IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice A.B.M. Khairul Haque.
-Chief Justice.
Mr. Justice Md. Muzammel Hossain.
Mr. Justice S. K. Sinha.
Ms. Justice Nazmun Ara Sultana.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Muhammad Imman Ali.

CIVIL APPEAL No.48 of 2011.

(From the judgment and order dated 26.08.2010 passed by the High Court Division in Writ Petition No.696 of 2010)

Siddique Ahmed. ..... **Appellant.**

-VERSUS-

Government of Bangladesh and others. ..... **Respondents.**

For the Appellant.	:	Syed Amirul Islam, Senior Advocate, (with Mr. Hassan M. S. Azim, Advocate, appeared with the leave of the Court), instructed by Mr. N. I. Bhuiyan, Advocate-on-Record.
For Respondent No.1	:	Mr. Mahbubey Alam, Attorney General, instructed by Mr. B. Hossain, Advocate-on-Record.
For Respondent No.2.	:	Mr. Murad Reza, Additional Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
Respondent Nos.3-5.	:	Not represented.
As Amici curiae	:	1. Mr. Rafique-ul-Haque, Senior Advocate, 2. Mr. Mahmudul Islam, Senior Advocate and 3. Mr. Ajmalul Hossain, Senior Advocate.
As Intervenor.	:	Mr. M. Amirul Islam, Senior Advocate.

Date of Hearing. : **08.05.2011,09.05.2011, 10.05.2011 and 15.05.2011.**

Date of Judgment. : **15th May,2011.**

JUDGMENT

A.B.M. Khairul Haque, CJ. :

Preliminary :

This appeal is by way of a certificate under Article 103 (2) (a) of the Constitution of the People's Republic of Bangladesh. Accordingly, this appeal was filed directly in this Division as provided in Order XII of the Supreme Court of Bangladesh (Appellate Division) Rules,1988. It involves determination of the legality of section 3 of the Constitution (Seventh Amendment) Act,1986 (Act 1 of 1986).

Facts of the Case :

The facts leading to the filing of the writ petition are that one Abu Taher son of Md. Kala Miah was killed on 12.1.1984 and Siddique Ahmed, the writ-petitioner was arrested on 11.04.1985 in connection with the P.S. Case No.25 dated 24.12.1984 (corresponding to G.R. No.1676 of 1984). On his application, the learned Sessions Judge, Chittagong, enlarged him on bail in Criminal Miscellaneous Case No.421 of 1985. In the meantime, following an investigation, charge-sheet No.167 dated 14.10.1985, was filed against 3 (three) persons including the writ-petitioner under section 302 of the Penal Code.

In due course, the case was forwarded to the Court of Sessions, Chittagong, vide Order dated 16.01.1986 and was numbered as S.T. Case No.10 of 1986 and vide Order dated 10.02.2006, was transferred to the Court of Additional Sessions Judge, Chittagong, for trial (Annexure-G to the writ petition). The writ-petitioner apparently did not appear in the trial and remained absconding.

Meanwhile, on being asked, the records of the said Sessions Case was transferred to the Chairman, Special Martial Law Court No.3, Zone-C, Cantonment Bazar, Chittagong, for trial. There it was re-numbered as Martial Law Case No.12 of 1986 and charge was framed under sections 302/34 and the trial proceeded against the accused persons including the writ-petitioner in absentia. After conclusion of the trial, all the accused persons including the writ-petitioner were convicted in absentia under sections 302/34 of the Penal Code and were sentenced to suffer imprisonment for life and also to pay a fine of Tk.1,000/- each, in default, to suffer rigorous imprisonment for a further period of 1 (one) year each (Annexure-L to the writ petition). The said conviction and sentence was confirmed in review by the Chief Martial Law Administrator by his Order dated 19.07.1986 (Annexure-M to the writ petition).

Long thereafter, the writ-petitioner was arrested by the police on 02.08.2006 and produced before the Court of the Metropolitan Magistrate, Chittagong. The learned Magistrate sent him to jail-hajat and forwarded the relevant records to the Court of Sessions, Chittagong (Annexure-N to the writ petition). The learned Sessions Judge by his Order No.3 dated 07.09.2006, issued the warrant of

conviction against the writ-petitioner. Since 02.08.2006, he was in jail in connection with Martial Law Case No.12 of 1986 (Annexure-O to the writ petition).

Filing of the Writ-Petition :

Being aggrieved by the conviction and sentence passed by the Martial Law Court, Siddique Ahmed filed a writ petition, being the Writ petition No. 696 of 2010 before the High Court Division under Article 102(2)(a)(ii) of the Constitution:

i) challenging the legality of section 3 of the Constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986);

ii) praying for a direction for retrial of Kotowali P.S. Case No.25 dated 24.12.1984 (corresponding to GR No. 1676 of 1984) under Section 302/34 of the Penal Code; and

iii) pending hearing of the rule , to grant bail to the petitioner in Martial Law Case No. 12 of 1986, arising out of Kotowali P.S. Case No. 25 dated 24.12.1984 (corresponding to GR No. 1676 of 1984).

The affidavit of the petition was sworn on 14.1.2010 .

The summary of the grounds taken in the writ petition are as follows :

i) The proclamation of Martial Law on 24 March 1982, by Lieutenant General Hussain Muhammed Ershad was a nullity and the consequent all Martial Law Regulations, Orders are all illegal and without lawful authority.

ii) Being violative of the of Constitution, the Martial Regulation No. 1 of 1982, establishing Martial Law Courts and Tribunals, providing for trial of offences under the penal laws of Bangladesh by the said Courts or

Tribunals, are without lawful authority and of no legal effect.

iii) The Constitution (Seventh Amendment) Act, 1986 of the Constitution is ultra vires the Constitution since the same was passed illegally and without lawful authority.

After the initial hearing, the High Court Division issued the following Rule Nisi on 05.04.2010 :

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why section 3 of the Constitution (Seventh Amendment) Act,1986 purportedly seeking to ratify and confirm the Proclamation of Martial Law on March 24, 1982 and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions etc. made during the period between March,24, 1982 and the date of commencement of the Constitution (Seventh Amendment) Act,1986 (Act I of 1986) shall not be declared to be without lawful authority and is of no legal effect and why a direction for re-trial of Kotowali P.S. Case No.25 dated 24.12.1984 (correspondent G.R. No.1676 of 1984) under sections 302/34 of the Penal Code shall not be made and/or pass such other or further order or orders as to this Court may seem fit and proper."

Besides, at the time of issuing the Rule, on the prayer made on behalf of the petitioner, he was enlarged on bail by the following interim order :

"Pending hearing of the Rule the petitioner is enlarged on bail in Martial Law Case No.12 of 1986 arising out of Kotowali P.S. Case No.25 dated 24.12.1984 (corresponding G. R. No.1676 of 1984) for a period of 6 (six) months from the date of release.

The petitioner is directed to furnish bail bond to the satisfaction of C. M. M. Chittagong."

After hearing, the Judges of the High Court Division delivered a learned and elaborate judgment. Towards the end of his judgment, Chowdhury, J., summarised his general conclusions. Some of those are :

1) Martial Law is totally alien a concept to our Constitution and hence, what Dicey commented about it, is squarely applicable to us as well.
2) A fortiori, usurpation of power by General Mohammad Ershad, flexing his arms, was void ab-initio, as was the authoritarian rule by Mushtaque-Zia duo, before Ershad, and shall remain so through eternity. All martial law instruments were void ab-initio. As a corollary, action purportedly shedding validity through the Constitution (Seventh Amendment) Act 1986, constituted a stale, moribund attempt, having no effect through the vision of law, to grant credibility to the frenzied concept, and the same must be cremated without delay."

On the basis of his findings in his elaborate judgment, the learned Judge declared the Constitution (Seventh Amendment) Act,1986, as illegal, without lawful authority, void ab-initio and also deleted paragraph 19 of the Fourth Schedule to the Constitution.

However, the High Court Division did not interfere with the conviction and sentence of the petitioner since original cognizance was taken by a Court of Sessions, a properly constituted Court. The Court also directed the petitioner to surrender to his bail bond.

Besides, on the prayer of the learned Advocate for the petitioner, certificate under Article 103 (2) (a) was also issued by the High Court Division but without specifying the specific questions of law which require address by this Division.

The writ petition traced the back-ground events leading to the enactment of the Constitution (Seventh Amendment) Act, 1986. It is stated therein that Lieutenant General Hussain Muhammad Ershad,

the then Chief of Staff of Bangladesh Army, by a proclamation of Martial Law on 24th March, 1982, took over and assumed all and full powers of the Government of the People's Republic of Bangladesh with immediate effect as the Chief Martial Law Administrator (in short 'CMLA'). He declared that the Constitution of the People's Republic of Bangladesh stood suspended and the whole of Bangladesh would be under Martial Law with immediate effect. He assumed the powers of Chief Martial Law Administrator and also assumed the command and control of the Armed Forces of Bangladesh.

By the Martial Law Regulation No.1, under clause 1, Martial Law Courts were established and those Martial Law Courts were vested with the power to try any offence punishable under any Martial Law Regulations or Orders or any other law. By different Constitution Partial Revival Orders, the CMLA, partially revived the Constitution from time to time and by the Constitution (Final Revival) Order 1986 (the CMLA Order No. 8 of 1986), the Constitution of the People's Republic of Bangladesh was fully revived. It is further stated that in the meantime, through a highly questionable election process, Lieutenant General Hussain Muhammad Ershad constituted the Third Parliament of Bangladesh. It is further stated in the writ petition that thereafter the Constitution (Seventh Amendment) Act, 1986 (Act No. 1 of 1986) was enacted. By Section 3 of the said Act, paragraph 19 was inserted in the Fourth Schedule to the Constitution.

Appointment of Amici Curiae :

At the beginning of the hearing, we invited the following learned Advocates of this Court to assist us in this matter :

1. Mr. Rafiqul Haque, Senior Advocate.
2. Mr. Mahmudul Islam, Senior Advocate.
3. Mr. Ajmalul Hossain, Senior Advocate.

Submissions on behalf of the Appellant :

Syed Amirul Islam, Senior Advocate, appeared on behalf of the appellant. In supporting the judgment of the High Court Division, he at the out-set assailed the legality of the Martial Law.

He submitted that the Constitution is supreme law in Bangladesh and Martial Law has got no place in our jurisprudence. As such, he submitted, the Proclamation of Martial Law on 24th March 1982 and all subsequent Martial Law Proclamations, Regulations and Orders are void ab initio since those are not only inconsistent with the Constitution but also sought to subordinate the Constitution, the supreme law of the Country. In support of his arguments, he relied squarely on the decision of this Court given in Khondker Delwar Hossain V. Bangladesh Italian Marble Works Ltd. (Fifth Amendment Case) 2010 (XVIII) BLT (AD)329.

He further submitted that since those Martial Law Proclamations, Regulations etc. are void ab initio, the setting up of all kinds of Martial Law Courts were not only illegal but the proceedings before those Courts or Tribunals were coram non judice. Consequently, he submitted, the verdicts pronounced by those Courts and Tribunals are all non est in the eye of Law.

The learned Advocate, however, assailed the Judgment and Order of the High Court Division on the ground that since the High Court Division held the Martial Law Proclamations etc. as void, it ought to have quashed the illegal conviction and sentence of the appellant by the illegally constituted Special Martial Law Court. The High Court Division, he submitted, ought to have allowed the appellant to continue in the bail earlier granted at the time of issuing the Rule.

Submissions on behalf of the Intervenor :

Mr. M. Amirul Islam, Senior Advocate, appeared in this appeal as an intervenor. Mr. Islam, the learned Advocate with regard to the doctrine of necessity, submitted that it was not at all necessary and termed the condonation as a dangerous principle. He traced the history of the doctrine of necessity in Pakistan since *Tamizuddin Khan's* case and submitted that it is not the function of the Court to pre-empt the ill apprehended chaos in the country and condone all the illegalities.

Regarding the maintainability of the writ petition, the learned Advocate submitted that since the vires of the Constitution (Seventh Amendment) Act,1986, was challenged in this writ petition and since there was no other efficacious and alternative remedy available to the writ-petitioner, his petition was maintainable. In support of his contentions, he relied on the case of State of Haryana V. Bhajan Lal AIR 1982 SC 604 and also the case of Bangladesh V. Iqbal Hasan Mahmood 60 DLR (AD)(2008)147.

Submissions on behalf of the amici curiae :

Mr. Rafiqul Haque, Senior Advocate, amicus curiae, in his short argument relying on *Fifth Amendment case*, submitted that the Proclamation dated 24 March 1982 and all subsequent Proclamations, Regulations and Orders were illegal and void, so also the Constitution (Seventh Amendment) Act,1986, which sought to ratify and validate the aforesaid illegal Proclamations etc. He also pointed out that a mere certificate granted under Article 103 (2) (a) is not enough, the High Court Division should also formulate the questions of law which require interpretation by the Appellate Division.

Mr. Mahmudul Islam, Senior Advocate, amicus curiae, at the out-set addressed us on the constitutional supremacy and the illegality of the Martial Law Proclamations etc. and also the unconstitutionality of the Constitution (Seventh Amendment) Act, 1986, which sought to validate and ratify the Martial Law Proclamations etc.

Referring to the doctrine of necessity, the learned Advocate submitted that the condonation of the past and closed transactions should not be absolute, rather, it should be proportional to the necessity. In this connection, he discussed the cases of Madzimbamuto V. Lardner-Burke (1968) 3 All ER 561 PC, Syed Zafar Ali Shah V. General Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869 and Sind High Court Bar Association V. Federation of Pakistan PLD 2009 SC 879 and came out with the opinion that the

principle propounded by Hamoodur Rahman, C.J., in Asma Jillani V. Government of Punjab PLD 1972 SC 139, needs to be reviewed.

So far the trial and conviction of the appellant in this appeal is concerned, the learned amicus curiae submitted that since the High Court Division itself found that the case is one of without jurisdiction, the Special Martial Law Court was constituted illegally, it rightly interfered in exercise of its powers in certiorari. In support of his contention he relied on in the case of Province of East Pakistan V. Hiralal Agarwala PLD 1970 SC 399.

The learned Advocate submitted that in a criminal case, the question of facts arises and there is also the question of limitation in case of availability of efficacious remedy. But judicial review, he submitted, is concerned with the exercise of power and manner of power. For the exercise of the power of judicial review, there is a pre-condition that no efficacious remedy is available and this principle is also applicable to criminal cases. But the theory of efficacious remedy does not arise if the trial was conducted without jurisdiction, so also in the case of coram non judice.

The Learned Advocate further submitted that section 561 A of the Code of Criminal Procedure, provides a general remedy in respect of a criminal case when there are admitted facts, an allegation of coram non judice and that the preconditions for prosecution have not been fulfilled.

In his written argument, the learned Advocate raised the question as to whether the certificate granted by the High Court

Division conformed to requirement of Article 103(2) (a) of the Constitution and if not what will be the consequence.

Besides, the learned Advocate raised the question regarding the parameter of condonation as held by the Appellate Division in *Fifth Amendment Case* and whether in this appeal, this Division may suo motu or at the instance of the parties go for review of the finding of the Appellate Division in the *Fifth Amendment Case*. But the learned Advocate raised another question as to whether the presiding judge in this Appeal can deal with the review of the Appellate Division's finding who is incidentally the author judge of the *Fifth Amendment Case* in the High Court Division.

If the learned Advocate meant merit in the *Fifth Amendment Case* by the words 'finding of the Appellate Division', then definitely we are not concerned with merit or finding of the said case in this appeal. But if the learned Advocate meant legal finding or ratio decidendi of the said case we find no difficulty, legal or otherwise in considering the vires of the Constitution (Seventh Amendment) Act, 1986. Like any other case, we are going to consider many decisions of home and abroad, specially the decision in the *Fifth Amendment Case* since it is very similar to or a replica of the present amending Act in question. It may be mentioned that Munir C.J., decided the cases of Federation of Pakistan V. Moulvi Tamizuddin Khan DLR 1955 FC 291, Usif Patel V. Crown 7 DLR 1955 FC 358, Governor General's Special Reference No. 1 of 1955, 7 DLR FC 395 and State V. Dosso , PLD 1958 SC 533, all on similar legal points, without any objection

from any body since he held a particular view in the earlier case, he should not decide the next case.

Similarly, many of the Judges who propounded the basic structure theory in Kesavananda Bharati V. State of Kerala AIR 1973 SC 1461, were members in the earlier Bench which decided Golak Nath V. State of Panjub AIR 1967 SC 1643. Similarly, the learned Judges of the Keshavnanda-Bench, including those who dissented, continued to affirm it in their subsequent decisions also.

The Judges of the Appellate Division are being elevated generally from the High Court Division. Those Judges, while in the High Court Division, of necessity, decided many a points of law. On elevation, they would come with their own innovative ideas but on hearing, they may either change or modify their ideas or may even affirmed those.

That is how, many of the earlier decisions of the House of Lords are being overruled by the subsequent Law Lords who were earlier in the Court of Appeal or in the High Court and were also bound by those earlier decisions, but that do not deter them in overruling the earlier decisions of the House of Lords in appropriate cases.

Besides, we in the Appellate Division, freely refer to the decisions of the High Court Division and where appropriate, uphold those decisions.

This is the way the law continuously moves towards refinements.

It so happened that the presiding judge of the present appeal was also the author judge of the Judgment passed in the *Fifth*

Amendment Case in the High Court Division and refused to accept the 'supra constitutional' status of the Martial Law Proclamations etc. unfortunately glorified earlier by the Appellate Division of the Supreme Court of Bangladesh, in a series of cases in late Seventies and early Eighties and thereafter, rather, the High Court Division eulogised the Constitution, specially Article 7, instead of the Appellate Division. The Appellate Division, in the *Fifth Amendment Case*, upheld the said declarations and the observations of the High Court Division with certain modifications in respect of its observations on Article 150 and the Fourth Schedule to the Constitution. But subsequently, the Appellate Division not only reviewed the said portion of the judgment in Civil Review Petition Nos.17-18 of 2011 by its Order dated 29 March 2011 and upheld the views of the High Court Division in this respect but also made the condonation of the past and closed transactions, as provisional, as held by the High Court Division.

Under the circumstances, firstly, there is nothing much to review the decision of the Appellate Division made in the *Fifth Amendment Case,* and secondly, there is no bar, legal or otherwise, for this six member Bench along with its presiding judge, to give its own opinion in this appeal, independently of the *Fifth Amendment Case*, specially when in this country unfortunately on a number of occasions its Constitution was shamelessly violated, mutilated, subordinated and was made subservient to the Martial Law Proclamations, Regulations, Orders and even Instructions of the Chief Martial Law Administrator, without any visible protest from any quarter or body, rather, acclaimed by all concerned including the

Parliament and also the Supreme Court. In this background, we would again and again and again continue to proclaim the unfettered sovereignty of the people of Bangladesh and the unqualified supremacy of its Constitution, no matter what odds and ends stand in the way.

Mr. Ajmalul Hossain, Senior Advocate amicus curiae, in his brief submission argued on the supremacy of the Constitution and the lack of legality of the Martial Law Proclamations etc.

Mr. Mahbubey Alam, learned Attorney General, argued on the supremacy of the Constitution and the illegality of the Martial Law Proclamations etc. and supported the judgment of the High Court Division in this respect but he pointed out that the High Court Division did not address upon the principle of condonation of the past and closed transactions as was made in the *Fifth Amendment case*. He also pointed out that during the Martial Law, a learned Chief Justice of Bangladesh and some other learned Judges of the High Court Division were also removed under the Martial Law Orders in utter violation of the Constitution.

The learned Attorney General, however, in respect of the jurisdiction of the High Court Division under Article 102, submitted that if the vires of the law or an order is challenged, then the High Court Division may issue writ in the nature of Certiorari and if it is a case of coram non judice and there is no other efficacious remedy it may be issued as a consequential relief. In support of his contentions, he relied upon the decisions in the cases of M/S Chittagong Engineering and Electric Supply Co. Ltd. V. I.T.O 22 DLR (SC) (1970)

443 and Jahangir Hossain Howlader V. CMM Dhaka 58 DLR (2006) 106. He further submitted that if any convict in jail alleges that his trial was without jurisdiction, a writ of habeas corpus may lie but he should not be enlarged on bail. In this connection, he submitted that the decision in Hiralal's case is not a good law in Bangladesh.

The learned Attorney General further submitted that there is a difference between Article 226 of the Indian Constitution where the precondition of efficacious remedy is absent, with Article 102 of the Constitution of Bangladesh, where it is made available when there is no other efficacious remedy, as such, the case of State of Haryana V. Bhajan Lal AIR 1992 SC 604, should not be followed.

Mr. Murad Reza, Additional Attorney General , appearing on behalf of the respondent no. 2 in his short argument submitted that the Supreme Court must dispassionately hold all kinds of extra constitutional adventurism as void ab initio without conceding the doctrine of State necessity which gives premium to the illegal activities of the usurpers and dictators. He also submitted that the trial and conviction of the appellant should not be reopened on the basis of the theory of past and closed transactions, otherwise, a flood-gate may be opened. In this connection, he raised the question of the rights of the convicts vis a vis the rights of the victims and their families to get justice. He suggested that if it is decided to re-open the cases of the convicts, convicted by the Martial Law Courts at all, then it should be done on a case to case basis on its individual merit but not en masse.

Before we enter into the merit of the appeal another matter requires attention. This appeal arose out of a certificate furnished by the High Court Division under sub-clause (a) of clause (2) of Article 103 of the Constitution that the case raised a substantial question of law as to the interpretation of the Constitution. But that is not enough. The High Court Division should have stated the specific and precise questions of law which require interpretation by this Divison in its certificate. This point have been raised both by Mr. Rafiqul Haque and Mr. Mahmudul Islam, amici curiae. Mr. Islam in this connection referred to the decisions in the cases of Shashi Bhusan Ghose V. Asgar Ali 20 DLR SC (1968) 217, Kazi Mukhlesur Rahman V. Bangladesh 26 DLR (SC) (1974) 45 and Qazi Kamal V. Rajdhani Unnayan Kartripakha 44 DLR (AD) (1992) 291.

However, this appeal raised the specific questions of the sovereignty of the people and the supremacy of its Constitution in the face of the Martial Law Proclamations etc. which were earlier given 'supra constitutional' status. Besides, the questions of the parameter of the condonation of past and closed transactions on the doctrine of necessity and the ambit of the writ of certiorari in criminal cases are also raised. These questions are dominant in the judgment of the High Court Division and are of paramount Constitutional importance. By way of abundant caution, the appellant also filed a petition of appeal under Article 103 (1) of the Constitution. As such, we are of the opinion that the appeal before this Division is not incompetent on the ground of defective certificate.

Political Scenario :

After reigning 190 years in India, the British Government enacted the Indian Independence Act,1947 on 18 July 1947, creating two independent Dominions, namely, India and Pakistan. The Dominion of Pakistan came into existence on 14 August 1947, while the Dominion of India became independent on the next day on 15 August 1947.

In India, its Constitution was framed and adopted on 26 November 1949 but Pakistan in this respect remained far behind. After the death of Mohammad Ali Jinnah, Pakistan became the hot-bed of palace clique. Soon the idea behind creating an independent Pakistan for the toiling mass had been conveniently forgotten and the bureaucracy, both civil and military, became its real beneficiary.

It may be remembered that in 1946, elections were held in the various provinces of India. Muslim League fought the election on Pakistan issue. Although Muslim League lost in Punjab, North-Western Frontier Province, Beluchistan and in other provinces and secured only a marginal majority in Sindh Province but in Bengal it won a land-slide victory, but after independence East Bengal became victim of wholesale discrimination in financial and all spheres of public life. As a matter fact, it became a colony of West Pakistan for all practical purposes.

The first onslaught was upon The Bangla language, the mother tongue of the Bengalees who were majority in Pakistan against all the other four provinces taken together.

After the assassination of Liaquat Ali Khan in 1951, Ghulam Mohammad, a former member of Indian Audits and Accounts Service,

become the Governor General of Pakistan while Khawaja Nazimuddin, the leader of the majority party in the Constituent Assembly, became the Prime Minister. But in 1953, Ghulam Mohammad, the Governor General, suddenly dismissed the majority leader Khawaja Nazimuddin and his Cabinet without any rhyme or reason, apparently even without lawful authority. He appointed another bureaucrat to be the Prime Minister of Pakistan. In his Cabinet, General Mohammad Ayub Khan, Commander in Chief of Pakistan Army, joined as the defence Minister.

After a long delay, in 1954, the draft Constitution of Pakistan had been prepared with the assent of the members of the Constituent Assembly but Ghulam Mohammed with the full knowledge of the preparation of the draft Constitution, suddenly by a Proclamation dated 24 October 1954, dissolved the Constituent Assembly. In due course, a new Constituent Assembly was elected which enacted a Constitution. It came into effect on 23 March 1956, and Major General Iskander Mirza became the first President of the Islamic Republic of Pakistan. It was resolved that a general election will be held in February, 1959 but on 7 October 1958, by a Proclamation, Iskander Mirza abrogated the Constitution, dissolved the National Assembly of Pakistan and all Provincial Assemblies and Martial Law was imposed all over Pakistan. General Ayub Khan, the C-in-C of the Army became the Chief Martial Law Administrator of Pakistan.

Referring to this incident, Yaqub Ali, J. in Asma Jilani V. Government of Punjab PLD 1972 SC 139 at page 245 commented:

> "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."

On 27 October 1958, General Ayub Khan deposed Iskander Mirza and himself assumed the office of President. He also took the rank of Field Martial. By holding a referendum with 'yes' or 'no' votes for or against him, he engineered a 'mandate' in his favour. In 1962, he gave a Constitution based on 'Basic Democracy' 'to suit the genius of the people' of Pakistan. But this was neither basic nor democracy. On 7 June 1962, Martial Law in Pakistan was withdrawn.

In June 1966, Sheikh Mujibur Rahman launched his 6 point demand based on universal adult franchise and political and economic autonomy for the provinces. This was overwhelmingly accepted and highly acclaimed especially in the Eastern Province.

Following a wide-spread political disturbance all over Pakistan, Ayub Khan instead of handing over his responsibilities to the Speaker of the National Assembly, in violation of the Constitution framed by him, handed over the State-Power to General Muhammad Yahya Khan, the Commander-in-Chief of the Army.

General Yahya Khan, in his turn, in disregard of his solemn legal duty under the Constitution, by a proclamation issued on 26 March 1969, abrogated the Constitution, dissolved the National Assembly of Pakistan and Provincial Assemblies and also imposed

Martial Law throughout Pakistan. General Yahya Khan, following the footsteps of General Ayub Khan became the President and the Chief Martial Law Administrator of Pakistan.

The first and the last general election of Pakistan was held in December,1970. One of the main tasks, ordained for the National Assembly was to frame a Constitution for Pakistan. Awami League under the leadership of Sheikh Mujibur Rahman secured 162 Parliamentary seats out of 300, as such, got a clear majority in the National Assembly of Pakistan. The National Assembly was due to be convened at Dhaka on 3 March 1971 but General Yahya Khan by a short declaration on 1 March, postponed the session indefinitely. As a consequence, there were wholesale protests all over East Pakistan and the entire population rose in one voice and demanded independence. On 7 March, at a huge meeting held at the Race Course, Sheikh Mujibur Rahman addressed the Bengali Nation. He ended his speech by declaring that this is a struggle for independence and liberation. On the night of 25 March 1971, the Pakistan army attacked the unarmed Bengalees at Dhaka and other places with ruthless brutality and killed thousands. In the first hours of 26 March, Sheikh Mujibur Rahman declared independence of Bangladesh and a nation was born. However, the independence was formally proclaimed at Mujibnagor on 10 April 1971. This was the first constitutional document heralding the birth of Bangladesh as a sovereign People's Republic on and from 26 March 1971. On the same day on 10 April, Laws Continuance Enforcement Order was made.

Pakistan army surrendered on 16 December 1971 at Dhaka and Bangladesh own its independence after a costly war which lasted for nearly 9 (nine) months.

The Constitution of People's Republic of Bangladesh was framed and adopted on 4 November 1972 and it commenced on and from 16 December,1972. The Constitution provided for a Parliamentary form of Government.

On the early hours of 15 August 1975, Sheikh Mujiur Rahman, the President of Bangladesh with almost all members of his family were brutally killed and the country plunged into a serious constitutional crisis. Khandaker Moshtaque Ahmed in collusion with a section of army officers seized the office of the President of Bangladesh, in utter violation of the Constitution. By a proclamation dated 20 August he imposed Martial Law with effect from 15 August all over Bangladesh and certain provisions of the Constitution were suspended and modified.

The proclamation dated 8 November 1975 shows that Khandaker Moshtaque Ahmed made over the office of President to Mr. Justice Abu Sadat Mohammad Sayem, the Chief Justice of Bangladesh. He also assumed the powers of Chief Martial Law Administrator and appointed the Deputy Chief Martial Law administrators. The proclamation dissolved the Parliament with effect from 6 November 1975 and certain provisions of the Constitution were suspended and omitted.

By a proclamation dated 29 November 1976, Justice Sayem, the President of Bangladesh and the Chief Martial Law Administrator,

handed over the office of the Chief Martial Law Administrator to Major General Ziaur Rahman B.U., psc.

Thereafter, by an Order dated 21 April 1977, Justice Sayem nominated Major General Ziaur Rahman, BU, to be the President of Bangladesh and handed over the office of President to him.

By the Referendum Order,1977 (Martial Law Order No.1 of 1977), a referendum was held on 30 May 1977 'on the question whether or not the voters have confidence in President Major General Ziaur Rahman BU and in the policies and programmes enunciated by him.' Just like Field Martial Ayub Khan he got overwhelming votes in his favour.

The Second Parliament by the Constitution (Fifth Amendment) Act, 1979, ratified, confirmed and validated all Proclamations, Martial Law Orders, Regulations and other Orders etc. made during the period from 15 August 1975 to 9 April 1979. It was published in Bangladesh Gazette on 6 April 1979.

It may be noted that since 15 August 1975, Martial Law continued for nearly 4(four) years and by the Proclamation dated 6 April, it was withdrawn. The Proclamation was published in Bangladesh Gazette Extraordinary on 7 April 1979.

On 30 May 1981, Ziaur Rahman was assassinated by a section of army rebels at Chittagong and Justice Sattar, the Vice President, became the President.

By a Proclamation date 24 March 1982, Lieutenant General Hussain Muhammad Ershad, the Commander in Chief of the Army, dissolved the Parliament, took over and seized all and full powers of

the Government of Bangladesh as the Chief Martial Law Administrator of Bangladesh and placed the whole of Bangladesh under Martial Law. He also assumed the full command and control of all the Armed Forces of Bangladesh.

The Proclamation dated 24 March 1982, reads as follows:

PROCLAMATION OF MARTIAL LAW

March 24, 1982

WHEREAS a situation has arisen in the country in which the economic life has come to a position of collapse, the civil administration has become unable to effectively function, wanton corruption at all levels has become permissible part of life causing unbearable sufferings to the people, law and order situation has deteriorated to an alarming state seriously threatening peace, tranquility, stability and life with dignity and bickering for power among the members of the ruling party ignoring the duty to the state jeopardising national security and sovereignty.

AND

WHEREAS the people of the country have been plunged into a state of extreme frustration, despair and uncertainty.

AND

WHEREAS in the greater national interest and also in the interest of national security it has became necessary to place our hard earned country under Martial Law and the responsibility has fallen for the same upon the Armed Forces of the country as a part of their obligation towards the people and the country.

NOW, therefore, I, Lieutenant General Hussain Muhammad Ershad, with the help and mercy of Almighty Allah and blessings of our great patriotic people, do hereby take over and assume all and full powers of the Government of the People's Republic of Bangladesh with immediate effect from Wednesday, 24th March,1982 as Chief Martial Law Administrator of the People's Republic of Bangladesh and do hereby declare that the whole of Bangladesh shall be under Martial Law with immediate effect. Along with assumption of powers

of Chief Martial Law Administrator I do hereby assume the full command and control of all the Armed Forces of Bangladesh.

In exercise of all powers enabling me in this behalf, I, Lieutenant General Hussain Muahmmad Ershad do hereby further declare that :–

a. I have assumed and entered upon the office of the Chief Martial Law Administrator with effect from Wednesday, 24th March,1982.

b. I may nominate any person as President of the country at any time and who shall enter upon the office of the President after taking oath before the Chief Justice of Bangladesh or any judge of the Supreme Court designated by me. I may rescind or cancel such nomination from time to time and nominate another person as the President of Bangladesh. The President so nominated by me shall be the head of state and act on and in accordance with my advice as Chief Martial Law Administrator and perform such function as assigned to him by me.

c. I may make, from time to time, Martial Law Regulations, Orders and Instructions among others;

(1) Providing for setting up of Special Military Courts, Tribunals and Summary Military Courts for the trial and punishment of any offence under Martial Law Regulations or Orders or for contravention thereof and of offence under any other law;

(2) Prescribing penalties for offences under such Regulations or Orders or for contravention thereof and special penalties for offices under any other law;

(3) Empowering any Court or Tribunal to try and punish any offence under such Regulation or Order or the contravention thereof;

(4) Barring the jurisdiction of any Court or Tribunal from trying any offence specified in such Martial Law Regulations or Orders ; and

(5) On any other subject or in respect of any other matter including any subject or matter specified in or regulated by or provided in any other law.

d. I may rescind the declaration of Martial law made by this Proclamation, at any time either in respect of whole of Bangladesh or any part thereof and may again place whole of Bangladesh or any part thereof under Martial Law by a fresh declaration.

e. This Proclamation and the Martial Law Regulations and Orders and other Orders and Instructions made by me in pursuance thereof shall have the effect notwithstanding anything contained in any law for the time being in force.

f. The Constitution of the People's Republic of Bangladesh shall stand suspended with immediate effect.

g. All Acts, Ordinances, President's Orders and other Orders, Proclamations, Rules, Regulations, By-laws, Notifications and other legal instruments in force on the morning of Wednesday, 24th March, 1982 shall continue to remain in force until repealed, revoked or amended. The judges of the Supreme Court including the Chief Justice, Attorney General, Chief Election Commissioner, Election Commissioner or Commissioners, Chairman and Members of the Public Service Commission, the Comptroller and Auditor General and others in the service of the Republic will continue to function. All Proceedings arising out of and in connection with writ petitions under Article 102 of the suspended Constitution shall abate.

h. 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 or other 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 any thing done, 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 or other Order made by me in pursuance of this proclamation.

j. Subject to the provisions aforesaid all Courts, including Supreme Courts, in existence immediately before this proclamation shall continue to function but subject to the provisions of Martial Law Regulation, Orders or other Orders made by me.

k. Martial Law Regulations and Orders and other Orders and Instructions shall be made by the Chief Martial Law Administrator.

l. There shall be a Council of Advisers/Council of Ministers to aid and advise the Chief Martial Law Administrator in the exercise of his functions. The Advisors shall be appointed by the Chief Martial Law Administrator and they shall hold the office during his pleasure. An Adviser may resign his office under his hand addressed to the Chief Martial Law Administrator. The Chief Martial Law Administrator shall be the Chief Executive and head of Government.

m. The persons holding office as President, Vice-President, Prime Minister, Deputy Prime Minister ,Ministers, Ministers of State. Deputy Ministers, Speaker, Deputy Speaker, Chief Whip and Whips immediately before this proclamation shall be deemed to have been ceased to hold office with immediate effect. The Council of Ministers and the

Parliament which existed before this proclamation shall stand dissolved with immediate effect.

n. The Chief Martial Law Administrator may appoint Deputy Chief Martial Law Administrator, Zonal Martial Law Administrator, Sub Zonal Martial Law Administrator and District Martial Law Administrator for effective enforcement of Martial Law. However the Chief Martial Law Administrator may delegate his power of appointing Sub-Zonal and District Martial Law Administrators, to the Zonal Martial Law Administrators. They shall exercise such powres and perform such functions which may be assigned to them by me from time to time.

I do hereby appoint :-

a. P No.3 Rear Admiral Mahbub Ali Khan, Chief of Naval Staff and
b. BD/4295 Air Vice Marshal Sultan Mahmud, BU, Chief of Air Staff as Deputy Chief Martial Law Administrators.

I hereby divide whole of Bangladesh into five Martial Law Zones in the following manner :-

ZONE "A"-Civil Districts of	:	Dacca, Dacca Metropolitan City, Mymensingh, Tangail and Jamalpur.
Zone "B"- " "	:	Bogra, Rangpur, Dinajpur, Rajshahi and Pabna.
Zone "C"- " "	:	Chittagong, Chittagong Hill Tracts and Bandarban.
Zone "D"- " "	:	Comilla, Noakhali and Sylhet
Zone "E"- " "	:	Jessore, Khulna, Kushtia, Barisal, Patuakhali and Faridpur.

And appoint Zonal Martial Law Administrators as follows :-

ZONE "A"	:	BA-121 Major General Mohammad Abdur Rahman, General Officer Commanding 9 Infantry Division.
Zone "B"	:	BA-119 Major General RAM Golam Muktadir, General Officer Commanding 11 Infantry Division.
Zone "C"	:	BA-112 Major General Abdul Mannaf, General Officer Commanding 24

		Infantry Division.
Zone “D”	:	BA-132 Major General Muahmmad Abdus Samad, General Officer Commanding 33 Infantry Division.
Zone “E”	:	BA-183 Brigadier K. M. Abdul Wahed, Officiating Commander 55 Infantry Division.

They shall hold the office during the pleasure of Chief Martial Law Administrator and shall be responsible for the effective enforcement of Martial Laws and maintenance of Law and Order in their respective area. I hereby delegate to them the authority to appoint Sub-Zonal and District Martial Law Administrators within their respective Zones.

This Proclamation, Martial Law Regulations, Orders and other Orders, Instructions made by me, during their continuance shall be the supreme law of the country and if any other law is inconsistent with them that other law shall to the extent of inconsistency be void.

I may by order notified in the official Gazette amend this Proclamation.

Dacca;
The 24th March,1982

Hussain Muhammad Ershad
Lieutenant General
Commander in Chief
Bangladesh Armed Forces
and
Chief Martial Law Administrator

The seizure of State-power by Lt. General H. M. Ershad resembled those of General Ayub Khan in 1958, General Yahya Khan in 1969 in Pakistan and that of Major General Ziaur Rahamn, in Bangladesh.

Initially, Lieutenant General Ershad, the CMLA, appointed Justice Ahsanuddin Chowdhury, a retired Judge of the Appellate Division of the Supreme Court, as the President of Bangladesh with

specific duties and functions as mentioned in Clause 2 of the schedule to The Proclamation (First Amendment) Order,1982 dated 11 April 1982, as if the President of Bangladesh was an employee under the CMLA. The said Proclamation also forced the Chief Justice of Bangladesh to retire prematurely as spelt out in the proviso to Clause 10 (1) of the schedule to the aforesaid Proclamation. The said Proclamation (First Amendment) Order,1982 (Proclamation Order No.1 of 1982) added a schedule to the Proclamation dated 24 March 1982.

By the above mentioned Martial Law Proclamation dated 24 March 1982 and the Proclamation (First Amendment) Order,1982 dated 11 April 1982, Lieutenant General H. M. Ershad, Commander in Chief of Bangladesh Army, became more powerful than any medieval Monarch. The question of violation of the Constitution of Bangladesh had become irrelevant , it was nowhere to be seen and perceived. Our solemn and hard-earned Constitution was made worthless and putty by the Chief Martial Law Administrator and other Administrators of the day. This was how the embodiment of the will of the sovereign people of Bangladesh was so nakedly abused, defaced and destructed.

The CMLA further directed that before entering upon office, the President of Bangladesh would make an oath under the provisions of the Proclamation dated 24 March 1982 and in accordance with law in the following form made under Martial Law Order No.05 of 1982 dated 27 March 1982 :

MARTIAL LAW ORDER NO.5 OF 1982.

AvwgÐÐÐÐÐÐÐÐÐÐÐÐ Avjvi bv g kc_ Kwi ZwQ h, Avwg evsjv ` k i ivócwZi c Avgvi KZe¨ 1982 mv j i 24 gv Pi Nvlbv Ges AvBb Abhvqx, mZ Zv mnKv i, Avgvi mva¨gZ, wek¯ZZvi mwnZ cvjb Kwie;

Avwg evsjv `k i cwZ AKwÎg wekvm I AvbMZ¨ cvlY Kwie;

Avgvi miKvix Kvh I wmØv K e¨w³MZ mv _i Øviv c fvweZ nB Z w`e bv ;

Avwg fxwZ ev AbMn AbivM ev weiv Mi ekeZx bv nBqv mK j i cwZ AvBb Abhvqx h_vwewnZ AvPiY Kwie;

Ges evsjv ` k i ivócwZi c h mKj welq Avgvi we ePbvi Rb¨ AvbxZ nB e ev h mKj welq Avwg AeMZ nBe, Zvnv ivócwZi c h_vh_fv e Avgvi KZe¨ cvj bi c qvRb e¨ZxZ cZ¨¶ ev c iv¶ fv e Kvb e¨w³ K Ávcb Kwie bv ev Kvb e¨w³ i wbKU cKvk Kwie bv|

It may be noted that the President of Bangladesh took oath not according to the Constitution but according to the Proclamation made on 24 March 1982.

In due course, by a proclamation dated 11 December1983, Lt. General H. M. Ershad, ndc, psc, CMLA, assumed the office of President of Bangladesh.

(Published in the Bangladesh Gazette, Extra, dated December 11,1983.)

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

OFFICE OF THE CHIEF MARTIAL LAW ADMINISTRTOR

PROCLAMATION

WHEREAS clause b of the Proclamation of the 24th March,1982, provides that the Chief Martial Law Administrator shall be the President of Bangladesh;

NOW, THEREFORE, I, Lieutenant General Hussain Muhammad Ershad, ndc, psc, Chief Martial Law Administrator, do

hereby declare that I have assumed the Office of President of Bangladesh this the 11th day of December,1983, in the forenoon.

H M ERSHAD, ndc, psc
LIEUTENANT GENERAL
Chief Martial Law Administrator
and
Commander-in-Chief.

DHAKA;
The 11th December,1983.

But before he entered the office of President, necessary amendments in the Proclamation of Martial Law dated 24 March 1982, were made by the Proclamation Order No.III of 1983 so that only he could remain all powerful supreme over-lord of Bangladesh.

Lt. General Ershad, the Chief Martial Law Administrator, made Martial Law Regulation No.1 of 1982, on 24 March 1982, for Constitution of Special Martial Law Tribunals, Special Martial Law Courts and Summary Martial Law Courts which are as follows :

1. Martial Law Courts

(1) The Chief Martial Law Administrator may, by notification in the official Gazette, constitute Special Martial Law (Tribunals), Special Martial Law Courts and Summary Martial Law Courts for such areas as may be specified in the notification.

(2) A Special Martial Law Tribunal shall consist of a Chairman and four other members and a Special Martial Law Court or a Summary Martial Law Court shall consist of a Chairman and two other members.

(3) The Chairman of a Special Martial Law Tribunal shall be appointed from among officers of the Defence Services not below the rank of Lieutenant Colonel or equivalent, and of the four other members of such Tribunal, two shall be appointed from among Commissioned Officers, Junior Commissioned Officers and non-commissioned officers of the Defence Services and two from among officers of the judicial service and Magistrates.

(4) The Chairman of a Special Martial Law Court shall be appointed from among offices of the Defence Services or Bangladesh Rifles not below the rank of Lieutenant Colonel or equivalent or from among Sessions Judges and of the two other members of such Court, one shall be appointed from among the officers of the Defence Services or Bangladesh Rifles not below the rank of Major or equivalent or from among Assistant Sessions Judge and the other from among Magistrates of the first class.

(5) The Chairman of a Summary Martial Law Court shall be appointed from among officers of the Defence Services not below the rank of Major or equivalent or Magistrates of the first class and of the two other members, one shall be appointed from among officers of the Defence Service or Bangladesh Rifles not below the rank of Lieutenant or equivalent and the other from among the Junior Commissioned Officers or equivalents from the Defence Services.

(6) The Chairman and members of the Special Martial Law Tribunals, Special Martial Law Courts (and Summary Martial Law Courts,) hereinafter referred to as the Martial Law Courts, shall be appointed by the Chief Martial Law Administrator.

(7) A Martial Law Court may try any offence punishable under any Martial Law Regulation or Order or under any other law.

(8) A Special Martial Law Tribunal and a Special Martial Law Court may pass any sentence authorised by the Martial Law Regulation or Order or Law for the punishment of the offence tried by it, and a Summary Martial Law Court may pass any sentence authorised by the Martial Law Regulation or Order or law for the punishment of the offence tried by it except death, transportation or imprisonment for a term exceeding seven years.

3. Review of Proceedings, etc.

(1). No appeal shall lie from (any order), judgment or sentence of a Martial Law Court.

(2) All proceedings of Special Martial Law Tribunal and Special Martial Law Courts shall, immediately after the termination thereof, be submitted to the Chief Martial Law Administrator for review.

(3) All proceedings of Summary Martial law Courts shall, immediately after the termination thereof, be submitted to the Zonal Martial Law Administrator, within whose jurisdiction the trials were held, for review.

(4) The Chief Martial Law Administrator or, as the case may be, Zonal Martial Law Administrator may, on review, confirm, set aside (enhance) vary or modify any order, judgment or sentence or make orders for retrial or such other orders as he deems necessary for the ends of justice.

(5) Subject to review, all orders, judgments and sentences of a Martial Law Court shall be final.

(6) No order, judgment, sentence or proceedings of a Martial Law Court shall be called in question in any manner whatsoever in, by or before any Court, including the Supreme Court.

(7) No Court, including the Supreme Court, shall call for the records of the proceedings of any Martial Law Court for any purpose whatsoever.

(8) No lawyer shall appear or plead before the Chief Martial Law Administrator or the Zonal Martial Law Administrator at the time of review of a case.

3A. Power of Chief Martial Law Administrator to suspend, remit or commute punishment.– The Chief Martial Law Administrator may, at any time, without condition or upon such condition as he deems fit to impose, suspend, remit or commute any sentence passed by a Martial Law Court.

These kinds of military Courts for the trial of the civilians were abolished in England in 1628 by King Charles I when he put his signature in the Petition of Right.

By the Constitution (Partial Revival) Order, 1984 (Chief Martial Law Administrator's Order No.1 of 1984), certain provisions of the Constitution relating to the elections to the office of the President, elections to Parliament, oath of office of the elected persons were revived. The said Order was made by the Chief Martial Law Administrator on 03.03.1984.

By the Constitution (Partial Revival) (Second) Order, 1985 (Chief Martial Law Administrator's Order No. 1 of 1985), certain fundamental rights were restored and enlarged the jurisdiction of the Supreme Court.

This order was published in Bangladesh Gazette on 15 January 1985.

In this way several other Constitution (Partial Revival) Orders were made from time to time.

On 7 May 1986, a general election was held for the Third Parliament. Lt. General Ershad was elected as President on 15 October 1986.

The Third Parliament enacted the Constitution (Seventh Amendment) Act,1986 (Act No.1 of 1986). This Act received the assent of the President on 11 November 1986 and was published in the Bangladesh Gazette on the same day.

In the meantime, the Martial Law proclaimed on 24 March 1982, was revoked by Lt. General Ershad, the Chief Martial Law Administrator.

The vires of the said Constitution (Seventh Amendment) Act,1986, has been challenged in the writ petition before the High Court Division.

Ravaging the Constitution :

This far the facts leading to the creation of Bangladesh and the enactment of the Constitution (Seventh Amendment) Act,1986, have been narrated.

Before considering the issues raised in this appeal involving violations of the Constitution, we would first look into the tragic tales of the ravagements of the Constitutions since the Pakistan days.

It may be recalled that on the direction of Lord Mountbatten, a separate Constituent Assembly for Pakistan, was formed and Mohammad Ali Jinnah was elected its first President on 11 August 1947. After his death, Moulvi Tamizuddin Khan was elected as the President of the Constituent Assembly on 14 December 1948. The functions of the Constituent Assembly, among others, were to frame a constitution for the Republic of Pakistan. When the draft of the Constitution was almost ready and prepared for placing before the Constituent Assembly, Ghulam Mohammad, the Governor General, with the knowledge of the draft Constitution, suddenly dissolved the Constituent Assembly on 24 October 1954, on the so called excuse that 'the constitutional machinery has broken down' and 'the Constituent Assembly.... has lost the confidence of the people'. We would see that this kind of plea was played over and over again by the autocratic rulers of Pakistan and Bangladesh from time to time to suit their nefarious purpose.

However, this proclamation was challenged by Moulvi Tamizuddin Khan, in Sind Chief Court by a writ petition filed under section 223-A of the Government of India Act on the ground that the proclamation was violative of the Indian Independence Act and Government of India Act. It may be noted that section 223-A was added by amendment of the said Act by the Constituent Assembly in 1954. This amendment empowered the High Courts in Pakistan to issue various orginal writs of mandamus, certiorari, quo warranto and habeas corpus.

A Full Bench of the Sind Chief Court issued a writ of mandamus restoring Moulvi Tamizuddin Khan to his office as President of the Constituent Assembly and also issued a writ of quo warranto against some of the Ministers that they were not qualified for appointment as Ministers since they were not Members of the Federal Legislature. (VII DLR 1955 WPC 121 Sind).

On appeal, it was contended before the Federal Court that since addition of section 223-A of the Government of India Act by amendment under which the Sind Chief Court issued the Writ had not yet received the assent of the Governor General, it was not law and the said Court had no jurisdiction to issue the said Writ.

It was contended on behalf of the writ-petitioner that assents to the Acts passed by the Constituent Assembly were not regularly taken since 1948 and it was never felt necessary. This contention was not accepted by the Federal Court.

The appeal was allowed by majority. Muhammad Munir, C.J., held in Federation of Pakistan V. Moulvi Tamizudin Khan VII DLR 1955 FC 291 at page-341 :

> ".....I hold that the Constituent Assembly when it functions under subsection (1) of section 8 of the Indian Independence Act, 1947, acts as the Legislature of the Dominion within the meaning of section 6 of that Act, that under subsection (3) of the latter section the assent of the Governor-General is necessary to all legislations by the Legislature of the Dominion, that since section 223-A of the Government of India Act under which the Chief Court of Sind assumed jurisdiction to issue the writs did not receive such assent , it is not yet law, and that therefore, that Court had no jurisdiction to issue the writs."

Cornelius, J. (as his Lordship then was) differed with the views of the majority and held that the assent of the Governor-General was not necessary to give validity to the laws enacted by the Constituent Assembly. Cornelius, J. held at page-378 :

> ".... the Constituent Assembly, as early as May, 1948, formally recorded its condered will that its constitutional laws should become operative with no more formality that (a) the President's signature on a copy of the Bill, by way of authentication and (b) publication in the Federal Government's Gazette under the authority of the President. What right could then be thought to be effectuated by applying a compulsive effect to the disputed words of mere potentiality? The argument of the appellants seemed to be that the right inherent in the Governor-General by virtue of his being the representative of His Majesty, and from the fact that Pakistan was a Dominion.
>
> I have already shown that section 5, Indian Independence Act, cannot operate to confer any right to grant assent beyond that conveyed by the relevant words in section 6(3). Therefore, to draw the *right* of assent from section 5 seems to me to be impossible. Moreover, the position of the Governor-General was such that there was no power on earth which could compel him to exercise any power

vested in him, unless it was or became coupled with a duty, as indicated in the case of *Julius v. Bishop of Oxford* (cited above), in which case recourse might perhaps be had to the Courts. For over seven years the Governor General had, despite advice being given by the permanent staff of the Law Ministry in the contrary sense, decided and acted on the basis that he did not possess any such right as that which was claimed for the first time in the present case. The sovereign body in the State, namely the constituent Assembly, had declared to this effect, and the view was confirmed on three occasions by the highest Courts in the land."

His Lordship further held at page-370 :

"..... I place the Constituent Assembly above the Governor-General, the chief Executive of the State, for two reasons, firstly that the Constituent Assembly was a sovereign body, and secondly because the statutes under and in accordance with which the Governor-General was required to function, were within the competence of the Constituent Assembly to amend."
(Underlinings are mine)

Long thereafter, Yaqub Ali, J, in Asma Jilani V. Government of Punjab PLD 1972 SC 139, termed the dissolution of the Constituent Assembly in 1954 by the Governor General as the second great mishap of Pakistan. He commented at page-213 :

"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."

Disapproving the majority Judgment passed in *Tamizuddin Khan* VII DLR 1955 FC 291, Yaqub Ali, J., commented in *Asma Jilani* at page-214 :

> "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."
> (Underlinings are mine)

In Usif Patel V. The Crown VII DLR 1955 FC 385, Usif Patel was detained under the Sind Control of Goondas Act (Governor's) Act of 1952. The said Act was passed by the Governor under section 92-A of the Government of India Act,1935. The said provision was inserted by an Order of the Governor General under section 9 of the Indian Independence Act.

When it became evident that that addition of section 92-A by the Governor General was without jurisdiction making the Sind Control of Goondas Act invalid, the Governor General after proclamation of Emergency, promulgated an Ordinance on 27 March 1955, two weeks before hearing of the appeal by the Federal Court.

In the case of *Usif Patal*, the Federal Court considered mainly the following two questions :

> i) whether the Governor General could by an Ordinance validate the Indian Independence (Amendment) Act,1948 which is a constitutional provision, and
>
> ii) whether the Governor General can give assent to constitutional legislation by the Constituent Assembly with retrospective effect.

The Federal Court held that the Governor General had no power under section 42 of the Government of India Act,1935, to make any provision as to the Constitution by an Ordinance, nor retrospective effect could be given to validate those.

Muhammad Munir, C.J., held at page 391 (DLR) :

> ".....the power of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion could under subsection 1 of section 8 of the Indian Independence Act be exercised only by the Constituent Assembly and that that power could not be exercised by that Assembly when it functioned as the Federal Legislature within the limits imposed upon it by the Government of India Act,1935. It is therefore not right to claim for the Federal Legislature the power of making provision as to the constitution of the Dominion a claim which is specifically negatived by subsection (1) of section 8 of the Indian Independence Act.
>
> .....under the Constitution Acts the Governor-General is possessed of no more powers than those that are given to him by those Acts. One of these powers is to promulgate Ordinance in cases of emergency but the limits within which and the checks subject to which he can exercise that power are clearly laid down in section 42 itself. On principle the power of the Governor-General to legislate by Ordinance is always subject to the control of the Federal Legislature and he cannot remove these controls merely by asserting that no Federal Legislature in law or in fact is in existence. No such position is contemplated by the Indian Independence Act, or the Government of India Act,1935. Any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is under the Constitution Acts precluded from exercising those powers."

The Hon'ble Chief Justice further held at page-393 :

> "The only effect, in a case like the present, of giving assent later to an Act passed by the legislature can be that the statute comes into operation on the date that it is assented to and not before such date,

all proceedings taken under that Act before assent being void unless they are subsequently validated by independent legislation."

It may be recalled that the Governor General had dissolved the Constituent Assembly on 24 October 1954 and there was no Constituent Assembly at that time.

The Hon'ble Chief Justice thereafter concluded as hereunder at page-393 :

> "For these reasons we are of the opinion that since the Amendment Act of 1948 was not presented to the Governor General for his assent, it did not have the effect of extending the date from 31st March,1948, to 31st March,1949, and that since section 92A was added to the Government of India Act,1935, after the 31st march, 1948, it never became a valid provision of that Act. Thus the Governor-General had no authority to act under section 92A and the Governor derived no power to legislate from a Proclamation under that section. Accordingly the Sind Goonda Act was ultra vires and no action under it could be taken against the appellants. That being so the detention of the appellants in jail is illegal."
>
> (Underlinings are mine)

The next case of constitutional importance is the Reference by the Governor General VII DLR 1955 FC 395.

After the decision of the Federal Court in *Usif Patel*, the Government of Pakistan landed in a precarious constitutional impasse. It was held in that case that validation of constitutional legislation could only be effected by the Constituent Assembly and not by means of an Ordinance promulgated by the Governor-General. But earlier dissolution of the Constituent Assembly was upheld by the Federal Court in *Tamizuddin Khan*. As such, all constitutional legislations passed earlier became invalid and in the absence of a

Constituent Assembly, it could not be enacted for assent by the Governor General as held in *Tamizuddin Khan*.

This constitutional debacle was noted by the Chief Justice himself in the beginning of his Judgment in the Reference at page - 401(DLR):

> "The situation presented by this Reference……is that after experimenting for more than seven years with a constitution……, We have come to the brink of a chasm with only three alternatives before us :
>
> 1) to turn back the way we came by;
> 2) to cross the gap by a legal bridge;
> 3) to hurtle into the chasm beyond any hope of rescue.
>
> It is not long a story to tell how we have come to this pass."

As a matter of fact, this constitutional crisis was the creation of the Governor-General himself who peremptorily dissolved the Constituent Assembly on 24 October 1954, knowing full well that the draft Constitution was ready for placement before the Constituent Assembly but this dissolution was upheld by the Federal Court in *Tamizuddin Khan* with the following comments by Muhammad Munir, C.J. at page-330 (1955 DLR FC):

> "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 Constituent 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 subsection (3) of section 8 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 position 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 Constitution 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 of estoppel stands in the way of a clear pronouncement."
> (Underlinings are mine)

It may be noted that the judgment in *Tamizuddin Khan* was delivered on 21 March 1955 but reasons were given on 3 April 1955. In the meantime, the Governor General promulgated the Emergency Powers Ordinance, by which he sought to validate and to give retrospective effect to 35 Constitutional Acts, passed earlier by the Constituent Assembly but in view of the judgment passed in *Tamizuddin Khan*, had all become invalid. This constitutional crisis had been brought upon Pakistan due to the unnecessary dissolution of the Constituent Assembly by the Governor General on a most flimsy stereotyped reasons. It may be recalled that the Federal Court in *Tamizudin Khan* did not consider the validity of the said dissolution on merit but only on the ground of maintainability of the writ petition filed under the added section 223A of the Government of India Act, 1935, since it was not then assented to by the Governor General. The case of the *Usif Patel* was decided on 12 April 1955, holding that validation of constitutional legislation could only be effected by the Constituent Assembly and not by an Ordinance promulgated by the Governor-General but the Constituent Assembly was no longer in existence.

It may be recalled what Muhammad Munir, C. J., forcefully said in *Usif Patel's* case at page-391 (DLR) :

> "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. We took pains to explain at length in that case that the position of the Governor-General in Pakistan is that of a constitutional Head of the State namely, a position very similar to that occupied by the King in the United Kingdom."

In this background the Federal Court delivered its opinion on the Reference by majority on 16 May 1955, set to rescue the Governor-General from the constitutional mess created by him, by calling upon an old English Maxim, *salus populi suprema lex.* Muhammad Munir, C.J., held at page-430 (DLR) :

> "Opinion.- That in the situation presented by the Reference the Governor-General has, during the interim period the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly are, during the aforesaid period, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force."

This is the complete U-turn of the Federal Court of Pakistan from its earlier two decisions, namely, *Tamizuddin Khan* and *Usif Patel*. It may be noted that the maxim *salus populi suprema lex* was forcefully argued on behalf of the writ-petitioner in *Moulvi Tamizuddin Khan* but was not accepted then by the Federal Court, rather, admonished the Constituent Assembly by saying "if the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business...."(DLR P-330) but now in the Reference in order to rescue the Governor-General

who acted recklessly rather conspirationally in dissolving the Constituent Assembly when the draft Constitution of Pakistan was ready for acceptance by the Constituent Assembly, the help of the same very maxim was merrily taken, giving a blind eye to its earlier two decisions, delivered within a month or so. Referring to the earlier judgment in *Usif Patel*, Cornelius, J., in his dissenting opinion in the Reference held at page-449 (DLR) :

> "The effect of that judgment is in my opinion, to make it clear that in relation to the very situation which the proclamation of the 16th April 1955, is intended to remedy, this Court was emphatically of the view that the Governor-General could not invoke any powers except such as were available to him under the constitutional instruments in force. To that opinion I steadfastly adhere and nothing which has been said in the arguments in the Reference affords in my view, sufficient justification for varying that finding, which constitutes law declared by this Court under section 212, Government of India Act,1935."

He concluded at page-450 (DLR) :

> "It is perfectly clear, in my opinion that in respect of the exercise of political initiative outside the constitutional instruments in force, the position since the Partition has been exactly the same as in regard to variation of the existing constitutional instruments, viz, that the power vests exclusively in the Constituent Assembly, and that the Governor-General can claim no share in the positive exercise of that power."
> (Underlinings are mine)

The opinion of Cornelius, J., shows how the majority opinion in the Reference deviated from the existing law declared earlier in *Tamizuddin Khan* and *Usif Patel*.

It is apparent that the Reference was meant to rescue the Governor General from the constitutional disarray created by him. By then the lions became tamed and served its purpose.

The next important decision we would consider is the case of State V. Dosso XI DLR (SC) (1959) 1. In this case the Pakistan Supreme Court upheld martial law as legal and valid and reached the zenith of constitutional immorality, as happened in the Courts of Nazi Germany during 1930s. It ushered a kind of peculiar martial law jurisprudence in the then Pakistan which triumphed and reigned supreme from time to time both in Pakistan and regrettably in Bangladesh also.

In State V. Dosso, Dosso and another were convicted and sentenced under the provisions of Frontier Crimes Regulation. This was challenged before the High Court of West Pakistan, Lahore, in its writ jurisdiction. The High Court found that the relevant provisions of the Frontier Crimes Regulation were void being repugnant to Art.5 of the Constitution of 1956.

The appeal by certificate, was taken up for hearing on 13 October 1958. By that time, the Constitution of 1956 had been abrogated and Martial Law was declared throughout Pakistan on 7 October 1958. On 10 October 1958, the laws (Continuance in Force) Order 1958, was promulgated.

The Supreme Court of Pakistan legitimized both the abrogation of the Constitution and also the promulgation of Martial Law without any demur. Muhammad Munir, C.J., very conveniently called upon the theory of grand norm propounded by Hans Kelsen, a jurist from

Germany in early 1930s, in order to legitimize the actions of the then President of Pakistan in destroying the existing Constitutional and legal Order of Pakistan. Referring to the theory of grand norm, Muhamad Munir, C.J., held at page-5-6 :

> "3. .....For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails, those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed, no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern justice doctrine, no change in the corpus or international entity of the State and the revolutionary Government and the new Constitution are, according to International Law, the legitimate Government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.
>
> 4. After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law- creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution".

This exposition of law is almost like the divine right claimed by James I, King of England and even acclaimed by Dr. Cowell, regius

professor of civil law at the University of Cambridge in his "The Interpreter" (1607) but it was the good fortune for the English people that even at that time, they had a conscientious Parliament and because of the remonstrance of the commons, the King had to abandon his idea of divine right. It was ill-luck for the people of Pakistan that they had no Parliament at that time, rather, had an ever obliging Chief Justice who was over-anxious to legitimize every unconstitutional acts of Major General Iskander Mirza, the President of Pakistan. The judgment in *Dosso* was delivered on 27 October 1958 and ironically on that very night the President was deposed by General Muhammad Ayub Khan, Commander in Chief of Pakistan Army and himself became the President of Pakistan. Another change, no doubt another new legal order. What a jurisprudential farce.

The appeal was allowed on the finding that the writ issued by the High Court had abated.

Fourteen years later, this is how Yaqub Ali, J. in *Asma Jilani* saw the situation, at page 216 (PLD) :

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

About the destruction of the legal order and its consequence, Yaqub Ali J., held 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."

His Lordship further commented at page-245 :

"..... 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."

About the recognition of the Martial Law Regime Yaqub Ali, J., held at page-245-246 :

"It was questioned how did the Court come to hold on the 13th October 1958, that the new Government was able to maintain its Constitution in an efficacious manner and that the old order as a whole had lost its efficacy " because the actual behavior of men does no longer conform to this old legal order." Indeed, it was the recognition by the Court which made the new Government de jure and its Constitution efficacious."

Yaqub Ali, J., still on *Dosso*, concluded in this manner at page-247-248 :

> "By laying down the law that victorious revolution and successful coup d' etat are internationally recognised legal methods of changing a constitution and that the revolution itself becomes a law-creation fact, and that Court can function only to the extent and in the manner declared by the new constitution, this Court closed the minds of all the Courts subordinate to it and bound down the hands of all executive authorities to accept the new government as de jure. The Attorney General did not hesitate in acknowledging that the decision in this case encourages revolutions and that it held out promise to future adventurers that if their acts for treason are crowned with success, Courts will act as their hirelings. No Judge who is true to the oath of his office can countenance such a course of action. Thus, with greatest respect to the learned Judges who are parties to the decision in the State V. Dosso we feel constrained to overrule it and hold that the statement of law constrained in it is not correct."

In this connection we must also remember that it is the Supreme Court which can say what the Constitution is. In 1958, in *Dosso*, the Supreme Court of Pakistan upheld the abrogation of the Constitution of the country and approved martial law as the new legal order of the country and acted as the cohort of the usurpers.

Forty-seven years later, in the case of Bangladesh Italian Marble Works Limited V. Government of Bangladesh BLT (Special Issue) 2006 (in short 'Fifth Amendment Case'), the High Court Division of Bangladesh held at page-169:

> "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. .....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 Commander-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."

It was further held at page-173 :

> "Munir C. J. with respect, in his anxiety 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."

Now coming back to Bangladesh, our Constitution became effective on and from 16 December 1972. The Constitution of the People's Republic of Bangladesh is the supreme law of Bangladesh because it is the embodiment of the will of the people of Bangladesh. This solemn expression of the will of the people makes this Instrument supreme law of the Republic. This Instrument of the people emphatically declared that all powers in the Republic belong only to the people of Bangladesh and no body else. The exercise of such power of the people shall be exercised only under and by the authority of this Constitution.

The preamble of the Constitution glorifies our historical war of liberation, our aims, objects and high ideals for which this nation came into existence by the highest sacrifice and dedication of our common people. It conceived in liberty, democracy and secularism, among others which are the fundamental basis of this nationhood

and as such the Constitution begins with a firm pledge and pronouncement that Bangladesh is a Republic.

Whoever we are and wherever we are, we must never waver and relent from this position that Bangladesh is a 'Republic' and we must always propound it as a Republic and nothing short of a Republic in its truest sense.

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) saw the Constitution as hereunder 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 Md. Shoib V. Government of Bangladesh 27 DLR (1975) 315, D. C. Bhattacharya, J., propounded the glory of the Constitution in the similar manner at para-20 page-325 :

> "In a country run under a written Constitution, the Constitution is the source of all powers of the executive organ 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."

Martial Law in Bangladesh was declared for the first time on 20 August 1975. It was made effective from 15 August 1975 when Sheikh Mujibur Rahman, the father of the nation, along with most of his family members were brutally murdered.

Halima Khatun V. Bangladesh 30 DLR (SC) (1978)207, was one of the first cases which reached the Supreme Court of Bangladesh, requiring interpretation of Martial Law and Martial Law Regulations. The case was decided on 4 January 1978. The country was at that time under Martial Law. The writ petition was as to the question whether the property involved was an abandoned property within the meaning of the Abandoned Property (Control, Management and Disposal) Order (P.O. No.16 of 1972). The Rule was discharged by the High Court. On appeal, a preliminary question arose as to whether in view of the provisions of the Abandoned Properties (Supplementary Provisions) Regulations, 1977 (Martial Law Regulation No.VII of 1977), the civil petition had abated.

In *Halima Khatun* the Supreme Court of Bangladesh held that the Proclamation or a Martial Law Regulation or a Martial Law Order subordinate the Constitution of the People's Republic Bangladesh. On behalf of the Supreme Court, Fazle Munim, J. (as his Lordship then was), held at para-18, page-218 :

> ".....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 Article 7(2) of the Constitution to the following effect: "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of 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."

With great respect for the learned Judges of the Supreme Court of the day, it must be held that their Lordships were absolutely wrong when they held that by clause (d) and (e) of the Proclamation made the Constitution of Bangladesh ..... subordinate to the Proclamation and any Regulation or order....." and in view of the Proclamation, 'the supremacy of the Constitution as declared in Article 7 was no longer unqualified." These observations are preposterous.

Let it be unquestionably declared that the supremacy of the constitution was unqualified, it is unqualified and it shall remain unqualified for all time to come.

The observations of their Lordships that 'no Constitutional provision can claim to be sacrosanct and immutable' and that 'The present Constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation.' are seditious.

Let it be unhesitatingly declared that the Constitution being the solemn expression of the will of the sovereign people of Bangladesh is sacrosanct and immutable and all organs of the Republic owe its existence to the Constitution. It is supreme in all respect. The Martial Law Proclamations, Regulations and Orders are non est before it.

Regarding the jurisdiction of the Supreme Court, it held that the Supreme Court had no power to call in question or declare illegal or void the Proclamation or any Regulation or Order. Fazle Munim, J., held at para-19, page-219:

> "On reference to Clause (g) of the Proclamation of August 24,1975, 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. Further Clause (g) also gives immunity from challenge in a Court of law to any declaration made or action taken by or under the Proclamation. There is no vagueness or ambiguity in the meaning of the words used in this clause as regards the total ouster of jurisdiction of this Court."

With great respect for the Supreme Court of the day, the whole approach was reprehensibly wrong. No authority in Bangladesh can oust the jurisdiction, powers and functions of the Supreme Court granted under the Constitution.

The Supreme Court further held that under the provisions of the Martial Law Regulation, an aggrieved person has no right to remedy, although previous to the Regulation, he might have granted relief. Fazle Munim, J. held at para-20, page-220:

> "In paragraph 5 it is provided that such taking over or vesting of property shall not be called in question on any ground whatsoever before any authority or in any Court. Further, no person who may be affected by such taking over or vesting of property in the Government could claim any compensation. In consequences 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."

These are shoking statements and would have blushed the Judges of the Star Chamber. With great respect for the learned Judges, this is not law, this is the negation of law.

The Supreme Court held in conclusion that in view of the Regulations, the civil petitions had abated. Fazle Munim, J., held at para-22, page-220:

> "Abatement in the context of Regulation connotes an idea of 'to demolish' or 'to put an end to,' so that nothing survives. The answer to the question whether the petitions have abated or not cannot but be in the affirmative."

With great respect, the above noted statements are not at all correct, rather, it is reiterated and emphatically declared that the Constitution is the supreme law of the country and the National Assembly, all Divisions and branches of the executive including the armed forces and the Judiciary including the Supreme Court owe

their existence to the Constitution of the People's Republic of Bangladesh. It is further unhesitatingly declared that any law, Proclamation, Regulation or Order, inconsistent with the Constitution, that law, Proclamation, Regulation or Order, no matter who made it, is void, and non est in the eye of law.

The law as declared by the Supreme Court in *Halima Khatun,* is not only alien to the Constitution, but gave legitimacy to Martial Law Proclamations etc., as such, with great respect for the learned Judges, we are constrained to overrule it and hold that the statements of law as contained in the said decision is wrong.

In State V. Haji Joynal Abedin and others 32 DLR(AD)(1980)110, the appellants were convicted by a Special Martial Law Court and were sentenced to death. On a writ petition, the High Court Division declared the said order of conviction was without lawful authority and of no legal effect and directed fresh trial by a competent Court. The Government appealed.

The appeal was decided on 20 December 1978. The country was under Martial Law. The Appellate Division by majority held that the Constitution was reduced to a position subordinate to the Proclamation and allowed to continue subject to the Proclamation and Martial Law Regulation or orders and other orders, as such, the Martial Law Courts had the authority to try any offence and its proceedings had been made immune from being challenged before a Court including the Supreme Court.

Ruhul Islam, J., held at para-18, page-122 :

> "18. 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 Pproclamation 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."

The observations made above that the Constitution 'was reduced to a position subordinate the Proclamation' and 'were kept in force and allowed to continue subject to the Proclamation' are not only gravely wrong but also seditious.

His Lordship further held at para-19, page-122-23:

> "19 ..... So long the Constitution is in force as the supreme law of the country, any act done or proceeding taken by a person purporting to function in connection with the affairs of the Republic or of a local authority may be made the subject matter of review by High Court in exercise of its writ jurisdiction. The moment the country is put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position. Martial Law Courts being creatures either of the Proclamation or Martial Law Regulation, have the authority to try any offence made triable by such Courts."

The observation made above that 'The moment the country is put under Martial Law, the.....constitutional provision.....loses its superior position' is disparaging to the Constitution, the supreme law of the country.

With regard to the jurisdiction of the Court, Ruhul Islam, J., held at para-30, page-126:

> "30. By the Proclamation (Amendment) Order, 1977 (Proclamation) Order NO.1 of 1977) all orders made, acts and things does, 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, were validated. In view of the provisions of law as shown above it leads to the irresistible conclusion that neither vires of clause (2) of Regulation No.3 of Martial Law Regulation No.1 of 1975 nor any order passed within the language of clause (b) transferring a case to a Special Martial Law Court can be challenged in any Court of Law. The writ jurisdiction of the High Court Division as conferred under Article 102 of the Constitution is to be exercised subject to the bar put under the Pproclamations and the Martial Law Regulations. In view of the position of law it is held that the High Court Division was not justified in interfering with the proceedings before the special Martial Law Court in the manner it has been done; and this order cannot be sustained."

With great respect, the whole basis, the ratio decidendi of this decision was wholesale wrong. The Appellate Division erroneously thought that the Martial Law Proclamation was the supreme law and all other laws including the Constitution of the People's Republic of Bangladesh are subordinate to the Martial Law Proclamations, Regulations and Orders.

Let it be known if it is not already understood that the People of Bangladesh is the only sovereign body in Bangladesh and the Constitution being the embodiment of their will, is the Supreme Law and there is no legal existence of Martial Law Proclamations, Regulations and Orders in Bangladesh.

The Supreme Court is a Court of Record and has all the powers of such a Court since the beginning of the King's Bench in England, subject only to the Constitution of Bangladesh but not the Proclamations, Regulations or Orders. Under Article 102, the High Court Division, has got the power and jurisdiction to issue the common law writs in the nature of certiorari, mandamus, prohibition, quo warranto and habeas corpus, subject only to sub-article (5) of Article 102 of the Constitution.

Since there is no existence of Martial Law Proclamations, Regulations and Orders, there is no Martial Law Courts and the High Court Division was justified in interfering with the proceedings of the Special Martial Law Court.

It is apparent that the decision of the Appellate Division in *Haji Joynal Abedin* was made in destruction of the Constitution of the People's Republic of Bangladesh, as such, with great respect for the learned Judges we are constrained to overrule it.

In the case of Kh. Ehteshamuddin Ahmed V. Bangladesh 33 DLR(AD)(1981)154, the conviction and sentence of death by the Special Martial Law Court was challenged by the appellant. The High Court Division discharged the Rule. The appeal was decided on 27 March 1980. In the meantime, on 6.4.1979, The Second Parliament by its Fifth Amendment of the Constitution, validated all Martial Law Proclamations, Martial Law Regulations and Orders. By a Proclamation published on 7.4.1979, Martial Law was withdrawn.

The Appellate Division in this case, however, conceded that the High Court Division can exercise its power under Article 102 if it is

found that the Martial Law Court or Tribunal acted without jurisdiction or the said Court was not properly constituted, in coram non-judice or acted mala fide. Besides this concession, the Appellate Division followed the erroneous principles decided earlier in the cases of *Halima Khatun* and *Haji Joynal Abedin* and held that inspite of withdrawal of the Martial Law and the revocation of Proclamations, the jurisdiction of the Supreme Court remains barred and ousted and no Court including the Supreme Court, can question the legality or otherwise of any Martial Law Regulations or Orders made by the Chief Martial Law Administrator earlier during the Martial Law. Denigrating the supremacy of the Constitution, Ruhul Islam, J., on behalf of the Court, held at para-16 page-163:

> "16. 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 Administrator."

With great respect for the learned Judge, the above observation that 'the supremacy of the Constitution cannot by any means compete with the Proclamation issued by the Chief Martial Law Administrator,' is most unfortunate and totally wrong. It is reiterated that the Constitution remains supreme, no mater what the Proclamations sought to proclaim and even if the Court is blinded by it.

Denying the jurisdiction of the Supreme Court, Ruhul Islam, J., referring to *Joynal Abedin*, 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 creatures 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."

It is reiterated that the Constitution is supreme and the High Court Division of the Supreme Court being the creature of the Constitution never loses its power to issue writs against any authority in order to uphold the Constitution and the fundamental rights of the people.

In considering the effect of the Constitution (Fifth Amendment) Act, 1979, Ruhul Islam, J. held at para-33, page 171:

> "33. .....It would not be correct to say that on account of the lifting of Martial Law and revocations of Proclamation and Martial Law Regulations and Orders, ouster of jurisdiction of the superior Courts to examine any such proceeding or action, has ceased to became operative. So, on account of change as noted above, neither any new power was acquired by the superior Courts nor the bar but under the Proclamations and Martial Law Regulations in relation to any orders passed or proceedings taken thereunder, has been removed. Article 18 of the Fourth Schedule to the Constitution and clause (h) of the Proclamation of April 6, 1979 leave no scope for making any argument that on account of withdrawal of the Martial Law and revocation of the Proclamations of August 20, 1975, and November 8, 1975, and the Third Proclamation of November 29, 1976, together with all other Proclamations and Orders amending or supplementing them; and on the repeal of all Martial Law Regulations and Martial Law Orders made in pursuance of the said Proclamations by the Proclamation of April 6, 1979 the order of the Chief Martial Law Administrator, the proceedings before the Martial Law Court, the order of the reviewing authority and the order of the confirming authority is now open to examination by the High Court

> Division in its the writ jurisdiction. Clause (h) of the Proclamation of April 6, 1979 provides total protection from being questioned before any Court including the Supreme Court."

With great respect, these pronouncements are totally erroneous and do not represent the correct legal position at all.

In the *the Fifth Amendment Case*, the High Court Division held that the there is no law called Martial Law and there is no authority called Martial Law Authority and further declared the Constitution (Fifth Amendment) Act, unconstitutional and void and that the Constitution (Fifth Amendment), Act, 1979, was not law. This pronouncement by the High Court Division was upheld by the Appellate Division.

Since the legal position of the Constitution and the Supreme Court, as postulated by the Appellate Division in the case of *Ehteshamuddin* was subversive of the Constitution, with great respect for the learned Judges, we are constrained to overrule it.

Next, we would consider the case of Nasiruddin V. Government of the People's Republic of Bangladesh 32 DLR(AD)(1980)216. This case was in respect of an abandoned property and was decided by the Appellate Division on 14 April 1980. In this case, the Appellate Division followed the ratio decidendi of the above noted earlier three decisions. Kemaluddin Hossain, C.J., held at para-9, page-221:

> "..... In view of the changed circumstances, the question arose whether the decisions of the Martial Law Courts have become amenable to writ jurisdiction of the High Court Division. After careful consideration of all the relevant proclamations and Regulations and enactments and considering all aspects of the question, this Division has expressed the opinion that such

> decisions or orders passed by the Martial Law Court or 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 mala fide."

The decisions and orders passed by the various Martial Law Courts are not at all protected. Those Courts being begotten out of void provisions, lack jurisdiction altogether and it is the duty of the High Court Division, nay, it is imperative on its part to say so. It did so in the *Fifth Amendment Case*.

We have already held that the Constitution is the supreme law of Bangladesh and the Supreme Court is empowered by the Constitution to look into any illegality or irregularity of any authority. The views of the Appellate Division in this case, upholding the vain supremacy of the Martial Law Proclamations etc. and the Martial Law Courts were erroneous and inconsistent with the Constitution, as such, with greatest respect for the learned Judges, we are constrained to overrule it.

Nearly a decade later, the Appellate Division retraced its path and since the decisions of the High Court Division in *Mridha* and *Shoib,* upheld the unqualified supremacy of the Constitution and its basic structures, in the case of Anwar Hossain Chowdhury V. Bangladesh (popularly known as 'Eighth Amendment Case') 1989 BLD (Special Issue). But the said solemn note was breached when Shahabuddin Ahmed, J. (as his Lordship then was) had observed at page-140:

> "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 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 alteration of the basic structures, but refrained from declaring them void in order prevent chaos in the national life and applied the Doctrine of Prospective Invalidation for the future. In our case also the past amendments which were not challenged have become part of the Constitution by general acquiescence."

This is not so and the observation that 'the past amendments which were not challenged have become part of Constitution by general acquiescence' with respect, are misconceived.

The Constitution is the Supreme law and its any violation is void and illegal and remains so for all time to come. The plea of waiver or acquiescence is not available in respect of violation of any law. If it is violated, the Court is bound to say so, no matter when it is raised. There is no period of limitation, no waiver, no acquiescence in this respect: Toronto Electric Commissioners V. Snider 1925 AC 396 PC, Lois P-Myers V. United States 272 US 52 (1926), Proprietary Articles Trade Association V. Attorney General of Canada 1931 All ER 277 PC, Frederick Walz V. Tax Commission of New York 25 LEd 2d 697(397 US 664), Motor General Traders V. State of Andhra Pradesh AIR 1984 SC 121.

The context in which the learned Judges in Golak Nath V. State of Punjab AIR 1967 SC 1643, applied the doctrine of prospective invalidation is no excuse to hold the past unconstitutional amendments which were not challenged to form part of the Constitution by general acquiescence.

Under the circumstances, the above mentioned observations of Shahabuddin Ahmed, J., that "Inspite of vital changes from 1957 by destroying some of the basis structures of the Constitution, nobody challenged them in court.....consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution." and his Lordship's conclusion that "the past amendments which were not challenged have become part of the constitution by general acquiescence" with great respect, are not correct and as such disapproved.

If the impugned amendments are destructive, violative or even inconsistent of the Constitution, the said amendments are void and the Act which made the amendments is not law.

In the present case, in the High Court Division, the vires of Section 3 of the Constitution (Seventh Amendment) Act, 1986, had been challenged. Section 3 reads as follows :

> 3. **Amendment of Fourth Schedule to the Constitution**.-In the Constitution in the Fourth Schedule, after paragraph 18, the following new paragraph 19 shall be added, namely:-
>
> **"19. Ratification and confirmation of the Proclamation of the 24th March, 1982, etc-** (1) The Proclamation of the 24th March,1982, hereinafter in this paragraph referred to as the said Proclamation, and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations,

Martial Law Orders, Martial Law Instructions, Ordinances and all other laws made during the period between the 24th March,1982, and the date of commencement of the Constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986) (both days inclusive), hereinafter in this paragraph referred to as the said period, are hereby ratified and confirmed and declared to have been validly made and shall not be called in question in or before any court, tribunal or authority 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 the said Proclamation or from any other Proclamation, Proclamation Order, Chief Martial Law Administrator's Order, Martial Law Regulation, Martial Law Order, Martial Law Instruction, Ordinance 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, shall be deemed 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 ground whatsoever.

(3) No suit, prosecution or other legal proceedings 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 proceedings 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 appointments made during the said period to any office mentioned in the Third Schedule shall be deemed to have been validly made and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever, and any person appointed under the said Proclamation to any such office during the said period and holding such office immediately before the date of commencement of the Constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986), hereinafter in this paragraph referred to as the said Act shall, as from that date hold such office as if appointed to

that office under this Constitution; and shall, as soon as practicable after that date, make and subscribe before the appropriate person an oath or affirmation in the form set out in the Third Schedule.

(5) All appointments made by the Chief Martial Law Administrator during the said period to any office or post which is continuing after the date of commencement of the said Act shall, as from that date, be deemed to be appointments made by the President.

(6) All Ordinances and other laws in force immediately before the date of commencement of the said Act shall, subject to the Proclamation revoking the said Proclamation and withdrawing the Martial Law, continue in force until altered, amended or repealed by competent authority.

(7) Upon the revocation of the said Proclamation and withdrawal of Martial Law, this Constitution shall stand fully revived and restored and shall, subject to the provisions of this paragraph, have effect and operate as if it had never been suspended.

(8) The revocation of the said Proclamation and 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.

(9) The General Clauses Act, 1897, shall apply to the said Proclamation, and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instructions made during the said period and also to the revocation of the said Proclamation and other Proclamations and the repeal of the said Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instructions as it applies to, and to the repeal of, an Act of Parliament as if the said Proclamation, and other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instructions and the Proclamation revoking the said Proclamation were All Acts of Parliament.

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

QAZI JALAL AHMAD,
Secretary.

It may be noted that earlier in *Fifth Amendment Case* the High Court Division declared Section 2 of the Constitution (Fifth Amendment) Act, 1979, ultra vires the Constitution. This was upheld by the Appellate Division.

On comparison of the above noted Section 2 of the Constitution (Fifth Amendment) Act, 1979, with Section 3 of the Constitution (Seventh Amendment) Act, 1986, it would appear that the purpose of both the provisions are same. Both the provisions were enacted to give validity and legitimacy to the Martial Law Proclamations, Regulations, Orders, Instructions etc. and all kinds of proceedings, functions and transactions made thereunder. Section 3 of the Constitution (Seventh Amendment) Act, 1986, is however, more elaborate than the earlier Section 2 of the Constitution (Fifth Amendment) Act, 1979. But by both the enactments, the Martial Law Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances and all other laws made during the periods of Martial Law from 1975 to 1979 and from 1982 to 1986, were sought to be ratified and confirmed and declared to be validly made respectively by the Second and Third Parliament of Bangladesh. The purpose in both the cases is to give legitimacy to the illegal and unconstitutional acts of the Martial Law Authorities and its vassals.

Besides, section 2 of the Constitution (Fifth Amendment) Act, amended the Fourth Schedule to the Constitution and after paragraph 17, paragraph 18, as contained in section 2, was added.

Similarly, section 3 of the Constitution (Seventh Amendment) Act,1986, amended the Fourth Schedule further and after paragraph 18, paragraph 19, as contained in section 3, was added.

The High Court Division in the *Fifth Amendment* case 2006 (Special Issue) BLT, elaborately discussed the concept of the supremacy of the Constitution, the legal position of Martial Law and its attempted validation by the Constitution (Fifth Amendment) Act,1979.

The Appellate Division 2010 (XVIII) BLT (AD)329, after hearing, dismissed the Civil Petitions in *Fifth Amendment* Case and held at para-76, page-453 :

> "76. Accordingly though the petitions involve Constitutional issues, leave, as prayed for, can not be granted as the points raised in the leave petitions have been authoritatively decided by superior Courts as have been reflected in the judgment of the High Court Division."

The Appellate Division found at page-433 :

> "64. .....Further as we have already stated while dealing with the principle of the supremacy of the Constitution, the will of the people does not contemplate Martial Law or any other laws not made in accordance with the Constitution. The armed forces are also subject to the will of the people and their oaths as provided in section 15(2) of the Army Act 1952, section 17(2) of the Air Force Act 1953 and section 14 of the Navy Ordinance 1961, make it plain. They serve the "people" and can never become the masters of the "people". Accordingly Martial Law is unconstitutional and illegal and it is a mischievous device not founded in any law known in Bangladesh and by Martial Law the whole nation is hijacked by some people with the support of the armed forces and the whole nation goes into a state of siege; it is like that the whole nation and "We, the people of Bangladesh", are taken hostage and further like a hostage-taking situation, the hostage takers themselves recognize that there is a superior law than their weapons which "We, the people" put in their hands to serve us and they recognize that there are two impediments to their taking over power or assuming power, first, the Constitution itself and so they, at first, start by saying " Notwithstanding anything in the Constitution" because they recognize that the Constitution is superior but they choose to brush it aside. The second impediment to

Martial Law is the Superior Court of the Republic entrusted with the solemn duty to "preserve, protect and defend the Constitution" and so every Martial Law, immediately upon Proclamation seeks to curb the Powers of the Court, particularly, the powers of the Constitutional Court.

65. .....Further, the Parliament though may amend the Constitution under Article 142 but cannot make the Constitution subservient to any other Proclamations etc. or cannot disgrace it in any manner since the Constitution is the embodiment and solemn expression of the will of the people of Bangladesh, attained through the supreme sacrifice of nearly three million martyrs. Further the Parliament, by amendment of the Constitution can not legitimize any illegitimate activity.

.....

.....

66. Accordingly we hold that since the Constitution is the Supreme law of the land and the Martial Law Proclamations, Regulations and Orders promulgated/made by the usurpers, being illegal, void and non-est in the eye of law, could not be ratified or confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or orders.

The Appellate Division concluded with a solemn hope at para-75, page-452 :

"75. We are of the view that in the spirit of the Preamble and also Article 7 of the Constitution the Military Rule, direct or indirect, is to be shunned once for all. Let it be made clear that Military Rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever as the same is against the dignity, honour and glory of the nation that it achieved after great sacrifice; it is against the dignity and honour of the people of Bangladesh who are committed to uphold the sovereignty and integrity of the nation by all means; it is also against the honour of each and every soldier of the Armed Forces who are oath bound to bear true faith and allegiance to Bangladesh and

> uphold the Constitution which embodies the will of the people, honestly and faithfully to serve Bangladesh in their respective services and also see that the Constitution is upheld, it is not kept in suspension, abrogated, it is not subverted, it is not mutilated, and to say the least it is not held in abeyance and it is not amended by any authority not competent to do so under the Constitution".

The supremacy of the Constitution, the non-amendability of the basic structures of the Constitution, the legal position of the Martial Law Proclamations, Martial Law Regulations and Martial Orders and the vires of the Constitution (Fifth Amendment) Act, 1979, and other incidental constitutional questions were elaborately discussed in the earlier *Fifth Amendment Case.*

Since the Constitution (Seventh Amendment) Act, 1986, is similar to that of the Constitution (Fifth Amendment) Act, 1979, we need not discuss and repeat all those points all over again, rather, we agree, accept and uphold what were decided in the *Fifth Amendment case.* We would only discuss the doctrine of necessity and the scope of condonation of illegalities committed during the Martial Law period.

But before that we would discuss three cases where the trial of the civilian accused by the army authority was disapproved by the Superior Courts of United Kingdom and the United States.

The first one is the case of Theobald Wolfe Tone, an Irish rebel. In 1798, Ireland was in the midst of a revolution. Wolfe Tone held no commission in the British army. He had worked with the French army to secure their invasion of Ireland. He was captured by the British army. A Court-Martial held in Dublin, found him guilty and sentenced him to be hanged. A writ of habeas corpus was moved before the King's Bench in Ireland on the ground that Wolfe Tone was not a military person, as such, not subject to trial by the Court-martial. Although participation of Wolfe

Tone with the French invasion was substantially admitted and Ireland was in turmoil, still the Court of King's Bench in Ireland granted the writ of habeas corpus in his favour and upheld the rule of law that a civilian cannot be tried by a military Tribunal.

Next we would consider the case of Ex parte Milligan 71 US (4 Wall) 2, 18 L.Ed. 281 (1866). Since the middle of 1861, civil war was raging between the Northern and Southern States of United States. It was continuing for four years and the very existence of the Republic as one nation had become doubtful. In this grave situation, an allegation of treason against the Northern America was raised against Lambdin P. Milligan, a civilian resident of Indiana. He was tried by a military commission and was sentenced to death by hanging on 19 May 1865.

On a writ of habeas corpus, the Supreme Court of the United States by majority upheld the Constitutional supremacy and declared that the 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. On the Order of the Supreme Court, Milligan was released. The decision of the majority of the Supreme Court was delivered by Mr. Justice Davis. A relevant portion of the judgment, although a bit long, is quoted below because it highlighted the rights of the people and the role of the Supreme Court:

> ".....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 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.

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.
(The underlinings are mine)

Quoted from 'Cases and Martial on Constitutional Law (1952 Revision) by Professor John P. Frank at pages 258-265.

In a recent case of Salim Ahmed Hamdan V. Donald H. Rumsfeld, Secretary of Defence (2006), the U.S. Supreme Court held that trial of Guantanamo Bay detainees in military tribunals violates U.S. and International law. Justice Stevens delivered the opinion of the Court. He held :

> "For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structures and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, ... that the offense with which Hamdan has been charged is not an "offens(e) that by ..... the law of war may be tried by military commissions."

After giving the detailed reasonings, Justice Stevens concluded:

> "We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge- viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction". (collected from website)

This kind of trial of civilians by martial law was made illegal during the reign of the King Charles I in 1628. King Charles I was engaged in war with Spain and then with France, as such he was in constant need of huge amount of money to carry on the wars. He had recourse to illegal methods of raising money. Apart from tonnage and poundage, the King forced people to contribute loans and many persons were imprisoned for refusing the loan and punishment was imposed by martial law. The people of England were very much agitated because of this kind of arbitrary imposition of loans and oppressions. The commons prepared a bill in the name of petition of Right, in order to protect the people from illegal exactions under the name of loans, arbitrary commitment who refused compliance and implication of punishment by martial law. Clause VIII of the said Petition of Right 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.)

At first the King avoided to give his assent to the Bill but on the insistence of the commons he grudgingly signified the royal assent

and the Petition of Right became an Act of Parliament (1628), relieving the people of England from oppression to a great extent.

The above discussion would show that with the advent of civilisation the rights of man took its roots and the arbitrary actions of the rulers of the day were gradually softened. By the Bill of Rights, 1689, the arbitrary powers of the King were brought under the domain of the Parliament but even then the conduct of the Parliament towards its colonies in America was not based on equality and consequently the colonies became an independent Republic in 1776. During these periods and thereafter the civil rights of the people gradually dominated the military might of the rulers. The 20th century saw two great wars. After the Second World War many of the colonies became independent. In 1949, United Nations was established and under its auspices, a number of Human Rights Conventions were enacted to protect the Human Rights. In the new nation, although democracies were promised and civil liberties were guaranteed under its Constitutions but in many of the new democracies, onslaught of the autocratic rulers could not be stopped. They not only abrogate the Constitution or suspend or keep its various provisions in abeyance, according to their whims and caprices, to suit their purpose, but also convene trial of the civilians for their criminal offences before the Martial Law Tribunals apart from creating Martial Law offences.

This happened in Pakistan in 1958, 1969, 1977 and also in 1999.

Although Bangladesh came into being with the blood and tears of thirty million people with the high ideals of democracy, republicanism, equality, securialism with other civil liberties, guaranteed by its Constitution but the curse of Martial Laws could not be avoided and the country passed through the periods of Martial Laws from 1975 to 1979 and then again from 1982 to 1986.

It is seen above that even during the turmoils of civil war in Ireland and in the United States, the trial of civilians by Court Martials were deprecated and the civilian accused persons were set free by the Superior Courts in exercise of their powers under the writ of habeas corpus, in order to uphold the rule of law.

In the same spirit of rule of law, the Supreme Court of the United States in the case of *Hamdan* was not slow in declaring his trial by a military commission illegal.

In our present case, apart from challenging the vires of the Constitution (Seventh Amendment) Act,1986, the trial and conviction of the petitioner by the Special Martial Law Court was also challenged on the ground that the Constitution does not permit so, so also the normal criminal laws of the country, specially when there is no legal existence of Martial Law Proclamations, Martial Law Regulations, Martial Law Orders etc.

Doctrine of Necessity:

The Appellate Division in the *Fifth Amendment Case* on the Doctrine of Necessity extensively quoted the judgment of the High Court Division but modified its 'provisional condonation' of illegalities. The said findings of the Appellate Division was again modified in the

Civil Review Petition Nos.17-18 of 2011 by the Appellate Division by its Order dated 29 March 2011 and made the condonations provisional. Still there appears to be some confusion so far paragraph 1 of the above Order is concerned, as such, we would consider the doctrine of necessity again but in brief.

It may be noted that the doctrine of necessity is based on a very old maxim *salus populi suprema lex* (safety of the people is the supreme law) but no decision of the superior Courts in England was found on this maxim on constitutional questions. The maxim was only available in the text books on Maxims. But it made its appearance in this Sub-Continent in Pakistan Supreme Court in Governor General's Reference No.1 of 1955, 7 DLR 1955 FC 395. We have already narrated the back-ground of the said Reference and also the decision delivered thereon.

It may be reiterated that the national crisis was brought about by the Governor General himself by dissolving the Constituent Assembly in October 1954, knowing full well that the draft Constitution was made ready for adoption. This dissolution was challenged before the Sind Chief Court. The Court declared the dissolution illegal. On appeal it came before the Federal Court in the case of Federation of Pakistan V. Moulvi Tamizuddin Khan 7 DLR 1955 FC 291. The majority of the Federal Court, being fully aware and alive that their declaration would augment a serious constitutional crisis, held that without the assent of the Governor General, the laws enacted by the Constituent Assembly, was ineffective.

We agree with the views of Yaqub Ali, J. in *Asma Jilani* that the minority view of Cornelius, J., that the Constituent Assembly was the sovereign body and assent of the Governor General who was only a titular head was not necessary under the Provisions of the Government of India Act,1935 and the Indian Independence Act,1947.

The Opinion of De Smith, in this connection, is appropriate :

> "It is clear.....that the leading Pakistan decision in 1955 was not very well disguised act of political judgment. By the normal canons of construction, what the Governor-General had done was null and void." (Quoted from Leslie Wolf-Philips : Constitutional Legitimacy, at page-11)

Muhammad Munir, C.J., applied the doctrine of necessity for the first time in this Constitutional case, firstly, in order to salvage the Governor General from the quagmire created by himself in dissolving the Constituent Assembly and secondly, in order to get out of the Constitutional impasse created by his own judgment in *Tamizuddin Khan*. Had he accepted the legal position propounded by the Full Bench of the Sind Chief Court in the case of *Tamizuddin Khan*, upheld by Cornelius, J., the hydra of doctrine of necessity would never had made its appearance in this Sub-Continent or in other parts of the world.

The observations of High Court Division in its judgment in the *Fifth Amendment case* were generously quoted by the Appellate Division 2010 (XVIII) BLT (AD) 329, in dismissing the civil petitions. There is no harm if we quote from the said portion of the judgment of the Appellate Division also (page 437 BLT):

68. The High Court Division then regarding the doctrine of necessity and condonation expressed its view as follows: :

"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 to 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 resent context, the illegality and gravest wrong was commited 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 Sate 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 digged deep into the early Middle Ages for Kings' prerogatives and the maxims, such as, Id Quod Alias Non Est Licitum, Necessitas Lictium 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.

.....But what the Hon'ble Chief Justice decided to ignore was that the Governor General himself brought disaster upon the entire country by dissolving the Constituent Assembly earlier in October 1954 when the Prime Minister had already set the date for adopting the Constitution for Pakistan in December, 1954.

That itself was a violation of the Independence Act, 1947 and a treasonous act against the people of Pakistan. With great respect, the Governor General ought not to have allowed to take advantage of his own grievious wrong against Pakistan. As a matter of fact, that was the beginning of the end. Besides, the Hon'ble Chief Justice also forgot that only a few months back in the case of Federation of Pakistan V. Moulvi Tamizuddin Khan PLD 1955 FC 240, his Lordship refused to interfere even in case of a real disaster brought about, again by the Governor General in dissolving the Constituent Assembly....."

This stoic and stout stand like that of a 16th Century Common Law Judge was taken by Munir, C.J., when the

dissolution of the Constituent Assembly was challenged but the same Chief Justice became full of equity when the Governor General was caught in his own game because of his earlier dissolution of the Constituent Assembly.

It appears that the Hon'ble Chief Justice was more concerned and worried about the difficulties of the Governor General who was supposed to be only a titular head, than the Constituent Assembly, the institution which represented the people of Pakistan but was dissolved by the Governor General which augmented the constitutional crisis. With great respect, it appears that the Hon'ble Chief Justice of Pakistan held a double standard in protecting the interest of the Governor General than that of the Constituent Assemble. 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."

Regarding the military take-over, state-necessity and democracy, the Appellate Division quoted the High Court Division at page-442 (BLT) :

"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 handed down in a silver platter. It has to be earned. It has to be owned. The world history is replete with stories of people, ordinary people who fought for their rights in different names in different countries, but the cry for liberty, the cry for equality, the cry for fraternity were reverbrated in the same manner from horizon to horizon. This sense of liberty made us independent from the yoke of the British rule in 1947 and the same sense of liberty pushed us through the war of liberation in 1971 and brought Bangladesh into existence. But the proclamation of Martial Law is altogether the negation of the said spirit of liberty and independence. In this connection we would recall what was said in the case of Shamima Sultana Seema V. Government of Bangladesh 2LG (2005)194 at para-123:

> It should be remembered that the ingrained spirit of the Constitution is its intrinsic power. It is its soul. The Constitution of a country is its source of power. It is 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 its 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."

In this connection, the comment of Justice Billing Learned Hand, Chief Justice of one of the U.S. Circuit Courts of Appeal delivered in a meeting in 1944 is pertinent:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitutions, no law, no court, can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."
> (Quoted from Brian Harris: The Literature of the Law, 1998, page-339)

I may add that in such a situation no doctrine of necessity is needed as in the realm of United Kingdom and in the Republic of the United States or even in India.

It is already mentioned that the doctrine of necessity was reincarnated in the Governor General's Reference No.1 of 1955 which was although disapproved in the case of Asma Jilani V. Government of Punjab PLD 1972 SC 139, but on the basis of the dissenting opinion of Lord Pearce in Madzimbamuto V. Lardner-Burke (1968) 3 All ER 561 PC, the Supreme Court of Pakistan accepted the doctrine in a limited form.

But first we would consider *Madzimbamuto*. In *Madzimbamuto,* the doctrine of necessity was not approved by the Privy Council. Lord Reid for the majority held at page-577 DC, referring to Grotius De Jure Belli Et. Pacis:

> "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."

It may be noted that on 11 November 1965, Southern. Rhodesia made a unilateral declaration of independence and broke away from the United Kingdom. Still Lord Reid emphatically upheld the authority of the United Kingdom Parliament at page-578 EF:

> "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."

Holding the emergency powers regulations as invalid, Lord Reid declared at page-578 I:

> " ..... it should be declared that the determination of the High Court of Southern 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 inspite of his dissenting judgment held at page-579 C to E :

> " ..... 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."

But Lord Pearce in his dissenting opinion focused on a different 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."

This appears to be a slender proposition for solution as a get away from the circumstances then prevailing in Southern Rhodesia. It should be noted that Lord Pearce even in his dissenting opinion agreed with the majority opinion of Lord Reid that the impugned emergency and the regulations were unlawful and invalid, only the acts may be valid. But the Pakistan Supreme Court in Asma Jilani not only accepted this slender proposition of Lord Pearce but also amplified it to some extent.

Hamoodur Rahman, C.J., gave his reasons 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 consequences to the body politic and upset the social

order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers in my humble opinion, this doctrine can be 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, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization".

His Lordship explained the doctrine in this manner 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."

Yaqub Ali, J. in this case held in connection with the doctrine of necessity 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 1998, in Pakistan, by the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998, civilian offenders were sought to be tried by the Military Courts for the offences committed under the ordinary Criminal Law. The legality of this Ordinance was challenged in the case of Sh. Liaquat Hussain V. Federation of Pakistan PLD 1999 SC 504 and such trial of the civilians before the Military Courts was declared unconstitutional. Ajmal Mian, C.J., explained where the Doctrine of Necessity can be invoked at page 595 :

> "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....."

Refusing to accept the plea of the Attorney General that the Doctrine of Necessity can be invoked for a limited purpose, Irshad Hasan Khan, J., was of the opinion in *Liaquat Hussain* that if it is approved of, it may very frequently resorted to by the Executive which 'would turn a democratic rule into a dispotic one' and any deviation from the Constitution may lead to anarchy. His Lorship concluded at page-806 (PLD):

> "58. .....the constitutionality of the Ordinance is not to be judged on the question of bona fides of the Federal Government simpliciter but on the touchstone of he Constitutional provisions. Here, impugned legislation is ultra vires of the Constitution in so far as it takes away the functions of the Courts in determining the guilt or innocence of an accused."

In the case of Syed Zafar Ali Shah V. General Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869, Irshad Hasan Khan, C.J., in dealing with the doctrine of necessity at para-252 to 266, took into account that the machinery of the Government had completely broken down. In this back ground, his Lordship concluded at para-266, page-1203:

> "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 extraordinary 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"

In the case of Sindh High Court Bar Association V. Federation of Pakistan PLD 2009 SC 879, the Supreme Court of Pakistan, examined in details the constitutionality of the declaration of emergency, Provisional Constitutional Order, 2007 and Oath of office (Judges) Order, 2007. General Pervez Musharraf was removed by the Prime Minister of Pakistan on 12 October 1999 while he was out of

the country. After his return on 13 October, 1999, General Musharraf seized the executive power of the Government and himself became the Chief Executive of Pakistan. On 21 June 2001, he ousted the President and assumed the office himself in addition to his post of Chief of Army Staff. In 2002, General Musharraf held a referendum on his continuation as the President and as usual he returned with more than 99% votes in his favour. From time to time he continued to amend the Constitution. On 3 November 2007, General Musharraf promulgated Emergency in Pakistan, Provisional Constitution Order No.1 of 2007 and Oath Order, 2007. These were challenged in this case. But long before that, in the evening of 3 November 2007, the Supreme Court instead of accepting or acquiescing the situation as happened earlier on 7 October 1958, 25 March 1969, 5 July 1977 and 13 October 1999, this time boldly passed a restraint Order upon the Government in the case of Wajihuddin Ahmed V. Chief Election Commissioner PLD 2008 SC 25. It made a notable difference and the Supreme Court in *Sindh High Court Bar Association case*, made brilliant coming back to the path of Rule of law.

Iftikhar Muhammad Chaudhry , C.J., on the principle of past and closed transactions, held at para-101-102, page-1070 :

> "101 ..... In our view, only those acts which were required to be done for the ordinary orderly running of the State could be protected. Similarly, only such past and closed transactions could have been protected, which were otherwise not illegal at the relevant time, and rights, privileges, obligations or liabilities had been acquired, accrued or incurred, or any investigation, legal proceeding or remedy in respect of any such

right, privilege, obligation, liability, penalty, forfeiture, or punishment had been taken. The actions taken by General Pervez Musharraf on 3rd November, 2007 and thereafter being unconstitutional, illegal and void ab initio, the principle of past and closed transaction was not attracted……."

But the learned Chief Justice, in the later part of para-101, sought to draw a distinction between the earlier Martial Laws and emergencies with the one promulgated on 3 November 2007, on the grounds, such as, the Order passed in *Wajihuddin Ahmed*, arrest of Judges, refusal of the Judges to accept it, sustained resistance in the shape of protests by the Bar Associations, masses, including civil society, political workers, students, labourers, large scale arrests of lawyers, resolution of foreign Bar etc.

With great respect for the learned Chief Justice of Pakistan although the aforementioned incidents encouraged the Supreme Court to take such bold stand instead of acquiescing the promulgation of emergency and other steps taken by General Musharraf on 3 November 2007, as happened earlier but we are of the view that the promulgation of Martial Laws and other unconstitutional activities of 1958, 1969 etc. remained illegal and void, no matter whether those were acquiesced or not, whether protests were raised or not.

The learned Chief Justice further held at page-1070 :

"102. In the light of the above discussion, it is held and declared that the amendments purportedly made by General Pervez Musharraf from 3rd November, 2007 up till 15th December, 2007 (both days inclusive) were neither made by an

> authority mentioned in the Constitution nor the same were made following the procedure prescribed in the Constitution and were, therefore, unconstitutional, illegal and void ab initio. Accordingly, the Constitution (Amendment) Order, 2007 (President's Order No. 5 of 2007), the Constitution (Second Amendment) Order, 2007 (President's Order 6 of 2007) and PCO No. 1 of 2007 as also Oath Order, 2007, which were tantamount to amending Articles 238 & 239 and the Third Schedule to the Constitution (Oath of Office of Chief Justice/Judge) respectively, or any other instrument having similar effect are unconstitutional, illegal and ultra vires of the Constitution and consequently of no legal effect."

As to the validity of the proclamations of martial laws or of emergencies issued by any functionary of the State, including the Chief of Army Staff, holding the Constitution in abeyance, issuing a PCO and an Oath Order, and thereby requiring the Judges of the superior Courts to make a fresh oath so as not to be able to pass any orders against such authority, the Supreme court pointed out that all such acts must be judged on the touchstone of the provisions of the Constitution and on no other consideration or criteria, theory, doctrine or principle.

Regarding the supremacy of the Constitution and the doctrine of necessity, his Lordship held at para-111, page-1082:

> "111. ..... The Constitution is the cementing force of the State and society. By making a Constitution, the society has already used and applied such a force and brought into existence a State and has chosen to govern itself in accordance with the Constitution so made. It has also unequivocally provided the method and manner for making any further

changes in the Constitution and by no other manner or means. Thus, how an authority created under the Constitution itself and equipped with certain powers including use of force to be exercised and resorted to under the control and command of a still superior authority created under the Constitution one day turn around and overthrow the Constitution itself considering that the force so vested in it was liable to be used by it at its own, and not at the authorization by the superior authority designated by the Constitution. That is the destruction of the Constitution and if the Constitution were to be destroyed, State and the society in the modern times could be preserved in no manner. Shall the Constitution of Pakistan continue to meet such a treatment in the garb of the civil and the State necessity and the welfare of the people, or in the name of "expediency", as ably put by Sardar Muhammad Raza Khan J, in the case of Jamat-e-Islami, by its intermittent holding in abeyance or suspension, mutilation and subversion time and again at the will and whim of the military ruler by recourse to flimsy consideration of non-existing facts? .....It is further held and declared that the doctrine of necessity and the maxim *salus populi est suprema lex,* .....have no application to an unconstitutional and illegal assumption of power by an authority not mentioned in the Constitution in a manner not provided for in the Constitution, including but not limited to a purported promulgation of Proclamation of Martial Law, Proclamation of Emergency, Provisional Constitution Order, Oath Order, Amendments of the Constitution and the Orders, Ordinances, Regulations, Rules, etc. issued in pursuance thereof, notwithstanding any judgment of any Court, including the Supreme Court."

(Underlinings are mine)

Under the above premises, the Supreme Court of Pakistan declared all acts/actions done or taken by General Pervez Musharraf

from 3 November 2007 to 15 December 2007 (both days inclusive), that is to say, Proclamation of Emergency and the subsequent acts/actions done or taken in pursuance thereof, are illegal, *ultra vires* and *void ab initio* and not capable of being condoned.

Chaudhry, C.J., held at page-1200:

> "179..... The aforesaid actions of General Pervez Musharraf are also shorn of the validity purportedly conferred upon then by the decisions in Tikka Iqbal Muhammad Khan's case. The said decisions have themselves been held and declared to be *coram non judice* and nullity in the eye of law. The amendments purportedly made in the Constitution in pursuance of PCO No. 1 of 2007 themselves having been declared to be unconstitutional and void ab inito, all the actions of General Pervez Musharraf taken on and from 3rd November, 2007 till 15th December, 2007 (both days inclusive) are also shorn of the validity purportedly conferred upon them by means of Article 270AAA."

On the question of protection of acts done during the period of illegal Proclamation of Emergency on 3 November 2007 to 15 December 2007, Chaudhry, C.J., found that though on 3 November 2007, the Constitution was held in abeyance and Pakistan made to be governed, as nearly as may be, in accordance with the Constitution, but subject to PCO No.1 of 2007 and any other Order issued by General Pervez Musharraf as President, the other two branches of the government, namely, the executive and the legislative were continued and the day-to-day business of the executive and legislative branches of the government was carried on in accordance with the Constitution.

Chaudhry, C.J. held at page-1203 :

> "184.....Thus, they would be presumed to be validly and competently done unless challenged on grounds of *vires, mala fides,* non-conformity with the Constitution or violation of the Fundamental Rights or on any other available ground. The umbrella of Proclamation of Emergency and PCO No.1 of 2007 was an eyewash and a blackmailing tool. Though emergency as purportedly proclaimed was in force and the Constitution was held in abeyance, General Pervez Musharraf made oath of President under the Constitution and not under PCO No.1 of 2007. The Proclamation of Emergency having been revoked on 15th December, 2007, the acts/actions done or taken from 16th December, 2007 onward until the swearing in of the elected representatives and formation of governments at the federal and the provincial levels were even otherwise done or taken under and in accordance with the Constitution and the law, and were, therefore, valid and were not affected in any way."

In Bangladesh, we had two spells of Martial Laws. The first one was from 15 August 1975 to 7 April 1979 and the second one was from 24 March 1882 to 11 November 1986.

The Constitution (Fifth Amendment) Act, 1979, sought to validate and legalise all Martial Law Proclamations, Martial Law Regulations, Martial Law Orders and other Orders, passed during the period from 15 August 1975 to 7 April 1979.

In the *Fifth Amendment case* 2006 (Special Issue) BLT (HCD), the High Court Division, held the said Act void and non est in the eye of Law.

The Appellate Division in appeal in the *Fifth Amendment case* 2010 (XVIII) BLT (AD) 329, quoted the declarations given by the High Court Division, at pages 432-33 :

"64. ..... The High Court Division after considering all the aspects concluded as follows:-

"There is no existence of Martial Law Authorities or Martial Law Proclamations, Regulations or Order in our Constitution or any of the laws of the land. Those authorities or proclamations are quite foreign to our jurisprudence. Still those proclamations etc. were imposed on the people of Bangladesh. Those have got no legal basis. Those are illegal and imposed by force. The people are constrained to accept it for the time being, not out of attraction to its legality but out of fear. As such it has no legal acceptance....."

"In the instant case, the solemn Constitution of Bangladesh were freely changed by the Proclamations, MLRs and MLOs, issued by the self-appointed or nominated Presidents and CMLAs, in their whims and caprices. The learned Additional Attorney General although did not support Justice Sayem but half-heartedly attempted to justify the actions taken by Khondaker Moshtaque Ahmed and Major General Ziaur Rahman, B,U. psc, but when we spwcifically asked him to show us any Constitutional or legal provision in justification of the seizure of State Power of the Republic, he was without any answer although he mumbled from time to time about the Fourth Amendment."

"The election of the Second Parliament was conducted in February, 1979, during Martial Law. At that time, Lieutenant General Ziaur Rahamn, B.U., psc., was the President and the Chief Martial Law Administrator.

The Constitution (Fifth Amendment) Act, 1979, was passed on April 6, 1979, legalizing all the Proclamations, Martial Law Regulations, Martial Law Orders and the actions taken thereon, some of which are mentioned above.

Any common man of ordinary prudence would say that the enormity of illegality sought to be legalized by this Act, would have shocked the Chief Justice Coke so much so that it would have left him dumb instead of saying that 'when an Act of Parliament is against right and reason, or repugnant ..... the common law will control it and adjudge that Act to be void'. Perhaps, it would also leave the Chief Justice Hamoodur Rahman, out of his comprehension, if he would found that 'after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country', an army commander can have the audacity to change the Constitution beyond recognition and transfiguring a secular Bangladesh into a theocratic State. Perhaps the U.S. Supreme Court would have kept mum instead of holding that the guarantee of due process bars Congress from enactments that 'shock the sense of fair play'.

But what duty is cast upon us. It is ordained that we must not 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 perspective.

We have done so. We must hold and declare that this Constitution (Fifth Amendment) Act, 1979, is not law".

Upholding the declaration given by the High Court Division, the Appellate Division held at page-435-36(2010 (XVIII) BLT (AD) 329):

"65.....The footprints that the "period of delinquency" leaves behind are Martial Law Proclamations, Regulations and Orders in the form of black laws and the ultimate insult to "We, the people" is the attempt to ratify these black laws by bringing those into the umbrella of the Constitution itself. In the present case the High Court Division recognizing these footprints sought to erase those once for all and since all the parties before the High Court Division agreed that the Constitution is supreme, obvious the result is that Martial Law is illegal and unconstitutional. So this Court should not, indeed cannot,

grant leave in these petitions because to do so would be perceived by "the people of Bangladesh" in the way that our highest judiciary is still unable, long after the "period of delinquency", to properly and adequately deal with such delinquency and further, it would send wrong signals to those who wish to circumvent the "will of the people" in the Constitution and that each of our generations must also be taught, educated and informed about those dark days; the easiest way of doing this is to recognize our errors of the past and reflect these sentiments in the judgments of this Court which will ensure preservation of the sovereignty of "We, the people of Bangladesh" forever as a true "pole star".

66. Accordingly we hold that since the Constitution is the Supreme law of the land and the Martial Law Proclamations, Regulations and Orders promulgated/made by the usurpers, being illegal, void and non-est in the eye of law, could not be ratified or confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or orders.

Moreover the Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other more basic features of the Constitution namely, independence of judiciary and its power of judicial review.

As such we hold that the Fifth Amendment is also illegal and void and the High Court Division rightly declared the same as repugnant, illegal and ultra vires the Constitution."

We uphold and reiterate that there is no law called 'Martial Law' and there is no authority called the 'Martial Law Authority' in our jurisprudence. We also agree and uphold the declarations of the Appellate Division given in the said case that the Martial Law

Proclamations, Martial Law Regulations, Martial Law Orders are all illegal, void and non-est in the eye of law and could not be ratified or confirmed even by the Parliament through Fifth Amendment of the Constitution.

The second Martial Law befell upon Bangladesh on 24 March 1982. This time it was declared by Lieutenant General Hussain Muhammad Ershad, ndc, psc, Chief of Staff, Bangladesh Army. By a Proclamation of Martial Law promulgated on 24 March 1982, he assumed the office of the Chief Martial Law Administrator of the People's Republic of Bangladesh, although there was no such post or office in Bangladesh. He also assumed the full command and control of all the Armed Forces of Bangladesh, again beyond the ambit of the Army Act. All these steps were taken illegality in utter disgrace and violation of the Constitution of Bangladesh.

Some of the salient features of the said Martial Law Proclamation, among others, are as follows:

i) The Constitution of the People's Republic of Bangladesh was suspended.

ii) The Proclamation, the Martial Law Regulations and Orders and other Orders and Instructions of the CMLA became the supreme law.

iii) The President of Bangladesh, Vice-President, Prime Minister and all the other Ministers, Speaker, Deputy Speaker and others ceased to hold office with immediate effect.

iv) No Court, including the Supreme Court did not have any power to call in question the Martial Law Proclamation or any Martial Law Regulation or Order or other Order made by the CMLA.

v) All Courts including the Supreme Court, would continue to function but subject to the provisions of Martial Law Proclamation etc.

The Proclamation also prescribed setting up of Special Military Courts, Tribunals and Summary Military Courts for the trial and punishment of any offence under Martial Law Regulations or Orders and of offence under any other law.

Bangladesh was ruled under the provisions of the Martial Law Proclamations, Martial Law Regulations, Martial Law Orders and Instructions of the CMLA, issued from time to time for the period of Martial Law since 24 March 1982 to 11 November 1986 when Martial Law was withdrawn. All the above mentioned Martial Law provisions and 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 CMLA, and all other matters mentioned in Section 3 of the Constitution (Seventh Amendment) Act, 1986, are sought to be ratified and confirmed by the Parliament by virtue of the said Section 3. The said vires of the Section 3 of the Constitution (Seventh Amendment) Act, 1986, has been challenged in the present writ petition.

It has long been established that the people of Bangladesh are sovereign. All office holders from the highest to the lowest, including the Constitutional functionaries, are there to serve the people alone, not for their personal aggrandizement. It is for the people they do exist. Without the people they are non-est. All their functions, duties

and rights are aimed towards rendering services to the people of Bangladesh without any question.

People rule through their Constitution. It is the supreme law in Bangladesh because it is the embodiment of the will of the Sovereign People of the Republic of Bangladesh. All kinds of laws, rules and regulations and orders, in whatever term those are named, must conform to the words of the Constitution. Let it be known for all time to come, if it is not already known, that any kind of law, acts or proceedings which are inconsistent with the Constitution, those laws, acts or proceedings, to the extent of the inconsistency are void and non est in the eye of law.

Our House of the Nation is vested with the legislative power of the People's Republic. Its members represent the sovereign People, that is why they are blended with the sovereignty of the people being the representatives of the sovereign people, that is why the House of the Nation as a whole is supreme. But the ultimate supremacy as well as the sovereignty lies with the people of Bangladesh, and no body else.

In United Kingdom, since the Bill of Rights of 1689, the King in Parliament is omnipotent and is entitled to enact any law, virtually without any restriction. Still there is some inbuilt limitation in its legislative functions inspite of its acknowledged and manifest supremacy. These limitations of an omnipotent Parliament were noticed by Professor A.V. Dicey long ago in 1885 in his celebrated work 'Introduction To The Study of The Law of the Constitution' at page-79 (ELBS edition, 1973):

> "Here we see the precise limit to the exercise of legal sovereignty; and what is true of the power of a despot or of the authority of a constituent assembly is specially true of the sovereignty of Parliament; it is specially true of the sovereignty of Parliament; it is limited on every side by the possibility of popular resistance. Parliament might legally establish an Episcopal Church in Scotland; Parliament might legally tax the Colonies; Parliament might without any breach of law change the succession to the throne or abolish the monarchy; but every one knows that in the present state of the world the British Parliament will do none of these things. In each case widespread resistance would result from legislation which, though legally valid, is in fact beyond the stretch of Parliamentary power. Nay, more than this, there are things which Parliament has done in other times, and done successfully, which a modern Parliament would not venture to repeat. Parliament would not at the present day prolong by law the duration of an existing House of Commons. Parliament, would not without great hesitation deprive of their votes large classes of parliamentary electors; and, speaking generally, Parliament would not embark on a course of reactionary legislation; person who honestly blame Catholic Emancipation and lament the disestablishment of the Irish Church do not dream that parliament could repeal the statutes of 1829 or of 1869. These examples from among a score are enough to show the extent to which the theoretically boundless sovereignty of Parliament is curtailed by the external limit to its exercise."

Leslie Stephen in his 'Science of Ethics' (1882) recognised the combined influence both of the external and of the internal limitation on legislative sovereignty. Dicey himself quoted with approval Leslie Stephen at page-81 (The Law of the Constitution):

> "Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of

> view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, 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."

Our Parliament is supreme but unlike the Westminster Parliament, its supremacy is subject to the Constitution, similar to that of the Congress of the United States. Our Parliament can make and unmake any law but within the bounds of the Constitution which is the embodiment of the will of the sovereign people of Bangladesh. It can also ratify any Ordinance made by a lawfully elected President, following a proper and lawful procedure but cannot ratify and confirm any illegal Proclamation, Regulation and Order by whomsoever it was made.

Section 3 of the Constitution (Seventh Amendment) Act, 1986, added paragraph 19 in the Fourth Schedule of the Constitution. The sub-para (1) of the said paragraph 19 sought to ratify and confirm the various Proclamations, Proclamation Orders, CMLA's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances etc. made from time to time since 24 March 1982 till 11 November 1986. Those are on the face of it, unconstitutional and illegal.

Besides, the very first Martial Law Proclamation promulgated on 24 March 1982, sought to make the Constitution of the People's Republic of Bangladesh its subordinate and subservient as pointed out above. This kind of making the Constitution subordinate and subservient to the Martial Law Proclamations, Proclamation Orders, CMLA'S Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions and Ordnances, continued for more than 4 (four) years till 11 November 1986. These Martial Law Proclamations etc. are void and non est on the face of it since those are not only inconsistent with the Constitution but destructive of the Constitution. Those Proclamations etc. which sought to subordinate the Constitution are treasonous towards the sovereign people of Bangladesh .

The matters contained in sub-para (2) to (10) in paragraph 19 in the Fourth Schedule of the Constitution, emanated from the Proclamations etc. mentioned in sub-para (1), as such, those are also on the face of it, unconstitutional and void.

Under the circumstances, the Parliament, supreme it is no doubt, but cannot ratify or confirm any of the Proclamations etc. and the acts and actions taken thereon and mentioned in sup-para (1) to (10) of paragraph 19, added by section 3 of the Constitution (Seventh Amendment) Act, 1986.

Since section 3 of the Constitution (Seventh Amendment) Act, 1986, sought to add a new paragraph 19 in the Fourth Schedule to the Constitution which contained provisions and the acts, actions and proceedings thereon, that subordinate the Constitution, the said

Act itself is ultra vires the Constitution, as such, void and non est in the eye of law. Section 3 of the Constitution (Seventh Amendment) Act, 1986, is not law.

In this connection, it should be noted that Article 150 of the Constitution provides that transitional and temporary provisions set out in the Fourth Schedule shall have effect notwithstanding any other provisions of this Constitution. The purpose of the Fourth Schedule enacted under Article 150 is to protect various provisions, functions of different organs of the State of Bangladesh and its functionaries during the war of liberation and thereafter and all other acts and actions taken since the declaration of independence of Bangladesh on 26 March 1971 and till the commencement of the Constitution on 16 December 1972. Since the Fourth Schedule is meant for transitional and temporary provisions specifically for the period from 26 March 1971 till 16 December 1972, no other provision no matter what it is , made beyond the said period, can be included in the said Fourth Schedule.

Accordingly, it is declared that paragraph 19 was illegally added to the Fourth Schedule in violation of Article 150 of the Constitution.

If a valid amendment of the Constitution is made, strictly in accordance with the provisions of the Constitution, it may find its place in the Constitution itself or seperately as in the case of first 4(four) amendments in the Constitution but must not be included in the Fourth Schedule to the Constitution which has a different purpose altogether.

Another matter in this connection, requires mention. The Appellate Division in its original judgment in the Fifth Amendment case, expunged all the findings and observations of the High Court Division, in respect of Article 150 and the Fourth Schedule. But in Civil Review Petition Nos. 17-18 of 2011 the Appellate Division by its Order dated 29 March 2011 expunged and modified its own above findings in respect of Article 150 and the Fourth Schedule to the Constitution. The relevant portion of the said order reads as follows:

> 3. Articles 149 and 150 of the Constitution have been inserted in the Constitution for giving continuity and making interim arrangements in respect of all laws made, acts, things and deeds done and orders promulgated or made or purported to have been made in the transitional period between 26th March, 1971 and the commencement of the Constitution, and all powers exercised and things done during the said period under the authority derived or purported to have been derived from the Proclamation of Independence, and therefore, the insertion of paragraph 3A in the Fourth Schedule by the Proclamations (Amendment) Order, 1977 (Proclamations Order NO. 1 of 1977) and Paragraph 18 in the Fourth Schedule by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) is void ab initio and is hereby expunged.
>
> 4. It is hereby declared that paragraphs 21 and 22 were wrongly accommodated in the Fourth Schedule along with those legislative measures taken during the transitory period between the date of Proclamation of Independence of Bangladesh and the commencement of the Constitution, and this insertion is not a legal ground to expunge all findings and observations of the High Court Division relating to Article 150 of the Constitution and therefore, all findings in this regard made by this Division are hereby expunged. Accordingly, the judgment of this Division stands modified.

Next we would deal with the doctrine of necessity based on an eight hundred year old maxim *'Salus Populi Suprema lex'* (Safety of the people is the Supreme law). We have already considered above how this long forgotten doctrine made its maiden appearance in Pakistan in the Governor General's Reference No. 1 of 1955 and how Muhammad Munir, C.J., abused it for the benefit of the Governor General in order to hide his illegal dissolution of the Constituent Assembly in 1954 when the draft Constitution was ready for adoption by the Constituent Assembly.

It should be noted that the Appellate Division in considering the question of condonation in the *Fifth Amendment Case*, generously quoted the observations of the High Court Division at para-68, page-445 (2010 (AD) BLT):

"Then the High Court Division concluded as follows:

> We provisionally condone the various provisions of the Proclamations with amendments as appended to the book, namely, the Constitution of the People Republic of Bangladesh; published by the Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh, as modified upto 31st May, 2000, save and except those mentioned above. But since we have declared the Constitution (Fifth Amendment) Act, 1979, ultra vires to the Constitution, the vires of the rest of the provisions of the Proclamations not considered herein, remain justifiable before the Court. However, all the acts and proceedings taken thereon, although were not considered yet, are condoned as past and closed transactions.
>
> We have held earlier held in general that there was no legal existence of Martial Law and consequently of no Martial Law Authorities, as such, all Proclamations etc. were illegal, void ab initio and non est in the eye of law. This we have held strictly in accordance with the dictates of the Constitution, the

supreme law to which all Institutions including the Judiciary owe its existence. We are bound to declare what have to be declared, in vindication of our oath taken in accordance with the Constitution, otherwise, we ourselves would be violating the Constitution and the oath taken to protect the Constitution and thereby betraying the Nation. We had no other alternative, rather, we are obliged to act strictly in accordance with the provisions of the Constitution.

The learned Advocates for the petitioners raised the possibility of chaos or confusion that may arise if we declare the said Proclamations, MLRs and MLOs and the acts taken thereunder as illegal, void ab initio and non est.

We are not unmindful of such an apprehension although unlikely but we have no iota of doubts about the illegalities of those Proclamations etc. What is wrong and illegal shall remain so for ever. There cannot be any acquiescence in case of an illegality. It remains illegal for all time to come.

A Court of Law cannot extend benefit to the perpetrators of the illegalities by declaring it legitimate. It remains illegitimate till eternity. The seizure of power by Khandaker Moshtaque Ahmed and his band of renegades, definitely constituted offences and shall remain so forever. No law can legitimize their actions and transactions. The Martial Law Authorities in imposing Martial Law behaved like an alien force conquering Bangladesh all over again, thereby transforming themselves as usurpers, plain and simple.

Be that as it may, although it is very true that illegalities would not make such continuance as a legal one but in order to protect the country from irreparable evils flowing from convulsions of apprehended chaos and confusion and in bringing the country back to the road map devised by its Constitution, recourse to the doctrine of necessity in the paramount interest of the nation becomes imperative. In such a situation, while holding the Proclamations etc. as illegal and void ab initio, we provisionally condone the Ordinances, and provisions of the various Proclamations, MLRs and MLOs save

> and except those are specifically denied above, on the age old principles, such as, Id quod Alias Non Est LIcitum, Necessitas Licitum Facit (That which otherwise is not lawful, necessity makes lawful), Salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law).
>
> In this connection it may again be reminded that those Proclamations etc. were not made by the Parliament but by the usurpers and dictators. To them, we would use Thomas Fullers warning sounded over 300 years ago: **Be you ever so high, the law is above you.** (Quoted from the Judgment of Lord Dennings M.R., in Gouriet v. Union of Post Office Workers (1977) 1 QB 729 at page-762. Fiat justitia, ruat caelum."

It is to be noted that the Appellate Division while dismissing the leave petitions in the *Fifth Amendment Case*, condoned various Proclamations, all executive acts, transactions as mentioned in the penultimate paragraph of the original judgment which was subsequently modified in the Order passed by the Appellate Division in Civil Review Petition Nos. 17-18 of 2011 and made the condonations provisional.

A question invariably arises as to why in one hand we hold all Martial Law Proclamations etc and all other actions, transactions proceedings thereon void and on the other hand condone all those illegalities.

Muhammad Munir, C.J., applied the maxim *salus populi suprema lex* and condoned the illegality in the Governor General's Reference in 1955, in order to extricate the Governor General of Pakistan from the quagmire created by himself. But on analysis it

would appear that this condonation was not for 'populi', rather, it was actually against their interest. The maxim was used, rather, misused to give premium to the illegal conducts of the Governor General of Pakistan.

Similarly, *Dosso* blessed the Martial Law Proclamations etc. in 1958 and sought to create a new kind of jurisprudence, though it was absolutely illegal but continued to cast its ominous shadow for a very long time which loomed large over Bangladesh till it was buried in the *Fifth Amendment Case* in 2005 by the High Court Division and was finally upheld by the Appellate Division in 2010.

In the *Thirteenth Amendment Case* also this Division held, although in obiter, that the near two years, beyond the 90 (ninety) days period of the Care-taker Government, being questionable even within the void Thirteenth Amendment Act but again in obiter, was constrained to observe that the functions and transactions of the Government for the said period be condoned but only in the interest of the people.

In earlier occasions, this Court was constrained to exercise its power of condonation, not very happily but only to avoid the apprehended chaos, confusion and uncertainty. A word of caution that in the back-ground of earlier pronouncements of this Court this kind of indulgence may not be available in future.

However, the whole purpose of granting condonation is to maintain the continuity and status quo in the workings and functions of the Government but it was never to bless the autocrats or the usurpers or their illegal regimes. Let us take the present case. The

Martial Law Proclamations etc. of 1982 to 1986 are all illegal and shall remain so for all time to come. No body can deny it. There can be no condonation in respect of those. But numerous administrative decisions were taken, orders were passed, transactions both national and international were made, proceedings of the trials were conducted by the Martial Law Courts, international treaties were entered into, which are inevitable in the running of the Government during the said period of Martial Law which continued for more than 4 (four) and half years from 24 March 1982 till 11 November 1986. Those functions can not be erased even though were done by an illegal and unconstitutional Government through its illegitimate organs. But those are there, mostly after so many years, as past and closed transactions. Legally speaking all those functions of the Government for the said period are all illegal and no right can be created and founded in favour of any body during the said period. Even the emoluments paid to the Government servants will be illegal to cite one example amongst thousands. Those would definitely create not only chaos but a wholesale devastation in the entire Republic, nationally and also internationally. The Republic would lose its credibility in all its spheres. This simply cannot be allowed to happen. In order to avoid such a havoc, we have to call up the aid of the maxim *'salus populi suprema lex'* and while declaring the Martial Law Proclamations etc., and section 3 of the Constitution (Seventh Amendment) Act 1986, as void, all other Government functions, Orders, acts, actions, transactions, proceedings of the Martial Law

Courts etc., as mentioned above, which are passed and closed, are condoned but condoned provisionally.

No doubt the legitimacy given by the Second and Third Parliament was illegal but a further question may arise as to whether by allowing the condonations of those illegalities, the usurpers will be encouraged to violate and ravage the Constitution in future.

The possibility cannot be denied. This is why the Supreme Court is always slow to condone the illegalities of violation of the Constitution.

We may reiterate that the whole purpose of condonation is to ameliorate the sufferings of the ordinary people whose legal rights may be jeopardized unless the functions and the transactions of the illegal regimes of the usurpers and violaters of the Constitution are condoned but never to condone their own illegalities.

The *'suprema lex'* is for *'salus populi'* , not for the usurpers and violaters of the Constitution of the *'populi'*. They personally remain liable for violation of the Constitution and for their illegal activities for all time to come.

No condonation is allowed for those who violate the Constitution which is the worst kind of offence that may be committed against the Republic and its people.

Why all those functions, acts, actions and proceedings are not fully condoned but only provisionally needs some explanation also.

Take the case of the writ petitioner. He was convicted on the charge of murder. The nature of the offence is immaterial. He has a constitutional right to be tried by a Court established under the

Courts Act and under the provisions of the Code of Criminal Procedure and Evidence Act. But the case against him was transferred to a Special Martial Law Tribunal for trial, not a Court under the Code.

We have already held that the Martial Law Proclamations etc. were illegal. The Special Martial Law Court was set-up by Martial Law Regulation No. 1 of 1982, made in pursuance of Proclamation of Martial Law of 24 March 1982. Those are illegal, so also the Special Martial Law Court. But the said Court, as far back as in 1984, had already convicted the petitioner in absentia and sentenced him for life imprisonment. His conviction and sentence was confirmed in review by a Martial Law Authority. Since the proceeding of the trial is past and closed and if it is condoned, the petitioner would have no remedy, although his trial was illegal and also without jurisdiction for two reasons, firstly, the Special Martial Law Court has got no legal existence since the Martial Law Proclamations etc. are void; secondly, a civilian cannot be tried by a Military Tribunal, Re. *Walfe-Tone*(1798), *Milligan* (1865), *Hamdan* (2006).

Since we hold that the condonation of orders acts, actions and proceedings etc. are allowed only provisionally, the Court, if moved, can in a proper case, look into the allegations on a case to case basis.

This is the reason we resolved to condone the orders, acts, actions, transactions, proceedings etc. during the period of Martial Law from 24 March 1982 to 11 November 1986, only provisionally, so that an aggrieved person or if he is dead, his next of kin, can challenge any order, act, actions, proceedings etc. of the aforesaid

period of Martial Law. We allow this because human dignity is no less important than life and liberty and the next of kin may like to absolve the allegations levelled against his predecessor.

The next question is what would be the procedure and forum for this kind of extraordinary relief.

The High Court Division in the present case in exercise of its writ jurisdiction had already declared that the Martial Law Proclamations etc. are illegal and void which we uphold.

The High Court Division is of the opinion that in appropriate cases it may intervene under Article 102 of the Constitution, even in criminal matters. It also held that when fundamental right is invoked, the question of alternative remedy becomes a matter of discretion only. In this connection the learned Judge of the High Court Division referred to a number of decisions from home and abroad including Bhajan Lal (AIR 1992 SC 604) and Iqbal Hasan Mahmood (60 DLR AD 147).

There are decisions in both sides of the fence as to whether Article 102 can be applicable in a criminal case. It is a gray area and needs to be explored. In this case we would consider, specifically the scope of the writ in the nature of certiorari as envisaged in Article 102(2)(a)(ii)of the Constitution.

In this connection we have to hark back to history. A thousand years ago, the King of England was the first Magistrate of the Realm and the fountain of justice. He himself used to preside over the King's Bench. The King was clothed with the Special Powers of prerogative

writs, issued at his own instance and discretion, in order to protect his own interest, execute his commands over his Earls, Barons and the three Estates of the Realm. With the passage of time, these extraordinary powers contained in the prerogative writs of the Crown were also made available to the causes of the subjects where no other alternative remedy was available. By then the King's Bench was used to be presided over by the Crown Judges, appointed by the King.

The writ of certiorari was originally a writ whereby information of the proceedings of the inferior Court or Tribunal was called for by the King, subsequently by the King's Bench in the name of the King, in order to be satisfied that the jurisdiction is properly exercised. During the time of Lord Holt, C.J., in 1700 or so this writ was in regular use but issued in the discretion of the Court.

In India, the Supreme Court at Fort William, Calcutta, was established in 1774, by a Royal Charter in pursuance of the Regulating Act of 1773. It had all the powers of the King's Bench to issue the prerogative writs including certiorari within its territorial limits.

By the Indian High Courts Act, 1861, the High Courts at Bombay, Madras and Calcutta were established with powers to issue prerogative writs in exercise of their original jurisdiction.

Article 102 of our Constitution empowers the High Court Division, to issue writs in the nature of mandamus, certiorari, habeas corpus and quo warranto. All those are, however, issued in the discretion of the Court and generally not available if there are

alternative remedies. But mere presence of alternative remedy, again in general, may inhibit the discretion of the Court but would not limit its jurisdiction, specially when there is an allegation of lack of jurisdiction, coram non judice or mala fide or where there is a breach of fundamental rights. The position, however, is otherwise if there is, not only alternative remedy but that is also equally efficacious.

So far certiorari is concerned, the relevant portion of Article 102 of the Constitutions runs as follows:

> 102 (1) .....
>
> (2) The High Court Division may, of satisfied that no other equally efficacious remedy is provided by law-
>
> (a) on the application of any person aggrieved, make an order-
>
> (i) .....
>
> (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or
>
> (b) .....

The words 'no other equally efficacious remedy is provided by law' appearing in clause (2) of Article 102 is very pertinent as well as important because that is the precondition for exercising the power of the High Court Division to issue the writ in the nature of certiorari. It should be noted in this connection that no word of the Constitution can be ignored and must be given due weight and importance to its meaning. As such, before issuing any such order the High Court Division must be satisfied that 'no other equally efficacious remedy' is available. But it must also be noted that the available remedy, is not mere efficacious, it must also be 'equally efficacious'. If the High

Court Division is satisfied that the available remedy is only efficacious but not equally efficacious, then in exercise of its discretion may issue necessary orders, depending on the facts and circumstances of the case in hand.

Article 226 of the Indian Constitution, empowering the High Courts to issue the writs in the nature of certiorari, does not contain the precondition of the absence of equally efficacious remedy as in Article 102 of our Constitution. This makes a great difference. Unlike our High Court Division, the High Courts in India may issue orders in the nature of prerogative writs even if equally efficacious remedy is available under another provision of law. *Bhajan Lal* itself is an example.

In Bhajan Lal (AIR 192 SC 604), a case was started against Bhajan Lal on the allegations of corruption. Being aggrieved Bhajan Lal filed a writ petition under Article 226 and 227 of the Constitution of India before the High Court. After hearing, the High Court quashed the impugned proceedings. On appeal, the Supreme Court of India held that the allegations made in the complaint, constitute a cognizable offence, as such, does not call for exercise of its extraordinary remedy, obviously under Article 226 and 227 or under its inherent powers, presumably under section 482 of the Code of Criminal Procedure (India) of the High Court, to quash the FIR itself (para-111).

It, however, transpires from the judgment (para-108) that the High Court in India may in appropriate cases, interfere both under its extraordinary jurisdiction under Article 226 of the Indian

Constitution (our Article 102) or even under section 482 of the Code of Criminal Procedure (Section 561A of the Code of Criminal Procedure, 1898) (para-108).

This is not so under our jurisdiction. Whenever it is found that an appeal or for that matter, the inherent power under Section 561A of the Code provides an equally efficacious remedy, the exercise of the extraordinary powers of the High Court Division would not be available and any petition in this respect filed under Article 102 of the Constitution would be misconceived. His remedy, if any, under the facts and circumstances of the case, would be under the Code and not otherwise.

On the facts of Bhajan Lal in Bangaldesh, an application under section 561A of the Code, under the inherent power of the High Court Division, would provide an equally efficacious remedy to that of the extraordinary power of the Court, as such, an application under Article 102 would be misconceived and is liable to be dismissed.

In this regard, we accept the contention of the learned Attorney General that Bhajan Lal is not to be followed in Bangladesh.

Under the premises of the above discussion, we have to consider the relief available to the appellant-writ-petitioner and the persons placed in similar position.

Since the vires of Section 3 of the Constitution (Seventh Amendment) Act 1986, was an issue, the appellant-writ petitioner rightly invoked the extraordinary powers of the High Court Division under Article 102(2)(a)(ii) of the Constitution.

Since the vires of Section 3 of the aforesaid Act had already been declared void, no further declaration in this respect, would be necessary.

However, in respect of the persons who may feel aggrieved by the proceedings conducted before the various Martial Law Courts and the consequent orders of conviction, they may challenge their such convictions.

The question now arises as to whether adequate remedy is available under the Code of Criminal Procedure.

It is obvious that no appeal is provided in respect of their convictions by the various Martial Law Courts under the Code.

The inherent power of the High Court Division under section 561A of the Code can only be invoked if the proceedings are under the provisions of the Code. It does not provide any relief if the trials are not conducted under the provisions of the Code. Since the convictions were made by the various Martial Law Courts, illegally constituted under the Martial Law Proclamations and Regulations and not under the Code, the inherent power of the High Court Division under the provisions of section 561A, cannot be invoked.

Under the circumstances, since no equally efficacious remedy is provided under any other provisions of law, the persons who are aggrieved by the orders of the Martial Law Courts, may in appropriate cases, invoke the extraordinary powers of the High Court Division under Article 102(2)(a)(ii) of the Constitution.

The High Court Division , however, must be satisfied that:

a) there is a genuine grievance,
b) the order, act and things done, complained of, could not be taken under the normal circumstances, by a proper authority,
c) the proceedings complained of, ended in a miscarriage of justice,
d) there is an over-all failure of justice.

The High Court Division in seisin of the matter, if satisfied, may quash the proceedings and set-aside the conviction passed by a Martial Law Court but would direct trial afresh before the appropriate Court if there is allegation of offence against the concerned person or persons. But privilege of bail is not available in certiorari.

Under the circumstances, so far as the present appeal is concerned, the trial and conviction of the appellant-writ petitioner by the Special Martial Law Court No.3, Zone-3, Cantonment bazar, Chittagong, in Martial Law Case No. 12 of 1986, arising out of Kotwali P.S. Case No. 25 dated 24.12.1984, corresponding to G.R.No.1676 of 1984, is declared illegal and void. However, the trial of the Sessions Trial Case No. 10 of 1986, be continued in the concerned Court of Additional Sessions Judge, Chittagong, from the stage it was transferred to the Special Martial Law Court.

The cliff-notes of our declarations are as follows :

1. The people of the Republic of Bangladesh are sovereign. The three organs of the Republic, the Legislature, the Executive and the Judiciary are the manifestations of the sovereignty of the People. The powers of the people are bestowed upon those three grand organs and all other functionaries and persons in the service of the Republic and thus they are so empowered.

2. People rule through the Constitution. It is the embodiment of the will of the sovereign People. There lies the supremacy of the Constitution. Any law, any act, any conduct, which is inconsistent with the Constitution is void.
3. The Legislature, the Executive and the Judiciary are the three grand organs of the Republic, created by the Constitution.
4. The Constitution creates all functionaries and services of the Republic and those owe their existence to the Constitution.
5. The Constitution covenants a democratic People's Republic of Bangladesh to be governed by the sovereign People through their elected representatives.
6. There is no such law as Martial Law or no such authority as Martial Law Authority in Bangladesh. As such, any person who declares Martial Law and ousts an elected government or attempts to do so, he and his associates would be liable for high treason against the Republic of Bangladesh.
7. The Proclamation of Martial Law on 24 March 1982, all other Proclamations, Proclamation Orders, Chief Martial law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances etc., made by Lieutenant General H.M. Ershad, ndc, psc., and taking over of the powers of the Government of Bangladesh as the Chief Martial Law Administrator and all his subsequent acts, actions and functions till 11 November 1986, all were made not only in clear violation but in destruction of the Constitution, as such, are absolutely illegal and void ab initio.
8. Section 3 of the Constitution (Seventh Amendment) Act, 1986, is ultra vires the constitution and void.
9. Constitution cannot be violated on any excuse. Its violation if any, is gravest of all offences and shall remain illegitimate for all time to come.

10. Under Article 150 the transitional and temporary provisions only for the period from the date of declaration of independence of Bangladesh on 26 March 1971 to the date of commencement of the Constitution on 16 December 1972, are set-out in the Fourth Schedule to the Constitution. No other provision made after 16 December 1972, can be included in the Fourth Schedule. As such, Paragraph 19 which was illegally added in the Fourth Schedule, is declared void and non est.

11. If a valid amendment is made in the Constitution, it may find its place in the Constitution itself or separately as in the case of first 4(four) amendments but must not be included in the Fourth Schedule to the Constitution.

12. Although the Martial Law Proclamations etc. made during the period form 24 March 1982 to 11 November 1986, are all declared illegal and void ab initio with the exception of international treaties, contracts and transactions. Besides, all orders made, acts and things done, actions and proceedings taken and trials conducted, during the aforesaid period which are past and closed, are condoned on the age old maxim ' salus populi est suprema lex', but provisionally. However, even this kind of indulgence of condonation may not be available in future. There shall be no condonation in respect of Martial Law Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances etc.

13. The 'suprema lex' is for the salus populi', not for the usurpers and violaters of the Constitution of the 'populi' and no condonation is allowed for those who violate the Constitution which is the worst kind of offence that may be committed against the Republic and its people.

14. The High Court Division may exercise its extraordinary powers under Article 102 of the Constitution if equally efficacious remedy is not available, but bail is not available in certiorari.

It is therefore ordered :

a) Section 3 of the constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986) is herby declared void.

b) Paragraph 19 in the Fourth Schedule to the Constitution is declared void and non est.

c) The trial and conviction of the appellant writ-petitioner by the Special Martial Law Court No.3, Zone-3, Cantonment bazar, Chittagong, in Martial Law Case No. 12 of 1986, is declared illegal and void, however, the trial of the Sessions Trial Case No.10 of 1986, would continue in the concerned Court of Additional Sessions Judge, Chittagong, from the stage it was transferred to the Special Martial Law Court.

d) The privilege of bail is not available on a petition in the nature of certiorari, however, in this appeal, the prayer for bail of the appellant is allowed as an exception, under the inherent jurisdiction of this Court, till the commencement of the trial, to the satisfaction of the concerned trial Court.

In the result, the appeal is allowed without any order as to costs.

C.J.

Md. Muzammel Hossain, J. : I agree with the judgment proposed to be delivered by the learned Chief Justice.

J.

S.K. Sinha, J. : I agree with the judgment proposed to be delivered by the learned Chief Justice.

J.

Nazmun Ara Sultana, J. : I agree with the judgment proposed to be delivered by the learned Chief Justice.

J.

Syed Mahmud Hossain, J. : I agree with the judgment proposed to be delivered by the learned Chief Justice.

J.

Muhammad Imman Ali, J. : I agree with the judgment proposed to be delivered by the learned Chief Justice.

J.

The 15th May,2011.
/Rezaul, B.R./
Approved for reporting.