company (1897) Q B242 CA at page-271.

> "…….when I turn to the preamble of the Act which in my opinion must first be read, there is no obscurity as to

> what the Legislature aimed at when it passed the Act in question."

On consideration of the effect of the Preamble his Lord-ship further held at page-272-3:

> "Now what effect has the preamble of an Act of Parliament when the Act has to be construed? I do not doubt that, if the words of the enacting part of an Act of Parliament are clear and unambiguous, they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shewn to be its object by its preamble. But the preamble must always play an important part in the construction of a statute. Dyer C.J. calls the preamble of a statute "a key to open the minds of the makers of the Act and the mischief which they intended to redress" : Stowel v. Lord Zouch……."

In construing the Cinematograph Act, 1909, Lord Alvrstone C. J., observed in respect of preamble in the case of London County Council V. Bermondsey Bioscope Company Ltd. (1911) IKB 445 at page-451:

> "I quite recognize that <u>the title of an Act is part of the Act</u>, and that it is of importance as shewing the purview of the Act; and I may express in this connection my regret that the practice of inserting preambles in Acts of Parliament has been discontinued, as they were often of great assistance to the Courts in construing the Acts." (The underlinings are mine).

The Craies on Statute Law, Seventh Edition (1971) explains the object of preamble thus at page-199:

> "Preambles, especially in the earlier Acts, have been regarded as of great importance as guides to construction. They were to set out the facts or state of the law for which it was proposed to legislate by the statute."

Coke was quoted in the said book at page-200:

> "The preamble of the statute, "said Coke, "is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof."

In Kesavananda Bharati V. State of Kerala AIR 1973 SC 1461, in highlighting the importance of preamble, S.M. Sikri, C.J., held at para -92, page-1501 :

> "92. I may here trace the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution."

Holding the preamble as the part of the Constitution, his Lordship held at para-102, page-1503 :

> "102. With respect the Court was wrong in holding as has been shown above, that the Preamble is not a part of the Constitution unless the court was thinking of the distinction between the Constitution Statute and the Constitution mentioned by Mr. Palkhivala. It was expressly voted to be a part of the Constitution."

Sikri, C.J., again held at para-121, page-1506 :

> "121. It seems to me that the Preamble of our Constitution is of extreme importance and the constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."

In Anwar Hossain Chowdhury etc. V. Bangladesh 1989 BLD (Spl) 1, M.H. Rahman, J. (as his Lordship then was) highlights the importance of Preamble thus:

> "443. …….The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself."

His Lordship, however, in his opinion approved the following observations of Shelat and Grover, JJ., in Kesavanada Bharati's case at para-453-455, page-173 :

> "453.……Shelat and Grover, JJ. observed in Kesavanand AIR 1973 SC 1461. "The Constitution makers gave to the preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled.…It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well defined words the key to the understanding of the Constitution" …..
>
> 454. At para 537 of the report the learned Judges said: "The Preamble serves several important purposes. Firstly it indicates the source from which the Constitution comes viz. the people of India. Next it contains the enacting clause which brings into force the Constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of government and polity which was to be established. From all these, if any provision in the Constitution had to be interpreted and if the expressions used therein were ambiguous, the Preamble would certainly furnish valuable guidance in the matter, particularly when the question is of the correct ambit, scope and width of a power intended to be conferred by Art. 368".
>
> 455. At para 539 of the report the learned Judges referred to Story: "While dealing with the Preamble to the United States Constitution it was observed by Story (Commentaries on the Constitution of the United States, 1833 edition, Volume I), that the Preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the Government. Its true office is to expound the nature and extent and application of the powers

> actuallyconferred by the Constitution and not substantially to create them".

As such, it goes without much ado that the preamble to our Constitution depicts in brief the background of our liberation, the basis of our nation-hood, the objectives and duties of the people of Bangladesh in a very precise manner.

The first paragraph of the original Preamble of the Constitution of Bangladesh reads as follows :

> "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.;"

This is how the people of Bangladesh, through their elected representatives, who formed the Constitutent Assembly, approved the Proclamation of independence on the 26th March 1971 and establishment of Bangladesh.

The fourth paragraph of the Preamble reads as follows :

> "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"

This portion of the preamble very clearly and without any ambiguity spels out and cast a sacred duty upon the people of Bangladesh to safeguard, protect and defend its Constitution and also to maintain its supremacy. This paragraph projects the doubtless supremacy of the Constitution and also the unshakable duty of all persons in Bangladesh to uphold it over every Institutions and functionaries it created. The preamble is a part of the Constitution and it in a nutshell declares its highest place of importance. Generally, a written constitution, as discussed above, being the supreme law, all other laws must conform to it, still in order to spell out any doubts the preamble

of our Constitution highlights the supremacy and paramountcy of the Constitution over all other laws without any exception.

This expression and spirit ordained in our Constitution has a remarkable similarity to what President Abraham Lincoln said seven score years ago in his famous address at Gettysburg in 1863 that the Government of the United States being a government of the people, by the people and for the people would not perish from the earth.

The said speech delivered on November 19,1863 at Gettysburg, Pennsylvania, reads as follows:

> "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.
>
> Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that the nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we can not dedicate -- we can not consecrate -- we can not hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth." (The underlinings are mine).

The Preamble of our Constitution eulogizes the lofty and holy ideals and spirit of the makers of the Constitution. In framing the Constitution they kept in mind those who gave their life and blood for the violent birth of Bangladesh and tried to uphold their ideals of liberation and independence which came about in the path silted with their blood and toil. The independence was not given in a silver platter. It was earned at the cost of many thousands of lives and tears of innumerable mothers and widows. The freedom fighters ungrudgingly gave their lives knowing full well that they might never see the liberation of Bangladesh still they made their supreme sacrifice with their last and solemn hope that others may live in an independent country, a country where their own Bangalee nationalism would flourish in a socialistic secular society, emblemed with democratic principles.

The freedom fighters fought against the militarily superior Pakistan army, they also fought against their Bengali vasals and compatriots who fiendishly fought against the liberation of Bangladesh. They wanted an independent Bangladesh and to get rid of the Pakistan army and their compatriots once for all. Those freedom fighters are the real architects of the Republic of Bangladesh and their ideals must be respected, honoured and be given utmost importance. The framers of the Constitution in framing the Constitution tried to visualize and feel their death agony in bringing Bangladesh into existence through the process of its violent birth.

This is how Bangladesh was liberated and independence was achieved against unfathomed odds which cannot now even be imagined. As such every one in the Republic, from the highest functionary to the lowest, must ingrain in their hearts that the liberation struggle itself is the cornerstone of the Republic of Bangladesh and its Constitution. This was also judicially recognized in the case of the Registrar, University of Dacca V. Dr. Syed Sajjad Hussain 34 DLR AD(1982), B.H. Chowdhury, J., (as his Lordship then was) observed at para-37, page-18:

> "…….liberation struggle is the cornerstone of our Constitution. As the preamble begins '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. By Proclamations Order No. 1 of 1977 amendment was made and previous to the amendment it read ' a historic struggle for national liberation". The historic struggle for national liberation is not only eulogized but in optative manner it was raised to the level of "historic war for national independence." 1971 period was one phase but the struggle continues because fundamental aim of the state is to realise a society in which the rule of law, fundamental human rights and freedom, equality and justice and in that view the Constitution has laid down the fundamental principles of state policy". Though the preamble to the Constitution was amended as aforesaid, clause(b) of paragraph 5 remained same and any attempt to redicule or belittle "liberation struggle" or "creation of Bangladesh" is condemned……"

We also join to add that any attempt to truncate any of the fundamental principles and basic features of the Constitution is condemned and deprecated.

The framers of the constitution kept in mind all these sad saga and the test of fire which the Bangalees went through while liberating their country at the time of framing of the Constitution. They knew that a time may come when the black shadow of the horrendous past may even make a return in future to engulf the nation all over again in various evil disguises, as such, in their wisdom emphatically spelt out the intentions of the real architects of this Republic in the original Preamble in this manner :

প্রস্তাবনা

> "আমরা, বাংলাদেশের জনগন, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষণা করিয়া জাতীয় মুক্তির জন্য ঐতিহাসিক সংগ্রামের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতন্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি ;

আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান্ আদর্শ আমাদের বীর জনগণকে জাতীয় মুক্তিসংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল–জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে;

আমরা আরও অঙ্গীকার করিতেছি যে, আমাদের রাষ্ট্রের অন্যতম মূল লক্ষ্য হইবে গণতান্ত্রিক পদ্ধতিতে এমন এক শোষনমুক্ত সমাজতান্ত্রিক সমাজের প্রতিষ্ঠা-যেখানে সকল নাগরিকের জন্য আইনের শাসন, মৌলিক মানবাধিকার এবং রাজনৈতিক, অর্থনৈতিক ও সামাজিক সাম্য, স্বাধীনতা ও সুবিচার নিশ্চিত হইবে;

আমরা দৃঢ়ভাবে ঘোষণা করিতেছি যে, আমরা যাহাতে স্বাধীন সত্তায় সমৃদ্ধি লাভ করিতে পারি এবং মানবজাতির প্রগতিশীল আশা–আকাঙ্ক্ষার সহিত সঙ্গতিরক্ষা করিয়া আন্তর্জাতিক শান্তি ও সহযোগিতার ক্ষেত্রে পূর্ণ ভূমিকা পালন করিতে পারি, সেইজন্য বাংলাদেশের জনগণের অভিপ্রায়ের অভিব্যক্তিস্বরুপ এই সংধিানের প্রাধান্য অক্ষুন্ন রাখা এবং ইহার রক্ষণ, সমর্থন ও নিরাপত্তাবিধান আমাদের পবিত্র কর্তব্য;

এতদ্দ্বারা আমাদের এই গণপরিষদে, অদ্য তের শত ঊনআশী বঙ্গাব্দের কার্তিক মাসের আঠার তারিখ, মোতাবেক ঊনিশ শত বাহাত্তর খ্রীষ্টাব্দের নভেম্বর মাসের চার তারিখে, আমরা এই সংবিধান রচনা ও বিধিবদ্ধ করিয়া সমবেতভাবে গ্রহণ করিলাম।”

(The underlinings are mine).

The English Text is :

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;

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;
>
> In our Constituent Assembly, this eighteenth day of Kartick 1379 B.S., corresponding to the fourth day of November 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution."
>
> (The underlinings are mine).

This was the dream of the true architects of this Republic who made supreme sacrifices for its emergence. This being the intentions of the architects of the Constitution also and that the 'pole-star in the construction of a Constitution is the intention of its makers and adopters' as aptly observed by an Ohio Judge in the case of H.M. Co. V. Miller (92) Ohio S.115. The said observation was also cited with approval by Muhammad Munir C.J. in the Reference by the President of Pakistan PLD 1957 SC 219 (235) = 9 DLR (1957) SC. 178 (188). So also M.H. Rahman, J., in Anwar Hossain Chowdhury's case, in holding the preamble as part of the Constitution, observed at para-456, page-173-4:

> "456. After referring to the Proclamation of Independence on 26th day March, 1971, the war of national independence and the principles of nationalism, democracy and socialism for which our brave martyrs sacrified their lives the makers of the Constitution in the name of "We, the people" declared the fundamental principles of the Constitution and the fundamental aims of the State……If any provision can be called the pole star of the Constitution then it is the Preamble." (The underlinings are mine).

PART XVII (B) : Supremacy of the Constitution:

In commensurate with the noble visions spelt out in the preamble, Article 7 proclaims that all powers in the Republic belong to the people of Bangladesh and the Constitution being the solemn expression of their will, is the supreme law of the Republic. Article 7 reads 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.

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.

In the case of Md. Shoib V. Government of Bangladesh 27 DLR(1975) 315, this concept has been noticed. D.C. Bhattacharya, J. held at para-20, page-325 :

> "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."
> (The underlinings are mine).

This Article-7 is the touch-stone in the construction of the Constitution which provides for undoubted supremacy of the Constitution.

In the case of Anwar Hossain Chowdhury etc. V. Bangladesh (1989) BLD (Spl) 1, B.H. Chowdhury J. (as his Lordship then was) analysed Article 7 in this manner at para-52, page-60:

> "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 Governement. 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;
>
> (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".

His Lordship further held at para-149-150, page-84 :

"149. Our Article 7 has reflected the wisdom of the past and the learning of the history. Therefore it has said categorically:

(1) All powers in the Republic belong to the people—this is a concept of sovereignty of the people. Sovereignty lies with the people not with executive, legislature or judiciary-all these three are creations of the Constitution itself.

(2) They are exercised on behalf of the people shall be an effected only, under,and by the authority of the Constitution. This is the concept of limited Government based on theory of separation of powers and then Article 7(2)says significantly that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic - This is the supreme law not in theory because it says "if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

150. Law as defined in Article 152 means any Act, ordinance, orders rule and regulations bye-law notification or other legal instruments and any custom or usage having the forces in law in Bangladesh. Article 7 says that if any law is inconsistent with the Constitution that law shall to the extent of inconsistency be void. When Article 26 says about the inconsistency of any law with the fundamental right to be void, Article 7 operates in the whole jurisdiction to say that any law and that law includes also any amendment of the Constitution itself because Article 142 says that amendment can be made by Act of Parliament. Therefore if any amendment which is an Act of Parliament contravenes any express provision of the Constitution that amendment act is liable to be declared, void. So

> says Article 7. But by whom this declaration is to be made? It is the executive which initiates the proposal for law. It is the legislature that passes the law. Then who will consider the validity or otherwise of the law-obviously the judiciary."

His Lordship further approved the contention of Mr. Syed Ishtiaq Ahmed, at para-198, page-97, that Article 7 stands like a statue of liberty.

Mustafa Kamal, J. (as his Lordship then was) in Kudrat-E-Elahi Panir V. Bangladesh 44 DLR AD (1992) 319, in acknowledging its importance held at para-72, that Article 7(1) says that all powers in the Republic belong to the people.

In this manner Article 7 declares the supremacy of the Constitution as stated in the fourth paragraph of the Preamble.

The second paragraph of the Preamble in the original Constitution, spells out the high ideals of the Republic. This paragraph reads as follows:

> "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;"

Our liberation war was fought on these high ideals of nationalism, socialism, democracy and secularism. These high ideals inspired our heroic people to dedicate themselves and our brave martyrs to sacrifice their lives in the national liberation struggle.

Those high ideals are the basis of our nation-hood and the framers of the Constitution had the foresight to apprehend that this country might not always be served by wise consciencious and true patriotic persons, rather, might sometimes be governed by 'wicked men, ambitious of power, with hafred of liberty and contempt of law' (Justice in Ex Parte Milligan) who, in their self-interest, may do away with the above noted high ideals of our martyrs, as such, in their wisdom, spelt out those high ideals both in the Preamble and also in Article 8(1) 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. The original Article 8(1) reads as follows:

> "৮।(১) জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতা-এই নীতিসমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভূত এই ভাগে বর্ণিত অন্য সকল নীতি রাষ্ট্রপরিচালনার মূলনীতি বলিয়া পরিগণিত হইবে।
>
> (২) এইভাগে বর্ণিত নীতিসমূহ বাংলাদেশ-পরিচালনার মূলসূত্র হইবে, আইনপ্রণয়নকালে রাষ্ট্র তাহা প্রয়োগ করিবেন, এই সংবিধান ও বাংলাদেশের অন্যান্য আইনের ব্যাখ্যাদানের ক্ষেত্রে তাহা নির্দেশক হইবে এবং তাহা রাষ্ট্র ও নাগরিকদের কার্যের ভিত্তি হইবে, তবে এই সকল নীতি আদালতের মাধ্যমে বলবৎযোগ্য হইবে না।" (The underlinings are mine).

The English version is :

> "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 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." (The underlinings are mine).

The apprehensions of the framers of the Constitution proved to be right. In 1975, Martial Law was imposed in the country and brick by brick, the various provisions of the Constitution was wrecked by the usurpers. The Second paragraph of the Preamble, the Article 8 and many other Provisions containing the fundamental principles of the Stale Policy was deleted on April 23, 1977, by the Proclamations (Amendment)Order, 1977 (Proclemation Order No,1 of 1977), proclaimed by Major General Ziaur Rahman, B.U.,psc., the President and the Chief Martial Law Administrator of Bangladesh.

If we hark 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 the 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) (The underlinings are mine).

Let us now see what our Supreme Court says about the Constitution. As early as in 1973, in the case of A.T. Mridha V. State 25 DLR (1973) 335, Badrul Haider Chowdhury, J.(as his Lordship then was) 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 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."

In the case of Anwar Hossain Chowdhury etc V. Bangladesh (Popularly known as the Constitution 8th Amendment case) 1989 BLD (Spl) 1, Shahabuddin Ahmed, J.(as his Lordship then was) , held at para-272, page-118 :

> "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 pre-eminance 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"…….(The underlinings are mine).

From a reading of the above Judgments, it would show that no-body denied the supremacy of the Constitution. Even the Attorney General accepted the supremacy of the Constitution, and so also the Court.

In the instant case, it is alleged that 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.

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.

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.

PART XVIII: Defence Services :

Our defence services trace their history from the former British Colonial Regime in British India. A brief look in its historical back-ground may be educative in order to understand and appreciate the constitutional position of the defence services in its proper perspective.

A thousand years ago, the King of England used to rule his Kingdom by Divine right. As the fountain of justice, he was the first Magistrate of the Realm and used to run his Kingdom mainly by Royal Decrees and prerogatives. The King was also the Commander-in-Chief of his army and also the defender of faith. As such, all the main functions of the Kingdom were fused in the Sovereign. The King used to resolve all matters of importance with Curia Regis or the Great Council of the Realm.

In 1215, the Barons of the Realm presented their Charter of demands to King John. The King, after some deliberations, accepted the Articles of the Barons which were embodied in the Great Charter, known as the Magna Carta, at Runnymede on June 15, 1215.

The Bill of Rights, 1689, prohibited the maintenance of a standing army by the Crown in peacetime without the consent of Parliament. A.V.Dicey, in his 'An Introduction to the Study of the Law of the Constitution',Tenth Edition, 1973, considered the legal position of the army in the United Kingdom in this manner at page-299:

> "The position of the army, in fact, was determined by an adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.
>
> The object and principles of the first Mutiny Act of 1689 are exactly the same as the object and principles of the Army Act, under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land…….. ….. "a person subject to military law," stands in a two-fold relation; the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the

members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English Law governed by definite principles.

A soldier's position as a citizen.- The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen.

"Nothing in this Act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt "any officer or soldier whatsoever from the ordinary "process of law".

These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

The results of this principle are traceable throughout the Mutiny Acts.

A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent "civil" (i.e. non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus, if a soldier murders a companion or robs a traveler whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft."

Dicey dealt with the conflict of jurisdiction between the military and a civil court in this manner at page-302 : :

"In all conflicts of jurisdiction between a military and a civil court the authority of the civil court prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil court, he cannot be tried for the same offence by a court-

martial; but an acquittal or conviction by a court-martial, say for manslaughter or robbery, is no plea to an indictment for the same offence at the Assizes.

When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence.

This is a matter which requires explanation.

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. His situation and the line of his duty may be seen by considering how soldiers ought to act in the following cases.

During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would he sufficient to put down the disturbance. The soldiers are, under these circumstances clearly bound from a legal, as well as from a military, point of view to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and as citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder, and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a

matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore to fire is not in itself a lawful order, that is, the colonel, or other officer who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers ? The matter is one which has never been absolutely decided; the following answer, given by Mr.Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide :-

"I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under' all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his

> officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each others, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army."(The underlinings are mine).

In the United Kingdom both the civil servant and the members of the armed forces hold their office during the pleasure of the Crown, although statutory protection of employment was given to the civil servants but such protection are not extended to the members of the armed forces, they are regulated under the Royal Prerogative.

The Parliament, however, since 1955, instead of passing annual Acts, gave the Army and Air Force Acts, a maximum life of five years, subject to annual renewal by the Order in Council. But such Orders in Council are required to be laid in draft before the Parliament and are subject to an affirmative resolution by each House.

The Navy, however, in the United Kingdom, has been free from constitutional problems. The maintenance of Navy has always been within the Royal Prerogative but its terms of enlistment and discipline are regulated by the Acts of Parliament.

Let us now turn our eyes to the United States of America. Following the continuous dissentions and resentments of the inhabitants of the colonies in the North American Continent because of imposition of new taxes and stricter trade laws, the Continental Congress appointed a Committee on June 12, 1776, to prepare a draft for the declaration of Independence. On July 4, 1776, the Declaration of Independence was adopted ushering the birth of a new nation. At that time George III was the King of England and Lord North was the Prime Minister. The war of independence continued for nearly six years. Ultimately with the surrender of Lord Cornwallis on October 19, 1781, the war ended and the Treaty acknowledging the independence and sovereignty

of the thirteen colonies was signed in 1783. In the meantime, the Articles of Confederation was ratified by all the States by March 1, 1781. These constituted the Constitution of the United States of America.

Article I describes the powers of the Congress of the United States.

The relevant portion of Section 8 under Article I reads :

> "Section 8.……..
>
> To declare War, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> To provide and maintain a Navy;
>
> To make rules for the government and regulation of the land and naval forces;
>
> To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
>
> To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.……"

Again, the relevant portion of Section 2 under Article II reads :

> "Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective officers and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

Similar is the position in most of the countries with written Constitutions including Bangladesh.

The defence services of Bangladesh are organs of the Republic, an important one. Because, it defend the country and protect its frontiers. The members of the forces are expected to be alert to face any emergency. Of necessity, they must maintain a very high degree of discipline so that they remain always equipped and prepared to serve the cause of the country and its people.

But at the same time, it should be remembered that they are not foreign legions, they are the citizens of this country and are raised from amongst the people of this country. They are sons of the soil.

Besides, the defence services owe its existence to the Constitution and also owe its absolute loyalty to the Constitution like any other service of the Republic and bound to obey its edicts to the letter. Article 62 of the Constitution provides for raising and maintenance of defence services. Article 62 reads as follows:

> "62 (1) Parliament shall by law provide for regulating-
> (a)the raising and maintaining of the defence services of Bangladesh and of their reserves;
> (b)the grant of commissions therein;
> ©the appointment of chiefs of staff of the defence services, and their salaries and allowances; and
> (d)the discipline and other matters relating to those services and reserves,
> (2) Until Parliament by law provides for the matters specified in clause (1) the President may, by order, provide for such of them as are not already subject to existing law."

But the supreme command of the defence services of Bangladesh is vested in the President. Article 61 reads as follows :

> "The supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law and such law shall, during the period in which there is a Non-Party Care-taker Government under article 58B, be administered by the President."

Besides, in case of grave emergency, threatening the security or economic life of Bangladesh, the President, with the advice of the Prime Minister, may even declare an emergency in the country under Article 141A.

From the above it would appear that the defence services are the creation of the Constitution like other services. Each service has got its respective and specific duties, purposes and functions. The one purpose is common. It is to serve the people. That is the most fundamental and prime object of all the services in Bangladesh. The defence services are no exception. The Constitution created those services not for any other purpose but in order to serve the Nation and its people. In this connection it should be engraved in our minds that the 'people' creates the Nation, the people builds the Nation. It is the people who makes supreme sacrifices for the creation of their Nation. It is the people for which a Nation exists. It is the people for which all 'services' are required and are created by the Constitution. It is the people for which all high functionaries of the Republic do exist. Those high functioneries are created not for staying in ivory towers, rather they are created, so that they can serve the people better. The people do not exist for them, rather, they including the Judges exist for the people and only for the people, however humble their station of life may be. The greatness of the State-functioneries depends not on their status or rank but how much and how far they can serve their people.

This fundamental principle to serve the people must be engraved in the minds of all Functioneries and all persons in the service of the Republic.

No wonder, one of the greatest President on Earth, while dedicating a portion of the battle-field at Gettysburg, for the fallen heroes, proclaimed '<u>that government of the people, by the people, for the people shall not perish from the earth</u>'.

PART XIX : Martial Law: Concept:

Now let us consider the concept of Martial Law. The learned Additional Attorney General and Mr.Akhtar Imam called it Martial Law Jurisprudence or Martial Law Culture in Bangladesh. Bangladesh is comparatively a new nation, so also its armed forces. As such, we would hark back to legal history predominantly of England. It appears that during the reign of Mary in 1557, rebels were executed according to martial law. In 1595, during the reign of Elizabeth I, Sir Thomas Wyllford was appointed provost-marshal and some riotous persons were executed as traitors by martial law. But even in those days martial law was applied under the civil authority of the Monarch.

In 1628, during the reign of Charles I, The Petition of Right was enacted. This Act nearly four hundred years ago, glorified the rights and liberties of the subjects in the then England. Clause VIII of the said Act forbidden trial of any subject by Martial Law. The relevant portion of Clause VIII, dealt with Martial Law, reads as follows:

> VIII. …….and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty will be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the foresaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land." (The underlinings are mine). (Quoted from Thomas Pitt Taswell-Langmead: English Constitutional History, Tenth Edition, 1946).

In support of the Bill, Seldon, Coke, Littleton, Digges, Noy and other eminent lawyers of the day argued on the part of the Commons while the Attorney General Heath, Serjeant Ashley and others acted as counsel for the Crown. Besides,

Charles I also consulted Chief Justices Hyde and Richardson. On 7th June, 1628, the King signified the royal assent – 'soit droit fait comme est desire.'

This Petition of Right was subsequently superseded by the Bill of Rights, 1689.

The subject of Martial Law has been extensively dealt with by F.K.M.A.Munim, our late Chief Justice, in his book titled 'Legal Aspects of Martial Law (1989)'. The author quoted from many authorities on the subject. We also cited some of those quotations from the said book as the original books are not readily available. This we have done in order to highlight the legal concept of Martial law from by gone days.

Blackstone said with regard to Martial Law in this manner :

> "Martial law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed as law, a temporary exerscence bred out of the distemper of the State and not any part of the permanent and perpetual laws of the kingdom. The necessity of order and discipline is the only thing which can give it countenance and therefore it ought not to be permitted in time of peace when the King's courts are open for all persons to receive justice according to the law of the land." (Quoted from Legal Aspect of Martial Law Page-1).

We also quote the speech of the Duke of Wellington from the aforesaid book at page – 3 :

> "The Duke of Wellington's Speech in the House of Lords on April 1, 1851 quoted in Clode's *Military Forces of The Crown, Vol.II,*502 – "As to the remark which had been made about him, he would say word in explanation. He contended that Martial Law was neither more nor less than the will of the General who commands the army. In fact, Martial Law meant no law at all…….".

Possibly the last time the Martial Law was applied in England in 1780 when serious disturbance and troubles broke out. Lord Chancellor Thurloe sought justification in this way :

> "In all cases of high treason, insurrection, and rebellion within the Realm, it was the peculiar office of the Crown to use the most effectual means of resisting and quashing such insurrection and rebellion, and punishing the instruments of it. But the King, any more than the private person, could not supersede the law, nor any act contrary to it, and therefore he was bound to take care that the means he used for putting an end to the Rebellion and Insurrection were legal and constitutional, and the Military employed for that purpose were every one of them amenable to the law, because no word of command from their particular officer, no direction from the War Office, or Order of Council, could warrant or sanction their acting illegally.(Quoted from Legal Aspect of Martial Law at page-21). (The underlinings are mine).

It is apparent in all those cases that the Martial Law was applied in a very restricted way on due approval from Parliament and the civilian authority.

The judicial view on Martial Law has been aptly explained in the case of Tilonko V. Attorney-General of Natal (1907) AC 93. Lord Halsbury L.C. held at page-94:

> "It is by this time a very familiar observation that which is called "martial law" is no law at all. The notion that "martial law" exists by reason of the proclamation- an expression which the learned counsel has more than once used–is an entire debusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force,…… But to attempt to make these proceedings of so-called "courts martial," administering summary justice under the supervision of a military

commander, analogous to the regular proceedings of Courts of Justice is quite illusory. (The underlinings are mine).

A.V.Dicey in his celebrated treatise 'An Introduction to the Study of the Law of the Constitution,. Tenth Edition-1959, dealt with the concept of Martial Law at page-287 in this manner :

> "Martial law," in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England……..
>
> Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognized in the most ample manner by the law of England. It is a power which has in itself no special connection with the existence of an armed force.
>
> It is also clear that a soldier has, as such, no exemption from liability to the law for his conduct in restoring order. Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position; ……..…they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force;…….Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than *Wolfe Tone's Case.* In 1798, Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a court-martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place application was made to the Irish King's Bench or a writ of habeas corpus. The ground taken was that

> Wolfe Tone, not being a military person, was not subject to punishment by a court-martial, or, in effect, that the officers who tried him were attempting illegally to enforce martial law. The Court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the court was made up of judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench."(The underlinings are mine).

The Amercian experience and the legal position of Martial Law has been dealt with by Professor Westel Woodbury Willoughby in his celebrated treatise on the Constitutional Law of the United States (Second Edition). In Vol. III at page – 1586, Martial Law has been dealt with in this manner :

> "1041. Martial Law Defined.
>
> In the most comprehensive sense of the term, Martial Law includes all law that has reference to, or is administered by, the military forces of the State. Thus it includes (1) Military Law Proper, that is, the body of administrative laws created by Congress for the government of the army and navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and, (3) Martial Law *in snsu strictiore'* or that law which has application when the military arm does not supersede civil authority but is called upon to aid it in the execution of its civil functions..…….
>
> 1042. Martial Law, in Sensu Strictiore, is a Form of the Police Power.
>
> ……As the Supreme Court in United States v. Lee, speaking through Justice Miller, declared:
>
> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is

> the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to the supremacy, and to observe the liabilities which it imposes upon the exercise of the authority which it gives." (106 US 196).

In delineating the role of an armed force in aid of the civil authorities, the Court in Ela v. Smith (5 Gray [Mass.} 121), said:

> "While thus recognizing the authority of the civil officers to call out and use an armed force to aid in suppressing a riot or tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops, when so assembled, to act independently of the civil authority….They are to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they are to perform. Nor can the magistrate delegate his authority to the military force which he summons to his aid; or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot. They must perform only such service, and render such aid, as is required by the civil officers….It does not follow from this, however, that the military force is to be taken wholly out of the control of the proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details in which a specific service or duty is to be performed. But the service or duty must be first prescribed and designated by the civil authority."(from Willoughly-page 1591(foot note).(The underlinings are mine).

The legislature of Rhode Island placed the State under martial law following Dorr's Rebllion. Lurther was a Dorr supporter, he brought an action against Borden for breaking and entering his house. Borden's defence was that he being a member of a militia acted under orders. In the case of Luther V. Borden 7 How I (1849). Teney C.J. of U.S. Supreme Court gave his opinion :

> "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it…….And, unquestionably, a State may use its military power to put- down an armed insurrection too strong to he controlled by the civil authority…… No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, and any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable." (The underlinings are mine). (Quoted from Willoughby Para-1048, Page-1593-94).

In outlining the general principles governing the powers and authority of military officers, Teney, C.J. held in Mitchell V. Harmony 13 How 115):-

> "There are," he said, "occasions where private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property and take it for public use……. It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right. Unless this is established, the defense must fail because it is very clear that the law will not permit private property to be taken merely to insure the success of an enterprise against a public enemy. . . . It can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify." (The underlinings are mine). (Quoted from Willoughby, Page-1597).

In the case of Raymond V. Thomas 91US 712, the attempt of a military commander to annul a decree of a court was declared void.

Even immediately after the war is terminated and the general legislative power is absent, the U.S. Supreme Court held in the case of Dooley V. United States 182 US. 222, that though prior to the treaty of peace, the military commander might, as a belligerent right, levy customs duties on goods coming into Porto Rico from the United States, after that date he no longer had the authority, (Quoted from Willoughby at page-1583-84).

Although under the Constitution, it is for the Congress to declare war but when a civil war is in existent, it may be recognized as such by the President of the United States, the Chief executive of the country, even without a congressional declaration, depending on the gravity and exigencies of the situation.

In the beginning of the civil war, President Lincoln without waiting for any congressional recognition of the State of war, swiftly ordered blocked of the seceding States on April 19, 1861. The Congress, however, formally declared war to exist on July 13 and validated retroactively the acts of the President prior to that date.

The famous case of Ex parte Milligan 71 US(4 Wall) 2, 18 L.Ed. 281 (1866), glorified the rights of people even during war.

Milligan, a civilian resident of Indiana, was a Southern sympathizer. On an allegation of treason against the Northern America he was arrested on October 5, 1864 and on the orders of General Hovey, he was tried by a military commission and sentenced to be hanged on May 19, 1865.

On a writ of habeas corpus, the following three questions were before the Supreme Court of the United States :

I) Whether the Court had jurisdiction in view of legislation suspending the writ of habeas corpus;

II) Whether the military had jurisdiction to try him;

III) Whether Milligan should be discharged.

This was a time when civil war was raging for more than three years and the very existence and foundation of the Republic was severely threatened. Even in that trying and precarious situation the Hon'ble Judges of the Supreme Court did not relent from upholding the fundamental principles of the Constitution in obedience to their oath and held that Congress was without constitutional authority to suspend the privilege of habeas corpus and to allow exercise of Martial law in the State of Indiana where there was no rebellion at the relevant time.

Mr.Justice Davis delivered the opinion of the Supreme Court. We quote the relevant portion of the opinion from Cases And Materials on Constitutional Law (1952 Revision) :by Professor John P. Frank, at page-258 -265 :

> "…….
>
> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birth-right of every American citizen, when charged with crime, to be tried and punished according to law. …..By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined . ……..
>
> Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be

avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority……

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this; that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"- the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them

> to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.
>
> …….The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. 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.
>
> ……As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence." (The underlinings are mine).

After this judgment, Milligan was released in April, 1866.

In March, 1868, he successfully brought an action for damages against General Hovey for unlawful imprisonment.

The lofty ideals of liberty, dreamt of and after a long and prolonged uncertain war of independence, penned down in the Constitution by its framers, was again rekindled in the forceful languaze of Justice Davies in this case nearly ninty years

after the Declaration of Independence. The civil war which was uncertain like any other war, though threatened the very existence of the Republic but that did not deter the Judges of the Supreme Court of the United States to uphold the ideals of liberty and democracy as enshrined in the Constitution even in the face of so very lucrative argument in favour of martial law and the trial by the military commission. The Supreme Court inspite of the raging civil war in and around Indiana refused to recognise martial law in the said State since the normal Courts were still functioning and an offender could very well be brought before the court there for trial under the law. It is only when because of existence of such a state of war that normal trial could not be held as the Courts were already closed only then and then only, martial rule could be exercised but for a very limited period and that also as regulated by Congress, the upholder of civil rule and authority.

This decision is a gift of the Supreme Court to the people of the United States. This is a bulwark for the protection of the liberties of its citizens.

PART XX : The Martial Law In Bangladesh :

It may be reiterated here that this new nation plunged into a disaster and a Constitutional crisis when in the early morning of August 15, 1975, the President of Bangladesh with his family members were brutally killed by a section of the army officers and Khandaker Moshtaque Ahmed in conspiracy with them seized the office of the President of Bangladesh. Bangladesh was ruled by Martial Law Proclamations for nearly the next 4(four) years. The said whole period of Martial Law was sought to be validated by insertion of Paragraphs 3A and 18 in the Fourth Schedule to the Constitution.

It appears that by the Proclamation Order No. 1 of 1977, the English text of a new paragraph, among others, paragraph 3A was inserted in the Fourth Schedule to the Constitution. Its Bengali version was inserted by the Second Proclamation Order No. IV of 1978.

Besides, by section 2 of the Constitution (Fifth Amendment) Act, 1979, paragraph 18 was added to the Fourth Schedule of the Constitution. This addition was done predominantly in order firstly, to validate all Proclamations, Martial Law Regulations and Martial Law Orders and other laws made during the period between the August 15, 1975 and the April 09, 1979; secondly, to validate all actions and proceedings taken in pursuance to those laws during the said period, and thirdly, to protect those actions and proceedings taken in pursuance to the above Proclamations etc from being called in question before any Court on any ground whatsoever.

Before considering the above mentioned paragraph 18 to the Fourth Schedule of the Constitution, we would familiarize ourselves as to some of the Proclamations and M.L.Rs and M.L.Os which were sought to be ratified and validated by the second Parliament.

On our queries as to which Proclamations, M.L.Rs and M.L.Os and proceedings were ratified by the Fifth Amendment, the learned Additional General referred to the Proclamation dated August 20, 1975, Proclamation dated November 08, 1975, Proclamation dated November 29, 1976. We were also informed on our queries that Khandaker Moshtaque Ahmed became the President of Bangladesh on and from the morning of the 15th August, 1975. He nominated Justice Abusadat Mohammad Sayem, the then Chief Justice of Bangladesh, as the President of Bangladesh on November 06, 1975. By the Proclamation dated November 8, 1975, Justice Sayem proclaimed himself as the Chief Martial Law Administrator and appointed the Deputy Chief Martial Law Administrators. From time to time, a number of Proclamation Orders, MLRs and MLOs were issued. By the Proclamation dated November 29, 1976, the office of the Martial Law Administrator was handed over to Major General Ziaur Rahman B.U., psc and he became the Chief Martial Law Administrator. In due course, Justice Sayem on April 21,1977, nominated Major General Ziaur Rahman, B.U., to become the President of Bangladesh. On becoming the President of Bangladesh, Proclamation (Amendment)

Order, 1977 (Proclamation Order No. 1 of 1977) was made on April 23, 1977. We also found that the Referendum Order, 1977 (Martial Law Order No. 1 of 1977) was made on May 01, 1977, followed by the Second Proclamation Order No. IV of 1978 and many others. There were a number of Martial Law Regulations and Orders, the details of which could not be furnished either by the learned Additional Attorney General or by the learned Advocate for the petitioners. However, from them we could gather that more than two hundred and fifty MLRs and MLOs were made in pursuance to the above mentioned Proclamations and that those above mentioned Proclamations and all other MLRs and MLOs and the proceedings and actions taken thereon were sought to be ratified and validated by the Fifth Amendment.

PART XX : (A). The Proclamation On August 20, 1975 :

Let us then first consider the Proclamation dated August 20, 1975. It reads as follows :-

> "PROCLAMATION
>
> The 20th August , 1975.
>
> 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. (The underlinings are mine)

It appears that on the 15th August, 1975. Khandaker Moshtaque Ahmed, seized all and full powers of the Government of Bangladesh and assumed and entered upon the office of the President of Bangladesh. We shall first consider the legal position in this respect.

We specifically asked the learned Additional Attorney General that under what provision of the Constitution, Khondaker Moshtque Ahmed assumed the office of the President of Bangladesh. The learned Additional Attorney General could not give any straight answer. He contended firstly that Fourth Amendment of the Constitution made such changes necessary, besides, he submitted, those actions, in any case, were ratified by the Parliament by enacting the Fifth Amendment of the Constitution.

His first contention, namely, the Fourth Amendment of the Constitution, is not the subject-matter of this Rule. Still, in order to consider and appreciate the contention of the learned Additional Attorney General in this respect, we would refer to it but briefly.

The Constitution of the People's Republic of Bangladesh, came into operation on December 16, 1972. This Constitution provided for a parliamentary form of Government. Under this Constitution, the first general election of the country was held in 1973 and one of the political parties secured almost all the parliamentary seats in the National Assembly out of the total 300 seats. Virtually, it had already became a one

party Parliament without almost no opposition. After the Fourth Amendment all the existing political parties joined the said National Party. We asked the learned Additional Attorney General as to why the ruling party inspite of its such majoirity became one of many, but he could not explain. However, the Fourth Amendment was a political decision and it ought to have been faced politically. But this amendment was opposed only by two or three members of the Parliament as submitted by the learned Additional Attorney General himself. Besides, this amendment could have been challenged in Court, even that was not done. Assassination of the President or declaration of Martial Law is not a very novel way to secure repeal of such an amendment of the Constitution. It might be a new innovation but it is neither democratic nor morally right or a legal way to change a legally elected Government.

In the 17th century King Charles I was beheaded at the instance of Lieutenant General Oliver Cromwell but this could not be accepted by the English people. Even after his death in 1658, they punished him for his treasonous acts. After restoration in 1660, the body of Oliver Cromwell was exhumed and was subjected to the ritual of a posthumas execution on January 30, 1661. Even if we go further backwards in the history, the assassination of Julius Caesar in 44 B.C was never approved even by the Romans and Marcus Junius Brutus was charged with treason. He fled from Rome and subsequently committed suicide.

Be that as it may, there may be divergent of opinions in the national politics of a democratic country. It is neither unnatural nor unheard of. But it was an out and out political issue and ought to have been settled either politically or legally. But Martial Law was definitely not the answer as if Martial Law is a multiparty democratic system. Rather, Khondaker Mostaque Ahmed and his renegades captured the State power for their own evil design and Fourth Amendment was not shown as an excuse for Martial Law, even by them.

Let us now consider the Proclamations and some of the Martial Law Regulations and Martial Law Orders, made thereunder, the copies of which are made available to us.

First, the Proclamation issued on August 20, 1975, narrated earlier. By this Proclamation, Martial Law was imposed in Bangladesh with effect from August 15, 1975. Some of its salient features are as follows:

i) Certain provisions of the Constitution were suspended and modified,

ii) The Proclamation, the Martial Law Regulations and Orders became effective in spite of the Constitution or other laws,

iii) The Constitution remained in force but subject to the Proclamation, the 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.

In reply to our querty as to who blessed Khondaker Mushtaque Ahmed with the above noted powers, the learned Additional Attorney General was without any reply save and except that the said Proclamation was ratified and validated by the Second Parliament.

On consideration of the above noted Proclamation it appears that –

i) Khondaker Moshtaque Ahmed had no lawful authority to seize the office of 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 justiciable before the Court of law, as such , the concept of the Rule of law was destroyed.

Khondaker Mushtaque Ahmed and his collaborators by these actions violated and disgraced the Constitution and thereby committed the offence of sedition against the Republic of Bangladesh.

PART XX (B) : The Proclamation On November 8, 1975 :

Next we shall consider the Proclamation made on November 08, 1975. The Proclamation reads as follows :

" PROCLAMATION

The 8th November, 1975.

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, prosperity and development of the country, I deem it necessary to 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 underlinings are mine)

Some of its salient features are as follows :

i) Mr. Justice Abusadat Mohammad Sayem entered upon the Office of President of Bangladesh on 6th November, 1975,

ii) He assumed the office of the Chief Martial Law Administrator (CMLA) and appointed three Deputy Chief Martial Law Administrators (DCMLA),

iii) Parliament was dissolved with effect from 6th November, 1975.

iv) Part VIA of the Constitution was omitted,

v) The Proclamation dated 8th November, 1975, modified the Proclamation dated 20th August, 1975 and became its part.

On consideration of the above Proclamation, it appears that :

i) Justice Abusadat Mohammad Sayem, the Chief Justice of Bangladesh, had no lawful authority to enter into the office of President of Bangladesh and to assume the powers 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 half years without any Parliament, by the dictators, as such, lost its Republican character for the said period.

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

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

vi) Justice Abusadat Mohammad 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 C.M.L.A.

PART XX (C) : Second Proclamation (Third Amendment) Order, 1975 :

By clause gb, added by the Second Proclamation (Third Amendment) Order, 1975 (Second Proclamation Order No. III of 1975) dated December 31, 1975, to the Proclamation dated November 8, 1975, the Bangladesh Collaborators (Special Tribunals) Order, 1972 (P.O. No. 8 of 1972), was omitted from the First Schedule to the Constitution.

PART XX (D) : Second Proclamation (Sixth Amendment) Order, 1976 :

By clause (eb), inserted by the Second Proclamation (Sixth Amendment) Order, 1976 (Second ProclamationOrder No. III of 1976) dated May 14, 1976, to the Proclamation dated November 8, 1975, the proviso to Article 38 of the Constitution was omitted.

PART XX (E): Second Proclamation (Seventh Amendment) Order, 1976 :

By the Second Proclamation (Seventh Amendment) Order, 1976 (Second proclamation Order No. IV of 1976), predominantly, the separate Supreme Court and High Court were set up instead of the earlier two Divisions of the Supreme Court, along with other incidental changes. It came into effect on and from August 13, 1976.

PART XX (F) : The Political Parties Regulation, 1976:

The political Parties Regulation, 1976, was made on 28th July,1976 by the MLR No. XXII of 1976. This was published in the Bangladesh Gazette, Extra Ordinery. This Regulation repealed the political parties Act, 1962 (III of 1962) and the Political Parties (Prohibition) Ordinance, 1975 (XLVI of 1975).

PART XX (G) : The Third Proclamation :

Next we shall consider the Proclamation dated November 29, 1976. The said Proclamation reads as follws :

> **No. 1184-Pub**. —The following proclamation made by the President of the People's Republic of Bangladesh, on the 29th November, 1976, is hereby published for general information:
>
> **THIRD PROCLAMATION**
>
> **The 29th November, 1976.**
>
> 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.

On consideration of the above noted Proclamation it appears that :

I) Justice Abusadat Mohammed Sayem, the President of Bangladesh handed over the office of Martial Law Administrator to Major General Ziaur Rahman B.U., PSC.

II) Major General Ziaur Rahman B.U., PSC.would exercise all the powers of the Chief Martial Law Administrator, with powers amongst others, to amend the Proclamations of the August 20, 1975, November 8, 1975 and the Proclamation dated November 29, 1976.

PART XX (H) : The Court's Jurisdiction (Restriction) Regulation, 1977:

The Courts' Jurisdiction (Restriction) Regulation,1977 was passed by the MLR No. XXXIV of 1977. The preamble of the said MLR reads as follows :

[Published in the Bangladesh Gazette Extraordinary, dated the 9th March, 1977]

THE COURTS' JURISDICTION (RESTRICTION)

REGULATION, 1977.

Martial Law Regulation No. XXXIV of 1977.

Whereas it is expedient to make a Martial Law Regulation for the purposes here in after appearing;)

Now, therefore, in pursuance of the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20th August 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf the Chief Martial Law Administrator is pleased to make the following Martial Law Regulations:-

It also put restriction on the power of High Court to make interim Orders. It also put restriction on the power of other courts to pass temporary or interim injunction.

PART XX (I) : Nomination of Major General Ziaur Rahman as President:

Thereafter, by an Order dated 21st April, 1977, Justice Sayem, nominated Major General Ziaur Rahman, B.U. to be the President of Bangladesh. The said Order was published in Bangladesh Gazette Extraordinary on April 21, 1977. The said Order reads as follows :

The Bangladesh Gazette

Extraordinary

Published by Authority

THURSDAY, APRIL 21, 1977.

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

CABINET SECRETRIAT

Cabinet Division

ORDER

Dacca, the 21st April, 1977.

No. 1/1/77-CD(CS)-1.- WHEREAS **I**, Abusadat Mohammad Sayem, Assumed office of President of Bangladesh on being nominated under clause (*aa*) of the Proclamation of the 20th August, 1975;

AND WHEREAS **I**, because of my failing health, am unable further to discharge the functions of the office of President;

NOW, THEREFORE, in pursuance of the said Proclamation and in exercise of all powers enabling me in that behalf, I do hereby nominate Major General Ziaur Rahman, BU, to be President of Bangladesh and hand over the office of President to him who shall enter upon that office after making the oath before the Chief Justice of Bangladesh or any other Judge of the Supreme Court designated by him.

ABUSADAT MOHAMMAD SAYEM
President.

From the above Order it appears as follows :

I) Mr. Justice Abusadat Mohammad Sayem assumed the office of the President of Bangladesh on nomination.

II) He nominated Major General Ziaur Rahman, B.U., as the President of Bangladesh.

PART XX (J) : The Proclamations (Amendment) Order, 1977:

On 23rd April, 1977, the President and the CMLA made the Proclamations (Amendment) Order 1977 (Proclamation Order NO.1 of 1977). This was published in the Bangladesh Gazette Extraordinary. The said Proclamation reads as follows :

[Published in the Bangladesh Gazette Extraordinary, dated the 23rd April, 1977]

THE PROCLAMATIONS (AMENDMENT) ORDER, 1977.

Proclamations Order No. 1 of 1977.

Whereas it is expedient further to amend the Proclamation of the 8th November, 1975, and to amend the Third Proclamation of the 29th November, 1976, for the purposes hereinafter appearing

Now, therefore, in pursuance of the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20th August 1 975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator is pleased to make the following order:-

1. Short title and commencement.- (1) This Order may be called the Proclamations (Amendment) Order, 1977.

(2) It shall come into force at once except paragraph 2(6)(l) which shall come into force on the revocation of the Proclamations of the 20th August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November 1976, and the withdrawal of Martial Law.

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

(1) (for clause (ea) the following shall be substituted, namely:—

"(ea) for article 6 of the Constitution, the following shall be substituted, namely:

"6. **Citizenship**.-(1) The citizenship of Bangladesh shall be determined and regulated by law.

(2) The citizens of Bangladesh shall be known as Bangladeshis.";

(2) in clause (f), the words and figures "of Article 48" shall be omitted;

(3) clause (fb) shall be omitted;

(4) in clause (gc), after the word "Schedule" at the end, the words "to this Proclamation" shall be added;

(5) in clause (i), for the words "I. may" the words "the Chief Martial Law Administrator may" shall be substituted ;

(6) in the schedule,—

(a) entries 1, 2,3,4,5,6,7, 8,9, and 10 shall be renumbered respectively as entries 8, 10, 11, 14, 15, 19, 20,21 and 22; -

(b) before entry 8 as so renumbered, the following new entries shall be inserted, namely:—

"1. In the beginning of the Constitution, above the Preamble, the following shall be inserted, namely:—

BISMILLAH-AR.-RAHMAN-.AR.-RARIM

(In the name of Allah, the Beneficent, the Merciful),"

2. In the Preamble,-

(i) in the first paragraph, for the words "a historic

struggle for national liberation" the words "a historic war for national independence" shall be substituted; and

(ii) for second paragraph the following shall be substituted, namely :—

"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 dedicate 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. In article 8, for clause (I) the following shall be substituted, namely :—

"(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."

4. For articles 9 and 10 the following shall be substituted, namely :—

"9. Promotion of local Government institute.—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.

10. **Participation of women in national life**.— Steps shall be taken to ensure participation of women in all spheres of national life."

5. Article 12 shall be omitted.

6. Article 25 shall be renumbered as clause (1), of that article, and after clause (1) as so renumbered, the following new clause shall be added, namely :—

"(2) The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity."

7. In article 42, for clause (2) the following shall be substituted, namely:—

"(2) A law made under clause (I) shall provide for the acquisition, nationalisation or requisition 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

(3) Nothing in this article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977(Proclamations Order No. 1 of 1977), in so far as it relates to the acquisition nationalization or requisition of any property without compensation."

(c) after entry 8 as so renumbered, the following new entry shall be inserted, namely :-

9. In article 47, in clause (2), for the provision the following shall be substituted, namely;-

'Provided that nothing in this article shall prevent amendment, modification or repeal of any such law.'

(d) after entry 11 as so renumbered, the following new entry shall be inserted, namely:—

12. In article 93, in clause (1), for the words 'Parliament is not in session' the words 'Parliament stands dissolved or is not in session' shall be *substituted*,"

(e) in entry 13 as so renumbered, in Chapter IB as substituted by that entry,-

(i) in article 105, for clause (2), (3) and (4) the following shall be substituted, namely:-

"(2) A Judge of the Supreme Court or of the High Court shall not be removed from office except in accordance with the following

provisions of this article.

(3) There shall be a Supreme Judicial Council, in this article referred to as the council, which shall consist of the Council, whch shall consist of the Chief Justice of Bangladesh, and the two next senior Judges of the Supreme Court:

Provided that if, at any time, the Council is inquiring into the capacity or conduct of a judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge of the supreme Court who is next in seniority to those who are members of the Council shall act as such member.

(4) The functions of the Council shall be-

(a) to prescribe a Code of Conduct to be observed by the judges of the Supreme Court and of the High Court and of the High Court; and

(b) to inquire into the capacity or conduct of a Judge of the Supreme Court or of the High Court or of any other functionary who is not removable from office except in like manner as a Judge of the Supreme Court or of the High Court.

(5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge of the Supreme Court or of the High Court

(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or,

(b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding.

(6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to he capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.

(7) For the purpose of an inquiry under this Article, the Council shall regulate its procedure and shall have, in respect of issue

and execution of processes the same power as the Supreme Court.

(8) A Judge of the Supreme Court or of the High Court may resign his office by writing under his hand addressed to the President." and

(ii) in article 107, in clause (1), after the word "period" at the end, the words and commas "as an ad hoc Judge and such Judge, while so sitting, shall exercise the same jurisdiction, powers and functions as a Judge of the Supreme Court" shall be added;

(f) after entry 15 as so renumbered, the following new entries shall be inserted, namely:—

"16. In article 118, in clause (5), in the proviso, for the words "Supreme Court" the words "High Court" shall be substituted.

17. In article 129 in clause (2), for the words "Supreme Court" the words"High Court" shall be substituted.

18. In article 139, in clause (2), for the words "Supreme Court" the words'High Court" shall be substituted.

(g) in entry 22 as so renumbered, for the words, commas, colon and dash "In the Fourth Schedule, after paragraph 6, the following new paragraph shall be inserted, namely:-" the following shall be substituted, namely :-

"In the Fourth Schedule,—

(i) after paragraph 3, the following new paragraph shall be inserted, namely:—

'**3A. Validation of certain Proclamations, etc.-**

(1) the Proclamations of the 20th August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November, 1976, and all other Proclamations and Orders amending or supplementing them, hereinafter in this paragraph collectively referred to as the said Proclamations, and all Martial Law Regulations, Martial Law Orders and all other laws made during the period between the 15th day of August, 1975, and the date of revocation of the said Proclamations and the withdrawal of Martial Law (both days inclusive), hereinafter in this paragraph referred to as the said period, shall be deemed to have been validly made and shall not be called in question in or before any Court or Tribunal on any ground whatsoever.

(2) All orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by the President or the Chief Martial Law Administrator or by any other person or authority, during the said period , in exercise or purported exercise of the powers derived from any of the said Proclamations or any Martial Law Regulations or Martial Law Order or any other law, or in execution of or in compliance with any order made or sentence passed by any Court or authority in the exercise or purported exercise of such powers, shall be deemed to have been validly made, done or taken and shall not be called in question in or before any Court, or Tribunal on any ground whatsoever.

(3) No suit, prosecution or other legal proceeding shall lie in any Court or Tribunal against any person or authority for or on account of or in respect of any order made, act or thing done, or action or proceeding taken whether in the exercise, or purported exercise of the powers referred to in sub-paragraph (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

(4) All amendments, additions, modifications substitutions and omissions made in this Constitution by the said Proclamations shall have effect as if such amendments, additions, modifications, substitutions and omissions were made in accordance with, and in compliance with the requirements of, this Constitution.

(5) Upon the revocation of the said Proclamations and the withdrawal of Martial Law this constitution shall, subject to amendments, additions, modifications, substitutions and omissions as aforesaid, have effect and operate as if it had been in continuous operation,

(6) The revocation of the said Proclamations and the withdrawal of Martial Law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal.

(7) All laws in force immediately before the revocation of the said Proclamations and withdrawal of Martial Law shall, subject to the Proclamation revoking the said Proclamations and with drawing the Martial Law, continue in force until altered, amended or repealed by the competent authority.

(8) The General Clauses Act, 1897, shall apply to the revocation of the said Proclamations and the withdrawal of Martial Law and the repeal of Martial Law Regulations and Martial Law Orders made during the said period as it applies to the repeal of an Act of Parliament as if the said Proclamations and the Proclamation revoking them and withdrawing the Martial Law and the Martial Law Regulations and Martial Law Orders were all Acts of Parliament.

(9) In this paragraph, 'laws' includes Ordinances, rules, regulations, bye-laws, orders, notifications and other instruments having the force of law." and

(ii) after paragraph 6, the following new paragraph shall be inserted, namely:—

3. **Amendment of the Third Proclamation:—** In the Third Proclamation of the 29th November, 1976,—

(i) in clause (b). for the words "This Proclamation" the words and comas"this proclamation, to make new Proclamations, and to revoke them by a subsequent Proclamation" shall be substituted ; and

(ii)in clause (c), for the words "to make" the words and comma "to make, amend and repeal" shall be substituted and shall be deemed always to have been so substituted.

DACCA
The 22nd April, 1977

ZIAUR RAHMAN,BU,PSC
Major General
President
and
Chief Martial Law Administrator.

(The under linings are mine).

On consideration of the above Proclamation Order it appears that:

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,

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.

PART XX (K) :The Referendum Order, 1977 :

In continuation of these kinds of Proclamations, The referendum Order, 1977, was made by the Martial Law Order No.1 of 1977, in order to ascertain the confidence of the people in the President and the CMLA. This MLO was published in the Bangladesh Gazette Extraordinary on the 1st May, 1977. The preamble of the MLO reads as follows:

THE REFERENDUM ORDER, 1977

Martial Law Order No.1 of 1977.

Whereas the President and the Chief Martial Law Administrator in his address to the Nation on the 22nd April, 1977, declared that, to ascertain the confidence of the people in him and in the policies and programmes enunciated by him, a countrywide referendum would be held on the 30th May, 1977, on the basis of direct adult franchise;

And whereas it is necessary to provide for the conduct of the said referendum;

Now, therefore, in pursuance of the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20th August, 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator in pleased to make the following Martial Law Order :-

Paragraph 2(f) defines the word 'referendum' in this manner:

(f) "referendum" means the referendum held under this Order.

Paragraph 3 mentions the question for referendum:

"3.Question for referendum.- There shall be held on the 30th May, 1977, in accordance with the provisions of this Order, a referendum on the question whether or not the voters have confidence in President Major General Ziaur Rahman, B.U. and in the policies and programmes enunciated by him**.**

On consideration of this MLO it appears:

i) The referendum was conceived and conducted under the MLO No.1 of 1977,

ii) This was done in order to ascertain the confidence of the voters in President Major General Ziaur Rahman,

iii) This kind of referendum is unknown to the Constitution, or any law of the land.

PART XX (L) : The MLR No. VII of 1977:

The Abandoned Properties (Supplementary Provisions) Regulation,1977, was made by the MLR No. VII of 1977. This was published in the Bangladesh Gazette, Extraordinary dated 7th October, 1977 (Annexure-L).

The MLR VII of 1977 was under consideration in the case of Halima Khatun V. Bangladesh 30 DLR (SC)(1978) 219. Fazle Munim, J.(as his Lordship then was) very crudely depicted the correct picture of the said Regulation. His Lordship held at para-18:

> "Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as the Supreme law of the country…….The present Constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation."

At para-19, his Lordship further held:

> "On reference to Clause (g) of the Proclamation ofAugust 20, 1975, it is seen that no Court including the Supreme Court has any power to call in question in any manner whatsoever or declare illegal or void the Proclamation or any Regulation or Order."

His Lordship finally concluded at para-20:

> "In consequence of these express provisions it would be merely knocking one's head against a stone wall if, one makes an attempt to get redress in a Court of law which, previous to this Regulation, might have granted relief if one could show that one's property did not come within the purview of the abandoned Property Order." (the underlinings are mine)

With great respect for the learned Judge we would acclaim that his Lordship very aptly depicted the inhuman face of the MLR.

Same kind of conclusions can be drawn in respect of other MLRs and MLOs.

PART XX (M) :Second Proclamation(Tenth Amendment) Order, 1977:

By the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) the Supreme Court was again made to consist of the Appellate Division and the High Court Division, with effect from December 1, 1977, with other ancilliary amendments.

PART XX (N) :Second Proclamation (Fifteenth Amendment) Order, 1978 :

Thereafter, the President and the CMLA, further repealed the Constitution by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

The pre-amble of the said Order reads as follows:

> "WHEREAS there has been persistent demand for the repeal of the undemocratic provisions of the Constitution incorporated therein by the Constitution (Fourth Amendment) Act, 1975;
>
> AND WHEREAS some of such undemocratic provisions have already been repealed by the President and the Chief Martial Law Administrator;
>
> AND WHEREAS the President and the Chief Martial Law Administrator, in response to the said popular demand, pledged to the nation to repeal the remaining undemocratic provisions after obtaining mandate from the people in the election to the office of President, and he has obtained that mandate;
>
> AND WHEREAS it is expedient further to amend the Proclamation of the 8th November, 1975, for the purposes of fulfilling the said pledge and other purposes hereinafter appearing;

> Now, therefore in pursuance to the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20th August, 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator is pleased to make the following Order:-……..……..
> (The underlinings are mine).

It appears that by the said Order although the most of the "undemocratic" provisions of the Fourth Amendment were removed but the Presidential system remained in tact, as if that was the only democratic principle in the Fourth Amendment so much so that Article 92A was also inserted to make the already powerful President more powerful. Earlier even after the Fourth Amendment, no fund would have been available to the President without having the budget passed by the Parliament. But Article 92A unilaterally authorized the President to withdraw money from the Consolidated Fund for a period of 120 days even without the approval of the Parliament so that the President after dissolving a dissident Parliament might elect a new Parliament. Even James I or Charles I in early 17th Century did not have such power in violation of the provisions of Magna Carta. Lieutenant-General Oliver Cromwell even purged the Parliament but could not get the badly needed funds from the Commons for his army.

It is surprising that although the Fourth Amendment was dismantled brick by brick but the office of the President was kept very much intact.. More surprise, by inserting Article 92A by the above Order, the Parliament was made subservient to the President, at the apex of the power, for all practical purposes, because in an unlikely event, even if the Parliament refuses to pass the budget, under the new provision, the President without any worries about the funds could dissolve the Parliament at his pleasure. In this way the President of Bangladesh in 1978 became the most powerful Chief Executive in the world virtually without any checks and balances either from the

Parliament or from any body else which would have envied even by Oliver Cromwell, the Lord Protector of England in 1653.

However, Article 92A was omitted by Section 10 of the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991). By this amendment the Parliamentary form of Government was restored, but the supervisory power of the Supreme Court as given in the original Constitution, over the Subordinate Judiciary was not restored. It remained with the Executive. That much of the Fourth Amendment was not disturbed yet, as if, that was another piece of 'democratic principle' which required to be kept intact.

PART XX (O) : Proclamation dated April 6, 1979 :

[Published in the Bangladesh Gazette, Extraordinary, dated the 7th April, 1979.]

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH
OFFICE OF THE CHIEF MARTIAL LAW ADMINISTRATOR
PROCLAMATION

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 the 15th August, 1975;

AND WHEREAS the situation in the country in all respects has since improved, and all the authorities and institutions in the country may now properly function in accordance with the Constitution and the law;

AND WHEREAS I, Lieutenant General Ziaur Rahman, BU, having been elected as President of Bangladesh under the Constitution in the election held on 3rd June, 1978, have already entered upon the office of President;

AND WHEREAS a Parliament has also been elected under the Constitution and it is in session now;

AND WHEREAS further continuance of Martial Law is no longer necessary in the national interest and it needs be withdrawn;

AND WHEREAS for the said purpose it is now necessary to revoke the Proclamations of the 2Oth August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November, 1976, and to repeal all Martial Law Regulations an Martial Law Orders, and to make provisions consequential and incidental thereto:

NOW THEREFORE, in pursuance of the Third Proclamation of the 29th November. 1976, read with the Proclamations of the 20th August, 1975, and 8th November,1975, and in exercise of all powers enabling me in that behalf, I, Lieutenant General Ziaur Rahman, BU, President of Bangladesh and Chief Martin Law Administrator, do hereby declare and direct as follows:—

(a) at 8 p.m. on the 6th day of April, 1979, hereinafter referred to as the commencing day, Martial Law declared on the 15th August, 1975, shall stand withdrawn and the Proclamations of the 20th August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November, 1976, together with all other Proclamations and Orders amending or supplementing them, hereinafter referred to as the said Proclamations, shall stand revoked:

(b) all Martial Law Regulations and Martial Law Orders made in pursuance of the said Proclamations, and in force immediately before the commencing day, shall stand repealed on the commencing day;

……

(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.

DACCA;
The 6th April, 1979.

ZIAUR RAHMAN, B U,
LIEUTENANT GENERAL,
President
and
Chief Martial Law Administrator.

(The underlinings are mine).

This Proclamation was published in Bangladesh Gazette, Extra-ordinary on April 7, 1979. It proclaims the following :

i) In the interest of peace, order, security, progress, prosperity and development, Bangladesh was placed under Martial Law on August 15, 1975.

ii) The said Martial Law stood withdrawn on and from April 6, 1979 at 8 p.m.

iii) The Proclamations were revoked and the MLRs and MLOs stood repealed from the above date and time.

But,

iv) The President may, to remove any difficulty, make any provisions notwithstanding anything contained in the Constitution or any other law for the time being in force.

This was possibly the last proclamation issued by the Chief Martial Law Administrator.

It appears that the Parliament was already in session and the Constitution (Fifth Amendment) Act, 1979 had already been enacted and was published in Bangladesh Gazette on April 6, 1979.

Although this Proclamation frankly gave the reasons for imposing Martial Law on August 15, 1975 and also revoked the Martial Law.

This was all very good but in the course of narrating the directions, it again sought to subordinate the Constitution when clause (O) of the Proclamation divulged that the President may make any order ‘notwithstanding anything contained in the Constitution’. The President does not have any such power ‘notwithstanding anything contained in the Constitution’ either now or at any time since December 16, 1972, still, this Proclamation bestowed such ‘supra Constitutional’ power on the then President of Bangladesh.

It may be noted that Paragraph 18 in the Fourth Schedule of the Constitution, inserted by the Constitution (Fifth Amendment) Act, 1979, ratified,

confirmed and validated all proclamations, among others, made during the period from August 15, 1975 to April 9, 1979. As such, the Proclamation published on April 7, 1979, also stood ratified, confirmed and validated, including the aforementioned 'supra Constitutional' power of the President.

Since clause (O) of this Proclamation bestowed the President with such power which sought to subordinate the Constitution, the said clause (O) is invalid, void and ultra vires to the Constitution.

PART XXI : Proclamations:

We have already narrated above the Proclamations dated August 20, 1975, November 8, 1975 and also November 29, 1976.

Let us first consider what is a proclamation. The meanings given in the Chambers Dictionary are 'an official notice given to the public', 'a proscription' etc. According to Black's Law Dictionary proclamation means 'a formal public announcement made by the government.' Generally proclamations are used for declarations of war and peace made on behalf of the Sovereign or the Republic.

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." (The underlinings are mine). (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 Proclamation 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.

The Declaration of Independence adopted on July 4, 1776, by the Continental Congress of the Colonies was also a proclamation. It announced the birth of a new nation of the United States.

Another example of proclamation is the declaration of Independence on March 26, 1971, followed by the formal Proclamation of Independence of Bangladesh itself made on July 10, 1971, at Mujibnagar, made on behalf of the Constituent Assembly. This proclamation ushered the birth of a new nation, our Peoples Republic of Bangladesh. The first paragraph of the Preamble of our Constitution also recognized such proclamation of independence on March 26, 1971.

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.

During normal times, everything is generally routine and rational but it is the time of crisis which puts a nation and its people on test. On the morning of August

15, 1975, we failed to uphold the Constitution and the laws made thereunder inspite of our oath. It remained in the book not in our hearts.

We repeatedly enquired about any legal basis for such seizure of office of President but received no satisfactory answer from the learned Additional Attorney General. Apparently, Khandaker Mostaque Ahmed with the active aid and assistance of a section of the armed forces, grabed the office of President and the Government of Bangladesh. All these were done on August 15, 1975. Five days later, on the 20th August, the Proclamation was made, declaring Martial Law in the country. By the Proclamation, the Constitution, the supreme law of the country, was suspended and the jurisdiction of the Supreme Court was ousted. We along with the learned Additional Attorney General and other learned Advocates for the petitioner as well as the respondent no.3, searched for any semblance of legal basis for all these actions but could not find any. It appears that Khandaker Moshtaque Ahmed along with his conspirators simply seized the Government by the muzzle of the guns. They grossly violated the Constitution. They were usurpers plane and simple.

But the Second Parliament by the Constitution (Fifth Amendment) Act, ratified their such actions, such as, illegal changing of the Constitution without any authority, suspension of the Constitution, ousting the jurisdiction of the Supreme Court, etc.

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. He is accountable for all his actions just like the humblest citizen of this country. He betrayed his oath to preserve, protect and defend the Constitution. He was obliged to do it with his life but he failed miserably. As a citizen, under Article 21, it was his duty to observe the Constitution, the laws and to maintain discipline but he failed. We find that his such actions were beyond the ambit of the Constitution and the ordinary laws of the land. As such, he was a usurper to the office of President of Bangladesh and his assumption of the powers of CMLA, a legally non-existent office, was void and non-est in the eye of law. Consequently, all his subsequent 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.

But the Second Parliament, by the Constitution (Fifth Amendment) Act, ratified all his such illegal functions and actions.

In due course, Justice Sayem by the Third Proclamation, handed over the office of Martial Law Administrator to Major General Ziaur Rahman, B.U., PSC., 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 Moshtaque 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.

Besides, 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:

> "১। রাষ্ট্রপতি ।- [প্রধান বিচারপতি] কর্তৃক নিম্মলিখিত ফরমে শপথ (বা ঘোষণা)- পাঠ পরিচালিত হইবে ঃ
>
> আমি, ..., সশ্রদ্ধচিত্তে শপথ (বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-অনুযায়ী বাংলাদেশের রাষ্ট্রপতি-পদের কর্তব্য বিশ্বস্ততার সহিত পালন করিব ;
>
> আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষণ করিব ;
>
> <u>আমি সংবিধানের রক্ষণ, সমর্থন ও নিরাপত্তাবিধান করিব</u>;
>
> এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-অনুযায়ী যথাবিহীত আচরণ করিব।" (The underlinings are mine).

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 Bangladeash according to law :
>
> That I will bear true faith and allegiance to Bangladesh:
>
> That <u>I will preserve, protect and defend the Constitution</u>:
>
> And that I will do right to all manner of people according to law, without fear or favour, affection or ill – will. ……."
>
> (The underlinings are mine).

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.

The Fourth Schedule was added 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.

This Proclamation Order changing the Constitution, was made by the President and the CMLA by amendment of the Proclamation dated November 8, 1975 and November 29, 1976, read with the Proclamation of August 20, 1975.

The main features of these changes of the Constitution are:

i) These changes were made by a nominated President and CMLA – who had no legislative power either to make a law or abrogate any, not to speak of any of the provision of the Constitution but it was done.

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 plane 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 promalgation 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.

PART XXII. Amendment of The Constitution :

In May, 1977, in pursuance of the Referendum Order, 1977(MLO No.1 of 1977), a Referendum was held and almost all the voters in Bangladesh expressed their confidence in Major General Ziaur Rahman, B.U. and in his policies and programmes. In due course, a general election was held in 1979 and the Second Parliament was commenced on April 1, 1979, although the Martial Law was still continuing in Bangladesh. On the April 6, 1979, as a sequel to the promulgation of Martial Law, the Constitution (Fifth Amendment) Act, 1979 was made by the Parliament and published in Bangladesh Gazette Extraordinary on April 7, 1979.

Let us first consider the general principle with regard to the power of amendment of the Constitution. Thereafter, we shall consider Article 142 of the Constitution of Bangladesh which confers such power of amendment on the Parliament and the Parliament alone.

In contradistinction to the amendment of an ordinary legislation, Constitutions of most of the countries provide for special procedure for amendment of any provision of the Constitution. The reason is and it is generally accepted that a Constitution is a fundamental or basic law of a country. It is being the supreme law and

when it is written, it is to be treated as permanent. But it also acknowledged that with the passage of time, the needs of the people, the needs of the society as a whole may require re-adjustment of some of the provisions of the Constitution, keeping its basis and basics intact. In order to provide such a mechanism, a provision for amendment is invariably kept in the Constitution itself.

As such, of necessity some special stringent procedure is provided for in the Constitution itself to allow such an amendment. This however, depends whether the constitution is a 'flexible' one or 'rigid'. If the provision of the Constitution can be changed with the same ease as that of an ordinary law it is known as a flexible Constitution but when the Constitution provides some special procedure for the amendment of its provisions then it is known as a rigid Constitution.

By way of example of flexible Constitution, United Kingdom may be cited as one. Firstly because there is no written Constitution being the supreme law, creating the Parliament or other Institutions of the State. Secondly, there is no distinction between the status of various laws enacted by the Queen in Parliament. Thirdly, amendment of any law can be made by the legislature without any special procedure as in the case of a written rigid Constitution.

So far a rigid Constitution is concerned, we first think about the Constitution of the United States. The United States has a written Constitution, one of the earliest. Besides, special procedure has been provided for amendment of the said Constitution. Similarly most of the European and American Constitutions are rigid. The only exceptions as could be gathered, are the Constitutions of Singapore and New-zeland. Those Constitutions, though written but can be altered by ordinary legislative process so also the Constitutions of the Australian States which are written but largely flexible.

In framing a Constitution, the will of the 'people' of the concerned Republic is the most important factor. Although as a matter of fact, the people never

frames a Constitution but the Constitution must, of necessity, reflects their ideals, their hopes their aspirations in general, otherwise, it will not come from the people, rather it would tantamount to imposing upon them, necessitating enactment and adoption of one Constitution after another. In the language of K.C. Wheare in the 'Modern Constitutions' at page - 67:

> "CONSTITUTIONS, when they are framed and adopted, tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of the society at that time. Moreover they do not necessarily reflect political or legal beliefs and interests only. They may embody conclusions or compromises upon economic and social matters which the framers of the Constitution have wished to guarantee or to proclaim. A Constitution is indeed the resultant of a parallelogram of forces political, economic and social-which operate at the time of its adoption"

As such, when a Constitution is framed it commands veneration and highest respect from all because, it is the supreme law of the land and the Government and all other Institutions are subordinate to the Constitution. The people in that view of the matter regards their Constitution as their guarantee of their own rights, duties and obligations towards the state and vice versa, as such, they would regard it as their own Constitution. Generally the people would not like any unilateral lighthearted attempt to change the Constitution, rather, would like to preserve it against all odds even against a usurper.

People of many a modern countries has got a say in the Constitutions of their countries and so also in its amendments, as such, provisions are made in the Constitutions of the Republic of Ireland, Denmark, Commonwealths of Australia, Switzerland and the States of the United States, providing for referring the proposed amendments to the people, after it has been passed by the legislatures. This highlights the sovereignty of the people.

In this connection the discussion of A. V. Dicey in his celebrated work 'An Introduction to the Study of the Law of the Constitution' (10th Edition) at pages 146 -150 is illuminating:

> "The constitution must be what I have termed a "rigid" or "inexpansive" constitution.
>
> The law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution.
>
> In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, …….The question, however, whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorised to amend or alter its terms is of merely speculative interest, for under existing federal governments the constitution will be found to provide the means for its own improvement. …… Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.
>
> Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority."

The basic principles of construction of a Constitution were enunciated by Earl Loreburn L.C., in the case of Attorney General for Ontario V. Attorney-General for Canada 1912 AC 571 at page – 581:

> "The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament. Much care and learning have been devoted to the case, and their Lordships are under a deep debt to all the learned judges who have delivered their opinions upon this anxious controversy.
>
> In 1867 the desire of Canada for a definite Constitution the embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self -government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

His Lordship further held at page – 583:

> "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed

> in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or other wise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. " (The underlinings are mine).

In re The Initiative and Referendum Act 1919 AC 935, in considering the validity of the Act passed by the Legislature of Manitoba, Viscount Haldane, held at page –943-5:

> "The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. …….. in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. ……. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far ultra vires.……Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.
>
> These considerations are sufficient to establish the ultra vires character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act, 1865(1), therefore, which was invoked in the course of the argument, does not assist the appellants." (The underlinings are mine).

The above Act envisaged removal of the Lieutenant-Governor of the Province from participation in the provincial legislative process, contrary to Section 92 of the British North America Act, as such, the said Initiative and Referendum Act was held invalid.

This character of the Constitution was also noted by the Privy Council in the case of Mc Cawley V. The King 1920 AC 691. Lord Birkenhead, L.C., recognised a distinction between a rigid and flexible Constitution. He however, termed it as controlled and uncontrolled Constitution.

In this case, the appointment of Mc Cawley as a Judge of the Queensland Supreme Court, under Section 6 of the Industrial Arbitration Act, 1916, passed by Queensland Parliament, was challenged on the ground that the said provision was contrary to Sections 15 and 16 of the Constitution Act, 1867. The challenge was upheld by the Queensland Supreme Court and the High Court of Australia. On appeal, the Privy Council reversed the said decisions. Lord Birkenhead, L.C. held at page – 703-4:

> "The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.
>
> …….Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter.
>
> The fundamental contention of the respondents in this appeal requires the conclusion that the constitution of Queensland is in the sense explained above a controlled constitution."

On consideration of the relevant provisions, his Lordship held at page-709-712:

> "Narrow constructions were placed by colonial judges upon the instruments creating constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the constitutions conceded to the colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such constitutions was "fundamental" or 'organic"and that therefore the constitution was controlled……...We observe, therefore, the Legislature in this isolated section carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority."

His Lordship concludd at page -714:

> "The Legislature of Queensland is the master of its own house hold, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal. It follows, therefore, that s. 6 of the Industrial Arbitration Act, 1916, was not ultra vires. The Legislature was fully entitled to vary the tenure of the judicial office."

The importance of Mc Cawley's case is that the Privy Council recognized that special procedure for amendment of the Constitution Act, 1867, may be made and unless such special procedure's are prescribed, amendment of a provision of the Act may be made in the same way as any other legislation. This brings fore the theory of the distinction between the flexible and the rigid Constitution in actual practice.

Next we shall consider the case of Attorney General for New South Wales V. Trethowan 1932 AC 526. In the said case, the Constitution Act, 1902 of New South Wales, was amended by the Act of 1929, adding section 7A. The said provision provided that no bill to abolish that Legislative Council or

repealing section 7A, should be presented for Royal Assent until approved by the electors in accordance with that section. But in 1930, without complying with the requirements of section 7A, two bills were passed one repealing section 7A and the other abolishing the Legislative council. The question arose whether the Parliament of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal section 7A of the Constitution Act, 1902, except in the manner provided by the said section 7A. Lord Sankey L.C, found at page -539-41:

> "…….The question then arises, could that Bill, a repealing Bill. after its passage through both chambers, be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner? In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of s. 5 of the Act of 1865 states a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that s. 7A may be repealed (in other words, in order that that particular law "respecting the constitution, powers and procedure" of the legislature may be validly made) the law for that purpose must have been passed in the manner required by s. 7A, a colonial law for the time being in force in New South Wales."

Then his Lordship held at page -541:

> "In the result, their Lordships are of opinion that s. 7A of the Constitution Act, 1902, was valid and was in force when the two Bills under consideration were passed through the Legislative Council and the Legislative Assembly. Therefore these Bills could not be presented to the Governor for His Majesty's assent unless and until a majority of the electors voting had approved them."

The importance of this decision lies in the strict adherence to the procedure spelt out in section 7A of the Constitution Act 1902. It was intra vires to

section 5 of the Colonial Laws Validity Act, 1865 and unless the manner as required in section 7A is meticulously followed the proposed amendment could not be made.

This decision is relevant for our purpose because Article 142 of the Constitution of Bangladesh clearly laid down the procedure for amendment of any provision of the Constitution but Khondaker Moshtaque Ahmed, Justice Abusadat Mohammad Sayem and Major General Ziaur Rahman, BU, psc., in exercise of their autocratic and illegal power, not only made our Constitution subservient to the Martial Law Proclamations etc. but also changed the basic structure of the Constitution according to their free will without caring a fig about the procedure laid down in the Constitution. Even Article 142 itself was changed illegally, presumably, to impede further amendment, so that subsequent Parliaments may not brought back the original provisions of the Constitution, by way of amendment.

In this connection we would refer to the decision of the Privy Council in the case of re The Regulation And Control of Aeronautics In Canada 1932 AC 54. In deciding the question regarding the right of legislation to control and regulate aeronautics and the air-stations in Canada as between the Dominion and the Provinces, Lord Sankey L.C., held at page-70:

> "To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the ease in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon ssentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

In the case of Attorney General For Canada V. Attorney General For Ontario 1937 AC 355, in deciding the question as to whether the Employment and Social Insurance Act, 1935, was ultra vires of the Parliament of Canada, Lord Atkin, in pronouncing the Act ultra vires held at page – 367:

> "…….Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid."

This decision is relevant for our purpose because in every enactment, its pith and substance is most important. In the above case, the legislation invaded the civil rights, as such, declared invalid. Similarly, the pith and substance of the Fifth Amendment, in the instant case, is sought to ratify and validate, the Proclamations etc.

In the case of Gallagher V. Lynn 1937 AC 86 in deciding the constitutional validity of an Act passed by the Legislature of Northern Ireland in 1934, Lord Atkin held at pages – 869-70:

> "It is well established that you are to look at the " true nature and character of the legislation": Russell v. The Queen (I) "the pith and substance of the legislation." If, on the view of the statute as whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislature. An Act may have a perfectly lawful object, e.g., to promote the health of the

> inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject."

That is exactly what we intend to do in this case in considering some of the proclamations etc., if not all, to find out the pith and substance of the Fifth Amendment Act.

In the case of The Bribery Commissioner V. Pedrick Ranasinghe 1965 AC 172, the Bribery Tribunal of Ceylon tried and convicted Ranasinghe on the bribery charges but it was alleged that the members of the Tribunal were not lawfully appointed, rather, the provision for appointment offended against an important safeguard of the Constitution of Ceylon. The questions before the Privy Council were as to whether the statutory provisions for the appointment of members of the panel of the Bribery Tribunal otherwise than by the Judicial Service Commission conflict with Section 55 of the Constitution, and, if so, whether those provisions are valid.

Lord Pearce in course of his Judgment observed at page- 194G:

> "The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth."

That is exactly what we are doing in the instant case in respect of the Proclamations etc. and its subsequent ratification by the Constitution (Fifth Amendment) Act.

In respect of the dispute in the case, his Lordship raised the issue in deciding the question at page – 196BC:

> "There remains the point which is the real substance of this appeal. When a sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the

course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner?"

In dealing with the issue, Lord Pearce considered the case of Mc Cawley V. The King 1920 AC 691 at page- 197G – 198F:

"……a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of Queensland to be. ……In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, ……"

Thereafter, Lord Pearce concluded at page-199G-200C:

"The legislative power of the Ceylon Parliament is derived from Section 18 and section 29 of its Constitution. Section 18 expressly says "save as otherwise ordered in subsection (4) of section 29." Section 29 (1) is expressed to be "subject to the provisions of this Order." And any power under section 29 (4) is expressly subject to its proviso. Therefore in the case of amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires. ……"

In the result, the Privy council dismissed the appeal holding that the members of the panel from which Bribery Tribunal were chosen were not lawfully appointed to the Tribunal and as such, there was a conflict between the Constitution of Ceylon and the Bribery (Amendment) Act.

In the case of Liyanage V. R (1967) 1 AC 259 = (1966) 1 All ER 650, although the Constitution of Ceylone did not expressly vest the Judicial power exclusively in the Judiciary but the privy Council found that that fact alone was not decisive, rather, the scheme of the Constitution particularly the provisions relating to the judiciary, among others, led the Privy Council to hold that the Constitution vested the Judicial power exclusively in the Judiciary. This case furnishes an instance where implied limitations were inferred. After referring to the provisions with regard to Judicature, Lord Pearce on behalf of the Board explains at page – 658 EFG of (1966) 1 All ER 650, that these provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control.

The Privy Council was of the view that 'there exists a separate power in the Judicature which under the Constitution as it stands cannot be usurped or infringed by the Executive or the Legislature'. Section 29 (1) of the Constitution was construed in this manner at page – 659 DE.

> "Section 29 (1) of the constitution says: "Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island." These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the constitution on a two-thirds majority with a certificate of the Speaker. Their lordships however cannot read the words of s. 29 (1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature-e.g., by passing an act of attainder against some person or instructing a judge to bring in a verdict of' guilty against some one who is being tried if in law

> such usurpation would otherwise he contrary to the constitution. There was speculation during the argument what the position would be if Parliament sought to procure such a result by first amending the constitution by a two-thirds majority; but such a situation does not arise here. In so far as any Act passed without recourse to s. 29 (4) of the constitution purports to usurp or infringe the judicial power it is ultra vires."

Now let us turn towards the Constitution of the United States.

It is however well settled for the last two hundered years that the Constitution is the only source of power in all three branches of the Federal Government of the United States. The Supreme Court stated and re-stated the said costitutional position whether in war or in peace. It established unfailingly:

> "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument" (Downes V. Bidwell 182 US 244, 288)" (Quoted from Cases on Constitutional Law by Professor Noel T. Dowling, Fifth Edition 1954, page – 398).

Article V provides for amendment of the Federal Constitution. The process of amendment is both difficult and circuitous. It is effected by proposal and ratification. An Amendment may be proposed by a two-thirds vote of both Houses of Congress or by a national constitutional convention called by Congress upon request of the Legislatures of two-thirds of the States. The proposed amendments must be ratified by the Legislatures of three-fourths of the states or by special convensions in three-fourths of the states. These stringent procedures were made to ensure that the will of the people will be voiced.

It may be recalled that the Federal Constitution was ratified by the thirteen States on September 17, 1987 and became operative in 1789. At that time it was assured that amendments guaranteeing individual rights would be made forthwith, as

such, the first Congress assembled under the Constitution, proposed a series of amendments to the State Legislatures in 1789.

The first ten amendments were proposed in 1789 and were ratified in December 15, 1791 and together form what is known as the Bill of Rights of the National Constitution. However, it is for the Supreme Court to say what rights are fundamental in this sense.

In Mormon Church V. United States (1890) 136 US I, it was held by the Supreme Court by way of dicta:

> "Doubtless Congress legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, then by any express and direct application of its provisions."

In the case of Dred Scott V. Sandford (1857), Justice Curtis held:

> "If, then, this clause does contain a power to legislate respecting the territory, what are limits of that power?
>
> "To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution." (Quoted from cases on Constitutional Law By Professor Noel T. Dowling, Fifth Edition, 1954, page -399)

In the case of Dorr V. United States (1904) 195 US 138 = 49 L. ED. 128, Justice Day held:

> "…….In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the Question may arise as to how far the exercise of the power is limited by the "prohibitions" of that

> instrument……..”(Quoted from Cases on Constitutional Law by Professor Noel. T. Dowling, Fifth Edition, 1954, page – 399-400).”

The next seventeen amendments were made during the last two hundred years, the last twenty-seventh amendment was ratified on May 7, 1992.

In Ullman V. United States (1956), 350 US 422 = 100 L. Ed. 511, it was held that nothing new can be put into the Federal Constitution except through the amendatory process, and nothing old can be taken out without the same process (Quoted form American Jurisprudence 2d Vol. 16, page – 358 n. 26).

In re Duncan (1891), 139 US 449, 461 = 35 L. Ed. 219, Chief Justice Fuller held:

> “…….distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.” (Quoted from cases on Constitutional Law by professor Noel .T. Dowling, Fifth Edition, Page-151 (notes))

A reading of the amendments would unmistakably show that the first ten amendments were made to protect the fundamental and basic human rights of the citizens of the United States. The next seventeen amendments were made during the last two hundred years of the Republic. Those amendments were made for the enhancement of the interest of the people of the United States and in general, of the Republic. During the last two hundred years the Republic of the United States went through a Civil war and many a crisis and in the most turbulent times, they did never disown or dishonour

their Constitution, rather, the supremacy of the Constitution was proved time and again, more so during their national crisis.

Amendments are part of the normal constitutional process in the United States and each amendment enriched its Constitution to some extent. Each of the twenty seven amendments contributed to the democratisation of the Republic and thereby highlighted the sovereignty of the people, by and for whom the Republic was brought into existence. In other words the amendment of the Constitution of the United States were meant to further grace the Republic, and enhance its prestige by achieving refinements of the Constitution but never meant for impoverish it by legalizing heinous seditionus acts against the Republic and its Constitution as happened more than once in Bangladesh.

Article V of the Constitution invests the Congress with enormous power to propose almost any amendment to the Constitution except that no State can be denied of equal representation in the Senate without its consent. From time to time, vires of the amendments were challenged before the Supreme Court, for example, Nineteenth Amendment extending suffrage to women was challenged in Lesser V. Palmer (1920) but those attempts proved futile.

On the question as to Constitution as limitation of power, American Jurisprudence, 2nd Vol. 16 states as follows:

> "The Constitution of the United States and any amendments thereto, together with federal laws made in pursuance thereof and treaties made under the authority of the United States, are expressly declared to be the supreme law of the land in the Constitution itself. The constitution as the supreme law is without qualification and is absolute. While the national government is one of limited powers, those actually granted constitute the paramount authority of the land. The Federal Constitution is binding on all officers and departments of both the federal and state governments, including every court, whether it

derives its authority from a state or from the United States." (Para-51, Page-408-9).

From the above discussion it would appear that the Constitution of the United States is a rigid one. It is the supreme law and all great Institutions of the Republic owe its existence to the Constitution. The Constitution itself provides for its amendment but the procedure is difficult and circuitious but was so made in order to reflect the will of the people. Their sentiment and voice is accepted as paramount and supreme. All 27 (twenty seven) amendments were made bonafide in the interest of the Republic, the beneficiary is the people alone. None of the amendments were made for personal aggrandizement or in order to hide the illegal acts of any usurper. The amendments of the United States, unlike the Constitution (Fifth Amendment), Act. 1979 of Bangladesh, were made not only as steps towards further refinements of the original Constitution but also to highlight the harmonions picture of the entire Constitution together with its amendments.

It will also be perceived that in none of the 27 (twenty seven) amendments, the original or the basic character of the Constitution of 1787 were varied or detoured in any manner, rather, the amendments were all made glorifying the basic ideals embodied in the original National Constitution for which their fore-fathers fought and won a Republic for the future generations. Since none of the amendments violated the basic features of the original Constitution, the US Supreme Court had no occasion to hold otherwise.

Now we shall pass on to examine the constitutional position of this sub-continent.

This Indian sub-continent gained its independence by the Indian Independence Act, 1947. This Act brought into existence two new Dominions, namely, India and Pakistan. Section 8 of the Act empowers the Constituent Assemblies of each country to frame its own Constitution.

India adopted its Constitution in 1950 while Pakistan its first in 1956.

In India the first amendment of the Constitution was made within one year of inauguration of its Constitution in 1951 being the Constitution (First Amendment) Act, 1951. This amendment added two new provisions to the Constitution, namely, Article 31A and Article 31B along with the Schedule IX. These new provisions curtailed the right to property guaranteed by Article 31. This amendment of the Constitution was challenged in the case of Shankari Prasad Singh Deo V. Union of India AIR 1951 SC 458.

The facts leading to the Shankari Prasad's case were that immediately after independence, the Parliament in India carried out agrarian reforms by enacting various laws. This resulted in the abolition of Zemindaries in various States in India. Those Acts were challenged on the ground that the fundamental rights as stated in Part III of the Constitution were contravened. The Union Government, in order to put an end to these litigations and also to push ahed with its agrarian reforms in aid of the millions of landless peasants, without loosing further time, passed the Constitution (First Amendment) Act, 1951. The Supreme Court of India upheld the said amendment of the Constitution.

It appears that the Supreme Court of India in Shankari Prasad's case, adopted a literal interpretation of the Constitution of India and held that Article 13 envisages legislative law made by a legislature but not to a constituent law, made to amend the Constitution. The Court rejected the argument that the fundamental rights including the right to property are sacrosanct and are not amendable in the normal process under Article 368 of the Constitution. The whole decision, it appears, hinged upon an assumption that the expression 'law' in Article 13 (2) does not include constitutional law.

The first Constitution of the Islamic Republic of Pakistan had been passed by the Constituent Assembly on the February 29, 1956 and assent to it was given

by the Governor General on March 2, 1956. It came into force on March 23, 1956 and Pakistan ceased to be a Dominion and became a Republic on and from that date. The President of Pakistan made reference under Article 162 of the Constitution to the Supreme Court for its opinion as to whether the Governor of a Province was empowered to dissolve the Provincial Assembly. Munir, C.J., in delivering the opinion of the Supreme Court (PLD 1957 SC 219 = (1957) 9 DLR SC 178) observed at para – 33 (DLR):

> "……..The Constitution defines the qualifications which a candidate for election to the Provincial Assembly, or a voter in a constituency for such Assembly, must possess; but Mr. Manzur Qadir would give to the President under Article 234 the power to destroy, though for a temporary period, the very basis of the new Constitution by claiming for him the power to form the constituencies and to order the preparation of electoral rolls in direct violation of the Constitution merely to implement the decision of a Governor."

Murshed, J. in the case or Muhammad Abdul Haque V. Fazlul Quader Chowdhury and others PLD 1963 Dhaka 669, read the above dictum in this perspective at page – 698 M:

> "The aforesaid dictum of the Supreme Court of Pakistan is a pointer that in the case before us the power of "adaptation" does not extend to the wiping out of a vital provision of the Constitution to implement a decision of the members of the Assembly who were invited to be Ministers."

And Cornelius, C.J., held about the same dictum in appeal of the above case, PLD 1963 SC 486 at page – 512 in this menner:

> "In that passage, there clearly appears a determination on the part of the Court to resist any attempt to manipulate the constitution in order to suit a particular person, and at the same time to insist that nothing should be permitted which derogates

> from the "very basis" of the Constitution or is in direct violation of the Constitution."

In the above noted case, Fazlul Quader Chowdhury, Khan A. Sabur Khan and Wahiduzzaman were elected as the members of the National Assembly of Pakistan. Shortly thereafter they were also appointed to the President's Council of Ministers in pursuance of an Order passed by the President, purported to have been passed under Article 224 (3) of the Constitution, in order to remove the difficulty in the formation of the Council of Ministers. Such appointment, their membership in the National assembly was challenged in this case. In considering the process of amendment of the Constitution in general, Murshed, J. held at para- 53:

> "53…….A Constitution is a solemn and sacred document of seminal and supremel consequence, partaking the nature of almost scriptura sanctity, embodying, as it usually does, the final will and testament of the sovereign authority that resides in the people and providing the manner and norms of the Government of a nation. It therefore, assumes something of the immutability of the laws of the Medes and the Persians. It is not subject to easy change which is usually effected by a special and somewhat difficult process. In the present Constitution the provisions with regard to "amendment" of the Constitution have been enumerated in Articles 208 to 210. We may note that it requires a two-thirds majority of the Legislature to effect an amendment in the Constitution."

Under such circumstances, in declaring the impugned Order 34 of 1962 ultra vires to the Constitution being in excess of the powers of the President Field Marshal Ayub Khan, Murshed, J., held at para – 78:

> "78. The text of Article 224 (3) is very clear and unambiguous. It does not permit alterations of the provisions of the Constitution for a solution of a political situation brought about by some members of the National Assembly who refused

to accept appointments as Ministers, if such appointments entailed cessation of their membership of the Assembly."

In dismissing the appeal before the Supreme Court, PLD 1963 SC 486, Cornelius, C.J., emphatically ordained as far back as in 1963 at page – 512:

> "The impression is clear and unavoidable that the ground of expediency was based on a desire to accede to the wishes of certain persons, probably a fairly small number of persons, but the Constitution was not intended to be varied according to the wishes of any person or persons. Anything in the nature of "respecting of persons", unless provided by the Constitution itself, would be a violation of the Constitution, and if the Constitution were itself altered for some such reason, and that in a substantial, and not merely a machinery aspect, there would clearly be an erosion, a whittling away of its provisions, which it would be the duty of the superior Courts to resist in defence of the Constitution. The aspect of the franchise, and of the form of Government are fundamental features of a Constitution and to alter them, in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the given Constitution into force, but to bringing into effect an altered or different Constitution.."

In the same case, Fazle Akbar, J., observed at page – 523:

> "In any event it is clear from Part-XI of the Constitution that no power has been bestowed on the President to amend the Constitution at his own will."

His Lordship further held at page – 524:

> "From the language of the Article it is abundantly clear that this Article was never meant to bestow power on the President to change the fundamentals of the Constitution. Our Constitution has provided for a Presidential form of government and the President by the impugned Order has introduced a semi-Parliamentary form of Government. As already stated, this Article 224(3) was never meant to bestow power on the President

> to change the fundamentals of the Constitution. However wholesome the intention and however noble the motive may be the extra-constitutional action could not be supported because the President was not entitled to ge beyond the Constitution and touch any of the fundamentals of the Constitution."

Approving Cooley in this respect, Hamoodur Rahman, J., (as his Lordship then was) observed at page – 535:

> "A Constitution", says Cooley in his Treatise on Constitutional Limitations is "the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised." The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rules for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within the four corners of the Constitution nor can anyone transgress the limits therein specified."

In highlighting the main feature of the Constitution, his Lordship further held at page – 538:

> "The main feature of the Constitution, therefore, is that a Minister should not be a member of the House, he should have no right to vote therein, nor should his tenure of office be dependent upon the support of the majority of the members of the Assembly nor should he be responsible to the Assembly. This is an essential characteristic of a Presidential form of Government and Mr. Brohi appearing on behalf of the respondent has called it the "main fabric" of the system of government sought to be set up by

> the present Constitution. An alternation of this "main fabric", therefore, so as to destroy it altogether cannot, in my view, be called an adaptation of the Constitution for purpose of implementing it."

These observations of the Pakistan Supreme Court were upheld in the minority judgment of Mudholkar, J. in the case of Sajjan Singh V. State of Rajasthan AIR 1965 SC 845 at para – 59, page- 864.

In the case of Sajjan Singh V. State of Rajasthan AIR 1965 SC 845, the validity of Constitution (seventeenth Amendment) Act, 1964, was under challenge. The said amendment again seriously affected the fundamental right to property. The majority of the Supreme Court, in following the decision in Shankeri Prasad, upheld the validity of the said Amendment Act, 1964. But the minority of the judges expressed their doubts about the correctness of the decision in Shankari Prasad's Case.

His Lordship further held at para-62.

> (62). It has been said, no doubt, that the preamble is not a part of our Constitution. But, I think, that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently of these features are an amplification or concretisation of the concepts set out in the preamble it may have to be considered whether the preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an Act of a legislature. It has the stamp of deep deliberation has is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?

It would appear that in Sajjan Singh's case Hidayatullah, J., propounded the theory of non-amenability of fundamental rights while Mudholkar, J. expressed his

views, although with caution, that the basic features of the Constitution are not amendable.

In the case of Golak Nath V. State of Punjab AIR 1967 SC 1643, constitutionality of the Seventeenth Amendment to the Constitution was under challenge.

The Sevententh Amendment was enacted in 1964, widening further the ambit of Article 31A, included by the first Amendment. It provided among others the inclusion of 'ryotwari' tenure within the definition of 'estate', as such, any legislation in respect of such ryotwari tenure became immune from challenge on the ground of violation of fundamental right to property. Besides, the said amendment added a further forty four new statutes passed by the various states to schedule IX to the Constitution, making those immune from challenge. With this amendment, the total number of immunized statutes rose to sixty-four.

It may be recalled that in Shankari Prasad's case (AIR 1951 SC 458), the First Amendment to the Constitution of India curtailing the fundamental right to property by inserting Article 31 A and 31 B was held to be valid. This decision was assumed to be correct in a number of subsequent decisions of the Supreme Court of India. But in Sajjan Singh's case (AIR 1965 SC 845), two of the learned Judges inclined to take a different view. The conflict between the majority and the minority views was resolved in Golak Noth's case by constituting a larger Bench of 11 (eleven) learned Judges. Subba Rao, C.J., on behalf of himself and four other judges gave the leading Judgment, supported by another Judgment, separately given by Hidayatulla, J.

In over-ruling the earlier decisions in Shankari Prasad's and Sajjan Singh's case, the majority of the Court reached the following conclusion at para – 53:

> "(53).<u>The aforesaid discussion leads to the following results:</u>
>
> (1) The power of the Parliament to amend the Constitution is derived from Arts. 254, 246 and 248 of the

Constitution and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Art. 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourt Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective overruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, The Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Arts. 13, 14 or 31 of the onstitution."

Next we shall consider the decision of the Supreme Court of India in the case of Kesavananda Bharati etc. V. State of Kerala etc. AIR 1973 SC 1461. This is a historical and land-mark Judgment delivred by the Supreme Court of India. Since we agree and rely on the principles stated in this decision, we shall refer to it some what elaborately.

In this case, the validity of Twenty-fourth, Twenty-fifth and Twenty-ninth Amendment of the Constitution of India, further denting the already truncated fundamental right to propertry, was under challenge. Besides, the correctness of the decision in Golak Nath's case was also decided. However, in deciding these above

noted questions, the real issue before the Supreme Court was the extent of the amending power, conferred by Article 368 of the Constitution apart form Article 13(2), on the Parliament.

The rigid formulation in Golak Nath's case that all fundamental rights are non-amendable by the Parliament, was modified in the Kesavananda Bharati's case. It was decided in the said case by a majority of 9-4 that the basic features of the Constitution cannot be destroyed or changed by the process of amendment, rather, those ideals and values of the Constitution should be preserved. The approach in the Kesavananda's case was flexible. It was decided therein that whether the relevant fundamental right constitutes a 'basic feature' or not remains with the Court to decide finally on the facts and circumstances of each case. It should be noted that even in this case it was held that the fundamental right to property is not a basic feature of the Constitution and thereby over-ruled the decision in the Golak Nath's case.

On consideration of different provisions of the Constitution, Sikri, C.J. explained an amendment of the Constitution in this manner at para- 291-294 and para-297-299:

> "291. What is the necessary implication from all the provisions of the Constitution?
>
> 292. It seems to me that the reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Arts.52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.
>
> 293. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of

the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

294. In view of the above reasons, a necessary implication arises the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

297. For the aforesaid reasons, I am driven to the consclusion that the expression "amendment of this Constitution" in Art. 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest.

298. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment.

299. If this meaning is given it would enable Parlaiment to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen."

Regarding the basic feature of the Constitution, his Lordship held as follows:

"302. The learned Attorney General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features;

(1) Supremacy of the Constitution;

(2) Republican and Democratic forms of Government.

(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) Federal character of the Constitution.

303. The above structure is built on the basic foundation, i. e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

304. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed."

In this connection it should be remembered that the country belongs to the people as a whole and not to the members of Parliament or to any other body of persons. They are voted to the Parliament to represent the people as their trusted agent. The members of Parliament are the trustees for and on behalf of the people of Bangladesh as a whole. As such, all the rights belong to the people, although in order to protect their interest, their rights are sometimes required to be adjusted or even curtailed but within the ambit of the Constitution itself, keeping in view their inalienable rights.

In repelling the conterntion of Mr. Seerevai, Advocate General, the Hon'ble Chief Justice held at para – 308:

"308**.** He also relied on the words "rights conferred" in Article 13 (2) and "enforcement of any rights conferred by this Part"to show that they wre not natural or inalienable and could not have been claimed by them. There is no question of the sovereign people claiming them from an outside agency. The people acting through the Constitutent Assembly desired that the righrs mentioned in Part III shall be guaranteed and, therefore, Part III was enacted. In the context 'conferred' does not mean that some superior power had granted these rights. It is very much like a King bestowing the title of "His Imperial Majesty' on himself."

In response to the argument in respect of waiver of rights, on the basis of an observation by S.K. Das, J., in Basheshar Nath V. C.I.T. AIR 1959 SC 149, the Hon'ble Chief Justice, held at para – 312:

> "312**.** I must point out that the learned Judge was expressing the minority opinion that there could be a waiver of fundamental rights in certain circumstances. Das, C.J., and Kapur, J., held that there could be no waiver of fundamental rights founded on Article 14 of the Constitution, while Bhagwati and Subba Rao, JJ. held that there could be no waiver not only of fundamental rights enshrined in Article 14 but also of any other fundamental rights guaranteed by Part III of the Constitution."

In conclusion, his Lordship regarded the First and Fourth Amendment as made within the amending power of the Parliament.

In considering whether the 24th Amendment enlarged the power of Parliament to amend the Constitution, his Lordship held at para – 408 and 410:

> **"**408. It seems to me that it is not legitimate to interpret Article 368 in this manner. Clause (e) of the proviso does not give any different power than what is contained in the main article. The meaning of the expression "Amendment of the Constitution" does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its indentity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two thirds majority to simple majority. Similartly it cannot get rid of the true meaning of the expression "Amendment of the Constitution"so as to derive power to abrogate fundamental rights."
>
> "410**.** …….Under Article 368, Parliament can amend every article of the Constitution as long as the result is within the limits already laid down by me. The amendment of Article 13(2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorize abrogation or the taking away of fundament rights.

After the amendment now a law which has the effect of merely abridging a right while remaining within the limits laid down would not be liable to be struck down."

To summarise, his Lordship, Sikri, C.J., held at para – 492:

"492. To summarise, I hold that:

(a) Golak Nath's case, (1967) 2 SCR 762 = (AIR 1967 SC 1643), declared that a Constitutional amendment would be bad if it infringed Article 13 (2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.

(b) Golak Nath's case, (1967) 2 SCR 762 = (AIR 1967 SC 1643). Did not decide whether Article 13 (2) can be amended under Artilce 368 or determine the exact meaning of the expression"amendment of this Constitution" in Article 368.

(c) The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.

(d) The Constitution (Twenty fourth Amendment) Act, 1971, as interpreted by me, has been validly enacted.

(e) Article 368 does not enable Parliament in its constitutent capacity to delegate its function of amending the Constitution to another legislature or to itself in its ordinary legilslative capacity.

(f) Section 2 of the Constitution (Twenty-fifth Amendmen) Act, 1971, as interpreted by me, is valid.

(g) Section 3 of the Constitution (Twenty-fifth Amendment) Act,1971 is void as it delegates power to legislatures to amend the Constitution.

(h) The Constitution (Twenty-Ninth Amendment) Act, 1971 is ineffective to protect the impugned Acts if they abrogate or take away fundamental rights. The constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them, and in the latter case whether they effect

reasonable abridgments in the public interest." (The underlinings are mine)

Regarding amendments vis a vis the basic strueture of the Constitution, Shelat and Grover JJ. held in Kishavananda in para – 599-600:

"599. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.
2. Republican and Democratic form of Governmentand sovereignty of the country.
3. Secular and federal character of the Constitution.
4. Demarcation of power between the legislature, the executive and the judiciary.
5. The dignity of the individual secured by the Various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6. The unity and the integrity of the nation."

Although many of the matters with regard to the amendments curtailing the fundamental rights to property had already been judicially settled but it is still justiciable if the basic structure of the Constitution is dented.

In perceiving the dreams of the founding fathers in achieving independence and enacting a modern Constitution for India with lofty ideals in a broad

and prismatic perspective, Hedge and Mukherjea, JJ., themselves carried away with their deep sense of concomitment to their nation-hood at para – 664:

> "664. From the preamble it is quite clear that the two primary objectives that were before the Constituent Assembly were (1) to constitue India into a Sovereign Democratic Republic and (2) to secure to its citizens the rights mentioned therein. Our founding fathers, at any rate, most of them had made immense sacrifices for the sake of securing those objectives. For them freedom from British Rule was an essential step to render social justice to the teeming millions in this country and to secure to one and all in this country the essential human rights. Their constitutional plan was to build a welfare state and an egalitarian society."

In considering the purpose of amendment of the Constitution and the implied limitation upon such power his Lordships held at para – 681:

> "681. There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adopt the Constitution to respond to the growing needs of the people…… A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest." (The underlinings are mine).

The summary of the views signed by nine out of thirteen learned Judges are amongst others:

> "1. Golak Nath's case is overruled.
> 2. Article 368 does not enable parliament to alter the basic structure or frame-work of the Constitution.
> 3. ……."

All the seven Judges, however, who constituted the majority in Kesavananda Bharati, agreed that democratic set-up is part of the basic structure of the Constitution of India.

Kesavanana Bharati's Case was followed and explained in the case of Smt. Indira Nehru Gandhi V. Shri Raj Narayan AIR 1975 SC 2299. In that case, the legality of clause 4 of Article 329-A was challenged. The Constittution (Thirty-ninth Amendment) Act, 1975, inserted the said Article. One of the purposes of the amendment was to confer validity on the election of smt. Indira Nehru Gandhi to the Lok Sabha in 1971. The question was whether the provisions of clause 4 of Article 329 by which the constituent authority in effect prescribed that no election law was to govern the challenge to the election of the appellant, or whether it is void on the ground that it effects the basic structure of the Constitution.

In considering the concept of the basic structure of the Constitution, Khanna, J. for the majority held at para – 210:

> "……..The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases……"

His Lordship further held at para – 213:

> "213. As a result of the above. I strike down clause (4) of Article 329A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution……."

In giving the instances of basic structure of the Constitution, Chandrachud , J., observed at para – 665:

> "665. I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, paractise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution." (The underlinings are mine)

The next important case we shall consider is Minerva Mills Ltd. V. Union of India AIR 1980 SC 1789. The company and its share-holders, the petitioners in this case, challenged the constitutional validity of certain provisions of the Sick Textile Under takings (Nationalisation) Act, 1974 and the Order of the Government authorizing taking over of the management of Minerva Mills Ltd. The constitutional validity of Sections 4 and 55 of the Constitution (Forty Second Amendment) Act, 1976, was also challenged and the Supreme Court, in this case, considered the said constitutional issue.

Section 4 amended Article 31C of the Constitution to the extent that no law giving effect to the policy of the State would be deemed to be void on the ground that it is inconsistent with any of the rights under Articles 14, 19 or 31.

Clause 4 of Section 55 deprive the Courts of their power to call in question any amendment of the Constitution while clause 5 confers upon the Parliament a vast and undefined power to amend the Constitution.

Chandrachud, C.J., on behalf of the majority observed at para – 22 about the limited power of amendment of the Constitution:

> "22. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

But clause 5 and 4 were declared to be unconstitutional in para – 21 and 26 since those clauses damaged and destroyed the basic or essential features or basic structure of the Constitution. Chandrachud, C. J. held:

> "21. ……The newly introduced clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by cl. (5), for it even empowers the Parliament to "repeal the povisions of this Constitution". that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government……..The power to destroy is not a power to amend."(Page–1798)
>
> 22……..……
>
> 26……Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled……." (Page–1799)

In considering the validity of section 4 of the 42nd Amendment Act, Chandrachud, C. J., held at para –64:

> 64. We have to decide the matter before us not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can."(Page-1807)

Next we shall discuss the decision in the case of Anwar Hossain Chowdhury etc. V. Bangladesh 1989 BLD (Spl.) 1. This case is also known as the Constitution 8th Amendment case. This is a historical Judgment of our Apex Court and we intend to deal with it rather elaborately.

Martial Law was proclaimed for the second time in Bangladesh on March 24, 1982, by Lieutenant General S. M. Ershad Ndc PSC, the Chief of Army Staff of Bangladesh. By this proclamation he assumed unlimited, supreme and absolute power in the Government of Bangladesh, in the garb of Chief Martial Law Administrator, for governing this counry by anything but the Constitution (Para-274 of the 8th Amendment case). Constitution of the Peoples Republic of Bangladesh was suspended and the Country was ruled by Martial Law Proclamations, Orders and Regulations. By the Martial Law Order No. 11 of 1982, four permanent Benches of the High Court was set-up in various places in the country including one at Dhaka. The Constitution, however, was restored on November 10, 1986. On June 9, 1988 Constitution (Eighth Amendment) Act, 1988, was passed, amending Article-100 of the Constitution, among others, setting up six permanent Benches in different district Head-Quarters of the country. The constitutionality of such amendment of Article-100 was challenged on the ground inter alia that the said amendment was beyond the amending power of the Parliament under Article 142 of the Constitution and that by this amendment a basic structure of the Constitution was destroyed. The High Court

Division rejected the petitions summarily. The appeals were allowed by the majority of 3 to 1 in the Appellate Division.

With regard to the amending power of the Parliament, Badrul Haider Chowdhury, J.(as his Lordship then was), held at para – 165-166:

> 165.The Attorney General argued that the amending power is a constitutent power. It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power.
>
> 166.The argument is untenable. The Attorney General argued this point keeping an eye on Article 368 of the Constitution of India which says that "Parliament may in exercise of its constituent power amend" etc. which was inserted by amendment following certain observations in the Golak Nath case. The amendment therefore recognised the distinction between an ordinary law and a constitutional amendment. It will not be proper to express any opinion as to the merit of any constitutional amendment made in Constitution of another country. It will be enough that our Constitution does not make such distinction. Secondly, our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself. For this reason, the Preamble, Article 8, had been made unamendable—it has to be referred to the people! At once Article 7 stares on the face to say: "All power in the Republic belongs to the people", and more, "their exercise on behalf of the people shall be effected only under, and by the authority, of this Constitution" To dispel any doubt it says: "This Constitution is as the solemn expression of the will of the people" You talk of law ? —it says: it is the Supreme law of the Republic and any other law inconsistent with this Constitution will he void. The Preamble says '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". The constituent power is here with the people of Bangladesh and Article 142 (1A) expressly recognises this fact.

> If Article 26 and Article 7 are read together the position will be clear. The exclusiduary provision of the kind incorporated in Article 26 by amendment has not been incorporated in Article 7. That shows that the 'law' in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution. The contention of the Attorney General on the non-obstante clause in Article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric. It may be noticed that untlike 1956 Constitution or Sree Lanka Constitution there is no provision in our Constitution for replacing the Constitution."

In considering the supremacy of the Constitution and in explaining the meaning of the word, 'amendment', his Lordship held at para – 195-196:

> 195. It must control all legislation including amending legislation. The laws amending the Constitution are lower than the Constitution and higher than the ordinary laws. That is why legislative process is different and the required majority for passing the legislation is also different (compare Article 80(4) and Article 142(1)(ii)). What the people accepted is the Constitution which is baptised by the blood of the martyrs. That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any a name- 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself-namely, the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7. Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution.

> 196. The argument of the learned Attorney General that the power of amendment as given in Article 142 'Notwithstanding anything contained in this Constitution' is therefore wide and unlimited. True it is wide but when it is claimed 'unlimited' power what does it signify ?-to abrogate ? or by amending it can the republican character be destroyed to bring monarchy instead ? The constitutional power is not limitless—it connotes a power which is a constituent power. The higher the obligation the greater is the responsibility—that is why the special procedure (long title) and special majority is required. Article 7(2) says—"if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency he void". The appellants have contended that the integral part of the Supreme Court is the High Court Division. By amendment this Division has been dismantled into seven courts or regional courts. Before we proceed further, let us understand what is meant by 'amendment'. The word has latin origin 'emendere'-to amend means to correct."(Page-96)

Besides, in accepting the contention that the amending power has its own limitation, approved the following passage from 'Constitutions, Constitutionalism and Democracy' by Water F. Murphy at para – 196:

> "Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature- that is an amendment operates within the theoritical parameters of the existing Constitution. But a proposal that would attempt to transform a central aspect of the nature of the compact and create some other kind of system— that to take an extreme example, tried to change a constitutional democracy into a totalitarian state — would not be an amendment at all, but re-creation, a re-forming, not merely of the covenant but also of the people themselves. That deed would lie beyond the scope of the authority of any governmental body or set of bodies, for they are all creatures of the Constitution and the peoples agreement. In so far as they destroy their own legitimacy."(Page–96)

His Lordship found that the amended article – 100 is ultra vires because it was inconsistent with the various provisions of the Constitution in disregard of Article 7 which forbids such a law. In accepting the contentions in this regard his Lordship observed at para -198 – 199:

> "198. Mr. Syed Ishtiaq Ahmcd reinforced the argument by his inimitable way of expounding the Constitution pointing to its grace and beauty and termed it as an unique constitution because Article 7 is not to be found in any other Constitution standing like statue of liberty.
>
> 199. Mr. Asrarul Hossain and Mr. Khandaker Mahbuhuddin Ahmed pointed out that Article 7 was never amended, no attempt was made because such exercise would be in futility constitutionally. (Page–97)

Shahabuddin Ahmed, J. (as his Lordship then was) explained the word 'amendment' of the Constitution at para -336:

> "336. ……the word 'amendment'or 'amend' has been used in different places to mean different things; so it is the context by referring to which the actual meaning of the word 'amendment' can be ascertained. My conclusion, therefore, is that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation destruction or a change resulting in the loss of its original identity and character. In the case of amendment of a constitutional provision "amendment" should be that which accords with the intention of the makers of the Constitution."
> (Page-141).

In recognizing the concept of the basic structure of the Constitution, his Lordship observed at para – 34`:

> "341 There is however a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the Constitution it shall have to pass through some test, because it is not enacted by the people through a Constituent

> Assembly. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practising any deception or fraud upon statutes and that is not so repugnant to the existing provision of the Constitution that its co-existence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution"
> (Page–143).

On consideration of the amended Article along with other provisions of the Constitution, his Lordship found the amended provision inconsistent with other provisions of the Constitution at para–373.

In appreciating the argument that the amendment destroyed a basic structure of the Constitution his Lordship held the amendment void at para – 377 -378:

> " 377. Main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structure of a Constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the Constitution…….. If by exercising the amending power people's sovereignty is sought to be curtailed it is the constitutional duty of the Court to restrain it and in that case it will be improper to accuse the Court of acting as "super-legislators". Supremacy of the Constitution as the solemn expression of the will of the people. Democracy, Republican Government, Unitary State, Separation of powers. Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution the Republic cannot be replaced by Monarchy. Democracy by Oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution……..I think the doctrine of bar to change of basic structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party

interest in countries where democracy is not given any chance to develop. (Page-156).

378. ……Amendment of the Constitution menans change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution."(Page–157).

M. H. Rahman, J. (as his Lordship then was), in considering the basic structure doctrine observed at para – 438:

435. The doctrine of basic structure is one growing point in the constitutional jurisprudence. It has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion without sending the Bill to any select committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment.

438. The doctrine of basic structure is a new one and appears to be an extension of the principle of judicial review. Although the U. S. Constitution did not expressly confer any judicial review. Marshall CJ held in Marbury v. Madison, (1803) I Cranch 137, that the court, in the exercise of its judicial functions, had the power to say what the law was, and if it found an Act of Congress conflicted with the Constitution it had the duty to say that the Act was not law. Though the decision of Marshall CJ is still being debated the principle of judicial review has got a wide acceptance not only in the countries that are under the influence of common law but in civil law countries as well."(Page-170).

In considering the rule of law as spelt out in the Preamble of the Constitution, his Lordship observed at para – 443:

> "443. In this case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. ……..."(Page–171)

In declaring the amendment of Article-100 and Article-107 of the Constitution as unconstitutional, his Lordship reminded the duties of the citizens at para – 488:

> "488. …… The future of the Constitution lies in the commitment of the citizens who are obliged under art. 21 of the Constitution to observe the Constitution." (Page– 181).

The case of Subhesh Sharma V. Union of India AIR 1991 SC 631, is in the nature of a public interest litigation, praying for filling up of the vacancies of Judges in the Supreme Court of India and also several other High Courts there. In considering the basic structure doctrine, the Supreme Court held at para -44:

> "44. Judicial Review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional policy. This essential constitutional docrtine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. On the contrary what is necessary is an interpretation sustaining the strength and vitality of Judicial review…....…" (Page – 646).

In the case of S. R. Bommai V. Union of India AIR 1994 SC 1918 various aspects of the Constitution of India 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:

> "28. Nothwithstanding 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 artticles 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) (The underlinings are mine).

In considering the concept of secularism, Sawant, J., held at para -88:

"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)

In considering the scope of judicial review in case of Presidential Proclamation of emergency, his Lordship held at para – 162:

> "162. …….It owes duty and responsibility to defend the democracy. If the Court, upon the material placed before it finds that the satisfaction reached by the President is unconstitutional, highly irrational or without any nexus,……In that event the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently Proclamation issued under Art. 356 would be declared unconstitutional……."

In his conclusion his Lordship held:

> 192. This Court as final arbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this Court/High Court to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. The judicial review, therefore, extends to examine the constitutionality of the Proclamation issued by the President under Article 356. It

> a delicate task, though loaded with political over-tones, to be exercised with circumspection and great care."(P – 2047) (The underlinings are mine)

B. P. Jeevan Reddy, J. also gave a separate but concurring Judgment highlighting the concept of Rule of Law and secularism as basic features of the Constitution of India.

The power of Judicial review, vested in the High Court and Supreme Court, as a basic feature of the Constitution, was examined by A. M. Ahmedi, C. J. I. in the case of L. Chandra Kumar V. Union of India AIR 1997 SC 1125, at para – 78.

In the case of State of Bihar V. Bal Mukund Sah (2000) 4 SCC 640, the question was whether the State Legislature, totally ignoring the High Court, can enact a statutory provision, introducing a scheme of reservation in the subordinate judiciary. In highlighting the basic structure doctrine, S. B. Majumdar, J., observed at para – 32:

> "32. It is true, as submitted by learned Senior Counsel, Shri Dwivedi for the appellant State that under Article 16(4) the State is enabled to provide for reservations in services. But so far as "Judicial Service" is concerned, such reservation can be made by the Governor, in exercise of his rule-making power only after consultation with the High Court …… But so long as it is not done, the Legislature cannot, by an indirect method , completely by passing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to the District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the constitutional scheme, will also fall foul on the concept relating to "separation of powers between the Legislature, the Executivc and the Judiciary" as well as the fundamental concept of an "independent Judiciary". Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme"(Page – 683 – 4).

To Sum-up:

(i) The Constitution of Bangladesh is an 'autochthonous' Constitution. This is a rigid or controlled and an organic instrument.

(ii) 'The pith and substance of a legislation' is crucial. It is for the Court to probe whether it is legal or invalid and 'the Court must not decline to open its eyes to the truth'.

(iii) The Constitution clothes the Parliament with the general power to legislate on any matter but this is subject to the fundamental limitations formulated in the Constitution and the specific procedure stipulated therein.

(iv) The President or any body else has got no power to amend the Constitution.

(v) Parliament may amend a provision of the Constitution following the necessary procedure but can neither abrogate it nor suspend it or change its basic feature or structure.

(vi) The power to destroy is not a power to amend.

(vii) The 'law' in Article 7 is conclusively intended to include an amending law. An amending law becomes part of the Constitution but an amendment, cannot be valid if it is inconsistent with the Constitution.

(viii) Article 142 merely confers the enabling power for amendment but cannot swallow the constitutional fabrics.

(ix) The fabrics of the Constitution cannot be dismantled even by the Parliament which is a creation of the Constitution itself.

(x) The amendments of the Constitution must be tested against Article 7 since such power of the Parliament is given by the Constitution itself, as such, must reside within the ambit of the Constitution and itself not beyond it.

(xi) The power to amend under Article 142 is wide but is not that wide to abrogate the Constitution or to transform its

democratic republican character into one of dictatorship or monarchy or to legalise illegalities.

(xii) Sovereignty of the people, supremacy of the Constitution, Rule of Law, Democracy, Republican form of Government, Unitary State, Seperation of powers, Independence of the judiciary, Fundamental Rights, Secularism, are the basic structures of the Constitution.

(xiii) The Court has got power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution. If an Act of Parliament conflicts with the Constitution, it has the duty to say that the Act is not law.

PART XXIII. Constitution Vis-a-vis Martial Law : Bangladesh

In the morning of August 15, 1975, in Bangladesh, the learned Additional Attorney General admitted, there was no rebelion or civil war or insurrection or riotious activities in Dhaka or in any other parts of the country, from any quarter other than the said very section of the armed forces with whose active collaboration Khandaker Moshtaque Ahmed, seized the office of the President of Bangladesh. Apparently, the said Khondaker Moshtaque Ahmed and his band of renegades, themselves are the perpetrators of the disturbance in the country. The Courts were not closed, rather the jurisdiction of the Supreme Court was ousted by the Martial law Proclamation. The country was not attacked by any foreign invaders or there was no disturbance inside the country except those created by the perpetrators of Martial Law themselves.

As such, the Martial law declared on August 20, 1975, had no semblence of legal basis or excuse of any sort and was absolutely illegal under all forms of jurisprudence.

In the Constitution of Bangladesh, Part IV starts with the broad heading ‘The Executive.’ Chapter I under Part IV deals with Office of ‘The President’, Chapter

II deals with 'The Prime Minister and The Cabinet', Chapter IV deals with 'The Defence Services'.

Article 48 of the Constitution provides that there shall be a President of Bangladesh. He shall be elected by the members of Parliament.

Article 56(1) provides for a Prime Minister of the Republic. Article 55(2) provides that the executive powers of the Republic shall be exercised by or on the authority of the Prime Minister.

According to our Constitution, the President is the head of the State while the Prime Minister is the Head of the Government.

Article 61 confers the President with the Supreme Command of the defence services of Bangladesh. Such command shall, however, be exercised by law to be made by the Parliament. Besides, the President, under Article 48(3), generally exercises all his functions and acts in accordance with the advice of the Prime Minister.

However, it is the Parliament, under Article 62, which regulates the defence services by legislation in respect of its raising and maintenance including its reserve and auxiliary forces, granting of commissions, the appointment of the Chief of Staff of all the defence services and the terms and conditions of their service, the discipline and other related matters.

Under Article 63, only with the assent of the Parliament, war may be declared or the Republic may participate in war, otherwise not.

The defence services of Bangladesh includes the Army, the Navy and the Air Force. Each of these services were created under the specific provisions of law, namely, The Army Act, 1952, The Air Force Act, 1953 and The Navy Ordinance, 1961. Those laws were in existence when Independence of Bangladesh was proclaimed on the March 26, 1971 and by the Laws Continuance Enforcement Order, made by the acting President on April 10, 1971 at Mujibnagar, all laws those were in force in Bangladesh on March 25, 1971, would subject to the Proclamation, continued to be so

in force. After liberation of Bangladesh, on the commencement of the Constitution on December 16, 1972, the aforesaid Order was repealed under Article 151(a) but by Article 149, subject to the Constitution all existing laws, continued to have effect.

The Pakistan Army Act, 1952, was enacted on May 13, 1952 and came into effect on April 1, 1952. The Act has been extended to the whole of the erstwhile Pakistan by the Central laws (Statute Reform) Ordinance, 1960 (21 of 1960) with effect from October 14, 1955. This Act repealed the Indian Army Act, 1911 among others. This Act has been accepted as the necessary legislation for Bangladesh Army with the deletion of the word 'Pakistan' wherever appearing and with other amendments as and when found necessary.

The Army Act with Rules made thereunder provides for appointment, enrolment and attestation, terms and conditions of service, offences and various kinds of punishment, Courts Martial, sentences and its execution and other related and anciliary matters.

Section 15(1) provides for oath or affirmation for a person who is to be attested. Sub-section 2 provides for the form of oath or affirmation which contains among others a promise that the person to be attested will be faithful to Bangladesh and its Constitution and bear true allegiance to the President of Bangladesh.

Under Rule 8 of the Army Rules, the Oath or Affirmation to be taken on attestation is in following form :

FORM OF OATH

I ……, swear by Almighty God that I will be faithful to Bangladesh and its constitutions and bear true allegiance to the President of Bangladesh that I will honestly and faithfully serve in the Bangladesh Army, that I will go wherever I may be ordered by land, air or sea, and that I will observe and obey all commands of any officer set over me even to the peril of my life.

FORM OF AFFIRMATION

I ……, do solemnly affirm that I will be faithful to Bangladesh and its constitutions and bear true allegiance to the

> President of Bangladesh that I will honestly and faithfully serve in the Bangladesh Army, that I will observe and obey all commands of any officer set over me even to the peril of my life. (Quoted from the book 'A Manual of Defence Laws in Bangladesh' Vol. II, First Edition, 1976, edited by A. T. M.-Kamrul Islam).

Similar are the provisions in the Navy Ordinance, 1961 (XXXV of 1961) and the Air Force Act, 1953 (Act VI of 1953) regarding appointment, terms and conditions of service and the disciplinary matters.

We have gone through the constitutional provisions with regard to the defence services and also the above noted provisions made for regulating the said services. We have also gone through Articles 48, 49, 55 and 56 but could not find any power enabling either the President or the Prime Minister to apply martial law in any part of Bangladesh.

In England with the Petition of Right, 1628, the power of the Crown to apply martial law in England was abolished. However, outside the United Kingdom in the colonies and even in Ireland martial law was applied during war, insurrection or rebellion. During the First and Second World wars also martial law was applied. But even in all these war situations where civil authorities ceased to function, martial law was applied with legislative sanctions only under the authority of the Crown. It should also be noted that the members of the defence services in the United Kingdom serve during the pleasure of the Crown.

Same is the position in the United States. It is the Congress which is charged with the maintenance of the defence forces. But during the state of war the Congress by legislation may authorize the President to take appropriate actions including the proclamation of martial law. We have already discussed above that even such martial law is not above the law but justiciable before the Court.

In this connection, it should be noted that the President of the United States, an elected civilian person being the Commander-in-Chief of all the defence forces, is the symbol of civilian authority and highlights the democratic principle of civilian supremacy.

Although the Congress by legislation allows the President with necessary powers during war-time but the purse of the Republic always remains with the Congress. The relevant portion of Section 8 under Article 1 reads as follows :

> "….But no appropriation of money to that use (raise and support armies) shall be for a longer term than two years;"

It appears that ultimate control remains with the Congress.

Professor Edward S. Corwin, in his book, 'The Constitution And What It Means To-day' (Sixth Edition, 1938) considered the position in this manner at page-55-56 :

> …….. In its measures for raising and supporting armies and for providing a navy, Congress may dictate the purposes for which these may be used. But so far as the statutes do not limit his discretion, and so long as he does not exceed the appropriations voted by Congress, the President may employ the armed forces of the United States as may seem to him best for the purpose of enforcing the laws of the United States and of protecting the rights under International Laws of American citizens abroad.
>
> The limitation of appropriations for the army to two years reflects the American fear of standing armies." (The underlinings are mine).

The safe-guard exercised by the Congress in 1861 is still fully effective and operative even now without slightest demur either from the President or from the defence forces or from any other quarter, rather, it appears that they would feel uneasy had it been otherwise. There neither the President nor the members of the Defence Forces feel themselves detached from the people, rather, it is engrossed in their minds

that they belong to the people and above all they are the sons of the soil. This outlook highlights the democratic spirit of the people of the United States.

In Bangladesh in contradistinction to U.S. Constitution, although President is the head of the State and also the Supreme Commander of the defence services but he is not the executive head of the Government while the U.S. President is the executive head of the Republic and also the Commander-in-Chief of all the forces. This is one of the distinguishing features of the constitutional position of these two countries. Like U.S., Bangladesh has a rigid Constitution but unlike U.S., it has a parliamentary form of government with the Prime Minister as its executive-head.

This was the position in the original Constitution of Bangladesh but the Constitution (Fourth Amendment) Act, 1975, made the office of the President executive Head of the Government. Although, since August 20, 1975, the Constitution was freely changed and badly mauled many a times but the position and status of the President was never changed rather, strengthened from time to time, obviously to suit the usurpers. However, by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), the present Parliamentary form of Government was again restored.

But we are not aware of any legislation allowing declaration of Martial Law by the President of Bangladesh, even under the Constitution (Fourth Amendment) Act, 1975. The learned Advocates of both the sides could not show any legislation which could allow the President to apply Martial Law in the morning of August 15, 1975, even under the Fourth Amendment but that was done under the Proclamation.

The learned Advocates, however, submitted that the President had the power under Article 141A to issue a proclamation of emergency and such an emergency was continuing at the relevant time.

Article 141A was not in the original Constitution. It was added by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973). It provides for proclamation of emergency. It is still in the Constitution.

In case of a grave emergency in which the security or economic life of Bangladesh or any of its part is threatened by war or external aggression or internal disburbance, the President may, with the advice of the Prime Minister, issue a proclamation of emergency. Such a proclamation, however, requires prior counter signature of the Prime Minister.

Although some of the fundamental rights may be suspended during the proclamation of emergency but it is not the Proclamation of Martial law. Besides, the proclamation of emergency must be approved by the Parliament within 120 days, otherwise it would automatically lapse. As a matter of fact, emergency was in existence since November,1974 and continued till November, 1979.

But the proclamation of Martial law is altogether a different matter. There was no law in Bangladesh which can allow the President or anybody on his behalf to declare martial law in Bangladesh, still, after the murder of the President by a section of army officers and men, Khondaker Moshtaque Ahmed, seized the office of President and declared Martial law on August 20, 1975. This Martial law was continued by Justice Sayem, the next President, nominated on November 6, 1975. He also assumed the office of CMLA. In due course, Major General Ziaur Rahman BU. took over firstly as CMLA and thereafter on April 21, 1977, as the next President again on nomination but he continued as such CMLA till April 7, 1979.

During the period from August 20, 1975 to April 9, 1979, hundreds of MLRs and MLOs were issued. Copies of only some of those are furnished by the learned Advocate for the petitioner. We have referred only to some of those Proclamation Orders, MLRs and MLOs above.

However, for our purpose, it is not that necessary either. We only wanted to see what kind of Proclamations, MLRs and MLOs were ratified confirmed and validated by the Fifth Amendment. Because, the Second Parliament ratified confirmed and validated all those Proclamations, MLRs and MLOs by the Fifth Amendment of the

Constitution by insertion of paragraph 18 in the Fourth Schedule to the Constitution, without referring even to the headings of those Proclamations etc. not to speak of giving of details which were sought to be ratified but stated in an omnibus manner although every Bill ought to have spelt out with all and every details with dates of every provision which are going to be the part of the Constitution, the most sacred instrument a nation may have but it did not. It is alleged that this lapse alone was enough to declare it invalid. The legal aspect of this lapse we shall consider later.

Now let us examine a few decisions of our Supreme Court where the status of the said Proclamations MLRs and, MLOs have been considered.

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, whther in view of the provisions of the Abandoned Properties (Supplementary Proviisions) 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 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 Artice 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."

However unpalatable it may appear to us Fazle Munim, J., very crudely narrated that the Constitution of Bangladesh was made subservient and subordinate to the Proclamations, MLRs and MLOs.

The second case is State V. Haji Joynal Abedin 32 DLR (AD)(1980)110. 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 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. ……..."

His Lordship further held at para-19 : page-122-23 :

> "……..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 Requblic 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." (The underlinings are mine).

His Lordship very specifically spelt out that the Constitution was reduced to a position subordinate to the Proclamations, MLRs and MLOs.

This opinion of the Appellate Division was given on Decembers 20, 1978. At that time the country was under Martial Law.

The next is the case of Kh. Ehteshamuddin Ahmed V, Bangladesh, 33 DLR(AD)(1981) 154. 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 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……." (The underlinings are mine).

In considering Ehteshamuddin's Case his Lordship held at Para -18 page-163 :

> "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 further held at para-25,page-166 :

> "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 underlinings are mine).

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.

The next is the case of Nasiruddin V. Government of the Peoples Republic of Bangladesh 32 DLR (AD) (1980) 216.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 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."

That very question is before us for consideration as to whether Fifth Amendment can give protection from challenge the actions of Khondaker Moshtaque Ahmed, Justice Sayem and Major General Ziaur Rahman, B.U., psc., none of whom were qualified to become the President under the Constitution.

In the case of Anwar Hossain Chowdhury etc. V. Bangladesh 1989 BLD (spl) 1, Shahabuddin Ahmed, J. (as his Lordship then was), considered the Constitution during Martial Law in this manner at para-272, page-118:

> "Bangladesh which got independence from Pakistan through a costly War of independence, which was fought with the avowed declaration to establish a democratic polity, under a highly democratic Constitution, met the same fate as Pakistan. Two Martial Laws covered a period of 9 years Out of her 18 years of existence. During these Martial Law periods the Constitution was not abrogated but was either suspended or retained as a statute subordinate to the Martial Law Proclamations, Orders and Regulation."

Let us now examine the findings of our Apex Court in respect of the Proclamations, the Martial Law and our Constitution.

It was held in the Halima Khatun's case:

> 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.

In Haji Joynal Abedin's case, the Appellate Division found:

> 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.

In Ehteshamuddin's case, 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.

In Nasiruddin's case, the Appellate Division found that the expression 'purported exercise' in the validating clause of Fifth Amendment cannot give protection of an act, which is coram non judice, from being challenged.

In Anwar Hossain Chowdhury's case, the Appellate Division found :

> The Constitution was retained as a statute subordinate to the Martial Law Proclamations, Orders and Regulations.

In this connection it should 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.

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 wheare 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 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 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.

Similar question had also been faced by Hamoodur Rahman, C.J. in the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139. This is how his Lordship dealt with the problem at page- 202-03 :

> "The learned Attorney-General however, insists that even this regime had received the legal recognition of this Court and, therefore, It had also acquired de jure authority to make laws. Reference in this connection has been made to two decisions, The first was in the case of Muhammad Ismail V. The State (1) in which the judgment was delivered again by myself. The only question raised in this case was as to whether after the promulgation of Martial Law on the 25th of March 1969, and the enactment of the Provisional Constitution Order on the 4th of April 1969, this Court continued to retain the jurisdiction conferred upon it by the Constitution of 1962 to entertain petitions for special leave to appeal in criminal proceedings in view of the fact that the Provisional Constitution Order did not specifically provide for any appeal by special leave. No question was raised in this case as to the validity of the Martial Law or of the Provisional Constitution Order. The only question

argued was whether on a proper construction of the language of this order an appeal for special leave in criminal proceedings was still within the competence of this Court. The Court held that upon a proper construction of the terms of the Order the Jurisdiction to entertain and hear appeals by special leave in criminal matters had not been taken away and that the jurisdiction given to it by Article 58 of the l962-Constitution remained unaffected. There was no question, therefore, of any conscious application of the mind of the Court to the question of the validity of the regime or the legality of the Provisional Constitution Order nor was this Court called upon to give any decision thereon as the latter order had manifested no intention to alter that jurisdiction and there was no conflict between the two. It is not correct, therefore, to say that this decision in any way constitutes a conscious recognition in law of the new regime.

The next case referred to is that of Mian Fazal Ahmad v. The State (2). In this case, which was a petition for special leave from an order of the Lahore High Court dismissing an application under section 561-A of the Code of Criminal Procedure for quashment of certain criminal proceedings pending investigation by the police; the High Court had admitted the petition and directed the police not to put up any challan in any Court. The police did not do so but instead of submitting a challan before a criminal Court placed the matter before a Military Court and the latter convicted the petitioner. Thereupon the petitioner moved the High Court, for taking action against the D S. P. in contempt for disobedience of its order. The High Court dismissed the application of the petitioner and this Court by a very brief order dismissed the petition for special leave observing that "when the Military Court took cognizance of the offence and imposed a penalty on the petitioner learned Judge in the High Court was right in dismissing the petitioner's application under section 56l-A of the Code of Criminal Procedure" No other reason was given for the order.

Again, this does not show that the legality of the order of transfer of the case to the Military Court was over challenged. The High Court's order was upheld possibly on the ground that the proceedings which were sought to be quashed by the original petition having been terminated by the transfer of the case to the Military Court, there was no further need of its quashment, and no question of commitment of the D. S. P. in contempt arose, as he had not violated the order of the High Court. In these circumstances, it can hardly be urged that this constitutes a conscious legal recognition of the military regime of 1969. Questions in dispute in these cases were it entirely different and had nothing whatever to do with the question now before us. It is incorrect, therefore, to say that this Court had given any legal recognition to the regime of General Agha Mohammad Yahya Khan.

The question, therefore, is still at large and has for the first time now been raised before this Court in this specific form. The learned Attorney- General's contention that even the tacit approval given by this Court by not questioning suo motu the various Martial Law Regulations made by the regime concerned during this period of 2 1/2 years is it self sufficient to preclude this Court from going into this question now, is not, in my opinion, tenable. The Courts, as I have already indicated are not called upon to suo motu raise a controversy and then decide it. They can only do so if a litigant raises the controversy in a concrete form, as it has now been done before us. "The Court", says Mr. Eaton Drome, "has authority to expound the Constitution only in cases presented to it for adjudication. Its Judges may see the President usurping powers that do not belong him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by 1aw." (Vide Marriot English Political Institutions, 1938 Edn., P, 293).

We have seen from the opinions of our Apex Court given in the cases of Halima Khatun, Haji Joynal Abedin, Kh. Ehteshamuddin, Nasiruddin and Anwar Hossain Chowdhury that the Martial Law Proclamations etc., made the Constitution a bunch of worthless sheaf of papers.

But the Constitution is supreme. The Constitution itself proclaims so. The Supreme Court said so in the A.T.Mridha's case and also in the case of Anwar Hossain Chowdhury etc V. Bangladesh.

First the Constitution. In paragraph-4 of the Preamble it is emphatically Proclaimed :

> "আমরা দৃঢ়ভাবে ঘোষণা করিতেছি যে, আমরা যাহাতে স্বাধীন সত্তায় সমৃদ্ধি লাভ করিতে পারি এবং মানবজাতির প্রগতিশীল আশা–আকাঙ্ক্ষার সহিত সঙ্গতি রক্ষা করিয়া আন্তর্জাতিক শান্তি ও সহযোগিতার ক্ষেত্রে পূর্ণ ভূমিকা পালন করিতে পারি, সেইজন্য বাংলাদেশের জনগণের অভিপ্রায়ের অভিব্যক্তিস্বরুপ এই সংবিধানের প্রাধান্য অক্ষুণ্ন রাখা এবং ইহার রক্ষণ, সমর্থন ও নিরাপত্তাবিধান আমাদের পবিত্র কর্তব্য;" (The underlinings are mine).

The English Text is :

> "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" (The underlinings are mine).

Article 1, Article 7 and Article 21(1) of the Constitution, affirms the supremacy of the Constitution.

After the Preamble, the Constitution commences in this manner with Article 1 :

PART I

THE REPUBLIC

1. Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh.

Article-7 reads as follows :

"৭। (১) প্রজাতন্ত্রের সকল ক্ষমতার মালিক জনগণ; এবং জনগণের পক্ষে সেই ক্ষমতার প্রয়োগ কেবল এই সংবিধানের অধীন ও কর্তৃত্বে কার্যকর হইবে।

(২) জনগণের অভিপ্রায়ের পরম অভিব্যক্তিরুপে এই সংবিধান প্রজাতন্ত্রের সর্বোচ্চ আইন এবং অন্য কোন আইন যদি এই

"

The English Text is :

"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.

(3) 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."

Article 21(1) reads as follows:

"21. (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property."

Besids, Article 148(1) Provides for making an oath or affirmation by the persons elected or appointed to an office mentioned in the Third Schedule to the Constitution.

Under this provision of the Constitution the President of the Republic is required to take an oath or affirmation as stated in the Third Schedule in the following manner :

"১। রাষ্ট্রপতি ।- [প্রধান বিচারপতি] কর্তৃক নিম্মলিখিত ফরমে শপথ (বা ঘোষণা)- পাঠ পরিচালিত হইবে ঃ

আমি,....., সশ্রদ্ধচিত্তে শপথ (বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-অনুযায়ী বাংলাদেশের রাষ্ট্রপতি-পদের কর্তব্য বিশ্বস্ততার সহিত পালন করিব ;

আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষণ করিব ;

আমি সংবিধানের রক্ষণ, সমর্থন ও নিরাপত্তাবিধান করিব;

এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-অনুযায়ী যথাবিহীত আচরণ করিব।" (The underlinings are mine).

English Text is as follows :

1. The President.–An oath (of affirmation) in the following form shall be administered by the '[Chief Justice]-

"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."

……..

(The underlinings are mine).

In his oath or affirmation, the President of Bangladesh pledges that he will 'preserve, protect and defend the Constitution'.

In the same manner, the Prime Minister and other Ministers, The Chief Adviser, The Speaker, the Deputy Speaker, the Chief Justice and other Judges of the Supreme Court, plege to 'preserve, protect and defend the Constitution'.

There is no existence of Martial Law Authorities 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. As such, it has got no legal acceptance. The Martial Law Authorities were also fully aware of it, as such, some times, they hold a referendum for one person and they invariably get almost cent percent votes, as in the cases of Field Marshal Ayub Khan and Major General Ziaur Rahman B.U., psc. The Martial Law Authorities some times abrogate the Constitution, as in the case of the abrogation of 1956 Constitution by Major General Iskender Mirja, President of Pakistan, and 1962 Constitution by General Yahya Khan, Chief Martial Law Administrator of Pakistan. Some times, the Constitution is suspended and made subservient to the Proclamations etc. as in the case Proclamations by Khondaker Moshtaque Ahmd, Justice Abusadat Muhammed Sayem and Major General Ziaur Rahman B.U., psc.

They are all intelligent people. They knew very well that the Proclamations etc. are all illegal and so also their activities. As such, they again came round and sought to hide all their illegalities in the bosom of the said very Constitution which they disgraced time and again in their free wills, whims and caprices. In their such pursuits, ironically, there was no dearth of hypocrisy in that although the Dictators freely truncate and modify the various provisions of the Constitution all the time to suit their ends but when those very illegal Proclamations etc. become part of our sacred Constitution, those become unchallengable, as argued by the learned Advocates for the respondents.

We, however, neither approve nor accept such a base treatment of our Constitution, the Supreme law of the land.

Keeping in view these saga of unfortunate national hara kiri, we have to examine our Constitution, the most sacred document in any country.

The Constitution of the People’s Republic of Bangladesh declares its own supremacy in the above manner. It does not need any aid from any of the

Institutions it created to declare its such eminence. It remains sublime for all time to come.

One may say that this is not Bible. Of course it is not Bible. While the Bible has got universal application and governs the mode of life of all persons in the World holding Christian faith, the Constitution governs the life of all persons within the Republic irrespective of caste, creed, religion and applies to persons of all faiths and even to atheists.

It is to be noted that amongst the three pillers of the Republic it is the Supreme Court which is privileged to declare the Majesticity of the Constitution and in having such a privilege, it is not the Constitution rather it is the Supreme Court which is honoured. The Constitution is supreme not because it is written on parchment papers but because it is the embodiment of the will of the people of the Republic. The Constitution of Bangladesh was born with such supremacy since it was adopted and enacted on November 4, 1972. The Supreme Court only declares its such existing supremacy.

We have already quoted the Proclamations and some of the MLRs and MLOs above in the beginning of our present discourse. We have analysed the findings of our Apex Court made in the cases of Halima Khatun, Haji Joynal Abedin, Ehteshamuddin Ahmed, Nasiruddin and Anwar Hossain Chowdhury. From the analysis of Proclamations, MLRs and MLOs scrutinised above 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 MLRs and MLOs made thereunder, as such, ultra vires to the Constitution. There is no provision 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, as such, non-est in the eye

of law. The doubtless supremacy of the Constitution is far above all Institutions, Functioneries and services it created.

It may be recalled that on the night following March 25, 1971, independence of Bangladesh was proclaimed. It was followed by a formal Proclamation of Independence. It was issued on April 10, 1971, from Mujibnagor. It reads as follows:

THE PROCLAMATION OF INDEPENDENCE

Mujibnagar, Bangladesh

Dated 10th day of April, 1971.

WHEREAS free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971, to elect representatives for the purpose of framing a Constitution,

AND

WHEREAS at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

WHEREAS General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution,

AND

WHEREAS the Assembly so summoned was arbitrarily and illegally postponed for an indefinite period,

AND

WHEREAS instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war,

AND

WHEREAS in the facts and circumstances of such treacherous conduct Banga Bandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million of people of Bangladesh, in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh,

AND

WHEREAS in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh,

AND

WHEREAS the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and Give to themselves a Government,

AND

WHEREAS the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

In respect of the above Proclamation B. H. Chowdhury, J (as his Lordship then was) held in the case of Anwar Hossain Chowdhury etc V. Bangladesh 1989 BLD (Spl) 1 at para-43 page-57:

"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."

It will be apparent that from the very beginning the framers of the Constitution dreampt of a democratic form of Government, not a Martial Law Government or a dictatorship or an autocratic form of Government. B.H.Chowdhury, J., held at para-47 Page-58:

> "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."

Regarding supremacy of the Constitution and its amendment his Lordship further held at para-145-148, page-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 Commission 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 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).

This nation has learnt its bitter lessons to the consequence of disobedience of the Constitution. (The underlinings are mine).

We have already seen above how Khondaker Moshtaque Ahmed, Justice Sayem and Major General Ziaur Rahman, B.U., psc., the three usurpers treated our

Constitution. This Constitution was written on the blood , toil and tears of milions of Bangalees but this was treated not even as one 'Dog Act' or 'Rat Act' , they treated it most disgracefully although all of them took oath to 'preserve, protect and defend' the said very Constitution but even a plane ticket gets more attention and care from a chance traveller to Bangladesh than what Khondaker Moshtaque Ahmed etc. did to our Constitution.

His Lordship again held that our Constitution is a written constitution and that again a rigid one. In upholding the supremacy of the Constitution his Lordship quoted with approval the following at para-181-182 page-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". He says there might be country with Constitution and the Constitution does more than establish institutions of Government and left them act as they wish. He observed:
>
> > "In such a case we would hardly call the Government Constitutional Government. 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."

Professor Wheare was quoted further ;

> "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 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).

Shahabuddin Ahmed, J.(as his Lordship then was), also in the Anwar Hossain Chowdhury's case upheld the supremacy of the Constitution in the following manner at para-272 page-118 :

"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 pre eminance 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."

This is how our Apex Court upholds and acclaims the supremacy of the Constitution and we are bound to follow it.

Before we conclude our discussions on the supremacy of the Constitution we would like to quote from the treatise; 'American Jurisprudence' second Edition (1998) Vol.16 published by West Group, U.S.A at pages: 344 to 349:

> **"1. Definition and nature of "constitution" and "constitutional law," generally**
>
> **5. Generally**
>
> The United States is a constitutional democracy.The constitutional form of government as it exists in the United States is based on the fundamental conception of a supreme law, expressed in written form,' in accordance with which all private rights must be determined and all public authority administered.
>
> Constitutional government by the people represents the greatest and grandest struggles of humanity for its betterment, and in its accomplishment marks the uttermost political accomplishment of the human race. The limitations imposed by the American system of constitutional law on the action of the governments, both state and national, are deemed to be essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. In the United States, the right of sovereignty is vested in the people and is exercised through the joint action of the federal and state governments.

From the above rather lengthy discussions it is firmly and undeniably established that:

I) The Constitution is the supreme law in Bangladesh;

II) All great Institutions of the Republic, namely the Legislature, the Executive and the Judiciary are the creations of the Constitution;

III) All functionaries of the Republic are the creatures of the Constitution;

IV) The services of the Republic including the defence services are the creatures of the Constitution;

V) As such, all the Institutions, functionaries and the services of the Republic, owe its existence to the Constitution and wholly and fully bound by its edicts.

VI) The existence of the country as a Republic is dependent on its Constitution.

Nobody can deny the above incidents of supremacy of the Constitution.

Since our Apex Court in a number of cases as discussed above found as a fact that the Proclamations, Martial Law Regulations and Orders issued from time to time since August 20, 1975, till April, 1979, made the Constitution of Bangladesh subordinate and subservient to those Proclamations, MLRs and MLOs, are void ab initio and non est in the eye of law.

But the Second Parliament validated those void and non-est provisions including the Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No. VII of 1977), by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979). As such, we have to consider the legality not only of Martial Law Regulation No. VII of 1977 but the Proclamations (Amendment) Order, 1977, (Proclamations Order No. 1 of 1977) and also the vires of the aforesaid Constitution (Fifth Amendment) Act, 1979, which purported to ratify and confirm those Proclamations, MLRs and MLOs including the MLR VII of 1977.

PART XXIV. Amendments In The Constitution:

But by the Proclamation dated August 20, 1975, the Constitution although was retained but it was made subordinate and subservient to the

Proclamations, the MLRs and MLOs. We have already held above that those Proclamations, the MLRs and the MLOs are void and non-est in the eye of law.

We shall now deal with the provisions of the Constitution which were replaced by the new ones in pursuance of those Proclamations, MLRs and MLOs. It is necessary to discuss those provisions of the Constitution with purported amendments because those were also ratified and validated by the Constitution (Fifth Amendment) Act, 1979. This is also required in order to understand the legality of the provisions sought to be ratified by the said Fifth Amendment.

The English text of the changes of the various provisions of the Constitution were made by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977) while the Bengali versions of those very changes and few others were made by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

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.

The Constitution, however, starts with the Preamble. This was also noticed by the Appellate Division in Anwar Hossain Chowdhury's case at para-48 (BLD).

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'. The second paragraph of the preamble was entirely substituted for the second paragraph contained in the original Constitution.

The original second paragraph of the Preamble reads as follows:

> "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান্ আদর্শ আমাদের বীর জনগণকে জাতীয় মুক্তিসংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল–জাতীয়তাবাদ,

সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে;"

The English Text is :

"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;"

But after amendment by The Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978), as inserted in the 2nd Schedule, it reads :

……..

"আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় স্বাধীনতার জন্য যুদ্ধে আত্মনিয়োগ ও বীর শহীদদিগকে পাণোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গণতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচারের সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে;"

The English Text is :

"Pledging that the high deals of obsolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence,shall be the fundamental principles of the Constitution"

The above amendment was inserted by the Proclamations (Amendment Order, 1977 (Proclamations Order No. 1 of 1977).

A plane reading comparing the original Preamble with the amended one would un-mistakably show certain basic changes were made by the above Order.

The original preamble clearly show that one of the four fundamental basis of our nation-hood was secularism but the amended Preamble specially the second paragraph show that the word 'secularism' was deleted from the preamble. Since 'secularism' is one of fundamental basis of our liberation war and the nation-hood of Bangladesh, its omission changed the basic character of the Constitution.

In line with the change made in the second paragraph of the preamble, Article 8(1) was also changed. The original Article 8(1) reads as follows:

> "৮।(১) জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতা–এই নীতিসমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভুত এই ভাগে বর্ণিত অন্য সকল নীতি রাষ্ট্রপরিচালনার মূলনীতি বলিয়া পরিগণিত হইবে।"

The English Text is :

> "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."

The amended version reads as follows:

> "৮।(১) সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গণতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচার–এই নীতিসমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভুত এই ভাগে বর্ণিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূলনীতি বলিয়া পরিগণিত হইবে।
>
> (১ক) সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাসই হইবে যাবতীয় কার্যাবলীর ভিত্তি।"

The English Text as amended is :

> "8.(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."

It may be noted that in pursuance to the Indian Independence Act, 1947 (Act 10 & 11 Geo. IV Ch.30), British-India was partitioned and India and Pakistan, emerged as two independent Dominions. 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 experiance 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). (The underlinings are mine).

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). (The underlinings are mine).

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.

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, destroyed 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.

Next is Article 6 of the Constitution, declaring the citizenship of Bangladesh. The original Article 6 reads as follows:

> "৬। বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নির্ধারিত ও নিয়ন্ত্রিত হইবে; বাংলাদেশের নাগরিকগণ বাঙালী বলিয়া পরিচিত হইবেন।"

The English text is :

> "6. Citizenship of Bangladesh shall be determined and regulated by law; citizens of Bangladesh shall be known as Bangalees."

But the Proclamations Order No. 1 of 1977 dated April 23, 1977, changed the Article 6 in this manner :

> "6. (1) The citizenship of Bangladesh shall be determined and regulated by law.
>
> (2) The citizens of Bangladesh shall be known as Bangladeshis."

In this manner, the Bangalees, by a Proclamation Order lost their identity as a Bangalee and over-night became Bangladeshi, due to the whims of an army commander.

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 Pakistanees 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 definit legal existence. As such, no body, how high so ever, must not ignore or under-value 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.

This concept of Bangalee nationalism was further expounded and explained in the original Article 9 of our Constitution. The original Article 9 reads as follows:

> "৯। ভাষাগত ও সংস্কৃতিগত একক সত্তাবিশিষ্ট যে বাঙালী জাতি ঐক্যবদ্ধ ও সঙ্কল্পবদ্ধ সংগ্রাম করিয়া জাতীয় মুক্তিযুদ্ধের মাধ্যমে বাংলাদেশের স্বাধীনতা ও সার্বভৌমত্ব অর্জন করিয়াছেন, সেই বাঙালী জাতির ঐক্য ও সংহতি হইবে বাঙালী জাতীয়তাবাদের ভিত্তি।"

The English Text is :

> "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 determined struggle in the war of independence, shall be the basis of Bangalee nationalism."

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 immorial, 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 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.

We have already seen the Article 9 above in the original Constitution before its amendment. After amendment by the Proclamation Order No. 1 of 1977, the substituted Article 9 reads as follows :

> "9. 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."

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 original Article 10 contained the provision for socialism and freedom from exploitation. This Article reads as follows:

> "১০। মানুষের উপর মানুষের শোষণ হইতে মুক্ত ন্যায়ানুগ ও সাম্যবাদী সমাজলাভ নিশ্চিত করিবার উদ্দেশ্যে সমাজতান্ত্রিক অর্থনৈতিক ব্যবস্থা প্রতিষ্ঠা করা হইবে।"

The English Text is :

> "10. 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."

This is one of the fundamental ideals on which the struggle for national liberation was fought, as such, spelt out in the Constitution as one of its basic structures.

But the Proclamations Order No. 1 of 1977 and the Second Prolamation Order No. IV of 1978, deleted the said magnanimous provision and substituted it with the following:

> "10. Steps shall be taken to ensure participation of women in all spheres of national life."

This 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.

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.

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 original Article-9 and the original Article-10 which were two basic features of our Constitution.

Next we shall consider the omission of Article12 altogether from the Constitution by the Proclamation Order No. 1 of 1977.

Article-12 dealt with secularism and freedom of religion. Article-12 reads as follows:

"১২। ধর্মনিরপেক্ষতার নীতি বাস্তবায়নের জন্য

(ক) সর্বপ্রকার সাম্প্রদায়িকতা,

(খ) রাষ্ট্র কর্তৃক কোন ধর্মকে রাজনৈতিক মর্যাদাদান,

(গ) রাজনৈতিক উদ্দেশ্যে ধর্মের অপব্যবহার,

(ঘ) কোন বিশেষ বা তাঁহার উপর নিপীড়ন বিলোপ করা হইবে।"

The English Text is :

12. The principle of secularism shall be realized by the elimination of-

(a) communalism in all its forms;

(b) the granting by the State of political status in favour of any religion;

(c) the abuse of religion for political purposes;

(d) any discrimination against, or persecution of, persons practicing a particular religion.

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 efforts to high light the secular Bangladesh into a Muslim country were even made clear from addition of clause 2 to original Article-25 of the Constitution. The original Article-25 was as follows:

> "২৫। জাতীয় সার্বভৌমত্ব ও সমতার প্রতি শ্রদ্ধা, অন্যান্য রাষ্ট্রের অভ্যন্তরীণ বিষয়ে হস্হক্ষেপ না করা, আন্তর্জাতিক বিরোধের শান্তিপূর্ণ সমাধান এবং আন্তর্জাতিক আইনের ও জাতিসঙ্ঘের সনদে বর্ণিত নীতিসমূহের প্রতি শ্রদ্ধা–এই সকল নীতি হইবে রাষ্ট্রের আন্তর্জাতিক সম্পর্কের ভিত্তি এবং এই সকল নীতির ভিত্তিতে রাষ্ট্র
>
> (ক) আন্তর্জাতিক সম্পর্কের ক্ষেত্রে শক্তিপ্রয়োগ পরিহার এবং সাধারন ও সম্পূর্ণ নিরস্ত্রীকরণের জন্য চেষ্টা করিবেন;
>
> (খ) প্রত্যেক জাতির স্বাধীন অভিপ্রায়–অনুযায়ী পথ ও পন্থার মাধ্যমে অবাধে নিজস্ব সামাজিক, অর্থনৈতিক ও রাজনৈতিক ব্যবস্হা নির্ধারণ ও গঠনের
>
> অধিকার সমর্থন করিবেন; এবং
>
> (গ) সাম্রাজ্যবাদ, ঔপনিবেশিকতাবাদ বা বর্ণবৈষম্যবাদের বিরুদ্ধে বিশ্বের সর্বত্র নিপীড়িত জনগণের ন্যায়সঙ্গত সংগ্রামকে সমর্থন করিবেন।"

The English Text is :

> 25. The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter, and on the basis or those principles shall-
>
> (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
>
> (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
>
> (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.

But by the Proclamations Order No. 1 of 1977, clause-2 was added:

> "2. The state shall endeavor to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity."

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.

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 original Article-38 with its proviso reads as follows:

> "৩৮। জনশৃঙ্খলা ও নৈতিকতার স্বার্থে আইনের দ্বারা আরোপিত যুক্তিসঙ্গত বাধানিষেধ–সাপেক্ষে সমিতি বা সঙ্ঘ গঠন করিবার অধিকার প্রত্যেক নাগরিকের থাকিবে;
>
> তবে শর্ত থাকে যে, রাজনৈতিক উদ্দেশ্যসম্পন্ন বা লক্ষ্যানুসারী কোন সাম্প্রদায়িক সমিতি বা সঙ্ঘ কিংবা অনুরুপ উদ্দেশ্যসম্পন্ন বা লক্ষ্যানুসারী ধর্মীয় নামযুক্ত বা ধর্মভিত্তিক অন্য কোন সমিতি বা সঙ্ঘ গঠন করিবার বা তাহার সদস্য হইবার বা অন্য কোন প্রকারে তাহার তৎপরতায় অংশ গ্রহণ করিবার অধিকার কোন ব্যক্তির থাকিবে না।"

The English Text is :

> "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:
>
> 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 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.

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.

It should be noted that earlier the English Version of the above noted Articles were amended by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977). The preamble of the said Order reads as follows:

> **[Published in the Bangladesh Gazette Extraordinary, dated the 23rd April, 1977.]**
>
> **THE PROCLAMATIONS (AMENDMENT) ORDER, 1977.**
>
> **Proclamations Order No. 1 of 1977.**
>
> Whereas it is expedient further to amend the Proclamation of the 8th November, 1975, and to amend the Third Proclamation of the 29th November 1976, for the purpose hereinafter appearing,

Now, therefore, in pursuance of the Third Proclamation of the 29th November, 1976, read with the proclamations of the 20th August 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator in pleased to make the following order :-

……

By the above Order, only the English version of the relevant provisions of the Constitution were amended leaving the original authenticated Constitution in Bengali intact. Presumably on detection of this lapse, the relevant Articles of the Constitution in Bengali, were again amended by The Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978). This Order, however, started with the following false pretexts stated earlier above for the amendments contained in the preamble:

THE SECOND PROCLAMATION(FIFTEENTH AMENDMENT) ORDER, 1978.

Second Proclamation Order No. IV of 1978.

WHEREAS there has been persistent demand for the repeal of the undemocratic provisions of the Constitution incorporated therein by the Constitution by the Constitution (Forurth Amendment) Act, 1975:

AND WHEREAS some of such undemocratic provisions have already been repealed by the President and the Chief Martial Law Administrator;

AND WHEREAS the President and the Chief Martial Law Administrator, in response to the said popular demand, pledged to the nation to repeal the remaining undemocratic provisions after obtaining mandate from the people in the election to the office of President, and he has obtained that mandate;

AND WHEREAS it is expedient further to amend the Proclamation of the 8th November, 1975, for the purposes of fulfilling the said pledge and other purposes hereinafter appearing;

Now, therefore in pursuance to the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20the August, 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator is pleased to make the following Order :-

……(The underlinings are mine).

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.

PART XXV. Incorporation of Paragraph 3A and 18 to the Fourth Schedule :

Next we shall consider the legality of incorporation of paragraph 3A and 18 to the Fourth Schedule to the Constitution.

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.

Article 150 reads as follows :

> "১৫০।এই সংবিধানের অন্য কোন বিধান সত্ত্বেও চতুর্থ তফসিলে বর্ণিত ক্রান্তিকালীন ও অস্থায়ী বিধানাবলী কার্যকর হইবে ।"

The 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 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 'ক্রান্তিকালীন ও অস্থায়ী বিধানাবলী'. 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.

Paragraph–1 of the Fourth Schedule deals with the dissolution of the Constituent Assembly. Para-1 reads as follows :

> "১।প্রজাতন্ত্রের জন্য সংবিধান রচনার যে দায়িত্বভার এই গণপরিষদের উপর ন্যস্ত ছিল, তাহা পালিত হওয়ায় এই সংবিধান-প্রবর্তনের সঙ্গে সঙ্গে গণপরিষদ ভাঙ্গিয়া যাইবে।"
>
> "1. Upon the commencement of thu Constitution, the Constituent Assembly, having discharged its responsibility of framing a Constitution for the Republic, shall stand dissolved."

It may be noted that the first general election in the erstwhile Pakistan was held in December, 1970. Its pre-dominant purpose was to frame a Constitution for the entire Pakistan. The National Assembly was due to be convened on March 3, 1971 but it was indefinitely postponed on March 1, 1971. This postponement of holding of the National Assembly had serious repercussions all over Pakistan specially in the erstwhile East Pakistan. The Army Rulers of Pakistan unleashed a reign of terror and a genocide on the unarmed People of the erstwhile East Pakistan. Consequently, Independence of Bangladesh was declared on the March 26, 1971, as a Sovereign Independent Republic.

After independence, the Constituent Assembly of Bangladesh was created by the elected representatives of this country, elected both in the National Assembly and also in the Provincial Assembly, held in December, 1970 and in January, 1971, in the erstwhile East Pakistan. This Constituent Assembly framed the Constitution of the Peoples Republic of Bangladesh. This Constitution was enacted and commenced on December 16, 1972. Having thus fulfilled its functions as the Constituent Assembly, on the commencement of the Constitution, it stood dissolved.

This obviously was a past and closed transaction and was stated so at paragraph 1 of the Fourth Schedule.

Paragraph –2 of the Fourth schedule stated about the holding of the first general election of the members of Parliament.

Paragraph-3 provides for continuity of the Government of Bangladesh and the laws and the powers exercised between the 26th day of March, 1971 and the commencement of the Constitution.

Paragraph–4 provides that the persons holding the office of the President of Bangladesh, the Speaker and the Deputy Speaker of the Constituent Assembly, immediately before the commencement of the Constitution, would be deemed to hold the said office respectively till they are duly elected in accordance with the provisions of the Constitution.

Likewise, paragraph–5 provides that the persons holding the office of the Prime Minister and other Ministers, immediately before commencement of the Constitution, would be deemed to hold the said office, till the holding of the first general election and appointment of the Prime Minister and other Ministers.

Paragraph-6 provides that the persons who was holding the office of the Chief Justice and every other person who held office as Judge of the High Court immediately prior to the date of the commencement of the Constitution, as from that date, held office as the Chief Justice and as a Judge, as the case may be. Besides, all legal proceedings, pending before the Appellate Division of the High Court and the High Court stood transferred to the Appellate Division and the High Court Division of the Supreme Court respectively.

Paragraph-7 provided for the interim rights of appeal before the Appellate Division, in respect of any judgment etc. since the 1st day of March, 1971, passed by the High Court, in accordance with the provisions of Article 103.

Paragraph–8 provided that the Election Commission existed immediately before the commencement of the Constitution and the Chief Election Commissioner and other Election Commissioners were deemed to be the Election Commission and also the Election Commissioners.

Paragraph-9 provides for the existence of the Public Service Commission and its chairman and members and its continuance after the commencement of the Constitution.

Paragraph-10 provides for the existence of the Public Services and its continuance on the commencement of the Constitution.

Paragraph-11 provides for Oaths for the continuance in office.

Paragraph-13, 14 and 15 deal with the taxation, interim financial arrangements and audit of past accounts.

Paragraph–16 deals with the property, assets, rights, liabilities and obligations of the Government.

Paragraph-17 deals with the adaptation of laws and removal of difficulties for the purpose of bringing the provisions of the laws in force in Bangladesh in conformity with the Constitution, within the period of two years from the commencement of the Constitution.

These are the original provisions contained in the Fourth Schedule. 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 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 'ক্রান্তিকালীন' 'and 'অস্থায়ী' are used. The ordinary dictionary meaning of the word 'ক্রান্তিকালীন'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.

The meaning of the word 'temporary' according to the The Oxford Dictionary is 'lasting or meant to last only for a limited time' and according to the The Chambers Dictionary is 'lasting for a time only, transient, impermanent, provisional'. From these words it is so very clear that the purpose of Article 150 of the Constitution is 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.

In reply to our query as to how further provisions were included in the Fourth Schedule, the learned Additional Attorney General contended that following the procedure mentioned in Article 142, further provisions were included by the Fifth Amendment of the Constitution, as such, those are legal and valid. But when it is pointed out to him that if the provisions which were sought to be ratified, confirmed and validated by the said Fifth Amendment, are found to be illegal then how the validation as well as the instrument itself by which those illegal provisions were validated would be legal, he had no answer.

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 '**এ**ান্তিকালীন' ('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 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 ‘‘ক্রান্তিকালীন’ 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.

PART XXVI. The Plea of Resjudicata:

The Plea of res judicata was raised in this writ petition on behalf of the respondent no. 3. Its such plea was supported by the respondent no. 1.

The plea of res judicata was raised on the ground that earlier the petitioners filed another writ petition being Writ Petition No. 802 of 1994. The said writ petition although was summarily rejected but with an elaborate Judgment, considering all the issues raised in the instant writ petition, such as, the vires of the Proclamation etc. and the Fifth Amendment of the Constitution but since all those issues had already been decided in the earlier Writ Petition No. 802 of 1994, the learned Additional Attorney General and Mr. Akhtar Imam, the learned Advocate for the respondent no. 3, both submitted that the present writ petition is not maintainable as barred by the principle of res judicata.

On the other hand, Mr. Azmalul Hossain, the learned Advocate for the petitioner, strenuously submitted that the issues involved in the Writ Petition No. 802 of 1994 are entirely different from the issues involved in this writ petition. Besides, he submitted that since no Rule was issued in the said earlier writ petition but was summarily rejected the same cannot operate as a res judicata for this writ petition on which a Rule was issued on entirely different points of law. Dr. Rafiqur Rahman, amicus curiae, in supporting Mr. Hossain, submitted that the present writ petition is not barred by the principle of res judicata since any of the issues raised in this petition were not finally and conclusively decided earlier. He stressed on the 'finality' and 'conclusiveness' of the decision, if it is to be treated as resjudica.

The principle of res judicata has been stated in section 11 of the Code of Civil Procedure. It is a well settled principle of law that if an issue was finally decided in an earlier proceeding, the same issue shall operate as res judica, in a subsequent proceeding between the same parties as against the same issue. The same principle applies to writ proceedings also (AIR 1998 SC 2046).

Let us now examine on facts whether the present writ petition is barred by the principle of res judica.

In order to understand and appreciate this plea we would hark back to 1976. Admittedly, the petitioner company is the owner of the Moon Cinema Hall premises. The said property was declared abandoned. This was challenged in Writ Petition No. 67 of 1976. The High Court Division, in its Judgment dated 15.6.1977, found that the said property was not an abandoned property, as such, directed release of the same in favour of the petitioner-company forthwith. But the respondents refused to comply with the direction of the Court on the plea that in view of the provisions of the Abandoned Property (Supplementary Provisions) Regulation, 1977 (MLR No. VII of 1977), promulgated on 7.10.1977, the Judgment and Order of the High Court Division, stood annulled.

The contempt proceedings continued for quite a some time but ultimately withdrawn in 1994.

In this back-ground, the Writ Petition No. 802 of 1994, was filed but no Rule was issued and there was no appearance on behalf of the respondents. However, it was summarily rejected on 7.6.1994. In the said writ petition, the cause-title reads as follows:

> "**In the matter of**
>
> Enforcement of Fundamental Rights as guaranteed in the Constitution and for direction upon the Respondents to deliver the possession of the "Moon Cinema House" situated at 11, Wiseghat, Dhaka to the petitioners."

The prayer of the petitioner, inter alia, was as follows:

> "**a)** A Rule Nisi may be issued calling upon the Respondents ot show cause as to why they shall not be directed to make over possession of the Moon Cinema Hall at 11, Wise Ghat, Dhaka, to the petitioners pursuant to Gazette Notification No. IND/(M-1)/4 (2)/72/11 dated 24.8.77 (Annexure–D) issued by Respondent No. 1;"
>
> b) ……..

The Notification referred to above as Annexure-D, is annexed as Annesure – J in the instant writ petition as one of the annexures. It reads as follows:

"No. ND/(N-1)/4(2)/72/11 Dacca dated 24th Aguust, 1977

NOTIFICATION

In compliance with the Honorable High Court's Judgement dated the 15th June, 1977 in the Writ petition No. 67 of 1976, MOON CINEMA 11, Wiseghat Road, Dacca is deleted form the list published under the Ministry of Industries Notification No. 186-SI dated 31.12.197 and N1. M/XV/72/531 dt. 15.12.1972 and the cinema is released in favour of the petitioner M/S. Bangladesh Italian Marble Works Ltd. 12, Dilkusha Commercial Area, Dacca."

From the plain reading of the Order dated 7.6.1994 in the Wrti Petition No. 802 of 1994, it appears that the petitionaer in the said writ petition prayed for a direction upon the Government of Bangladesh and another (presumably Bangladesh Freedom Fighters Welfare Trust), to make over possession of the Moon Cinema Hall, to the petitioners in pursuance to the above noted Notification dated 24.8.1977 (Annexure–D). In the said writ petition all that the petitioners wanted was to enforce the order dated 15.6.1977, passed in the earlier Writ Petition No. 67 of 1976. But at the time of moving the petition apparently on various points, such as, the legality of Martial Law Proclamations etc. or its subsequent ratification by the Fifth Amendment of the Constitution appeared to have been incidentally raised. However, no Rule was issued either on the specific prayer made in the Writ Petition or on any of the points of law but was summarily rejected on the basis of a passing and incidental observation made by Shahabuddin Ahmed, J. (as his Lordship then was), in reply to a contention raised by Mr. M. Nurullah, the learned Attorney General in Anwar Hossain Chowdhury's case, apparently without appreciating the context of that observation. Besides, Fifth

Amendment was not the issue in the said case, it was not even argued by any of the parties in the said case.

It appears that the legality of either the Martial Law Proclamations or that of the Fifth Amendment was not finally decided in the Order summarily rejecting the Writ Petition No. 802 of 1994. Such summary rejection does not debar challenging of those provisions in a subsequently filed writ petition, on the principle of res judicata, since no such issue had been raised therein or heard and finally dicided by the said Court. The sine qua non for application of the principle of res judicata is the finality of a decision in an earlier action. Since no rule was issued in the Writ Petition No. 802 of 1994, the summary order passed in the said writ petition in the absence of the respondents therein, do not operate as resjudicata in the present writ petition.

Besides, the vires of the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979), was not under challenge in the Writ Petition No. 802 of 1994. This will also be apparent from the observation of Mustafa Kamal, C.J., in dismissing the Civil Appeal No. 15 of 1997:

> "……Also, the vires of Act No. 1 of 1979 is not under challenge in this appeal."

In the present writ petition No. 6016 of 2000, the cause-title reads as follows:

> "**IN THE MATTER OF:**
>
> Paragraph 18 of the Fourth Schedule under Article 150 of the Constitution of the People's Republic of Bangladesh added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) purported to ratify and confirm. The Abandoned Property (Supplementary Provisions) Regulation, 1977 (Martial Law Regulations No. VII of 1977) and the proclamations (Amendment) order, 1977 (Proclamations Order No. 1 of 1977) inserting Paragraph 3.A to the Fourth Schedule of the Constitution of the People's Republic of Bangladesh;"

The prayers in the present writ petition reads as follows:

> "A) Pass an order or orders issuing Rule Nisi upon the respondents calling upon them as to why taking over the management of "M/S Moon Cinema" 11, Wise Ghat, Dhaka by/under Notification No. 186-S1 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 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 to be of no legal effects and to further show cause as to why purported "ratification and confirmation" of The Abandoned Propetties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No. VII of 1977) and Proclamations (Amendment) Order, 1977 (Proclamations 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 of no legal effect and as to why the respondents should not be directed to hand over "Moon Cinema" 11, Wise Ghat Road, Dhaka with its assets and management to the petitioners.
>
> B). …….
> ....."

It is obvious and apparent that the issues in Writ Petition No. 802 of 1994 and the issues in the present Writ Petition are altogether different. The decision of the Court in Writ Petition No. 802 of 1994 was in respect of the Notification dated 24.5.1977. The Court summarily rejected the petition praying for handing over the concerned property in favour of the petitioner-company. But no Rule was issued and no issue could be said to be finally decided in the said writ petition, either in respect of the

aforesaid notification or any of the Martial Law Proclamations etc. and its ratification, confirmation and validation by the Constitution (Fifth Amendment) Act, 1979.

Under the circumstances, on both these two grounds, the contention that the present petition is barred under the principle of res judicata, has got no substance.

In this connection, the decision of the Supreme Court of India in the case of B. Prabhakar Rao V. State of A.P AIR 1986 SC 210 is pertinent:

> "23. .....a writ petition similar to Writ Petitions Nos. 3420-3426/83 etc. had been filed earlier and had been dismissed in limine by a Bench of this Court. We do not see how the dismissal in limine of such a writ petition can possibly bar the present writ petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction. So the objection such as it was, was not pursued further." (page-227).

PART XXVII. Waiver and Acquiescence By Delay:

The next contention raised on behalf of the respondent no. 3 is that since no body challenged the Constitution (Fifth Amendment) Act 1979, for all these years, that was deemed to be accepted by the people and the vires of the said Act cannot now be re-opened, more so in view of the observation of Shahabuddin Ahmed, J., made in Anwar Hossain Chowdhury's Case. This observation was also noted and followed in rejecting the Writ Petition No. 802 of 1994. In that view of the matter, Mr. Akhter Imam, Advocate, submitted that the vires of the Fifth Amendment Act, cannot now be re-opened. The learned Additional Attorney General, though feebly but supported the said contention of Mr. Imam.

We have already made lengthy discussions above on the questions of supremacy of the Constitution, the powers of the Parliament to enact any law including amendment of the provisions of the Constitution.

We have found that the Constitution is supreme. All organs of the Republic emanate from the Constitution. The Parliament can enact any law but subject

to the provisions of the Constitution. The Parliament can also amend any provision of the Constitution but thereby cannot change its basic character.

We have already found that the Martial Law Proclamations etc. not only changed the basic structure of the Constitution but also made this supreme law, subordinate and subservient to those Proclamations etc. This was also found in Halima Khatun's case and the subsequent other decisions. Shahabuddin Ahmed, J. in Anwar Hossain Chowdhury's Case himself held at para- 331:

> "**331**. Within a short time came the first Martial Law which lasted for four years. By Martial Law Proclamation Orders the Constitution was badly mauled on 10 times. Secularism, one of the Fundamental State Principles, was replaced by "Bismillah-er-Rahmar-Ar-Rahim" in the Constitution and Socialism was given a different meaning. Supreme Court, one of the symbols of national unity, was bifurcated for about two years and then was restored. All these structural changes were incorporated in and ratified, as the Constitution Fifth Amendment Act, 1979."

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 legalise 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.

Our clear and explicit answer is that making of the Constitution subordinate and subservient to the Martial Law Proclamations MLRs, MLOs etc., are absolutely illegal void and non-est in the eye of law. 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.

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 commited 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.

In this connection it should be remembered that the amendment under question is not like the Fifth Amendment of the United States providing that without indictment before the Grand Jury no one should be held liable for serious offence or other amendments of its Constitution, every one of which are beneficial to the human race. On the other hand, the Constitution (Fifth Amendment) Act, 1979, of Bangladesh, sought to legalise and validate the Martial Law Proclamations etc. subordinating the

Constitution. Each and every 28 (twenty eight) amendments of the United States Constitution, made during the last more than two hundred years of its history, was for further improvement, further advancement, further enlightenment of the constitutional position of its citizens. Whereas, our Fifth Amendment destroyed the very fabrics of the concept of justice and concept of fairness, in legalizing all illegal Martial Law Proclamations etc. While with each amendment of the Constitution, the citizens of the United States inched towards further refinements but with this one amendment, the citizens of Bangladesh immersed in the other direction.

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. This is the true spirit for amendment of a Constitution, the supreme law of the Republic, but not to legalise 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. If the Court finds that the amendment is affected for a collateral and illegal purpose, the Court will not 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.

Now let us consider a few decisions in this respect. In the case of Toronto Electric Commissioners V. Snider 1925 AC 396 PC, the question was whether the Industrial Disputes Investigation Act, 1907 of Canada, was within the competence of the Parliament of Canada under the British North America Act, 1867.

This action in respect of the aforesaid Act of 1907, was commenced in August, 1923, 16 years after the enactment, still Orde J. not only entertained the action but was of the opinion that the act was ultra vires the Parliament of Canada. His opinion was upheld by the Privy Council. Even after lapse of so many years, Viscount Haldane on behalf of the Board held at page- 400 :

> "It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of the Act. In this case the Judicial Committee have come to the conclusion that it was not." (The underlinings are mine)

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." (The underlinings are mine)

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 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." (The underlinings are mine)

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 unjustifiabley 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 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 worn out and its unconstitutionality is now brought to a successful challenge."

These well reasoned dicisions 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.

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.

He further submitted that a declaration, if any, that the said Fifth Amendment is void, may also create chaos in the national life, as such, any such declaration should be avoided in the national interest also.

The learned Additional Attorney General also supported these contentions of Mr. Akhtar Imam, Advocate.

These contentions raised on behalf of the respondents, on the face of it have no legs to stand on. These contentions are 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:

> "332. 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 theConstitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitutin. In the case of Golak Nath, the Indian Supreme Court found three past amendments of their Constitution invalid on the ground of alterationof 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." (The underlinings are mine)

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 back-ground.

It all started in 1950. The agrarian reforms were long over due in British India before partition in 1947. A. K. Fazlul Haque, during his tenure as the Prime Minister of Bengal, had already taken steps in early 1940s for abolition of Zemindary and other agrarian reforms in Bengal. The result was the enactment of East Bengal State Acquisition and Tenancy Act, 1950 which was followed by a number of litigations in the then East Bengal which went upto the Supreme Court of Pakistan.

Similar agrarian reform measures were taken in various provinces in India immediately after independence in 1947. At that period of time a vast majority of people of India belonged to peasent class and out of that a very large population were even land-less. As such social reforms including abolition of Zemindary was found to be an immediate and compelling necessity, to ameliorate the sufferings and to protect the interest of a vast majority of the people in India. Under such circumstances, various

Zemindary abolition and agrarian reform laws were passed in the various provinces in India. In the meantime, the Constitution of India was inaugurated in 1950 and some of the High Courts held those reform Acts unconstitutional. While appeals were pending before the Supreme Court in respect of those decisions, the Parliament in its anxiety to hasten its long awaiting agrarian reform measures and to avoid any delay, hurriedly enacted the Constitution (First Amendment) Act, 1951. The purpose of the said First Amendment was to protect the Zemindary abolition laws from being declared inconsistent to one of the fundamental rights under the Constitution, namely, the right to property. The whole idea of the Amendment was public interest in protecting the rights of the many millions of land-less miserable peasants in India. The purpose of the Amendment was not to hide and legalise the defacing and disgracing of the Constitution as in the case of the Fifth Amendment in Bangladesh but to uphold the cause of suffering humanity in India. The modus oprendi of the two constitutional amendments are dipolar, one was for ameliorating the suffering humanity, the other one was for legalizing the most illegal and criminal acts in making the Constitution subservient to the Martial Law Proclamations etc. There cannot be any comparison between the two.

The apex Court whether it is in the United States or in India or in Bangladesh or any where in the world is a social Institution if not a political Institution. As such, of necessity this high Institution cannot keep its eyes shut to the legal needs of the society.This will only be too evident of we browse through the decisions of the Supreme Court of the United States for the last two hundred years and would find that the Supreme Court revised its earlier out-look many a times. After all public interest is the highest law, salus populi est suprema lex.

As such, in this back-ground, it is no surprise that the Supreme Court of India, in Shankari Prasad V. Union of India AIR 1951 SC 458, upheld the validity of the Constitution (First Amendment) Act, 1951. This decision was followed by a number of subsequent decisions of the Supreme Court of India.

But in I.C. Golak Nath V. State of Punjab AIR 1967 SC 1643, the approach of the Supreme Court was changed. The Supreme Court held that although there is no limitation of power of the Parliament in amending any provision of the Constitution but such a power is not extended to abridge or take away any fundamental rights so that even the Parliament is not entitled to curtail any fundamental rights by its amendatory process. The Supreme Court in this decision over-ruled both Shankari Prasad (1951) and Sejjan Singh (1965). But in 1973, the Supreme Court in Kesavananda Bharati V. State of Kerala AIR 1973 SC 1461, over-ruled the decision in Golak Nath's case itself.

But the Attorney General of Bangladesh used the decision in Golak Nath as his trumpcard in 1989 in the case of Anwar Hossain Chowdhury etc. V. Bangladesh, 1989 BLD (Spl.) 1 and contended that although in India some of the past amendments of the Constitution which destroyed its basic structures, still those amendments were retained as valid in Golak Nath's case on the doctrine of 'prospective overruling'.

In the present case also, Mr. Akhter Imam, Advocate, raised similar contentions in 2005 but without appreciating the back-ground and the reasons for invoking the doctrine of prospective overruling.

We have already discussed above how in order to cater the needs of the toiling mass and for the over all benefit of the society in India, the Constitution (First Amendment) Act, 1951, was enacted and also the Court's appreciation for such agrarian reforms in Sankari Prasad's case in upholding the said First Amendment as valid.

Secondly, the Sankari Prasad's case was assumed to be correct in a number subsequent decisions of the Supreme Court itself. Some of those are noticed in Golak Nath's case at para-14, namely, S. Krishnan V. State of Madras (AIR 1951 SC 301), State of West Bengal V. Anwar Ali (AIR 1952 SC 75), Basheshar Nath V. Commissioner of Income-tax, Delihi and Rajashtan (AIR 1959 SC 149) and Sajjan Sing's case (AIR 1965 SC 845).

It may be noted that Article 31A and Article 31B were added to the Constitution by the said First Amendment. The ambit of Article 31B was determined in the cases of State of Bihar V. Maharajadhiraja Sir Kameshwar Singh (AIR 1952 SC 252), N.B. JeeJeebhoy V. Asst. Collector, Thana (AIR 1965 SC 1096). These decisios were noted at para 480-483 in Kesavananda's case.

In Golak Nath's case, the learned Judges, holding majority view, were put in the horns of dilemma. In the language of Subba Rao C.J. at para -44:

> "44. Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country-Zamindaries, mams and other intermediatary estats were abolished, vested rights were created in tenants, consolidation of holdings of villages was made, ceiling were fixed and the surplus lands transferred to tenants. All these were done on the basis of the correctness of the decisions in Sankari Prasad's case, 1952 SCR 89= (AIR 1951 SC 458) (Supra) and Sajjan Singh's case. 1965-1 SCR 933=(AIR 1965 SC 845)(supra), namely, that Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground they infringed thesaid rights. The agrarian structure of our country has been revolutionsised on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament had power to take away fundamental rights, a time might come when we would gradually and impereceptibly pass under a totalitarian rule." (The underlinings are mine).

In order to solve the problem and to meet both ends legally, the Hon'be Chief Justice, finding no other way out, since the Supreme Court itself consistemtly upheld the said First Amendment as valid in a number of its earlier decisions, abandoned the common law principles and adopted the comparatively recent concept of 'prospective overruling' of the United States Supreme Court. The Hon'ble Judge in his summing up at para 53 held :

"(1) ……..

……..

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective overruling', as explained by usearlier, our decision will have only prospective operation and, therefore, thesaid amendments will continue to be valid.

……..."

In this respect 2(two) points are to be noted. Firstly the American concept of prospective overruling is still not familiar in our jurisprudence. We still depend and follow common law principles as narrated and explained by Blackstone, Stephen and Halsbury. Even in the United States prospective overruling is not of universal application.

Secondly, the reason for options for prospective overruling was that since its enactment in 1951, the Supreme Court itself in a number ot its earlier decisions, consistently upheld the validity of the Constitution (First Amendment) Act, 1951, finally deciding the rights of the parties in the respective cases on the basis of the said very Amendment specially when no review petition was pending in respect of all those earlier cases which were finally resolved earlier by the Supreme Court. This will be evident from sub-para 3 of the summing up at para-53:

> (3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. <u>But, on the basis of earlier decisions of this Court</u>, they were valid. (The underlinings are mine).

But not on the basis of Golak Nath's case. It is apparent that had there been no final decision in the Supreme Court in respect of the First Amendment, in a number of earlier cases, the question of prospective overruling would not have arisen. Very naturally, the Supreme Court was not prepared to resile from its earlier stand specially when the concerned legislation was admittedly for public interest.

On the other hand, the Constitution (Fifth Amendment) Act, 1979, was admittedly never before challenged.

However, this doctrine of prospective overruling does not appear to be accepted in Kesavananda Bharati's case.

The Constitution (Twenty Fourth) Amendment Act was passed to get over the effect of the decision in Golak Nath's case. This Amendment expressly empowered the Parliament to amend any provision of the Constitutiion including those relating to the Fundamental rights.

Kesavananda Bharai's case upheld the aforesaid power of the Parliament to amend but subject to the condition that any change in the basic feature of the Constitution would be beyond the amendatory power of the Parliament under Article 368 of the Constitution.

In repelling similar arguments, as raised by the Attorney General in Anwar Hossain Chowdhury's case and of Mr. Akhter Imam, Advocate, in our present case, Sikri C.J. in Kesavananda Bharai's case, held in 1973 at para-487 :

> "487. 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 debated before. As Lord Atkin observed in Proprietary Articles Trade Association v. Attorney-General for Canada, 1931 AC 310 at 317:
>
> "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.
>
> 488. 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 Conciliatiion 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."

Under the circumstances, the contentions of the learned Advocates for the respondents that the Constitution (Fifth Amendment) Act, 1979, had already been accepted by the people of Bangladesh by acquiescence, have got no substance and their such arguments are rejected.

Now let us consider how other learned Judges in the Anwar Hossain Chowdhury's case appreciated the above argument raised by Mr. M. Nurullah, the learned Attorney General.

B.H. Chowdhury, J. (as his Lorship then was) referred to the submissions of the learned Attorney General at para 26 :

> "The learned Attorney General submitted that by the amendment no illegality had been committed far less of destroying the basic structure of the Constitution. He also extensively quoted from two Indian decisions e.g. Goaknath's case A.I.R. 1967 S.C 1643 and minority view of Keshavananda's

> case A.I.R 1973 S.C 1461 for the proposition that no limitation can be implied upon the power of amendment."

It is evident that the arguments of the learned Attorney General as referred to in paragraph 328, could not make much of a dent on the mind of his Lordship, as his Lordship apparently did not give much of an importance to such an argument.

M. H. Rahman, J., referred to the self-same above argument of the learned Attorney General at para 442 :

> "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." (The underlinings are mine).

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.

In this respect we found that the Constitution is the Supreme law of the land. The Martial Law Proclamations, Martial Law Regulations and the Martial Law Orders are all illegal, void and non-est in the eye of law. Since those Proclamations are void, it could not be ratified or confirmed by the Second Parliament by the Constitution(Fifth Amendment) Act, 1979, as it itself had no such power to amend the Constitution in the manner it was done by the Martial Law Authorities or to make law by the Martial Law Proclamations etc.

The Parliament 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. Such acts are seditious 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. But the Second Parliament in enacting the Fifth Amendment, ratified, confirmed and validated such disgrace of the Constitution by the Proclamations etc., as such, ought to be declared illegal.

PART XXVIII. Kelsen's Theory Vis-à-vis Proclamation:

Next it was argued although feebly about the legitimacy of the period ruled by Martial Law Proclamations etc. based mainly on Kelsen's theory as applied in Dosso's case.

Hans Kelsen, a jurist from Germany was well known among others, for his theory of the change in the grundnorm brought about by a revolution.

His theory, in simple terms is, if the revolution is successful, it will create a new legal order. If it fails, it will be an illegal act, constituting an offence of treason.

This theory of grandnorm was propounded in early 1930s and expectedly was the subject of all round criticism. It received its first known judicial recognition by the Supreme Court of Pakistan in The State V. Dosso PLD 1958 SC 533. Pakistan

gained its independence in August 1947. Its Constitution was enacted in March, 1956. But within two years, just few months before holding its first general election, Major General Iskandar Mirza, the President of Pakistan, annulled the Constitution in October, 1958, dissolved the National and Provincial Assemblies, the whole country was put under the Martial Law and General Muhammad Ayub Khan, Commander in Chief of the Pakistan Army, was appointed the Chief Martial Law Administrator. The appeal in Dosso's case arose out of orders passed by the High Court of West Pakistan under its writ jurisdiction, quashing certain orders issued by the Deputy Commissioner, referring certain cases for trial before the Council of Elders.

The appeal was taken up for hearing an October 13, 1958, six days after Martial Law was promulgated in Pakistan and Munir C.J., instead of deciding the appeals on merit, over-anxiously took the opportunity to glorify the Martial Law in Pakistan which annuled its Constitution, the supreme law of the land and in doing so, his Lordship called in aid of the Kelsen's theory of grundnorm, completely forgetting the Oath he had taken to protect, preserve and uphold the Constitution. The other Hon'ble Judges of the Supreme Court also joined hand with the Hon'ble Chief Justice in successfully burying the first Constitution of Pakistan and Chief Justice Munir wrote the epitaph in this manner:

> "Thus victorious revolution or a successful coup d' Etat is an internationally recognized legal method of changing a Constitution."

The consequence was disastrous and far reaching. In the language of Yaqub Ali, J., in the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139 at page -245 :

> "As regards the application of the Kelsenian theory as mentioned already Mr. Iskander Mirza, and Mr. Ayub Khan had joined hands on the night between 7th and 8th October 1958, to over through 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."

With greatest respect for the Hon'ble Judges of the Supreme Court of Pakistan in State V. Dosso, we would very humbly disagree with their Lordships' views. The Municipal Laws of a State take precedence even over the International laws within its boundaries. As such, Lord Reid rightly held in Madzimbamuto V. Lardner-Burke (1968) 3 All ER 561 PC at page -573 H.

> "With regard to the question whether the usurping government can now be regarded as a lawful government much was said about de facto and de jure governments. Those are conceptions of international law and in their lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control." (The underlinings are mine).

In a State, it is the Constitution which is the supreme law, takes precedence over everything and all great Institution, such as the Office of President, the National Assembly, the Supreme Court etc. are all creations of the Constitution and owe their existence to the Constitution. The Commandar-in-Chief of Army, whatever rank he may hold, he is in the service of the Republic, as such, a servant of the people in the Republic.

In this connenction, we would like to note the concept of independence vis-à-vis governance.

In the dawn of civilization, it was the might which was law for the country. The people had hardly any say in the affairs of the State. The rulers depended on their own strength in men and materials to rule his Kingdom. They considered themselves as lesser gods and used to enjoy homage from their subjects. In ancient

Japan, the people used to worship their King as the son of God. In China, people used to respect their King in the same manner. In Egypt, the people used to workship their Pharaohs. It was no exception in the civilzation of Mesopotemia, in India or in the then Europe. Niro used to receive homage as a god from the Romans even after the appearance of Jesus Christ or Prophet Isa.

Although slowly and feebly but surely the voices of the people were being started to be echoed in many early civilizations. At that time, civilizations were growing around the City States of the then known world. The history records that some two thousands five hundred years ago there were Assemblies in Greek and Athenian City States. A process of showing hands in affirmation and in endorsing the wishes of the King was there in those Assemblies, although the participants were far from the ordinary people, rather, they were the henchmen of the King. The rise of Roman Empire saw the dependence of the mighty Ceasers on the Senators and Tribunes. Although the inhabitants of the provinces had no voice but the citizens of Rome had some though restricted influence upon their Senators. The Ceasers also needed them to raise their armies to invade other countries or to protect their own frontiers.

In Arabian Peninsula, with the advent of Islam, in early 7th century, Prophet Mohammed (sm) used to confer with his disciples, before taking any major decisions. Before his demise in 632 A.D., he asked his ashab (disciples) to elect one person as their Amirul Momenin from amongst his wisest ashab. The next 4 (four) great Caliphs of Islam, were in that manner elected. Their such election in the 7th century were used to be approved by the general mass in the open congregations. This was an unique examble of participation of ordinary people of the city state of Medina in selecting their leader. This was unknown in the first-half of the seventh century anywhere in the then known world.

In this part of the world we follow and greatly influnced by the common law principles born, groomed and grown in England. In England, King John was

persuaded to sign the Magna Carta in 1215. This Magna Carta was not an Act of Parliament but it provided a magnificent guide line for the King to rule his subjects in his Realm. Although there was no involvement or participation of the ordinary people in signing the Magna Carta but with its acceptance the King of England who used to rule by divine right, recognized for the first time the concept of ruling by 'consent' of the ruled, the ordinary subjects of his Kingdom. This was the beginning of the participation of the people although within a very limited class.

With this beginning, the people of England started to exercise their own right, even the right to be ruled by a King. In 1610, on the question of the power of the King to issue proclamations, the commons were agitated and ultimately the King James I, had to yield.

Nearly three hundred and fifty years later in 1958, Major General Iskander Mirza, the President of Pakistan with the aid of General Ayub Khan, the Commander in Chief of Army of Pakistan, very conveniently abrogated the Constitution, started to make laws by proclamations and set-up Martial Law Courts. And these were done by invoking in aid his "foremost duty before God and the people of Pakistan to maintain the integrity of Pakistan."

17 (Seventeen) years later, in August 1975, Khandaker Moshtaque Ahmed seized the office of President of Bangladesh "with the help and mercy of the Almighty Allah and relying upon the blessings of the people…"

It may be stated incidentally that in 1982, Lieutenant General Hussain Muhammad Ershad, ndc., psc., Chief of staff, Bangladesh Army, seized all and full powers of the Government of Bangladesh "with the help and mercy of Almighty Allah and blessings of our great patriotic people…."

It appears that all usurpers seize powers though fully and wholly illegally but ironically always in the name of God and the people. But all the usurpers very conveniently forget that even in the early Seventh century Hajrat Abu Bakr Siddique

(R) did not seize power but relied on the confidence of the people because he believed that the blessings of God lies in the free will and consent of His creation.

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. It has to be nurtured. The world history is replete with stories of people who fought for their rights in different names, in different countries, in different ages,but the cry for liberty, the cry for equality, the cry for fraternity, were reverbrated, may be in different languaze but in the same manner from horizon to horizon. This sense of liberty pushed us to the war of liberation in 1971 and brought Bangladesh into existence. But the proclamation of Martial Law is negation of the said very spirit of liberty and independence of the people of Bangladesh.

This concept of independence and liberty is not for merely gaining of independence from foreign Ruler as we obtained independence from the British Monarch and the Emperor of India in 1947 or our owning of liberation in 1971. The concept of independence and liberty has a deeper and greater connotation. It does not depend upon formal independence. It goes to the root of the concept of governance by the people themselves. It is based on the concept of equality that all men are equal and no one can govern others without his consent because without such consent, however beneficient the Ruler may be, it will be a negation of democratic spirit. Whether it is the Monach or a Federal form of Government or a Parliamentary form of Government, all forms of governments derive their just powers from the consent of the governed, because the ultimate sovereignty lies with the people. This sovereignty of the people can never be ignored.

In this connection it can be recalled what Justice Mathews emphatically stated six score years ago in the case Yick Wo V. Peter Hopkins (1885) 118 US 356 (Book 30 Law. Ed) (370). We repeat :

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign

> powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and the limitation of power.

History proved that whenever governance was imposed upon people without their consent or participation, such governance was never accepted for long.

Lord Fairfax, the Commancer in Chief of the Commanwealth with his Second in Command, Lieutenant-General Oliver Cromwell, could defeat the army of King Charles I on a number of occasions but could not won the hearts of the English people. The dream of Cromwell to become the King of England was never fulfilled and he had to remain satisfied with the title Lord Protector. After restoration his dead body was exhumed and hanged. During the Interregnum, England was ruled by the Major Generals and Colonels. They could purge the Parliament but could not get the finance, badly needed for maintaining the army. King Charles I was no benevolent ruler, rather, he was a tyrant, still the people of England did not like to be ruled by the Major Generals and Colonels against their will, because whatever might have been his vices, he represented the people as their lawful King.

The question of governance arose during the middle of the 18th Century in thirteen North American Colonies. Although most of the people in those colonies had the same culture, language and religion but when they felt that they were being governed through imposition of taxes against their consent, in no time they rose as the 'Sons of Liberty' and the ultimate result was the Declaration of Independence in the 4th of July, 1776, proclaiming:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes

> destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

In France, French Revolution of 1789 swept the whole country. The France was not under subjugation of any other foreign country. It was the most flourishing country in Europe. It reached the height of prosperity in science, arts, culture, philosophy and in all other disciplines. The King was French and so also his subjects. But the despotism of Louis XVI left the people helpless. The writings of Voltaire, Montesquieu, Rousseau, Abbe Raynal, Quesnay, Turgot etc. roused the people to revolution with a battle cry for equality, liberty and fraternity, although as a nation, they were independent. After deposing the King, the National Assembly made the Declaration of the Rights of Man and of Citizens. Some of the rights as declared were as follows:

> 'I. Men are born, and always continue, free, and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.
>
> 'II. ……..
>
> 'III. The nation is essentially the source of all sovereignty; nor can any INDIVIDUAL, or ANY BODY OF MEN, be entitled to any authority which is not expressly derived from it.
>
> **'**IV. Political Liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man, has no other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law.
>
> ……..
>
> (Quoted from Thomas Paine : Rights of Man, Pub: Penguin classics 1985, page-110-1).

These historical incidents clearly show that the concept of independence is not only to free a community from an alien subjugation but if necessary, also to free itself from the subjugation of its own people.

The liberation of Bangladesh is a classic example of this kind of independence. The Bangalees spear headed the independence of Pakistan in 1947 but soon they discovered that they are being treated as a colony by the dominant West Pakistani Rulers. As such, the inevitable happened. The ordinary Bangalees fought against the militarily superior West Pakistani army and jettisoned West Pakistan. Thus independent Bangladesh came into being.

From this analysis of historical events for the last four hundred years it would show that mere political independence of a country is not enough. The concept of independence or liberty will not be achieved if one person or a group of persons keep the people of a country under subjugation. The people has a right to refuse such subjugation although greater independence was offered by making the Kingdom in England as a Commonwealth by Oliver Cromwell. The same result followed in other countries as discussed above.

As such to be independent in the real sense, the governance must be with the consent of the people to be governed. In case of existence of a written Constitution, such consent of the people must be strictly in accordance with the provisions of the Constitution, which is the embodiment of the will of the people, otherwise, it is no consent and the Government, however powerful it may be, is an illegal one. It has no right to govern the people which it sought to do by force, such as, by Martial Law Proclamations. The Governments which sought to rule without the consent of the governed can only be equated with the primitive rule by might. That kind of rule cannot be accepted as legal in the 20th or 21st century.

Munir C. J. with respect, in his anxity to bestow legitimization on the Martial Law Authorities in Dosso's case, chained the people of Pakistan including the

then East Pakistan by misinterpreting Kelsen's theory. His Lordship further missed the point, again with respect, that the Indian Independence Act, 1947, or the Government of India Act, 1935, did not envisage running of the Dominions with Martial Laws.

This goes for Bangladesh also. Bangladesh was not made independent, with the sacrifice of three million martyrs, to be ruled by the Martial Law Authorities. This is negation of independence. The Government which fails to govern by consent of the governed fails to satisfy the most basic and important criteria for legitimacy, that is to govern by consent. During the period of Martial Law, the people of Bangladesh was governed not according to their Constitution through their elected representatives in the House of Nation, but by the Proclamations, MLRs, MLOs etc. and ruled by the Major Generals, Colonels etc. To the Bangalee people it mattered little whether they were under the subjugation of the British or the Pakistanies or even the Bangalees. Since they were not governed by their own consent, through their own representatives, they were not free and independent and the Government which kept the people of Bangladesh under subjugation, inviolation of the Constitution, was out and out an illegal one and shall remain so for all time to come.

This kind of illegal Government cannot be legitimized by invoking Kelsen's theory as was done by the Supreme Court of Pakistan in Dosso's case and was rightly overruled in Asma Jilani's case.

It may be noted that even the Privy Council did not approve the Kelson's theory in Madzimbamuto v. Lardner –Burke (1968) 3 All ER 561.

The Kelsen's theory of grund-norm can only be used to explain the past incidents and nothing more. A Judge in deciding a case may call upon many a legal theory in establishing his own point of view but should not regard it as a precedent.

We can see that grund norm was not changed during Interregrum although the country was under Commonwealth temporarily. King Charles II actually ascended the thrown in 1660 but he was deemed to be the King since the death of

Charles I in 1649. Legally, there was no existence of Commonwealth but only in history. So also the Martial Law periods.

But grund norm was changed on the declaration of Independence by the thirteen colonies of North America on 4th July 1776 which culminated in the formal surrender of Lord Cornwallis in October, 1781.

Similarly grund norm was changed on 14th July, 1789 in France and on 14th August, 1947 in British India. Grund norm was also changed on the declaration of independence of Bangladesh on the night following March 25, 1971.

By invoking the Kelsen's theory, the above changes can be explained. But this theory of grund norm cannot be used as a legal justification for overthrowing a constitutional government by usurpers. A usurper shall remain a usurper for all time to come since their actions tantamount to dominate a free people, not the other way around as in the case of French Revolution.

No wonder, Hamoodur Rahman, C.J. , in Asma Jilani's case was very emphatic in holding at page -207 :

> "I would not also condone anything which seriously impairs the rights of citizens except in so far as they may be designed to advance the social welfare and national solidarity."

Rightly, Yakub Ali, J. sounded a stern warning to the future usurpers at page -243 :

> "My own view is that a person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers." (The underlinings are mine).

PART XXIX. The Rule of Law :

The next question is whether the Constitution (Fifth Amendment) Act, 1979, violates the principle of rule of law. We have already held that the Martial Law Proclamations etc, were all illegal and were issued without lawful authority. This question has become pertinent because by this amendment no new right or obligation, either of the State or its citizens has been created, rather, this amendment ratified, confirmed and validated the preceding Martial Law Proclamations, MLRs and MLOs and the actions taken thereon.

In this connection, it should be noted that 'Rule of Law' means, supremacy of law. It means all are treated equally under the law in accordance with the same yardstick of standard as opposed to arbitrary exercise of power. It means, from the highest in the country to the lowliest, all must submit to law and law alone. It means that there cannot be any divergence of approach in dispensing justice but must be on equal footing in all respect. Above all, it implies the notion of liberty. Besides, so far the Executive is concerned, it must also be a Government under the law.

A. V. Dicey in his 'An Introduction to the Study of the Law of the Constitution', 10th Edition (1959), explained the meaning of the Rule of Law which has profound influence on the thoughts in this branch of discipline in Constitutional Law. Dicey summed up at pages-202-3 :

> "That "rule of law," then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.
>
> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; ……
>
> The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

But Stanley de Smith viewed the ideas of Dicey as only his idiosyncracy. His notion of rule of law is as follows :

> "……..One can at least say that the concept is usually intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural." (Qoted from the Constitutional And Administrative Law By Stanley de Smith and Rodney Brazier, Eighth Edition at page-17).

But the obligation to obey law was shown long ago in 399 B. C by Socrates. We learn from the writings of Plato that Anytus and Meletus and other democratic leaders of Athens charged Socrates that he was an atheist because he believed in one God instead of many and that he was corrupting the minds of youths of Athens who were his pupils. The crowd of Athens decreed that he should drink the hemlock. His friends offered him an easy escape but he refused, rather, accepted the

verdict in obedience to the law of Athens although he knew that he was not wrong, but preferred death than giving up his right to free thought.

This English principle of rule of law or the American concept of 'due process law' was first found place in the Magna Carta. The Great Charter of the Barons was accepted by the King John of England in June 15, 1215 at Runnymede. Clause 39 and 40 are :

> "39. No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.
>
> 40. To no one will we sell, to no one will we deny or delay right or justice."(Quoted from 1215 The year of Magna Carta by Danny Danziger & John Gillingham, 2003).

In the Thirteenth Century, Henry de Bracton was a Judge during the reign of King Henry III. He had the courage to write in his Treatise :

> "Quod Rex non debet esse sub homine, Sed Sub Deo et Lege" (That the King should not be under man, but under God and the law).

At that time and thereafter on the divine right to rule asserted by the Kings of England, Bracton was quoted time and again to the their annoyance who took it not only as an affront but as a treason specially by the Stuart King James I.

Earlier, during the reign of Edward III, men were arbitrarily imprisoned without legal process, as such, in those early years of the Parliament in England in enacting a provision in 1354, debarring such arbitrary action, used the words 'due process of law':

> "that no man, of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, <u>without being brought to answer by due process of law</u>:" (Quoted from Select Documents of English Constitutional History, 1910, Edited by George

> Burton Adams and H. Morse Stephens, from clause IV of The Petition of Right, at page-340). (The underlinings are mine).

This provision was enacted long before the enactment of the Fifth Amendment of the U.S. Federal Constitution in 1791.

James I, on coming to the English throne, initially tried to assert his divine right to be the King but on the remonstrance of the Commons, Lord Salisbury reported to the House of Lords that the King had acknowledged that, although he derived his title from his ancestors, "yet the law did set the crown upon his head," "and that he was a king by the common law of the land." (1610) (Quoted from English Constitutional History By Thomas Pitt Taswell-Langmead, Tenth Edition, 1946, Page-384 n.p.).

At about this time, Moghal Emperor Jahangir, after his ascension to the throne in 1605, hung a great golden chain with sixty bells in his palace so that any man of however humble calling, could pull it in order to draw his attention, so that the Emperor could readily redress his grievance and grant relief to his sufferings. The purpose was obviously to see that even handed justice is dispensed with.

In Ashby V. White (1703), White, the Tory mayor and other returning officers refused to accept the vote of Ashby, a whig in the election for Aylesburg. The plaintiff's action for damages failed in the King's Bench. But the dissenting views of Holt C.J., which was upheld by the House of Lords, was as follows :

> "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."(Quoted from 'Administrative Law By H. W. R. Wade, Fifth Edition, 1982 at page-670).

But long before that when Hajrat Umar Farooq (R.A), was elected as the Caliph in 633 A.D, he not only appointed Qadis for every district but issued the following instructions :

> "Praise to God.
>
> Verily Justice is an important obligation to God and man. You have been charged with this responsibility. Discharge the responsibility so that you may win the approbation of God and the goodwill of the people.
>
> Treat the people equally in your presence, in your company, and in your decisions, so that the weak despair not of justice, and the high-placed have no hope of your favour.
>
> The onus of proof lies on the plaintiff. He who denies must do so on oath. Compromise is permissible, provided it does not turn the unlawful into lawful, and the lawful into unlawful. ……" (Quoted from Prof. Masud-ul-Hasan on 'Hadrat Umar Farooq', Second Edition, 2001, at page-167-8).

This shows that the spirit of Rule of Law was present so long ago in Arabian Peninsula on the advent of Islam.

The American verson of the rule of law was contained in the Fifth Amendment of Federal Constitution. This amendment was proposed by Madison and was ratified in 1791 along with nine other amendments which together are known as the 'Bill of Rights'. The said Fifth Amendment reads as follows :

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in case arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness ageist himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This is a charter for liberty, equality and fraternity for the citizen of the United States. The people of the other countries may feel envious for this amendment alone. This embodies a constitutional limitation or check on the powers of the Government that no person should be deprived of life, liberty or property except by due process of law. This amendment guarantees the right to be free and to obtain judicial relief for any illegal violation of such rights. It is the deprivation of right or interest without due process of law, is unconstitutional which was set right by this amendment.

In this connection the U.S. Supreme Court held that the guarantee of due process bars Congress from enactments that 'shock the sense of fair play.' (Bowen V. Gilliard 483 US 587=97L.Ed.2d 485(1987), (Quoted from American Jurisprudence, Second Edition, Vol. 16B. Para -893, Page-469).

Next we shall consider the case of Smt. Indira Nehru Gandhi V. Raj Narain AIR 1975 SC 2299. In that case, the appellant was declared elected to Lok Sabha in March, 1971. This was challenged by the respondent in an election petition in the High Court. The High Court declared the election void. During the pendency of her appeal before the Supreme Court, Constitution (Thirty-ninth Amendment) Act, 1975, was made, making various changes including insertion of Article 329A. It was argued, inter alia, before the Supreme Court that the election of the appellant would not be void since in view of clause 4 of Article 329A, no law relating to the election petitions made before the aforesaid amendment, would be applicable to the election of the appellant to the Lok Sabha. Khanna, J. held :

> "205. ……..Rule of law postulates that the decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is not predictable and such decision is the antithesis of a decision taken in accordance with the rule of law.

206.The matter can also be looked at from another angle. The effect of impugned clause (4) is to take away both the right and the remedy to challenge the election of the appellant. Such extinguishment of the right and remedy to challenge the validity of the election, in my opinion, is incompatible with the process of free and fair elections……."

Mathew, J. in Smt. Indira Nehru Gandhi's case explained the concept of rule of law in this manner :

"338. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere. 'Rule of Law' is an expression to give reality to something which is not readily expressible. That is why Sir Ivor Jennings said that it is an unruly horse. Rule of Law is based upon the liberty of the individual and has as its object, the harmonizing of the opposing notions of individual liberty and public order. The notion of justice maintains the balance between the two; and justice has a variable content."

In Bachan Singh V. Punjab AIR 1982 SC 1325, Bhagwati, J., expounded the heart of rule of law in this manner at pages 1336-1337 :

"10. ……it is clear that the rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire'. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. That is why Aristotle preferred a government of laws rather than of men. 'Law', in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever arbitrary or despotic it may be. Otherwise even under a dictatorship it would be possible to say that there is rule of law, because every law made by the dictator howsoever arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial, it is law that governs the

> relationship between men and men and between men and the State. But still it is not rule of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator it is in effect and substance the rule of man and not of law which prevails in such a situation. What is a necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people. ……"

Hilaire Barnett in the Constitutional and Administrative Law, Fourth Edition, (2002) drew her conclusion thus : at page-103 :

> "The law is not autonomous but rest on the support of those it governs. The law is the servant of the sense of rightness in the community, and whilst the rule of law places law above every individual irrespective of rank and station- it remains, paradoxically, subject to the ultimate judgment of the people."

In Anwar Hossain Chowdhury's case M.H. Rahman J. considered rule of law on the touchstone of the preamble at para -443 :

> "443. In this case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself."

In view of our discussions made above, let us now examine how far Constitution (Fifth Amendment) Act, 1979, adhered to the principles of rule of law, as solemnly and lofty enshrined in the Third Paragraph of the Preamble of the Constitution of Bangladesh.

It may be reiterated that it was contended on behalf of the respondents that the Fifth Amendment itself, did neither make any new provision nor changed any

basic feature of the Constitution, that it merely ratified, confirmed and validated Martial Law Proclamations, MLRs, MLOs etc. and only the actions taken thereon.

This contention, however, is literally true that the Fifth Amendment itself did not create any new law but section 2 added new paragraph, namely, Paragraph 18, to the Fourth Schedule to the Constitution. This provision ratified, confirmed and validated all Martial Law Proclamations, MLRs and MLOs and the actions taken thereon thereby sought to hide a black period of our Constitutional history because those Proclamations etc. literally uprooted the Constitution, not merely changed it.

We have already found that those Proclamations etc. were issued in complete violation of the Constitution of the People's Republic of Bangladesh, notably, Articles 7, 21, 31 and 142 :

> **Article 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.
> **Article 21 :**
> (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.
> (2)Every person in the service of the Republic has a duty to strive at all times to serve the people.
> **Article 31 :**
> To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

But by the Proclamations etc., the Martial Law Authorities, specially Major General Ziaur Rahman B.U. psc., changed the basic feature and structure of the Constitution so much so that secular Bangladesh had been deformed into a theocratic State.

We have already found that the Constitution which is the supreme law of Bangladesh, was made subordinate and subservient to the Proclamations, MLRs and MLOs, by the Martial Law Authorities, which had no legal basis thereby betrayed and insulted the entire population of Bangladesh with its three mullion martyrs.

We have also found that Khondaker Moshtaque Ahmed, Justice Abusadat Sayem and Major General Ziaur Rahman B.U., psc., had no authority or jurisdiction either to declare Martial Law in Bangladesh or to govern Bangladesh by such Martial Law Proclamations, MLRs and MLOs.

We have further found that rule by Martial Law is a negation of liberty and independence for which nearly three million Bangalees laid down their lives.

Paragraph 18 to the Fourth Schedule, was thrust into the Constitution by the Fifth Amendment, sought to legalise all those arbitrary and illegal Proclamations, MLRs and MLOs. As such, the Court is not only entitled but it is imperative on its part to break open the veil of enactment and to bring those Proclamations etc. to open which the said amendments illegally sought to rarify, confirm and validate and which would certainly 'shock the sense of fair play' of any reasonable person.

We have also noticed the last limb of Para -18 to the Fourth Schedule :

> "18. All Proclamations …….made during the period between the 15th August, 1975, and the 9th April, 1979 …….all orders made, acts and things done,……..shall not be called in question in or before any Court, tribunal or authority on any ground whatsoever."

This kind of ouster of jurisdiction clause is negation of fair play, and devoid of confidence on the part of the dictators and almost always is employed to shun away from the scrutiny of a Court of law. This is what we term as the breach of the principle of rule of law.

Thus, in enacting the Constitution (Fifth Amendment) Act, 1979, a colourable legislation, a fraud was committed upon the people of Bangladesh.

This is the worst case of violation of rule of law known to us, comparable possibly only to the Constitution (Seventh Amendment) Act, 1986. As such, we are of the opinion, that the Parliament had no rational basis in enacting the Fifth Amendment, in violation of the various provisions of the Constitution, notably, the Third Paragraph of the Preamble and Articles 7, 21 and 31, and also 142.

PART XXX. Role of the Supreme Court and Its Power of Judicial Review :

We have noticed above that Paragraph 18 to the Fourth Schedule of the Constitution sought to oust the jurisdiction of the Court.

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 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."(The underlings are mine)(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.

Article III begins with the statement 'The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish'. Section 2 states that the judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United State.

The Supreme Court of the United States wields its powers from this Article of the Constitution. In pursuance of the powers ordained in this provision, the Supreme Court is charged with the delicate task of declaring the constitutionality not only of the administrative actions of the Executive but also of the laws enacted by the Legislatures. That was the intention of the founding fathers of the said great Republic. Such intentions can be gathered from the Federalist Papers also.

Alexander Hamilton in his Federalist 78 (1787-1788) examined the judiciary department of the proposed government thus :

> "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the

like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. ……

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. ……..…….

It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention their agents. ……." (Quoted from Pater Woll on 'American Government', 1962) (The underlinings are mine).(page-265-266).

It is apparent that the framers of the Constitution envisioned that the Supreme Court shall exercise its power of judicial review.

The authority of the Supreme Court, in the language of Justice Robert H. Jackson was, in his proposed Godkin lecture at Harvard in 1954, which he could never deliver on the topic 'The Supreme Court as a Unit of Government':

"What authority does the Court possess which generates this influence? The answer is its power to hold unconstitutional

> and judicially unenforceable an act of the President, of Congress, or of a constituent state of the Federation. That power is not expressly granted or hinted at in the Article defining judicial power, but rests on logical implication. It is an incident of jurisdiction to determine what really is the law governing a particular case or controversy. In the hierarchy of legal values, if the higher law of the Constitution prohibits what the lower law of the legislature attempts, the latter is a nullity; otherwise, the Constitution would exist only at the option of Congress. Thus it comes about that in a private litigation the Court may decide a question of power that will be of great moment to the nation or to a state." (Quoted from the draft lecture notes of Justice Robert H. Jackson of U. S. Supreme Court, published by Harverd University Press, 1955, at page-22) (The underlinings are mine).

In ultimate analysis it would appear that it is the people which is the source of power of the Court because 'We the people of the United States' dreamt that they would have a Court which would be independent of both Congress and the Executive and cannot be brow-beaten by any. The people believe that inspite of all its short-comings, the Supreme Court is still the most trustworthy and at the same time dispassionate custodian of their rights and liberties guaranteed under their own Constitution. That is why the famous Presidents like Jefferson, Jackson, Lincoln, Roosevelts, inspite of their visible irritation towards many Rulings of the Supreme Court, dared not curb any of its constitutional prerogatives. There lies the real supremacy of the Supreme Court and although 'scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question' (Alexis de Tocqueville, 1848). The Supreme Court neither approves nor condemns any legislative policy, it declares whether the legislation is in accordance with or in contravention of the provisions of the Constitution. It is 'the living voice of the Constitution' (Bryce).

Now on the question of judicial review.

Chief Justice Coke in Dr. Bonham's Case (1610) went so far as to declare that the Court can even declare an Act of Parliament void.

Chief Justice Coke said :

> "When an Act of Parliament is against right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge that Act to be void." (Quoted from Lord Denning in 'What Next In The Law' page-319).

His such views was supported by Hobart C. J., another contemporary Chief Justice. He held in Day V. Savage (1614), "…….even an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself, for jura natural sunt immutabilia and they are leges legumes."(Quoted from Administrative Law by H.W. R. Wade, Fifth Edition, 1982 at page-418).

At that time, however, the Bill of Rights, 1689, declaring the supremacy of the Parliament was not enacted. But Chief Justice Holt in the City of London V. Wood (1701) also subscribed to the views of Chief Justice Coke in 1701 also.

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.

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 contradiction 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 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).
> (The underlinings are mine).

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?
>
> …..……It is emphatically the province and duty of the judicial department to say what the law is.
>
> ……..The judicial power of the United States is extended to all cases arising under the Constitution.
>
> 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." (The underlinings are mine).

Similarly, the case of Asma Jilani etc. V. Government of Punjab PLD 1972 SC 139, arose out of habeas corpus petitions for detention of the detenue under Martial Law Regulation 78 of 1971. The Supreme Court of Pakistan not only declared the orders of detention illegal but went further and also held both Presidential Order No. 3 of 1969 and the Martial Law Regulation No. 78 of 1971, as invalid.

In that detention case, the High Court held that they had no jurisdiction to enquire into the matter because of an ouster clause in The Jurisdiction of Courts (Removal of Doubts) Order, 1969 (President's Order No. 3 of 1969). In that premises, this is how Hamoodur Rahman, C. J., dealt with the controversy in Asma Jilani's Case in setting her father, Malik Ghulam Jilani, free, at page-197-199 :

> "This provision, as very appropriately pointed out by Mr. Brohi, strikes at the very root of the judicial power of the Court to hear and determine a matter, even though it may relate to its own jurisdiction. The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right

which has consistently been claimed by this and other Courts of superior jurisdiction in all civilised countries ……...”(Page-197)

Learned Attorney-General does not seriously dispute the correctness of the contention that “judicial power” is different from “jurisdiction” and so far as judicial power is concerned it must exist in Courts as long as the Courts are there. In fact, he has been bold enough, and I admire him for his boldness, in characterising these provisions of the Presidential Order No. 3 of 1969, which seek to take away the judicial power itself as “absurdities”. He frankly concedes that the Courts have and must have the power to determine all questions of their own jurisdiction. It is a proposition so well-settled that no one can challenge it.

The learned Attorney-General has, however, sought to contend that where there is a written Constitution the Courts are themselves creatures of the Constitution and have only such jurisdictions as the Constitution chooses to confer upon them. I have no cavil with this proposition, as I have myself is several cases indicated, that the Constitution can confer or restrict the jurisdiction of even superior Courts but this is not the same thing as saying that it can also restrict or curtail the judicial power, because, that in effect would be denying to the Court the very function for which it exists, i.e. to decide a controversy even if it relates to its own jurisdiction.

In the view that I have taken of the President Order No. 3 of 1969 that it is a sub-constitutional legislation I cannot but hold that it could not have curtailed the jurisdiction that was given to the High Courts and to this Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order.

Looking at the matter, therefore, from any point of view, whether, from the strictly legal and constitutional side, or on the basis of the principle of implied authority as suggested by Mr. Manzoor Qadir, or even in terms of the so-called legal order purported to be created by the Provisional Constitution Order of 1969 itself, I cannot escape the conclusion that the Presidential

> Order No. 3 was an unconstitutional document. General Agha Mohammad Yahya Khan had according to me, no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws, and it certainly was in excess of the implied authority, if any, given to him by the letter of Field Marshal Muhammad Ayub Khan dated the 24th of March 1969.
>
> The High Courts were, therefore, wrong in thinking that they had no jurisdiction to enquire into this matter."

The Supreme Court of India even treated mere letters of an aggrieved person as a petition under Article 32 and dispensed justice in accordance with law. The Supreme Court of Pakistan, in one occasion, on receipt of a telegram from the Amnesty International, stayed public hangings on finding those as violative of human dignity.

Justice Robert H. Jackson held the same view as will be apparent from his Godkin Lecture, quoted above:

> "……..Thus it comes about that in a private litigation the Court may decide a question of power that will be of great moment to the nation or to a State."

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."

As such it is apparent that the Court may consider the constitutionality of any provision in course of a litigation brought before it, it does not have to be a public interest litigation to do so.

It may be noted that 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.

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 of arrogation of power."

His Lordship further held at page-204 :

> "Reverting now to the 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 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 Constitution 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."

Yaqub Ali, J. also held in the same vein at page -237 :

> "As both President's Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law. Neither would be recognized by Courts as law."

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

Now back to Bangladesh. Under the Constitution of Bangladesh, all the powers and functions of the Republic are vested in the three grand 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 Supreme Court came into being out of Article 94 of the Constitution, with all the atributies of such a High Tribunal as in existence in the civilised world.

It may be recalled that a thousand years ago, the King of England, as a fountain of justice, was the first Magistrate of his Realm but by and by his judicial functions were taken over by his judges. In this connection a historical episode was narrated by B. H. Chowdhury, J. (as his Lordship then was) 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".

The moral is here in the following words:

> "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"

About the judiciary and its independence, B. H. Chowdhury, J., further observed, quoting Bhagwati, J. and Justice Krishna Iyer, 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 throught 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 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 socio-economic 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".

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."

Since Marbury V. Madison (1803), the U. S. Supreme Court went a long way in expounding the Constitution, a vigorous taproot, in the language of Woodraw Wilson, into a vast constitutional system. The process how the American Constitutional

system has been developed can be understood from the oft quoted observation of Chief Justice Charles Evans Hughes, as observed by Lord Denning :

> "The rule in the United States is not contained in their Constitution itself. It is a judge-made rule. It was stated by Chief Justice Marshall in 1803 in the Marbury case. Later on Charles Evans Hughes, the tenth Chief Justice, in 1908 firmly declared :
>
> > 'We are under a Constitution, but the Cnstitution is what the judges say it is and the judiciary is the safeguard of our liberty and our property under the Constitution.'
>
> Their Constitution nowhere provides that it shall be what the judges say it is. Yet it has become the most fundamental and far reaching principle of American constitutional law." (Quoted from Lord Denning : 'What Next In The Law' at page-318 of First Indian Reprint, 1993).

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 incontradistinetion 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 three grand Departments, 'the Legislature makes, the Executive executes and judiciary construes the law' (Chief Justice Marshall), constituting a trichotomy of power in the Republic under the Constitution. 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 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 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 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 to the Constitution.

Hamoodur Rahman, C. J. explains the legal position thus in State V. Zia-ur-Rahman PLD 1973 SC 49 at page-69 :

> "This is a right which it acquires not de hors the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself."

His Lordship further explains the nature of the power of the Court 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 considers 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 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. ……If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof. This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment but generally not in the case of a first or a new Constitution, unless the powers of the Constitution-making body itself are limited by some supra-Constitutional document." (The underlinings are mine).

We do not have any doubts about the correctness of the Constitutional position so lucidly explained above although stated in the back-ground of the Interim Constitution of Pakistan, 1972, but it is true, in general, of any written Constitution.

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 44, page-257-8 :

> "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 provisions of the Constitution. It is true that this independence, as emphasised by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. ……."

His Lordship further 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-E-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." (The underlinings are mine).

Latifur Rahman, J.(as his Lordship hen was) also held so at para-76, page-271 :

> "76. The written Constitution of Bangladesh has placed the Supreme Court in the place of the guardian of the Constitution itself. It will not countenance to any inroad upon the Constitution. A reference to Articles 94, 95, 96 and 147 of the Constitution clearly reveal the independent character of the Supreme Court." (The underlinings are mine).

Now let us test the constitutionality of the Constitution (Fifth Amendment) Act, 1979. This amendment Act sought to legalise the following among others :

i) The seizure of office of President of Bangladesh by Khondaker Moshtaque Ahmed on August 15, 1975,
ii) Change of Article 48, 55 and 142 of the Constitution by Khondaker Moshtaque Ahmed,
iii) Proclamation of Martial Law,
iv) Made the Constitution subordinate and subservient to the Proclamation of Martial Law,
v) Ousted the jurisdiction of Court including the Supreme Court,
vi) Nomination of Justice Abusadat Mohammad Sayem as President of Bangladesh on November 6, 1975;

vii) Proclamation issued on November 8, 1975, and assumption of the powers of Chief Martial Law Administrator,

viii) Dissolution of the National Asembly,

ix) Omission of The Bangladesh Collaborators (Special Tribunal) Order, 1972,

x) Deletion of proviso to Article 38 of the Constitution,

xi) Deletion of the amendments made by the Fourth Amendment of the Constitution, save and except the provisions in respect of the office of the President, the control and discipline of Subordinate Courts and also Article 116A.

xii) Proclamation dated November, 1976, appointing Major General Ziaur Rahman B.U., psc., the Chief of Army Staff, as the Chief Martial Law Administrator,

xiii) Various Proclamation Orders, Martial Law Regulations and Martial Law Orders,

xiv) Nomination of Major General Ziaur Rahman B.U., psc., as the President of Bangladesh by an Order dated April 21, 1977.

xv) Change of the Preamble and Article 6, 8, 9, 10, 11, 25, 42, 93 and 142 of the Constitution and addition of Article 92A therein.

xvi) Paragraph 3A to the Fourth Schedule to the Constitution, legalising all Proclamations, MLRs and MLOs and the actions taken thereon, which were kept out side the jurisdiction of the Court,

xvii) The Referendum Order, 1977 (Martial Law Order No. 1 of 1977) dated May 1, 1977 and various other Proclamations, MLRs, MLOs etc. including Martial Law Regulation No. VII of 1977 and the actions taken thereon, till the lifting of the Martial Law on April 7, 1979.

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 mumb 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 keep our eyes shut, rather, we are bound by our oath that we must see and appreciate the facts and the law in its proper perpective.

We have done so. We must hold and declare that this Constitution (Fifth Amendment) Act, 1979, is not law.

PART XXXI. Procedure For Amendment of the Constitution :

Now the procedure for amendment. It is specifically provided in Article 142 that no Bill for an amendment shall be allowed to proceed unless the long title expressly states that it will amend a provision of the Constitution. It is a mandatory provision and prohibited the introduction of any amendment bill without such long title.

The question of long title in a bill for amendment came up for consideration in Anwar Hossain Chowdhury's case. B. H. Chowdhury, J., gave example what is a long title and a short title at para-170-172 (BLD) at page-89 :

> "170. This has a little history. The title of Acts was added since 1495 in England. Often there was a long title and short title. The long title merely indicates the purpose of the Act while the short title is the label of the law. For example: the Opium Act, 1857 it says: An Act to consolidate and amend the law relating to the cultivation of the poppy and the manufacture of opium in Bangladesh.
>
> 171. The Canals Act, 1864 (Bengal Act V of 1864)-it says: An Act to amend and consolidate the law relating to the collection of tolls on canals and other lines of navigation, and for the construction and improvement of lines of navigation in Bangladesh.
>
> 172. It is no use multiplying such instances. It is clear that the draftsmen knew the purpose and distinction between the long title and short title. When the Constitution by prohibitive language issued a mandate it is not understood as to why such mandate was disobeyed."

Although B. H. Chowdhury, J., accepted the contention at para-174 (BLD) that long title was deliberately avoided in order to confuse the members of the Parliament but refrained from pronouncing on it since the amended Article had already been found to be bad on merit.

Shahabuddin Ahmed, J., at para-357 (BLD) also found that the requirement of long title is a mandatory provision but his Lordship held at para-359 that since there was nothing to indicate that the members of the Parliament were confused or misled as to the nature and scope of the Bill, the mandatory requirement as to procedure was substantially fulfilled.

Similarly, M. H. Rahman, J., in rejecting the objection with regard to the lack of long title also held at para-415(BLD) that since there was nothing on record to show that any member of the Parliament felt aggrieved or misled for the long title not being really a long one.

But this much is established that the long title of a Bill of a proposed amendment is mandatory and a Bill without a long title is prohibited. The purpose is very clear. The long title gives a clear indication as to what provision of the Constitution is proposed to be amended. It gives the members of the Parliament to ponder over the pith and substance of the proposed amendment so that they can make up their own mind about it.

We have gone through Section 7 of The Constitution (Eighth Amendment) Act, 1988, amending Article 100 of the Constitution. Whatever might be its merit, the purpose was very clear. There was no confusion or scope of misleading the members of the Parliament about its real intent. Any reasonable man would understand what it purported to do.

As such, both Shahabuddin Ahmed, J., and M. H. Rahman, J., rejected the objection on the ground of lack of long title. B.H. Chowdhury, J., however, ignored it for an all together different reason.

Be that as it may, it is well established that long title, as in the case of the Constitution (Third Amendment) Act, 1973, is mandatory :

> "An Act further to amend certain provision of the Constitution of the people's Republic of Bangladesh to give effect to the Agreement entered into between the Governments of the People's Republic of Bangladesh and the Republic of India."

Even this long title ought to have expressly stated the provisions of the Constitution sought to be amended but since those are stated with sufficient clarity in the body of the Act, appending therewith the Agreement between the countries which any person of ordinary prudence would understand, as such, it would satisfy the mandatory requirement of Article 142.

Now let us look at the title of the Constitution (Fifth Amendment) Act, 1979 :

> "An Act further to amend certain provision of the Constitution of the People's Republic of Bangladesh."

From this short title no body, however gifted he may be, would understnd its disgraceful contents.

Section 1 reads as follows :

> 1. Short-title – This Act may be called the Constitution (Fifth Amendment) Act, 1979.

Section 2 reads as follows :

> 2. Amendment of Fourth Schedule to the Constitution-In the Constitution of the People's Republic of Bangladesh, in the Fourth Schedule after Paragraph 17, the following new paragraph 18 shall be added, namely:-
>
> "18. Ratification and Confirmations of Proclamations etc.- All Proclamations, Proclamation Orders ……..all orders made, acts and things done, and actions and proceedings taken, …….are hereby ratified, and confirmed and are declared to have been validly made, …….shall not be called in question in or before any Court, tribunal or authority on any ground whatsoever."

Nobody would realize that scores of proclamations, Proclamation Orders, hundreds of MLRs and MLOs and thousands of acts and proceedings were validated and kept safe in its seemingly innocent bosom. These were beyond the philosophy of even Horatio. These were so craftily camouflaged by the masterly stroke of the draftsman that even angels would not comprehend that the Constitution was not only disgraced but even made subordinate and subservient to those Proclamations, MLRs, MLOs, which were sought to be ratified and confirmed in the said new paragraph. We will not repeat the pith and substance of this Act which we have already discussed in details above. It is, however, too apparent that the purpose of the mandatory provision of Article 142 had been completely frustrated. This was done in

order to defraud not only the members of Parliament but also the people of Bangladesh. This is only too obvious. The very purpose for which the provision for a long title as provided for in Article 142, had not been adopted in order to hide the real intent and purport of the Fifth Amendment Act. As such, we are of the opinion that this Act was enacted by practicing fraud upon all concerned with regard to its real intention.

On this ground also the enactment of the Constitution (Fifth Amendment) Act, 1979, is invalid and void.

PART XXXII. The Amendment Itself :

Now the last point. The question here is whether the purported ratification, confirmation and validation of all Proclamations, MLRs, MLOs and the acts taken thereon from August 15, 1975 to April 9, 1979, by enacting Paragraph 18 to the Fourth Schedule of the Constitution at all come within the meaning of the word 'amendment'.

This question was raised by Ms. Nighat Sultana Nabi, Advocate, on the first day of argument on April 4, 2005. Let us deal with this point.

Earlier we have considered the criteria for amendment of the Constitution. Article 142, provides for its procedure. It also provides that any provision of the Constitution by way of addition, alteration, substitution or repeal, may be amended. These are the modes of amendment.

Article 142 as amended by the Constitution (Second Amendment) Act, 1973, starts with the heading ……

Article 142 in the Constitution reads as follows :

"১৪২। এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও

(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংশোধিত বা রহিত হইতে পারিবে;

তবে শর্ত থাকে যে,

(অ) অনুরুপ সংশোধনী বা রহিতকরণের জন্য আনীত কোন বিলের সম্পূর্ণ শিরনামায় এই সংবিধানের কোন বিধান সংশোধন বা রহিত

করা হইবে বলিয়া স্পষ্টরুপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণ করা যাইবে না;

(আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরুপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্থাপিত হইবে না;

(খ) উপরি-উক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তিনি তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে।"

The English text starts with the heading 'Amendment of The Constitution'.

The English text reads as follows :

"**142**.(1). Notwithstanding anything contained in this Constitution-

Power to amend any provision of the Constitution

(a) any provision thereof may be 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 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.

(2). Nothing in article 26 shall apply to any amendment made under this article.

First, the meaning of the words 'সংশোধন' and 'সংশোধিত'. According to Bengali Dictionary published by Bangla Academy, Sixth Edition, 2005, at page-1102, its meaning is :

সংশোধন : বিশুদ্ধিকরণ, পবিত্রকরণ, সংস্কার (চরিত্র-সংশোধন), ভূলভ্রান্তি দূরীকরণ (লেখা সংশোধন)।

সংশোধিত: বিশুদ্ধিকৃত, নির্ভূলীকৃত, সংশোধন করা হয়েছে এমন।

In the Chalantika Bengali Dictionary, 13th Edition, 1389 B. S, the meaning of the word 'সংশোধন' is পরিশোধন, বিশুদ্ধি-সম্পাদান ।

Next, the meanings of the words 'amendment' and 'amend'as given in the Chambers Dictionary, Deluxe Edition, published in India in 1993 :

Amendment :

Correction; improvement; an alteration or addition a document, agreement etc.; an alteration proposed on a bill under consideration; a counter-proposal or counter motion put before a meeting.

Amend :

to free from fault or error; to correct, to improve, to alter in detail, with a view to improvement (eg a bill before parliament); to rectify, to cure, to mend, to grow or become better; to reform; to recover.

In the Oxford Dictionary and Thesaurus, Edited By Sara Tulloch, 1997;

Amendment :

A minor improvement in a document (esp. a legal or statutory one), an article added to the US Constitution.

Amend :

> Make minor improvements in (a text or a written proposal), correct an error or errors in (a document), make better, improve.

The Corpus Juris Secundum defines the words ‘amendment’ and ‘amended’ as follows :

> Amendment:
>
> > In general use, the word has different meanings which are determined by the connection in which it is employed, but it necessarily connotes a change of some kind, ordinarily for the better, but always a change or alteration. It has been said that the word implies something upon which the correction, alteration, improvement, or reformation can operate, something to be reformed, corrected, rectified altred or improved; a reference to the matter amended; usually a proposal by persons interested in a change, and a purpose to add something to or withdraw something so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment; and may include several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject. The word has been defined or employed as meaning a change of something; a change or alteration for the better; a continuance in a changed form; a correction of detail, not altering the essential form or nature of the matters amended, nor resulting in complete destruction; a correction of errors or faults; a material change; an addition, alteration, or subtraction; an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed; an alteration or change; an improvement; a reformation; a revision; a substitution; the act of freeing from faults; the act of making better, or of changing for the better; the supplying of a deficiency.
>
> Amended:
>
> > The term implies the existence of an original, a defect therein, and of certain new facts to be added thereto, or a restatement in a more accurate and legal manner, so that it is nolonger indentical

> with the original text: but also it involves the superseding of the original and in this respect is to be distinguished from "supplemental" which ordinarily implies only something added to and to be read with the orininal.

In this connection we must remember that a Constitution is the most sacred Instrument a Nation may possess and its each and every provision must be read and obeyed with utmost respect and reverence. As such, there is no scope for reading anything in Article 142 which is not there. Specially, "……when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions." (Lord Atkin in Pakala Narayana Swami V. Emperor AIR 1939 PC 47).

In this connection it would be profitable to repeat what Lord Loreburn, L.C., said in the case of Vickers, Sons of Maxim Limited V. Evans 1910 AC 444 :

> "My Lords, this appal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say;…"

From a plain reading of the meanings of the words 'amendment' and 'amended', given by a number of authorities mentioned above, it is crystal clear that however wide meaning we give, the words 'ratification', 'confirmation' appearing in the sub-title of the Paragraph 18 to the Fourth Schedule of Constitution, would not come within the ambit of the words 'amendment' or 'amended' in Article 142. Similarly, the words 'ratified', 'confirmed' and 'validly' appearing in the last portion of aforesaid paragraph 18 do not come any where near the ambit of the provision of 'Amendment of the Constitution' by any stretch of imagination.

This insertion of Paragraph 18 is anything but an amendment of the Constitution, rather, this paragraph was thrust into the Fourth Schedule in an effort to

legalise what was the most illegal activities of the usurpers and dictators who ruled Bangladesh during the period from August 15, 1975 to April 9, 1979.

B. H. Chowdhury, J., also explained the word 'amendment' in 'Anwar Hossain Chowdhury' at para-196, page-96 (BLD):

> "196. ……let us understand what is meant by 'amendment'. The word has latin origin 'emendere' – to amend means to correct.
>
> "Thus an amendment corrects errors of commission or omission, modifies the system without fundamentally changing its nature-that is an amendment operates within the theoretical parameters of the existing Constitution. But a proposal that would attempt to transform a central aspect of the nature of the compact and create some other kind of system-that to take an extreme example, tried to change a constitutional democracy into a totalitarian state-would not be an amendment at all, but re-creation, a re-froming, not merely of the covenant but also of the people themselves. That deed would lie beyond the scope of the authority of any governmental body or set of bodies, for they are all creatures of the Constitution and the peoples agreement. In so far as they destroy their own legitimacy."

That exactly what happened in the Constitution (Fifth Amendment) Act, 1979. We have already found that all the Proclamations, MLRs and MLOs were issued in total violation of the Constitution and all those provisions were grossly illegal. This was not, obviously, unknown to the rulers of the day. As such, in their predicament, in order to hide their acts of violation of the Constitution, they further disgraced the Constitution by inserting Paragraph 18 to the Fourth Schedule of the Constitution, and ratified, confirmed and validated all those Proclamation etc, incorporating in the said paragraph. This whole process of amendment was engineered in order to hide the illegalities committed by the dictators.

But as a matter of fact, if the pertinent provisions are illegal, those shall remain so, no matter whether those are thrust into the Constitution or not. If the relavant provisions are legal and beneficial to the community, those need not be appended to the Constitution, such provisions remain valid on its own right, since those would be the expressions of the free will of the sovereign people. Those need not require any constitutional protection.

In this case, on lifting the veil of enactment we found that the real purpose of the Constitution (Fifth Amendment) Act, 1979, was to ratify, confirm and validate the Martial Law Proclamations etc., by insertion of Paragraph 18 to the Fourth Schedule to the Constitution, but since it does not come within ambit of 'amended' or 'amendment' as envisaged in Article 142, the said Amendment was illegal and void.

In this connection it should be noted that by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978), clause (1A), clause (1B) and clause (1C) were added to Article 142 of the Constitution. Clause 1A provides that when any Bill is passed providing for amendment of the Preamble or any of the provisions of Article 8, 48, 56, 58, 80, 92A or Article 142 is presented to the President for assent, he would cause it to be referred to a referendum the question whether the said Bill should or should not be assented to.

This addition of clause (1A) was very craftily made. In one hand the President and the Chief Martial Law Administrator was not only merrily making all the amendments in the Constitution of the People's Republic of Bangladesh according to his own whims and caprices by his Orders which would have envied James I and Charles I in early 17th Century, but at the same time, made provision in Article 142 itself in such a manner so that the amended provisions can not be changed even by the two-third majority members of the Parliament short of a referendum. In short, by the executive Order of one person, amendment of the Constitution can be made at any time and in any manner but even the two-third majority members of the representatives of

the people cannot further amend it. We are simply charmed by the sheer hypocracy of the whole process.

In this connection it is pertinent to refer to what Hegde and Mukherjea, JJ. said in Kesavananda Bharati's case AIR 1973 SC 1461 at para-681 :

> "There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adopt the Constitution to respond to the growing needs of the people. We have earlier seen that by using the amending power, it is theoretically possible for Parliament to extend its own life indefinitely and also, to amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards. A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest."

The then President and the Chief Martial Law Administrator might be a very powerful and a gifted person but he had no right or authority, under the Constitution, the supreme law of the land, to make any amendment of any law not to speak of the Constitution.

As such, the additions made in Article 142 of the Constitution, by the above Second Proclamation No. IV of 1978, is invalid and ultra vires to the Constitution.

PART XXXIII. The Oath of the Judges :

In these circumstances, we question ourselves, 'what is our duty under the Constitution? What is our own obligation to the people of Bangladesh when we took oath to' preserve, protect and defend the Constitution'?

Two hundred years ago, Chief Justice John Marshall in deciding the vires of a congressional Statute, raised similar questions in Marbury V. Madison (1803):

> "Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support !
>
> The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words; "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as - , according to the best of my abilities and understanding agreeably to the constitution and laws of the United States."
>
> Why does a judge swer to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." (Quoted from Professor Noel T. Dowling on the 'Cases on the Constitutional Law, Fifth Edition, 1954, at page-97) (The underlinings are mine).

Some takes his oath seriously, others may not, they take it as a matter of course.

Let us again hark back to the history. Thomas More was one who took it very seriously. Henry VIII appointed him as the Lord Chancellor. He resigned the Great Seal in 1532. He was asked by the King to take an oath acknowledging him as the Head of the Church of England but he refused and was indicted for treason. He was upbraided by many including his wife for his refusal to take the oath. He did not relent and ultimately he was beheaded. He gave his life but did not compromise with his values.

Four hundred years ago, the case of Commendams (1616) was heard in the Exchequer Chamber before all the twelve Judges. In that case, a prerogative of the King was disputed, as such, the King James I, sent a massage through Attorney General Bacon, asking the Judges not to proceed until they spoke to the King. But the Judges informed the King :

> 'Obedience to His Majesty's Command to stay proceedings would have been a delay of justice, contrary to the law, and contrary to oaths of the Judges.' (The underlinings are mine).

On return to London, the King summoned all the twelve Judges and put this question:

> 'When the King believes his interest is concerned and requires the judges to attend him for their advice, ought they not to stay proceedings till His Majesty has consulted them?'

All the Judges except Coke, promised to act in future according to the Royal desire. But Coke said:

> 'When that happens, I will do that which it shall be fit for a judge to do.'
> (The above quotations are from Lord Denning On: 'What Next In The Law', Indian Reprint, 1993, at page-9-10).

Chief Justice Coke risked his nake but did not compromise with his Oath of Office. He however, had to pay for his uprightness by being dismissed within a few days.

Coming back to the present, A. R. Cornelius, J. (As his Lordship then was), in Federation of Pakistan V. Moulvi Tamizuddin Khan PLD 1955 FC 240, in dissenting, referred to the oath of office of a Judge at page-319:

> "The resolution of a question affecting the interpretation of important provisions of the interim constitution of Pakistan in relation to the very high matters which are involved, entails a

> responsibility going directly to the oath of office which the constitution requires of a Judge, namely, to bear true faith and allegiance to the Constitution of Pakistan as by law established and faithfully to perform the duties of the office to the best of the incumbent's ability, knowledge and judgement."

Again, in Fazlul Quader Chowdhury V. Muhammad Abdul Haque PLD 1963 SC 486, A. R. Cornelius, C. J., referred to oath of office of the Judges at page-502-3 :

> "The Judges of the Supreme Court and the High Courts when they enter upon their office, are required to swear an oath that they will "preserve, protect and defend the Constitution."
>
> ……..The reasons why the Judges of the Supreme Court and the High Courts have to take a similar oath can in my opinion be found within the simple provisions of Article 58. It is there provided for all persons in Pakistan that in any case where it becomes necessary for them to assert in their interest, any provision of the Constitution, they shall have access to the High Courts and through the High Courts to the Supreme Court as of right, and these two Courts are bound by their oath and duty to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its provisions against attack of any kind. The duty of interpreting the Constitution is, in fact a duty of enforcing the provisions of the Constitution in any particular case broguth before the Courts in the form of litigation."

His Lordship further held at page-506 :

> "From these circumstances, it is clear that the conclusion cannot be escaped that the President's Order is of sub-constitutional force, and bearing in mind that he as well as the Courts are under oath, to "preserve, protect and defend the Constitution" the duty of the Court is plainly to place the provisions of the Order strictly against the enabling provision in Article 224 (3), and if upon such comparison, the Court is

> satisfied that the provisions of the Order do not fall within the ambit of the power given by Article 224(3) the Court has no alternative but to declare to that effect and thus to invalidate the amendment." (The underlinings are mine).

In the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139, Hamoodur Rahman C. J., of necessity, referred to the oath of office of the Judges at page-203-204 :

> "Incidentally it may also be mentioned here that a great deal that has been said about the oath of Judges is also not germane to the question now before us, for, in the view I take of the duty of a Judge to decide a controversy that is brought before him it cannot be said that any Judge of this Court has violated his oath which he took under the Constitution of 1962. ……So far as this Court is concerned it has always acted in accordance with its oath and will continue to do so whenever a controversy is brought before it, no matter what the consequences." (The underlinings are mine).

Our Supreme Court is also fully alive to the importance and sanctity of the oath of office of the Judges of the Superior Court.

In Anwar Hossain Chowdhury's case, B. H. Chowdhury, J., observed at para-246, page-106 (of BLD) :

> "246. While it is the duty of the people at large "to safeguard, protect and defend the Constitution, the oath of the President, Judges is to preserve, protect and defend the Constitutioon. To preserve it is an onerous duty While for the people the duty is to "safeguard". Nature of the two duties are different and run in parallel. To deny the power to judiciary to "preserve" the constitution is to destroy the independence of the judiciary thereby dismantling the Constitution itself."

Shahabuddin Ahmed, J., observed at para-379, page-157 :

> "379. Judges are by their oath of office bound to preserve, defend and protect the Constitution and in exercise of this power

and function they shall act without any fear or favour and be guided by the dictate of conscience and the principle of self restraint. It is these principles which restrain them from exceeding the limits of their power. In this connection the following observation of the sitting in the Court of Appeal, State of Virginia, is quite appropriate :

> "I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature and consequently the whole community against the usurpations of the other and whenever the proper occasion occurs, I shall feel the duty; and fearlessly perform it ….if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the court, will meet the united powers at my seat in this tribunal, and pointing to the constitution, will say to them, there is the limit of your authority; and hither shall you go, but no further."

Similarly, M. H. Rahman, J., observed at para-488, page-180 :

> "488. The Court's attention has repeatedly been drawn to the oath the Chief Justice or a Judge of the Supreme Court takes under art. 148 of the Constitution on his appointment. Mr. Asrarul Hossain has pointed out the difference between the language of the oath the Judges of the Indian Supreme Court take "to uphold the Constitution", and that of the oath the Judges of our Supreme Court take "to preserve, protect and defend the Constitution". The import of the single world 'uphold' is no less significant or onerous than that of the three words 'preserve, protect and defend'. In either case the burden is the same. And the Court carries the burden without holding the swords of the community held by the executive or the purse of the nation commanded by the legislature. The Court could do so because all

> the authorities of the Republic act, as enjoined by the Constitution under art. 112, in aid of the Court for securing obedience to its judgments and orders. When the Constitution is suspended or made subject to a non-law the Court is deprived of the aid of the relevant authorities of the Republic. When such an abnormal situation occurs a Judge has got two alternatives: either he would resign or he would hold on to his post. One who has not lost faith in the rallying power of law may prefer a temporary deprivation of freedom to desertion. It is hardly necessary to point out that the Court will have no worthwhile power without the Constitution. The future of the Constitution lies in the commitment of the citizens who are obliged under art. 21 of the Constitution to observe the Constitution." (The underlinings are mine).

It should be noted that the oath of office, an individual Judge takes at the time of his elevation to the Bench, is a personal one and each individual Judge declares it taking upon himself, the obligation to 'preserve, protect and defend the Constitution'. It is an obligation cast upon each individual Judge. Each individual Judge himself remains oath-bound to fulfil his own obligations under the Constitution. This obligation under the oath is personal and remains so upon him, every day, every week, every month, every year, during his tenure as a such Judge. His all other obligations are subject to his Oath and the Constitution.

The learned Advocates for the respondents obliquely submitted that any decision touching the vires of the Fifth Amendment may have serious political repercussions, as such, they contended that the Court may not enter into the question of vires of the Fifth Amendment after so many years which may jeopardise the Constitutional position of the Republic if it is held ultra vires to the Constitution.

This apprehension has got no substance. It is true, however, that the constitutional process in Bangladesh remained eclipsed till holding of the gereral election in 1991 but we now have a parliamentary form of Government since the said

general election, as envisaged in the original Constitution. But we reiterate what we said earlier that what is wrong, what is illegal, what is perverse, shall remain so for all time to come. Nothing can legalise the illegal acts of the Martial Law Authorities perpetrated since August 15, 1975. As such, it is best for the country that we put our records correct, once for all. It is no use keeping the skeleton in the cub-board. It was bound to come out some day. It has come out now, exposing its corrupt nature. It exposes its hollow and shallow ground on which it stood. It also exposes the unbounded illegalities committed by the usurpers and dictators.

We the Judges have got the obligation to uphold the Constitution and we are oath-bound to do it, no matter who is hurt. It is better to hurt a few than the country. In any case everybody must face the truth however awkard it may seem at first. But truth and only the truth must prevail. We Judges are obliged to enhance the cause of justice and truth and not to disgrace it, however political over-tone it may seem to have but the Constitution, the supreme law with the ever vigilant people of this country, shall over-ride all political implications. In this connection we refer to the upbraiding of Nasim Hasan Shah, J. (as his Lordship then was) in the case of Federation of Pakistan V. Haji Muhammad Saifullah Khan PLD 1989 SC 166 at page-41 :

> "The circumstance that the impugned action has political overtones cannot prevent the Court from interfering therewith, if it is shown that the action taken is violative of the Constitution. The superior Courts have an inherent duty, together with the appurtenant power in any case coming before them, to ascertain and enforce the provisions of the Constitution and as this duty is derivable from the express provisions of the Constitution itself the Court will not be deterred from performing its Constitutional duty, merely because the action impugned has political implications." (The underlinings are mine).

As such, the contention that since the Fifth Amendment may have political implications, we should refrain from deciding its legality, has got no substance.

This Court on no excuse refrain from upholding the Constitution and at the same time oath bound to declare the constitutionality of any law which comes before it in course of any dispute or litigation. If we do not, we ourselves shall be guilty of violation of our oath and also the Constitution, the supreme law of the country.

PART XXXIV : The Scope of the Rule :

Let us now consider the scope of this Rule. We have travelled in a very wide scale in the field of Constitutional law and the Constitution not only of Bangladesh but also of many other countries. But this is not for nothing. We have issues to decide of utmost Constitutional and national importance, as such, in order to appreciate the real issues at hand, we had to travel far and wide.

We know that this is not a public interest litigation. No Raymond Blackburn or Mehta challenged the vires of the Constitution (Fifth Amendment) Act, 1979. The Petitioner No.1 is a Company and the Petitioner No.2 is its Managing Director. Apparently, they have no special interest in the Constitution of Bangladesh or its legal history. They are, however, very much interested in their own properties, namely, the premises at 11, Wiseghat and 12, Wiseghat. Initially both the properties were declared abandoned although the premises at 12, Wiseghat was released earlier but the premises at 11, Wiseghat which housed the Moon Cinema House, remained abandoned and was not released. As such, the petitioners successfully challenged the order declaring the said property as abandoned. The High Court Division in Writ Petition No. 67 of 1976 not only declared the impugned order illegal but also directed the respondents to hand over the possession of the same in favour of the petitioners within 60(sixty) days. But the said Order of the High Court Division was not carried out on the plea of bar created by MLR VII of 1977. The petitioners unsuccessfully filed contempt petitions and ultimately those were withdrawn in 1994.

Since in the face of MLR VII of 1977, even the orders of the High Court Division of the Supreme Court could not be executed to the prejudice of the petitioners, they were aggrieved.

They were aggrieved, not because their properties were earlier enlisted as abandoned, since it was already declared illegal by the High Court Division and the said finding being remained undisputed since 1977 but the petitioners are aggrieved because inspite of the Notification issued by the Government itself, releasing the property from the list of abandoned properties and directing handing over possession of its property in their favour, the said Notification even could not be carried out, again on the plea of MLR VII of 1977 to the prejudice of the petitioners.

In this manner, although the petitioners were prejudiced and remained so by MLR VII of 1977 but they were unable to challenge it because MLR VII of 1977 was firstly, validated with all other Proclamations, MLRs and MLOs, by paragraph 3A to the Fourth Schedule of the Constitution, inserted by Proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977). Secondly, MLR VII of 1977 along with all Proclamations MLRs, MLOs, were again ratified, confirmed and validated by Paragraph 18 to the Fourth Schedule of the Constitution. This paragraph 18 was added by amendment of the Fourth Schedule by Section 2 of the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979). This Act was published in the Bangladesh Gazette Extra-ordinary on April 06, 1979.

Although this is no public interest litigation but in order to reach MLR VII of 1977, in the turn of the 21st Century, the petitioners in the instant Rule challenged the ratification and confirmation of MLR VII of 1977 and Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977) with regard to insertion of the aforesaid paragraph 3A to the Fourth Schedule of the Constitution by the aforementioned paragraph 18 of the Fourth Schedule to the Constitution, added by the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979).

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." (The underlinings are mine).

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……."

We, however, considered these observations in the back-ground of the Doctrine of supremacy of the Constitution discussed in details earlier in our judgment.

In the instant case, it was declared long ago in 1977 that the premises of Moon Cinema House is not an abandoned property. This is not disputed either by the learned Additional Attorney General or Mr. Akhtar Imam, the learned Advocate for the respondent no. 3. Their contentions are that the Judgment passed inWrit Petition No. 67 of 1976 was annulled by the provisions of MLR VII of 1977. This provision along with all Proclamations, MLRs and MLOs became part of the Constitution by virtue of Paragraph 3A to the Fourth Schedule of the Constitution. The said paragraph was immune from challenge since it was part of the Constitution. Even after lifting of the

Martial Law on April 7, 1979, the said paragraph 3A of the Fourth Schedule along with all Proclamations etc. were ratified, confirmed and validated by the addition of Paragraph 18 of the Fourth Schedule to the Constitution by section 2 of the Constitution (Fifth Amendment) Act, 1979, passed by the Second Parliament. As such, consideration of the vires of the said very Act becomes incumbent. Because if the Fifth Amendment Act is intra vires and valid, MLR VII of 1977 remains unassailable being 'ratified and confirmed and are declared to have been validly made'. In that situation, the Judgment and Order passed in Writ Petition No. 67 of 1976, remains annulled and the petitioners would have no remedy. But if the aforesaid Act is found to be ultra vires, paragraph 3A to the Fourth schedule to the Constitution and MLR VII of 1977 become justiciable. Under such circumstances, an in depth enquiry about the vires of the Constitution (Fifth Amendment) Act, 1979, is unavoidable, rather becomes imperative.

The next obvious question is about the ambit and the extent of enquiry which should be made in respect of the aforesaid Act.

The Constitution (Fifth Amendment) Act, 1979, was enacted by the Second Parliament. As an Act of Parliament, generally it is inviolable, unless the Amendment sought to destroy the basic structure of the Constitution itself. As such, it was necessary to examine the subject matters of the amendment. In order to understand and appreciate the real purpose, it was found necessary to lift the veil of enactment and examine the pith and substance of the amending Act. This amending Act, inserted Paragraph 18 to the Fourth Schedule of the Constitution. The said Paragraph 18, as stated earlier, sought to ratify, confirm and validate all Martial Law Proclamations, Martial Law Regulations and Martial Law Orders and also all actions taken under those provisions in a sweeping and omnibus manner without specifying any particular provision or provisions and actions. We have examined some of those in order to find out the real face and the purpose of those Proclamations etc. But for our purpose, it was not necessary to examine all the Proclamations, MLRs and MLOs. Even if one of those

is found to destroy the basic structure of the Constitution, the amendment would be illegal since it is inseperable. However, we have examined the three main Proclamations with some of the amendments and other MLRs and MLOs. We have also recorded our findings in respect of those Proclamations etc. as discussed above.

Besides, the learned Advocates for the respondents candidly submitted that the question of destroying the basic structure of the Constitution by the amending Act itself did not arise at all since it did neither make any new provision nor deleted any, it only inserted Paragraph 18 in the Fourth Schedule which ratified, confirmed validated earlier Proclamations, MLRs and MLOs and the actions taken thereunder, as such, the Fifth Amendment-Act itself did not come into conflict with the Constitution at all.

Let us now read the Constitution (Fifth Amendment) Act, 1979 (Act of 1979) itself :

> "[Published in the Bangladesh Gazette, Extraordinary, dated the 6th April, 1979]
>
> The following Act of Parliament received the assent of the President on the 6th April, 1979, and is hereby published for general information:-
>
> **ACT No.1 OF 1979**
>
> An Act further to amend certain provision of the Constitution of the People's Republic of Bangladesh.
>
> Whereas, it is expedient further to amend certain provision of the Constitution of the People's Republic of Bangladesh for the purpose hereinafter appearing;
>
> It is hereby enacted as follows:-
>
> 1. **Short title**- This Act may be called the Constitution (Fifth Amendment) Act, 1979.
> 2. **Amendment of Fourth Schedule to the Constitution**,- In the Constitution of the People's Republic of Bangladesh, in the Fourth

Schedule after paragraph 17, the following new paragraph 18 shall be added, namely:-

"18. Ratification and confirmation of Proclamations, etc.–All Proclamations, Proclamation Orders. Martial Law Regulations, Martial Law Orders and other laws made during the period between the 15th August, 1975, and the 9th April, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in this Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by any person or authority during the said period in exercise of the powers derived or purported to have been derived from any such Proclamation, Martial Law Regulation, Martial Law Order or any other law, or in execution of or in compliance with any order made or sentence passed by any Court, tribunal or authority in the exercise or purported exercise of such powers, are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be called in question in or before by any court, tribunal or authority on any ground whatsoever."(The underlinings are mine).

By this amendment of the Constitution Paragraph 18 was inserted in the Fourth Schedule of the Constitution. This Paragraph ratified all Proclamations, Proclamation Orders, MLRs, MLOs and other laws made during the period between the 15th August, 1975 and 9th April, 1979 (both days inclusive) with all amendments and orders made thereunder.

Obviously, the perpetrators and beneficiaries of those Proclamations, MLRs, MLOs, etc. themselves had doubts about its legality, as such, this exercise was engineered to make all those Proclamations ratified, confirmed and validated and also made part of the Constitution.

We asked the learned Advocates for the respondents to narrate what provisions of the Constitution were amended and what were the purposes, they were without any reply.

In this connection it is pertinent to consider the Rule in Heydon's Case (1584) to arrive at the real reason for the Act. It was stated that the Court should consider the following four things :

- what was the common law before the passing of the statute?;
- what was the mischief in the law which the common law did not adequately deal with?;
- what remedy for that mischief had Parliament intended to provide?;
- what was the reason for Parliament adopting that remedy?

(Quoted from 'The English Legal System' By Gary Slapper and David Kelly, Fifth Edition, 2001, page-172).

As such, after applying the mischief rule as propounded in Heydon's case, we find no reason for enactment of the Fifth Amendment Act but for hiding of the Proclamations etc.in the Fourth Schedule to the Constitution.

For such reasons also we have examined the main Proclamations, MLRs and MLOs, as made available by the learned Advocate for the petitioners from the Gazette Notifications and also from the book 'The Constitution of the People's Republic of Bangladesh', published by the Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh, as modified upto 31st May, 2000. Accordingly, we have scrutinized those Proclamations, MLRs and MLOs, as stated and discussed earlier in this Judgment in order to understand the import, purpose and extent of the Constitution (Fifth Amendment) Act. This is how we came to examine those Proclamations etc. in order to consider the legality and validity of the aforesaid Act No. 1 of 1979.

In course of our examination of those Proclamations, MLRs and MLOs, which are discussed earlier in the Judgment, we are surprised to comprehend the extent

of gross illegalities and the reckless abuse of powers committed by the Martial Law Authorities, but without any semblance of legal authority or jurisdiction, in promulgating those Proclamations, MLRs and MLOs, so much so that our surprise has turned into bewilderment.

We found to our utter astonishment that how a Minister in the cabinet of the Government, a Chief Justice of the Supreme Court, the Chief of Staff of the Army, treated the Constitution, the supreme law of this country with so much disgrace that independent Bangladesh was virtually made subservient to a few. Khondaker Moshtaque Ahmed seized the office of President and virtually occupied Bangladesh. Justice Sayem dissolved the National Assembly and made the country fully auto-cratic, without any Parliament, even worse than what it was before August, 1947, under the British Government. Major General Ziaur Rahman B.U. psc., did not even stop there. The autocratic Government was soon degenerated into a military dictatorship. He not only continued with the illegalities committed by his predecessors in office but destroyed the basic structures of the Constitution on the false pretext of repealing the 'undemocratic' provisions of the Fourth Amendment. Besides, he took steps to give permanency to all those 'democratic' Proclamations, MLRs and MLOs by making those part of the Constitution, the most sacred instrument on which this Republic exists. During Martial Law, by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. 1 of 1977), it was sought to validate not only all the past and existing Proclamations, MLRs and MLOs but also future ones till the withdrawal of the Martial Law by inserting paragraph 3A in the Fourth schedule to the Constitution. But that was not the end.

By the Referendum Order, 1977 (Martial Law Order No. 1 of 1977), published in the Bangladesh Gazette Extraordinary dated May 1, 1977, a referendum was arranged, to ascertain the confidence of the people in Major General Ziaur Rahman, BU, psc. Accordingly, a referendum was held on May 30, 1977 and more than 98%

voters of Bangladesh showed confidence in him. But inspite of our repeated quiries, the learned Additional Attorney General, could not show any such provision for holding any referendum either in the Constitution or in the Army Act or in any other law of the land save and except the Martial Law Order 1 of 1977. Only the example of Field Marshal Ayub Khan can be cited. He along with Major General Iskender Mirza, President of Pakistan, abrogated the 1956 Constitution. Subsequently, he removed the President and became the President himself. In due course, he also held a sort of referendum with 'yes' or 'no' votes. Although the said referendum did not earn him much credibility as Hamoodur Rahman, C.J. in Asma Jilani's case saw it as a so-called mandate (page -161) but his example was followed in Bangladesh.

However, the said Referendum Order and all other Proclamations, MLRs and MLOs were ratified, confirmed and validated and were made part of the Constitution by adding paragraph 18 in the Fourth Schedule to the Constitution by virtue of Section 2 of the Constitution (Fifth Amendment) Act, 1979. As such, this amendment is a unique one and it has no parallel any where in the civilized world. Apparently, this was done only to hide illegal and unconstitutional provisions and activities and also to bring those under the blanket cover of the Constitution, the supreme and most secred Instrument of the Republic of Bangladesh. But even at the time of revoking and repealing the Proclamations, MLRs and MLOs by the Proclamation dated April 6, 1979, the Constitution was sought to be made subordinate to the 'Orders' of the President. We have no words to deplore and deprecate such conduct. Thus, in the garb of this seemingly innocent amendment, a fraud had been committed upon the people of Bangladesh and their Constitution.

These are the reasons and circumstances which compel us to declare that the Constitution (Fifth Amendment) Act, 1979, was enacted for a collateral purpose and not for any benefit to the people of Bangladesh or for enhancement of the prestige of the Republic of Bangladesh or for further refinement of the Constitution but only for

ratification, confirmation and validation of illegal provisions and illegal activities perpetrated by the illegal Martial Law Authorities and for making all those part of the Constitution as if the Fourth Schedule is dumping ground.

Since we, as Judges of the Supreme Court took oath to preserve, protect and defend the Constitution, we have no other alternative, rather, constrained to declare the said Constitution (Fifth Amendment) Act, 1979, as ultra vires to the Constitution of the Peoples Republic of Bangladesh. As such, the ratification, confirmation and validation of all Proclamations, MLRs and MLOs issued since August 15, 1975 becomes all illegal, void and non est in the eye of law.

At this stage, in conclusion, I would like to refer to the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139. One Malik Ghulam Jilani was arrested under the Defence of Pakistan Rules, 1971. His said detention was challenged under a writ of habeas corpus and the Lahore High Court admitted the petition and issued notice. But the original order was rescinded and substituted by another order issued under Martial Law Regulation No. 78 of 1969. The High Court, on consideration of the preliminary objection as to its jurisdiction, dismissed the writ petition.

Declaring the order of detention illegal, Hamoodur Rahman, C.J., held at page – 204 :

> "Reverting now to the 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 <u>they were both made by an incompetent authority and, therefore; lacked the attribute of legitimacy which is one of the essential characteristics of a valid law</u>."

In deciding the same question, Yaqub Ali, J. held at page-237 :

> "<u>During Martial Law the legislative powers of the State were usurped by the Executive and attempt made to deny to Courts the exercise of judicial functions. The usurpation of legislative powers of the Stage by the Chief Martial Law Administrator was therefore against the basic norm. The new</u>

> Legal Order consisting of Martial Law Orders, Martial Law Regulations, Presidential Orders and Presidential Ordinances was, therefore, unconstitutional and void ab initio."

His Lordship further held at page-238-9 :

> "The Martial Law imposed by Yahya Khan was, therefore, in itself illegal and all martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.
>
> Let us next examine the validity of the Presidential Orders and Ordinances issued by Yahya Khan between 26th March 1969, and 20th December 1971. He assumed the office of President on 31-3-1969 with effect from the 25th March 1969. Under Article 16 of the 1962-Constitution if at any time the President was unable to perform the functions of his office, the Speaker of the National Assembly was to act as President. Muhammad Ayub Khan could not, therefore, transfer the office of the Presidnet to Yahya Khan. Indeed, he did not even purport to do so. He simply asked him to perform his constitutional and legal responsibilities. Yahya Khan, therefore, assumed the office in violation of Article 16 of the Constitution to which he had taken oath of allegiance as Commander-in-Chief. It could not, therefore, be postulated that Yahya Khan had become the lawful President of Pakistan and was competent to promulgate Orders and Ordinances in exercise of the legislative functions conferred by the Constitution on the president. All Presidential Orders and Ordinances which were issued by him were, therefore, equally void and of no legal effect."

The Proclamations, MLRs, MLOs and the actions taken thereon by the Martial Law Authorities in Bangladesh, which were sought to be ratified, confirmed and validated by insertion of paragraph 18 to the Fourth Schedule of the Constitution, were in no better position than what are stated above. With great reverence for the learned Judges in the above case, we hold the same view.

This is how we came to consider the legalities of various Proclamations, MLRs and MLOs, proclaimed and made during the period from August 20, 1975 to April 9, 1979, which were mentioned in an omnibus manner in paragraph 18 enacted by the Fifth Amendment and inserted in the Fourth schedule of the Constitution.

No doubt the Parliament may enact any law but subject to the Constitution, the supreme law in the Republic.

Under the circumstances, we declare the Constitution (Fifth Amendment) Act, 1979, ultra virus to the Constitution for the following reasons:

> 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 Proclamation MLRs, MLOs etc. were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.
>
> Secondly, on lifting the veil of enactment, we find that the real purport and reason, 'the pith and substance' for the amendment was for ratification confirmation and validation which do not come within the ambit of 'amendment' in Article 142 of the Constitution.
>
> Thirdly, the Proclamations etc., being illegal and constitute offence, its ratification confirmation and validation by the Parliament were against common reason.
>
> Fourthly, the Constitution was made subordinate and subservient to the Proclamations etc.
>
> Fifthly, those Proclamations etc. destroyed its basic features.
>
> 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.

The effect of this declaration is that Paragraph–18, contained in Section 2 of the Fifth Amendment Act and inserted in the Fourth Schedule to the Constitution, cease to exist along with Paragraph 3A. The Proclamations, MLRs, MLOs and the acts and proceedings taken thereon become bereft of ratification, confirmation and validation made by the said Paragraph 3A and Paragraph 18. With the withdrawal of the Martial Law on April 7, 1979, those ceased to be effective but with the ceasure of Paragraph 18, the constitutional protection of those Proclamations etc. also ceased.

We have already considered the Proclamation dated August 20, 1975. Proclamation dated November 8, 1975, Proclamation dated November, 29, 1976 and also some of its amendments, other MLRs, MLOs and other Orders as discussed earlier in this Judgment, in order to understand and appreciate the reasons and purposes of the Fifth Amendment Act. We found those provisions as illegal and void. All the other provisions are also similarly justiciable.

In short, The Constutiton (Fifth Amendment) Act, 1979, protected the Proclamations, MLR, MLOs etc. and the actions taken thereon from being challenged in Court but after its declaration as void, all those Martial Law provisions and actions become justiciable before the Court.

Now let us consider the Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No. VII of 1977) (Annexure L to the writ petition)

It reads as follows:

> WHEREAS it is necessary in the public interest to make certain supplementary provisions relating to abandoned properties for the purposes hereinafter appearing;
>
> Now, THEREFORE, in pursuance of the Third Proclamation of the 29th November, 1976, read with the proclamations of the 20th August, 1975, and the 8th November, 1975 and in exercise of all powers enabling

him in that behalf, the Chief Martial Law Administrator is pleased to make the following Regulation: -

1. Short title- This Regulation may be called the Abandoned Properties (Supplementary Provisions) Regulation, 1977.
2. Regulation to override other laws- This Regulation shall have effect notwithstanding anything contained in the Constitution or in any other law for the time being in force.
3. Definitions – In this Regulation, unless there is anything repugnant in the subject or context, -----
   (a) "the Acting President's Order" means the Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972 (A.P.O. No. I of 1972;
   (b) "Court" includes the High Court and the Supreme Court exercising any jurisdiction under the Constitution or any other law;
   (c) "The President's Order" means the Bangladesh Abandoned Property (Control Management and Disposal) Order, 1972 (P.O. NO. 16 of 1972).

.....

.....

6. Certain judgments, etc., annulled – (1) Subject to the provisions of sub-paragraph (2) all judgments decisions, decrees, writs, injunctions or orders rendered passed, issued of made before the commencement of this Regulation by any Court, which declares, or has the effect of declaring any such taking over or vesting of property as is referred to in paragraph 4 to be void, illegal, improper, irregular, incorrect or otherwise inoperative or ineffective, or which direct or require the restoration return, transfer or other disposition of any property as has been so taken over or issued, shall stand annulled and shall be of no effect as if such judgments, issued or made

(2) Annulment of any judgment, decision, decree, writ,

injunction or order under sub-paragraph (1) shall not disturb or otherwise affect the right or interest of any person in any property which, before the commencement of this Regulation, has been actually and effectively restored or transferred to such person any delivery of possession or other appropriate means in pursuance of such judgment, decision, decree, writ, injunction or order; and such person shall exercise and have his rights and interests in the property as so restored and transferred as if no such annulment had taken effect in respect of such property.

7. Regulation not to effect certain tights, etc., of Government.— The provisions of this Regulation shall not limit restrict or otherwise affect the right power or authority of the Government to transfer or in any manner dispose of any property or any right or interest in any property, which has vested in it under this Regulation, the President's Order or any other law.

DACCA
The 5th October, 1977

ZIAUR RAHMAN BU,
MAJOR GENERAL
Chief Martial Law Administrator.

We reiterate what was found by our Apex Court in respect of MLR VII of 1977 in the case of Halima Khatun V. Bangladesh 30 DLR (SC) (1978) 207: It was held in the Halima Khatun's case:

(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.

We also reiterate the findings of our Appellate Division in the case of Nasiruddin V. Government of the People's Republic of Bangladesh 30 DLR AD (1980) 216 in respect of MLR VII of 1977:

(1) If any property is taken over as an abandoned property, notwithstanding any defect, it would be deemed to be vested in the Government.

(ii) This taking over or vesting shall not be called in question on any ground whatsoever before any authority or Court.

(iii) All suits, appeals, petitions or other legal proceedings pending before the commencement of this Regulation in any Court would abate.

(iv) All judgments, decrees, writs, injunctions, etc. passed before the commencement of the Regulation by any Court stood annulled and would be of no effect.

This is a total negation of the principle of the Rule of Law and violative of the fundamental right to property. Besides, this Regulation not only sought to oust the jurisdiction of the Court but also annulled the judgments and decrees passed by the Court.

In this connection it is pertinent to refer to the case of Raymond V. Thomas 91 US 712

In the said case of Raymond V. Thomas 91 US 712, the attempt of a military commander to annul a decree of a Court was declared void. The U.S Supreme Court held :

> "It was an arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. <u>It is an unbending rule of law that the exercise of military power where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires".</u> (The underlinings are mine) (Quoted from Willoughby:

The Constitutional Law of the United States. Vol. III, Second Edition, Page 1583).

Under such circumstances, we are of the opinion that this MLR VII of 1977 violated the Constitution and also changed its basic character, as such ultra vires to the Constitution.

PART XXXV : Doctrine of Necessity :

None of the parties argued much on the doctrine of necessity. The learned Additional Attorney General and Mr. Akhter Imam, Advocate, appeared to be satisfied by putting all the blames on the Fourth Amendment of the Constitution for the Proclamation of Martial Law in Bangladesh but neither could reply to our various quaries nor argued much on the said very Amendment. Their further arguments were that ratification and confirmation by the Fifth Amendment made all those Martial Law Proclamations etc as serene as the Bible as if its legality and validity are all above board and even beyond the reach of the Constitution and also the Court, that the said Amendment is the cure for all short-comings, if any, that those Martial Law Proclamations etc. and the Fifth Amendment not being challenged in all these years, those are accepted by the people of Bangladesh by acquiescense.

Although we found all those arguments, raised on behalf of the respondents, discussed in details above, as misconceived and bereft of all substance but we are neither in oblivion nor unmindful of the solemn and onerous responsibility that befall and rests upon the Courts, to dispense justice strictly in accordance with law but at the same time to keep a keen eye to avoid any confusion or to create a greater state of chaos, rather the Courts should use all endevours to avoid all such predicaments, if it is possible, without of course, compromising with illegalities.

We have already discussed above how Khandaker Moshtaque Ahmed, a Minister of the Government of Bangladesh with his band of army officers, serving as well as retired, seized the office of President and the Government of Bangladesh, how

Justice Sayem, the Chief Justice of Bangladesh, assumed the office of President on nomination and how he nominated Major General Ziaur Rahman B.U.psc., as the President of Bangladesh. On being assumed the office of Minister and the Office of the Chief Justice respectively, they obviously took oath to protect and uphold the Constitution. Similarly, Major General Ziaur Rahman B.U. psc., as a Military Commander must have taken oath under the Army Act at the time of his appointment as an officer under the Government of Bangladesh, to 'be faithful and bear true allegiance to the Cosntitution'. But unfortunately all of them betrayed their oaths of allegiance to the Constitution as well as their country which reposed upon each of them such confidence and such solemn responsibility and bestowed upon them such high positions in the Republic so that they could serve the Republic better not only in time of peace but also during turmoil and unrest when their loyal and faithful services would be needed most. But all of them not only failed their country but also betrayed the trust reposed upon them, in not only disobeying, rather, disfiguring the Constitution.

It cannot be believed that Khandaker Moshtaque Ahmed, a Minister, Justice Sayem, the Chief Justice of Bangladesh and Major General Ziaur Rahman, B.U. psc., Chief of Army Staff of Bangladesh, did not know that under Article 48 of the Constitution, they were not eligible to become the President of Bangladesh, still all of them, in defiance and violation of the Constitution, seized the office of President, the highest position in the Reupblic by force thereby apparently all of them committed the offence of sedition.

It cannot be believed that they were not aware that the Constitution or the laws in Bangladesh do not provide for Martial Law or the office of the Chief Martial Law Administrator but they in violation of the Constitution merrily assumed such position, and continued to issue Proclamations of Martial Laws, Martial Law Regulations and the Martial Law Orders as if Bangladesh was a conquered country.

In this connection, the observations of Yaqub Ali, J. in the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139 at pages -237-239 are worth reading:

> "In this connection, we may examine also the nature of Matial Law imposed by Yahya Khan on the 26th March 1969, for lest it is said that the Martial Law Regulations, and Martial Law Orders were not laws in juristic sense, but they derived their validity from the Proclamation of the 26th March 1962. Martial Law is of three types: (i) the law regulating discipline and other matters determining the rule of conduct applicable to the Armed forces. We are not concerned with it; (ii) law which is imposed on an alien territory under occupation by an armed force. The classic function of this type of Martial Law was given by the Duke of Willington when he stated in the House of Lords that "Martial Law is neither more nor less than the will of the General who commands the Army. In fact Martial Law means no law at all." We are also not concerned with this type of Martial Law; and (iii) law which relates to and arises out of a situation in which the Civil power is unable to maintain law and order and the Military power is used to meet force and recreate conditions of peace and tranquility in which the Civil power can re-assert its authority. The Martial Law Regulations and Martial Law Orders passed under this type of Martial Law must be germane only to the restoration of peace and tranquillity and induced during the period of unrest.
>
> In practice, the Martial Law imposed by Yahya Khan belonged to the second category. A large number of Martial Law Regulations and Martial Law Orders passed by him between 25th March 1969, and 20th March 1971, had no nexus with civil disturbances. In fact, peace and tranquility was restored in the country within a few days of his stepping in. Martial Law should, therefore, have come to an end but the entire structure of institutions of Pakistan including superior Courts were made to appear by Yahya Khan as merely the expression of his will which a victorious military commander imposes on an alien territory to regulate the conduct and behaviour of its subjugated populace. Neither Pakistan was a conquered territory, nor the Pakistan

Army commanded by Yahya Khan was an alien force to justify the imposition of this type of Martial Law.

The Martial Law imposed by Yahya Khan was, therefore, in itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.

Let us next examine the validity of the Presidential Orders and Ordinances issued by Yahya Khan between 26th March 1969, and 20th December 1971. He assumed the office of President on 31.3.1969 with effect from the 25th March 1969. Under Article 16 of the 1962-Constitution if at any time the President was unable to perform the functions of his office, the Speaker of the National Assembly was to act as President. Muhammad Ayub Khan could not, therefore, transfer the office of the President to Yahya Khan. Indeed, he did not even purport to do so. He simply asked him to perform his constitutional and legal responsibilities. Yahya Khan, therefore, assumed the office in violation of Article 16 of the Constitution to which he had taken oath of allegiance as Commander-in-Chief. It could not, therefore, be postulated that Yahya Khan had become the lawful President of Pakistan and was competent to promulgate Orders and Ordinances in exercise of the legislative functions conferred by the Constitution on the President. All Presidential Orders and Ordinances which were issued by him were, therefore, equally void and of no legal effect."(The underlinings are mine).

We are in total agreement with the legal position in taking over of the State apparatus by a usurper, as lucidly explained by Yakub Ali, J., above. In Bangladesh, the usurpers even went one step further. They started with the murder of the President and his family members. Thereafter, they seized the Government, issued the Martial Law Proclamation, ousted the jurisdiction of the Supreme Court. Their successors statrted to govern the country by Martial Law Regulations and Orders in dictatorial manner. This continued till April 7, 1979.

Under such circumstances, we held ealier that such assumption of the office of President and CMLA, the Proclamations, MLRs and MLOs, discussed above, were all illegal, void ab initio and non est in the eye of law.

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's 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 and diged 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 Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherewise 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." (The underlings are mine).

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 month's 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. But in that case Munir, C.J., 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 the consequences, 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." (The underlinings are mine).

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 standared 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 at page-358 FF:

> "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 soverign 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."
> (The underlinings are mine).

It should be noted that earlier to the Governor General's 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 invlid law relates, the principle governing validation being that validation being itself legislation you cannot validate what you cannot legislate upon. Threfore 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." (The underlinings are mine).

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." (The underlinings are mine).

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." (The underlinings are mine).(Quoted from Leslie Wolf-Phillips: Constitutional Legitimacy at page- 11).

This is how the doctrine of necessity made its appearence in order to salvage what was left of the normal constitutional process in Pakistan at that time in 1955.

The next case we shall consider is Madzimbamuto V. Lardner-Burke (1968) 3 All ER 561 PC. In that case in Souhern Rhodesia, on November 6, 1965, the order of detention of the appellant's husband was made. On November 11, unilateral declaration of independence was made. On the question of the doctrine of necessity, Lord Reid, for the majority of the Board referring to Grotius De Jure Belli Et. Pacis, observed at page-577 DE:

> "It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognizes the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the sovereignty of Her Majesty in the Parliament of the United Kingdom."

His Lordship further observed at page-578 E F:

> "Her Majesty's judges have been put in an extremely difficult position. But the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorized by the United Kingdom Parliament, by the introduction of a doctrine of necessity which

> in their lordships' judgment cannot be reconciled with the terms of the Order in Council. It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping government, to such extent as may be necessary for that purpose."

In declaring the order of detention invalid, his Lordship held at page -578 I:

> " … it should be declared that the determination of the High Court of Souhern Rhodesia with regard to the validity of emergency powers regulations made in Southern Rhodesia since Nov. 11, 1965, is erroneous, and that such regulations have no legal validity, force or effect."

Lord Pearce in his dissenting judgment also held at page-579 B to E:

> "…… in legal terms Rhodesia was still a colony over which the United Kingdom Parliament had sovereignty. That Parliament still had the legal power to cut down the 1961 Constiution and alter the status of Rhodesia to that of a colony governed from the United Kingdom through a Governor. While I appreciate the careful reasoning of BEADLE, C.J., by which he seeks to say that the United Kingdom Parliament had no such power, I cannot accept its validity.
>
> Likewise I cannot accept his argument that the de facto control by the illegal government gave validity to all its acts as such so far as they did not exceed the powers under the 1961 Constitution. The de facto status of sovereignty cannot be conceded to a rebel government as against the true Sovereign in the latter's courts of law. The judges under the 1961 Constitution therefore cannot acknowledge the validity of an illegal government set up in defiance of it. I do not agree with the view of Macdonald, J.A., that their allegiance is owed to the rebel government in power. It follows that the declaration of emergency and the regulations under which it is sought to justify the detention of the apellant's husband are unlawful and invalid."

Lord Pearce, however, propounded a further legal proposition at page-579 F:

> "I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised 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 orderly 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." (The underlinings are mine).

This acceptance of the acts as valid but done without lawful validity by Lord Pearce in his dissenting judgment, were approved and consistently followed in almost all the decisions since Asma Jilani in 1972 by the Supreme Court of Pakistan in bestowing restricted or liberal validity, as the case may be, on the actions of the Army Rulers in Pakistan from time to time.

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 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. ……"

Then the Hon'ble Chief Justice fell back on the doctrine of necessity and held at page-206-7

> "I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequence 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 invoked 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 that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, nothwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization".

But his Lordship not only accepted the formulation of Lord Pearce but rather, extended it further, held at page-207:

> "Applying this test I would condone (1) all transactions which are past and closed, for, no useful purpose can be served by re-opening 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 the 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 its legitimate objectives. I would not also 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 ."

The Hon'ble Chief Justice in declaring both the orders of detention illegal, ultimately held at page-207:

> "I am not in a position , therefore, to say that Marrial Law Regulation No. 78 was necessary for the ordinary orderly running of the State or for promoting the good of the people of West Pakistan. This Regulation cannot thus in my opinion, be justified even on the ground of necessity."

Yaqub Ali J., in the same case, in considering the question of State necessity held at page-239:

> "The next question which arises for determination is whether these illegal legislative acts are protected by the doctrine of State necessity. The Laws saved by this rule do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions that the recognition given by the Court is proportionate to the evil to be averted, it is transitory and temporary in character-does not imply abdication of judicial review. In the Southern Rhodesian case Madzimbamuto V. Lardner Burke only those legislative acts of the de facto

> Government of Smith were recognized which were necessary for the ordinary, orderly running of the Courts and which did not defeat their rights of the citizens and in its operation did not directly or indirectly entrench the usurpation (Fieldsend, A. J.A.) Acts which are beneficial to the Society and provide their welfare, such as, appointment of Judges and other public functionaries by Yahya Khan will also be covered by the doctrine.
>
> It has been noticed that both President's Order 3 of 1969 and Martial Law Regulation 78 of 1971 were intended only to deny to the Courts the performance of their judicial functions. No chaos or anarchy would have taken place in the Society if these 'laws' were not promulgated. Both Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regulation 78 are, therefore, not protected by the doctrine of State necessity." (The underlinings are mine).

At this stage, we would observe that the doctrine of necessity is not a normal rule but it is an exception to the normal rule, as such, can be called upon only in an exceptional circumstances, in order to remedy a lapse or illegality which could not be settled in any other way but such a lapse or illegality must be remedied in the greater interest of the State and its citizens but not to bestow benefit upon the usurpers and the dictators. If the said doctrine is not invoked the interest of the State as well as its citizens could be seriously prejudiced and harmed only in such circumstances it can be invoked. In other words, this doctrine can only invoked, when there is no other way out and most certainly, not in a matter of course.

In general, if a usurper wrecks the Constitution or interferes with the normal legal order of the country, on the very first opportunity such an usurper and his collaborators should be suitably punished under the law. But this depends on the awareness of the people of their rights. Nothing normally can be done, in the Third world countries, even if the people at large and their country suffers because of the

illegal activities of the usurpers. However, if the existence of the national fabrics are threatned then and only then the doctrine of necessity can be invoked as a last resort.

Next we shall consider the case of Begum Nusrat Bhutto V. Chief of Army Staff PLD 1977 SC 657.

It appears that on July 5, 1977, the Chief of the Army Staff imposed Martial Law all over Pakistan. He also removed the Prime Minister from his office and dissolved the National and Provincial Assemblies. All these were done obviously in violation of 1973 Constitution of Pakistan.

In this case, the detention of Mr. Zulfikar Ali Bhutto and ten others were challenged. However, in considering the order of their detention, the validity and legal effect of the imposition of Martial Law was considered.

It appears from the Judgment that the first general election in Pakistan under the 1973 Constitution, was held on March 7, 1977, followed by whole-sale chaos, agitation and unrest all over Pakistan, as such, Martial Law was imposed on July 5, 1977.

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 Zia ur Rahman.

With great respect for the learned Judges of the Supreme Court of Pakistan, we are unable to agree with their views on democracy, morality and legality. However, that is a different country and they certainly do know what is best for them.

We must remember that democracy is a way of life. It is of later origin and of modern innovation with the growth of civilisation. More the people grow civilized, more they become aware and feel duty bound to their civic duties and obligations towards the Republic and also to their own corresponding rights.

In by gone days, the Rulers, whatever might have been their title, used to rule by force. The people accepted their rule out of fear and perhaps also due to habit. Then came the King or Monarch. Apart from might, they used to rule by divine right as a justification for their rule upon the people of the Kingdom. The Roman Ceasers and Emperors and also the Kings in Europe including England, used to govern their Kingdoms by such divine rights.

The learned Judges of the Supreme Court of Pakistan also referred to the argument that one is permitted to eat which is forbiddin, namely, dead meat or the flesh of swine if one is forced by necessity but the learned Judges of the Supreme Court, although endowed with excellent reason and wisdom, failed to perceive that the justification for such necessity shall be finally decided by God himself, the wisest of all Judges, on the day of Judgment, but we being the mere mortals with our borrowed and very meagre knowledge, are unable to judge it so either way. Besides, eating of dead meat or the flesh of swine and seizing of State apparatus by sheer force are not the same thing, rather for apart. One concerns only one person or two but the other dominates the country and subjugates its entire population. There can not be any comparison between the two. The learned Judges possibly forgot that on the demise of our Prophet Hajrat Mohammad (Sm) in 632 A. D. in Medina, a great chaos and confusion ensued as to who was going to be the next head of State. Even in those early days of Islam, none of the great leaders of that time or military commanders tried to seize power by force out of any ‘necessity’, rather, even in the face of such an extreme uncertainty, the people of Medina elected Hajrat Abu Bakr Siddique (R) as the leader of the believers (Amir ul Momenin), but not their King, although at that first quarter of the seventh century, title

of King would have been the only appropriate position. But the democratic spirit displayed in 632 AD by the Muslims was unique and beyond the perception of the then known world. The Amir ul Momenin, of necessity, had to deal with many a great Kings and Emperors of his time but no 'state necessity' was felt to crown himself as King.

With great respect, we are constrained to differ from the views expressed by the Supreme Court of Pakistan in Begum Bhutto's case. Some how it reminds us of the judgment given by Chief Baron Fleming and Baron Clarke, in Bates's case (the case of Impositions) in 1606. Fortunately we are now in the 21st century and we must learn to live in this century.

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 :

> "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 invaluable with 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 next we shall consider the case of Sh. Liquat Hussain V. Federation of Pakistan PLD 1999 SC 504. In this case Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998, whereby the civilians are to be tried by the Military Courts for the civil offences, was declared unconstitutional. On 'the Doctrine of necessity, Ajmal Mian, C.J. held at para-25:

> "……In my humble view, if the establishment of the Military Courts under the impugned Ordinance is violative of the Constitution, we cannot sustain the same on the above grounds or on the ground of expediency. Acceptance of the Doctrine of Necessity by this Court inter alia in the case of The State v. Dosso and another (PLD 1958 SC (Pak.) 533), turned out to be detrimental to the evolution and establishment of a democratic system in this Country. It may be observed that some critics feel that the same had encouraged and caused the imposition of the Martial Law in this country more than once, which adversely

> affected the attainment of maturity by the Pakistani nation in the democratic norms. As a fall out, our country had been experiencing instability in the polity. The Doctrine of Necessity cannot be invoked if its effect is to violate any provision of the Constitution." (The underlinings are mine).

We have also gone through the Judgment of Irshad Hasan Khan, C.J. , in the case of Syed Zafar Ali Shah V. General Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869. His Lordship dealt with the doctrine of necessity at para - 252-266. The concluding para-266 at page 1203 reads as follows :

> "266. It will be seen that the 'doctrine of necessity' is not restricted to criminal prosecution alone. However, the invocation of the doctrine of State necessity depends upon the peculiar and extra-ordinary facts and circumstances of a particular situation. It is for the Superior Courts alone to decide whether any given peculiar and extraordinary circumstances warrant the application of the above doctrine or not. This dependence has a direct nexus with what preceded the action itself. The material available on record generally will be treated at par with the "necessity/State necessity/continuity of State" for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy. ……"(The underlinings are mine).

Although we agree with the above views of his Lordship but with respect, unable to agree to his conclusions in the facts of that case.

We, however, accept the views of Hamoodur Rahman, C.J. and Yakub Ali, J. in Asma Jilani's case and also the views expressed by Ajmal Mian, C.J., in Sh. Liaquat Hussan's case and that of Irshad Hasan Khan, C.J., in Syed Zafar Ali Shah's case, as narrated above.

We have already found earlier that the Constitution (Fifth Amendment) Act, 1979, ratified, confirmed and validated all those Proclamations, MLRs and MLOs and the actions taken on the basis of those Proclamations etc. but since all those

Proclamations etc. were illegal, its ratification, confirmation and validation, by the Fifth Amendment was illegal and void. Since the very purpose and object of the enactment of the Fifth Amendment was illegal and void ab initio, so also the Fifth Amendment itself, as it was enacted for a collateral purpose. Besides, since the Martial Law Proclamations etc. were void and non-est, there were nothing for the Second Parliament to ratify or confirm or validate by the subsequent Fifth Amendment.

However, we shall consider next whether any of those Proclamations come within the ambit of the doctrine of necessity.

We have already examined Proclamations dated 20.8.1975. We have found that Khandaker Moshtaque Ahmed was a cabinet Minister of the Government of Bangladesh. As a Minister, he took oath to preserve, protect and defend the Constitution. He was a Minister even in the morning of August 15, 1975. On that morning, the President of Bangladesh was murdered. As such, in accordance with the provisions of Article 55 of the Constitution as amended by the Constitution (Fourth Amendment) Act, 1975, the Vice-President ought to have become the Acting President until a new President was elected. This was the legal and constitutional position on that morning but Khondaker Moshtaque Ahmed, by a Proclamation issued on August 20, 1975, changed certain provisions of the Constitution to suit his purpose and to give legal coverage to the seizure of office of the President of Bangladesh. His such issuance of the Proclamation amending the Constitution and seizure of the Office of President were all done not only in violation of the Constitution but also constituted offence under the law. As such, the said proclamation was void and non est in the eye of law, so the question of its condonation does not arise. It was illegal and void for all time to come. But on the principles propounded by Lord Pearce in Madzimbamuto, Hamoodur Rahman, C.J and Yaqub Ali; J. in Asma Jilani and Ajmal Mian, C.J. in Sh. Liaquat Hossain's Case, we would condone only the acts done during the period from August

15, 1975 to November 6, 1975, as past and closed transactions although those were neither legal nor valid, rather were also void.

It appears that on 8.11.1975, Justice Abusadat Mohammad Sayem, the then Chief Justice of Bangladesh, issued a Proclamation. By that Proclamation, he proclaimed that he assumed the office of President of Bangladesh on and from November 6, 1975. He also assumed the powers of the Chief Martial Law Administrator and modified the Proclamation issued earlier on August 20, 1975. He also issued Proclamations, Martial Law Regulations and Martial Law Orders from time to time.

Justice Sayem as the Chief Justice of Bangladesh, took oath to preserve, protect and defend our Constitution. He had neither legal nor constitutional right to assume the office of President or was in a position to exercise the so called powers of the Chief Martial Law Administrator. It may be mentioned here that the Constitution or the Army Act or any law of the land do not envisage Martial Law or the Office of the Chief Martial Law Administrator. As such, issuance of Proclamation, its amendments, Martial Law Regulations and Martial Law Orders either as a President or as a CMLA or both were all without jurisdiction, illegal, void and non est in the eye of law. Still, on the basis of discussions made above, we would condone the acts done during the period from 6.11.1975 to 21.4.1977. We, however, are not going to condone the amendments which changed the fundamental principles and basic structures of the Constitution. But we shall be able to condone only those amendments which did not change the basic structure of the Constitution and which were brought to our notice. It may also be noted that some such changes made in the Constitution, were brought to our notice on behalf of the petitioners.

It may be noted that till 1975, four constitutional amendments were made. The Fourth Amendment made provisions for one National Party and transformed the Parliamentary form of Government into one of Presidential form of Government.

This was done as a political decision on the affirmative votes of 297 Members of Parliament out of 300. This figure was stated by the learned Advocate for the petitioner and the learned Additional Attorney General submitted that 2/3 Members opposed the said Bill out of 300 Members.

Although, Shahabuddin Ahmed, J. (as his Lordship then was) was very critical about the Fourth Amendment, in Anwar Hossain Chowdhury's case 1989 BLD (spl)1, but with greatest respect and with utmost humility to the learned Judge,we could not be that uncharitable in our opinion since firstly, the Fourth Amendment is not the issue before us, Secondly, the said amendment was passed by a sovereign Parliament, admittedly by overwhelming majority of the representatives of the people, and thirdly, the Fourth Amendment was never challenged before any Court even obliquely. As such, we feel obliged to hold back and reserve our own opinion in this respect specially when it was not the issue in this case although the said observation was referred to us by the learned Advocates for the respondents in support of their contention on the Fourth Amendment of the Constitution by way of a very poor and out of context justification for the Proclamation of Martial Law in Bangladesh but failed to notice that Shahabuddin Ahmed, J., in his said very judgment was very critical about Martial Law also.

Still, we would condone those amendments effected by the Proclamations made by Justice Sayem which deleted most of the provisions of the Fourth Amendment, those which made inroads in the original Constitution. Since the said Fourth Amendment was made by the Parliament, it could have been reversed by the said Parliament also. But the illegality in deleting the Proviso to Article 38 of the original Constitution by the Second Proclamation (Sixth Amendment) Order, 1976 (Second Proclamation Order III of 1976) is not condoned as it was in the original unamended Constitution. Besides, the said omission would tend to change the secular character of the Constitution which was one of its basic features.

Justice Sayem, however, left chapters I and II in Part IV of the Constitution with regard to the office of President unchanged from what was done by the Fourth Amendment, as if that was the only justification for the said Amendment. This was also admitted by the learned Advocates for the respondents and also stated in the book 'Bangladesh Constitution: Trends And Issues'. It required another 14(fourteen) years by the Constitution (Twelfth Amendment) Act, 1991, to bring it in its present position. Besides, although, once the constitution of the Supreme Court was bifurcated by separating the High Court and inserting the provision for consultation with the Chief Justice by the President in respect of appointment of the Judges of the Supreme Court and High Court as was in the Original Constitution under Articles 95 and 101, by bringing amendments under the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976), yet the said provision requiring consultation with the Chief Justice was again deleted by the subsequent Second Proclamation (Tenth Amendment Order), 1977. The specific provision for consultation in respect of appointment of Judges, though re-introduced by Justice Sayem, was again omitted through another amendment by his successor in Office of President and CMLA, Major General Ziaur Rahman, BU., psc. deleting the provision requiring consultation with the Chief Jusitce of Bangladesh, in appointing Judges of the Supreme Court.

It appears that Major General Ziaur Rahman, B.U., psc., was made one of the Deputy Chief Martial Law Administrators by the Proclamation issued by Justice Sayem on November 8, 1975. By the Proclamation issued by Justice Sayem on November 29, 1976, the office of the CMLA, was again handed over to Major General Ziaur Rahman B.U., psc., who was the Chief of Army Staff at that time. But he must have taken oath under the Army Act to be faithful and bear true allegiance to the Constitution, as noted by Hamoodur Rahman, C.J., in Asma Jilani's case in respect of General Yahya Khan. In this respect the learned Additional Attorney General or Mr.

Akhter Imam, Advocate, could not show any legal validity of the aforesaid Proclamation either under the Constitution or under the Army Act or under any law for the time being in force. Their only argument was that, good or bad, legal or illegal, white or grey, those were ratified and confirmed by the Fifth Amendment, as such, remain beyond further consideration even by the Supreme Court, as spelt out in the said Amendment, specially when it was not challenged for such a long time.We do not agree. The answer has been aptly given by Denning LJ in Packer 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 never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."

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.

Mr. Akhter Imam, Advocate, however, argued half-heartedly that under Martial Law Jurisprudence, developed in this sub-continent, the Martial Law Proclamations, Martial Law Regulations and Martial Law Orders, are always kept under the Constitutional protection. We are not aware of any such Martial Law Jurisprudence either under our Constitution or any other laws of the land. The learned Advocate could not refer to the views of any Jurist of fame in support of his such argument.

We have already held that all the Martial Law Proclamations including the one issued on November 29, 1976, were not issued under any legal authority and since we refuse to acknowledge Martial Law as legally enforceable provision and a source of law and the office of the Chief Martial Law Administrator as a lawful office, both are non-existent in Jurispruduce and we emphatically hold that there is no such concept as Martial Law Jurisprudence or Martial Law culture. As such, in any view of

the matter, handing over of the office of Martial Law Administrator to Major General Ziaur Rahman B.U., psc. was without any lawful authority.

Under such circumstances, we are unable to accept his argument as to the existence of the so called Martial Law Jurisprudence or Martial Law culture, in order to give validity to those.

As such, the legality of the Proclamation dated November 29,1976, is next to nothing. It cannot confer any office or power on any body, because such way of transferring authority which was not in existence either under the Constitution or under any law prevalent at the time, cannot be done. We have already found and held that neither Martial Law nor the office of Martial Law Administrator had or has any existence in our law and Jurisprudence. As such, the handing over of the office of the Martial Law Administrator in favour of Major General Ziaur Rahman B.U. , psc., was illegal and void. Under the circumstances, the Proclamations, MLRs and MLOs issued during the period from November 29, 1976 to April 9, 1979, were all illegal, void and non est in the eye of law.

The same goes for all the Martial Law Regulations and Martial Law Orders, issued from the period of November 6, 1975 to November 29, 1976. But we condone the illegality of the Political Parties Regulation, 1976 (Martial Law Regulation No. XXII of 1976) published in Bangladesh Gazette on July 29, 1976, with amendments. This was done on the third ground for condonation as propounded by Hamoodur Rahman, C.J. in Asma Jilani's case, as the same was in respect of a right graranteed under the Original Constitution and to promote the good of the people. We, however, condone the illegalities in respect of the actions taken on all the MLRs and MLOs, as past and closed transactions during the said period. Besides, we also condone various Ordinances passed during the above period.

It appears that Justice Abusadat Mohammad Sayem by his Order No. 1/1/77-CD(CS)01 dated April 21, 1977, nominated Major General Ziaur Rahman, B.U.

Psc. to be the President of Bangladesh. This Order was published in the Bangladesh Gazette Extraordinary on April 21, 1977.

This kind of nomination in the Office of President is unheard of. Even nomination to the office of President (or Chairman) of a mere local union council is not permissible but it was made possible in the highest office of the Republic of Bangladesh. It was done in violation of the Constitution of Bangladesh, and as such, it was illegal, void ab initio and non-est in the eye of law.

Lieutenant General Oliver Cromwell even after waging war for more than eleven years, could only become a Lord Protector in 1653 but Khandaker Moshtaq Ahmed, Justice Sayem and Major General Ziaur Rahman BU, could attain the highest office in Bangladesh apparently without much efforts.

It may be noted that on April 21, 1977, Major General Ziaur Rahman, B.U., as the Chief of Army Staff, was in the service of the Republic, as such, was oath bound to bear true allegiance to the Constitution but he assumed office of the President of Bangladesh, in utter violation of the said very Constitution.

Under such circumstances, since he assumed the office of President in violation of the Constitution and since the Martial Law Proclamations and MLRs and MLOs were made in violation of the Constitution and the Army Act or any other law prevalent at the relevant period of time, those Proclamations etc. were all illegal, void and non-est in the eye of law.

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.

Now let us consider the basic changes in the Constitution made during the period from August 15, 1975 to April 9, 1979, as far as we could gather from the Constitution and Bangladesh Gazette.

The changes made by the Proclamation dated August 20, 1975 :

1. Article 48
2. Article 55
3. Article 148
4. Form 1 of the Third Schedule.

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 VIA 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 the following changes in the Constitution, amongst others :

Original Constitution	**Proclamations (Amendment) Order, 1977**
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	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 war for national independence],

the independent, sovereign People's Republic of Bangladesh;	established the independent, sovereign People's Republic of Bangladesh;
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;	2. **Second Paragraph of the Preamble:** 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:** Citizenship of Bangladesh shall be determined and regulated by law; citizens of Bangladeshshall be known as Bangalees.	3. **Article-6:** (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:** (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 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.	4. **Article-8:** [(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 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 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.
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.	5. **Article-9**: 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**: 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.	6. **Article-10**: Steps shall be taken to ensure participation of women in all spheres of national life.
7. **Article-12**: The principle of secularism shall be realized by the examination of- (a) communalism in all its forms; (b) the granting by the State of political status in favour of any religion; (c) the abuse of religion for political purposes; any discrimination against, or persecution of, persons practicing a particular religion.	7. **Article-12** was deleted.
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 solidatiry.]

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.
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

Besides, a new paragraph being paragrape 3A was added to the Fourth Schedule of the Constitution in order to validate all Proclamations, MLRs and MLOs and all actions taken thereon since August 15, 1975, till revocation of the Proclamations and the withdrawal of the Martial Law (Annexure-L).

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. IVof 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.

The changes are as follows :

Original Constitution	**Proclamations (Amendment) Order, 1978**
১। প্রস্তাবনার প্রথম অনুচ্ছেদঃ আমরা, বাংলাদেশের জনগণ, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষনা করিয়া জাতীয় মুক্তির জন্য ঐতিহাসিক সংগ্রামের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতম্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি।	**১। প্রস্তাবনার প্রথম অনুচ্ছেদঃ** আমরা, বাংলাদেশের জনগণ, ১৯৭১ খ্রীষ্টাব্দের মার্চ মাসের ২৬ তারিখে স্বাধীনতা ঘোষনা করিয়া জাতীয় স্বাধীনতার জন্য ঐতিহাসিক যুদ্ধের মাধ্যমে স্বাধীন ও সার্বভৌম গণপ্রজাতন্ত্রী বাংলাদেশ প্রতিষ্ঠিত করিয়াছি ;
২।প্রস্তাবনার দ্বিতীয় অনুচ্ছেদঃ আমরা অংগীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগনকে জাতীয় মুক্তিসংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণোৎসর্গ করিতে উদ্বুদ্ধ	**২।প্রস্তাবনার দ্বিতীয় অনুচ্ছেদঃ** আমরা অংগীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগণকে জাতীয় স্বাধীনতার জন্য যুদ্ধে আত্মনিয়োগ ও বীর শহীদদিগকে প্রানোৎসর্গ করিতে উদ্বুদ্ধ

করিয়াছিল- জাতীয়তাবাদ, সমাজতত্ম, গণতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূল নীতি হইবে ঃ	করিয়াছিল সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গণতন্ত্র এবং সমাজতন্ত্র অথ্যাৎ অর্থনৈতিক ও সামাজিক সুবিচারের সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে ;
৩। অনুচ্ছেদ-৬ঃ বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নাগরিকত্ব নির্ধারিত ও নিয়ন্ত্রিত হইবে; বাংলাদেশের নাগরিকগন বাংগালী বলিয়া পরিচিত হইবেন।	**৩। অনুচ্ছেদ-৬ঃ** (১)বাংলাদেশের নাগরিকত্ব আইনের দ্বারা নির্ধারিত ও নিয়ন্ত্রিত হইবে ।
৪।অনুচ্ছেদ-৮ঃ (১) জাতীয়তাবাদ, সমাজতন্ত্র, গনতন্ত্র ও ধর্মনিরপেক্ষতা-এই নীতিসমূহ এবং তৎসহ এই নীতিসমসূহ হইতে উদ্ভুত এই ভাগে বর্নিত অন্য সকল নীতি রাষ্ট্রপরিচালনার মূল নীতি বলিয়া পরিগনিত হইবে। (২) এইভাগে বর্ণিত নীতিসমূহ বাংলাদেশ-পরিচালনার মূলসূত্র হইবে, আইন প্রনয়ণকালে রাষ্ট্র তাহা প্রয়োগ করিবেন, এই সংবিধান ও বাংলাদেশের অন্যান্য আইনের ব্যাখ্যাদানের ক্ষেত্রে তাহা নির্দেশক হইবে, তবে এইসকল নীতি সকল আদালতের মাধ্যমে বলবৎযোগ্য হইবে না।	**৪।অনুচ্ছেদ-৮ঃ** (১) সর্ব-শক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ,গণতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচার-এই নীতি সমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ধৃত এইভাবে বর্ণিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূলনীতি বলিয়া পরিগণিত হইবে । (১ক) সর্ব-শক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাসই হইবে যাবতীয় কার্যাবলীর ভিত্তি। (২) এই ভাগে বর্ণিত নীতিসমূহ বাংলাদেশ-পরিচালনার মূলসূত্র হইবে, আইন-প্রণয়নকালে রাষ্ট্র তাহা প্রয়োগ করিবেন, এই সংবিধান ও বাংলাদেশের অন্যান্য আইনের ব্যাখ্যাদানের ক্ষেত্রে তাহা নির্দেশক হইবে এবং তাহা রাষ্ট্র ও নাগরিকদের কার্যের ভিত্তি হইবে, তবে এই সকল নীতি আদালতের মাধ্যমে বলবৎযোগ্য হইবে না।

৫।অনুচ্ছেদ-৯ঃ ভাষাগত ও সংস্কৃতিগত একক সত্তাবিশিষ্ট যে বাঙালী জাতি ঐক্যবদ্ধ ও সংকল্পবদ্ধ সংগ্রাম করিয়া জাতীয় মুক্তিযুদ্ধের মাধ্যমে বাংলাদেশের স্বাধীনতা ও সার্বভৌমত্ব অর্জন করিয়াছেন, সেই বাঙালী জাতির ঐক্য ও সংহতি হইবে বাঙালী জাতীয়তাবাদের ভিত্তি।	**৫।অনুচ্ছেদ-৯ঃ** রাষ্ট্র সংশ্লিষ্ট এলাকার প্রতিনিধিগণ সমন্বয়ে গঠিত স্থানীয় শাসন সংক্রান্ত প্রতিষ্ঠান সমূহকে উৎসাহ দান করিবেন এবং এই সকল প্রতিষ্ঠানসমূহকে কৃষক, শ্রমিক এবং মহিলাদিগকে যথাসম্ভব বিশেষ প্রতিনিধিত্ব দেওয়া হইবে।
৬।অনুচ্ছেদ-১০ঃ মানুষের উপর মানুষের শোধন হইতে মুক্ত ন্যায়ানুগ ও সাম্যবাদী সমাজলাভ নিশ্চিত করিবার উদ্দেশ্যে সমাজতান্ত্রিক অর্থনৈতিক ব্যবস্থা প্রতিষ্ঠা করা হইবে।	**৬।অনুচ্ছেদ-১০ঃ** জাতীয় জীবনের সর্বস্তরে মহিলাদের অংশগ্রহন নিশ্চিত করিবার ব্যবস্থা গ্রহন করা হইবে।
৭। অনুচ্ছেদ-১২ঃ ধর্মনিরপেক্ষতার নীতি বাস্তবায়নের 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 নিপীড়ন বিলোপ করা হইবে।	**৭। অনুচ্ছেদ-১২ঃ** বিলুপ্ত।
৮। অনুচ্ছেদ-২৫ঃ (২) অনুপস্থিত।	**৮। অনুচ্ছেদ-২৫ঃ** (১) ..... (২)রাষ্ট্র ইসলামী সংহতির ভিত্তিতে মুসলিম দেশ সমুহের 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	**৯। অনুচ্ছেদ-৩৮ঃ** জনশৃঙ্খলা ও নৈতিকতার স্বার্থে আইনের দ্বারা আরোপিত যুক্তিসংগত বাধানিষেধ-সাপেক্ষে সমিতি বা সঙ্ঘ গঠন করিবার অধিকার প্রত্যেক নাগরিকের থাকিবে ঃ

থাকিবে। তবে শর্ত থাকে যে, রাজনৈতিক উদ্দেশ্যসম্পন্ন বা লক্ষ্যানুসারী কোন সাম্প্রদায়িক সমিতি বা সংঘ কিংবা অনুরুপ উদ্দেশ্য সম্পন্ন বা লক্ষ্যানুসারী ধর্মীয় নামমুক্ত বা ধর্মভিত্তিক অন্যকোন সমিতি বা সিংঘ গঠন করিবার বা তাহার সদস্য হইবার বা অন্য কোন প্রকারে তাহার তৎপরতায় অংশ গ্রহন করিবার অধিকার কোন ব্যক্তির থাকিবে না।	
১০। অনুচ্ছেদ-৪২ঃ (২) এই অনুচ্ছেদের (১) দফার অধীন প্রণীত আইনে ক্ষতিপূরণে বাধ্যতামূলকভাবে গ্রহন, রাষ্ট্রায়ত্তকরণ বা 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 আইনে ক্ষতিপূরণের বিধান করা হয় নাই বলিয়া কিংবা ক্ষতিপূরণের বিধান অপর্যাপ্ত হইয়াছে বলিয়া সেই আইন সম্পর্কে কোন আদালতে কোন প্রশ্ন উত্থাপন করা যাইবে না।	**১০। অনুচ্ছেদ-৪২ঃ** (২) এই অনুচ্ছেদের (১) দফার অধীন প্রণীত আইনে ক্ষতিপূরণসহ বাধ্যতামূলকভাবে গ্রহণ, 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 প্রশ্ন 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 পারিবে ঃ তবে শর্ত থাকে যে, (অ) অনুরুপ সংশোধনীর জন্য আনীত কোন বিলের সম্পূর্ণ শিরনামায় এই সংবিধানের কোন বিধান সংশোধন করা হইবে বলিয়া স্পষ্টরুপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহন	**১১। অনুচ্ছেদ-১৪২ঃ** (১) এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও (ক) সংসদের আইন দ্বারা এই সংবিধানের কোন বিধান সংযোজন, পরিবর্তন, প্রতিস্স্থাপন বা রহিতকরণের দ্বারা সংশোধিত হইতে পারিবে ঃ তবে শর্ত থাকে যে, (অ) অনুরুপ (সংশোধনীর) জন্য আনীত কোন বিলের সম্পূর্ণ শিরনামায় এই সংবিধানের কোন বিধান সংশোধন

করা হইবে না ; (আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরুপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্থাপিত হইবে না ; (খ) উপরিউক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে। (২) এই অনুচ্ছেদের অধীন প্রণীত কোন সংশোধনের ক্ষেত্রে ২৬ অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না।	করা হইবে বলিয়া স্পষ্টরুপে 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 উপস্থাপিত হইবে না ; (খ) উপরিউক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে। (১ক) (১) দফায় যাহা বলা হইয়াছে, তাহা সত্বেও এই সংবিধানের প্রস্তাবনার অথবা ৮, ৪৮, বা ৫৬ অনুচ্ছেদ অথবা এই অনুচ্ছেদের কোন বিধানাবলীর সংশোধনের ব্যবস্থা রহিয়াছে এইরুপ কোন বিল উপরি-উক্ত উপায়ে গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট উপস্থাপিত হইলে উপ স্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন কি করিবেন না এই প্রশ্নটি গণভোটে প্রেরণের ব্যবস্থা করিবেন। (১খ) এই অনুচ্ছেদের অধীন গণ-ভোট [সংসদ] নির্বাচনের জন্য প্রস্তুতকৃত ভোটারতালিকাভুক্ত ব্যাক্তিগণের 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 সেইদিন- (অ) প্রদত্ত সমুদয় ভোটের সংখ্যাগরিষ্ঠ ভোট উক্ত বিলে সম্মতিদানের পক্ষে প্রদান করা হইয়া থাকিলে, রাষ্ট্রপতি বিলটিতে

	সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে, অথবা (অ) 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 আস্থা বা অনাস্থা বলিয়া গণ্য হইবে না। (২) এই অনুচ্ছেদের অধীন প্রণীত কোন সংশোধনের ক্ষেত্রে ২৬ অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না।
১২। **Article-142:** Notwithstanding anything contained in this Constitution- (a) any provision thereof may be 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 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	১২।**Article-142:** Notwithstanding anything contained in this Constitution- (a) any provision thereof may be 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 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

Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period. (2). Nothing in article 26 shall apply to any amendment made under this article.	deemed to have assented to it on the expiration of that period. (1A) Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble or any provisions of articles 8,48 [or] 56 or this article, is presented to the President for assent, the President, shall, within the period of sseven days after the Bill is prersented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to. (1B) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provoded by law, amongst the persons enrolled on the electoral roll prepared for the purpose of electioin to [Parliament]. (1C) On the day on which the result of the referendum conducted in relation to 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 assented to ; or (b) withheld assent therefrom, if the majority of the total votes cast are not in favour of the Bill being assented to. [(1D) Nothing in clause (1C) shall be deemed to be an expressiion of confidence or no-confidence in the Cabinet or Parliament.]

	(2). Nothing in article 26 shall apply to any amendment made under this article.

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.

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 Amemdments 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.

It may be reiterated that by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamtion 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 the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamtion 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 amounts to revival of Article 95(1) as amended by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamtion Order No. IV of 1976) which commensurates with that of the original Constitution which reads as follows :

> "**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.
>
> ……..”

In our view, this is the present correct position of Article 95(1) of the Constitution in both Bengali and English texts. We also declare so.

We provisionally condone the various provisions of the Proclamations with amendments as appended to the book, namely, the Constitution of the People's Republic of Bangaldesh; published by the Ministry of Law, Jusitce 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 justiciable 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 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 respondents 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 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 Fuller's 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.

PART XXXVI : Summary :

To summarise, we hold :

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 are 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 Services 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 but any attempt by any person or group of persons, how high so ever, to usurp an elected government, shall render themselves liable for high treason.

7. A proclamation can only 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 no such authority as Martial Law Authority, as such, 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 the 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., PSC., 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 Rahman, 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 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.

We further declare :

i) The Constitution (Fifth Amendment) Act, 1979 (Act 1 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 by Paragraph 18 of the Fourth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979), is declared to have

been made without lawful authority and is of no legal effect.

We further direct the respondents to handover the physical possession of the premises, known as Moon Cinema Hall at 11, Wiseghat, Dhaka, in favour of the Petitioners, within 60 (Sixty) days from the date of receipt of the copy of this Judgment and Order.

In the result, the Rule is made absolute but without any order as to costs.

Before parting with the case, I would like to express my deep gratitude to the learned Advocates appearing in this case for their unfailing assistance to us. I have enriched my knowledge by their profound learning and experience. I would like to put it on record my deep appreciation for all of them.

A. T. M. Fazle Kabir, J.-

I agree.