IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 696 of 2010

In the matter of:

An application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh

And

In the matter of:

Siddique Ahmed.
... Petitioner

-Versus-

Bangladesh, represented by the Secretary Ministry of law, justice and Parliamentary Affairs, Bangladesh Secretariat, P.S.-Ramna and District-Dhaka and others.
....Respondents

Mr. Hasan M.S. Azim with
Mr. Mirza Ali Mahmood, Advocate.
...For the petitioner

Mr. Mahbubey Alam, Attorney General
Mr.Akram Hossain Chowdhury
Mr.Karunamoy Chakma
Mr.Bhisma Dev Chakravarty
Ms.Promila Biswas
Ms.Shakila Rowshan Jahan
Deputy Attorneys General
Mr.Ekramul Haque
Md.Diliruzzaman
Ms. Kasifa Hossain
Assistant Attorneys General
And
Mr.M.K.Rahman, Additional Attorney General
with
Mr.Mostafa Zaman Islam
Deputy Attorney General
Mr.S.M.Nazmul Huq
Assistant Attorney General

... For respondent no.1.

Mr. Murad Reza, Additional Attorney General
with
Mr. Md. Nazrul Islam Talukder
Mr. Md. Motaher Hossain Sazu,
Mr. M. Khurshid Alam sarker,
Mr. Mahammad Selim

.... Deputy Attorneys General
Mr. Delowar Hossain Samaddar, A.A.G
Mr. A.B.M. Altaf Hossain, A.A.G
Mr. Amit Talukder, A.A.G
Mr. Md. Shahidul Islam Khan, A.A.G
Ms. Purabi Saha, A.A.G
Ms. Fazilatunessa Bappy, A.A.G
... For the respondents No.2

Mr. M. Amir-Ul Islam, Senior Advocate
Mr. A.F.M. Mesbahuddin, Senior Advocate
Mr. Abdul Matin Khasru, Senior Advocate
Mr. Yusuf Hossain Humayun, Advocate

.....As Amicus Curiae

Heard on 08.07.10, 26.07.10, 27.07.10, 10.08.10, 16.08.10, 25.8.10 and Judgment on 26.08.2010.

Present:
Mr. Justice A.H.M. Shamsuddin Choudhury
And
Mr. Justice Sheikh Md. Zakir Hossain

A.H. M. Shamsuddin Chowdhury J:

By this Petition, which engendered the under mentioned Rule, the petitioner sought to have the conviction and sentence, a special martial law court passed on him on 20th March 2006, set aside.

Although the relief the petitioner asked for, is simple, the grounds on which he erected his claim to the aspired relief, invoke an issue of immense Constitutional importance, questioning the very validity of all the martial law instruments, inclusive of the proclamation of martial law itself, General Hussain Mohammed Ershad, purportedly, issued on assumption of power on 24th March 1982 and all other instruments that emanated from the authoritarian ruler during his de-facto rule.

The petitioner has, to make out a case for the effacement of the conviction handed upon him, challenged the constitutionality of an Act of Parliament, named the Constitution (Seventh Amendment)Act 1986, by which the Constitution was purportedly amended to accommodate into it all the aforementioned instruments. It is the petitioner's claim that the pretentious court was in fact a 'coram non judice' as it was an offspring of a martial law instrument, which can not be visualised through any spectacle of legality.

By the rule, the petition succeeded to animate, the Respondents were asked 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., henceforth conjointly cited as 'instruments', made during the period between March 24, 1982 and the date of the commencement of the Constitution (Seven Amendment) Act, 1986 (Act 1 of 1986), should 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, (corresponding G.R. No. 1676 of 1984), under Section 302/34 of the Penal Code, should not be issued, and why such other order or orders should not be passed as this court may deem appropriate.

Pending hearing of the Rule, the petitioner was enlarged on bail in Martial Law Case No. 12 of 1986, which arose 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 Rule was issued by a Division Bench comprising Momtazuddin Ahmed and Naima Haider JJ.

To lend support to what he craved, the petitioner figured detailed averments, which are summarised below ;

Notwithstanding that, as a law abiding citizen, the petitioner has always maintained a straight and impeccable track record , he was, nevertheless, indicted of an offence punishable under Section 302, read with Section 34 of the Penal Code. The case stemmed from a First Information Report that was lodged with the Kotwali Police Station of Chittagong on 24th December 1984 and was registered as Kotwali PS Case Number 25, dated 24/12/1984.

The allegations, figured in the Report, was to the effect that one Abu Taher, son of Md. Kala Miah, resident at a dwelling named Islam Colony at Khatunganj area of Chittagong, was pursuing his vocation as a vender for his livelihood. His aforenamed son also resided with him at the same address. On 11th November 1984, Kala Miah along with his son was busy in selling spices in the market. During the period of intermission, Kala sent his son off to their residence to fetch lunch items. His son was carrying an amount of Tk.1500. An hour afterward, one of the accused persons named Nur, cited in the FIR, approached Kala at the latter’s shop and intimated that he saw his son in an alarming state of health. Kala rushed to his residence while Nur left for a doctor. On arrival Kala found his son , Abu Taher, not alive, in a sitting posture with his lungi around his neck, tied with a bamboo. Kala’s

landlord intimated the Kotwali police of the incident over telephone, and the police responded by arriving at the venue of occurrence. It was alleged in the FIR that Siddique Ahmed, the petitioner before us, along with Nur were to blame for the for homicide of Abu Taher. It was indeed, Kala who lodged the Information.

The case was initially registered as Kotwali PS UD Case number 17 of 1984.

The autopsy report compiled by the doctors at the General hospital in Chittagong, revealed that the death was occasioned by hemorrhage in the brain surface, which resulted from attack by moderately heavy blunt weapon and the death was homicidal in nature.

A Sub-Inspector at Kotwali PS subsequently lodged a fresh FIR on 24th December 1984, citing Section 302 of the Penal Code and the case at that stage received it's latest number.

Two different Sub-Inspectors of the Kotwali Police Station investigated into the incident on turn and then submitted a final report. A Deputy Commissioner of Chittagong Metropolitan Police, however, at that stage, set the Detective Branch into motion for further investigation and, a Sub-Inspector of the said branch transmitted a Police Report in affirmative term, indicting 3 persons inclusive of the petitioner, engaging Section 302 of the Penal Code.

The petitioner was arrested on 11th April 1985 and was produced before a Magistrate on the same day. It appears from the Magistrate's order sheet that the petitioner successfully applied for bail in the Court of the Session's Judge,

Chittagong, and the petitioner won his liberty on 24th December 1985.

On maturity for trial, the case was transferred to the Session's judge, Chittagong, it was re numbered as ST Case no 10 of 1986, and the learned judge transferred it to an Additional Session's Judge for disposal. The Additional Session's Judge concerned, however, being asked to do so by the authorities, transmitted the case records to the Chairman, Special Martial Law Court no 3, Zone C, Chittagong.

The Special Martial Law Court, which owed it's existence to a martial law regulation, then assumed jurisdiction over the matter and numbered it as Martial Law Case no 12 of 1986. Records divulge that neither the petitioner nor the other accused persons made themselves available before the said martial law court when trial commenced therein. The said court proceeded with the trial in absence of the accused persons engaging Section 339 of the Code of Criminal Procedure, framed charges on 15th March 1986 against all the accused under Sections 302/34 of the Penal Code.

In view of the absence of the accused persons, a state appointed counsel was commissioned to defend the latter. Some 8 out of 10 prosecution witnesses, the remaining 2 being tendered only, were examined by the prosecution and cross examined by the state engaged lawyer. At the conclusion of the trial, the martial law court concerned found all the accused persons guilty and sentenced them to suffer imprisonment for life and to pay fine of Tk.1000.00, or to suffer another period of rigorous imprisonment in default.

A Lieutenant Colonel, on a so called review, affirmed the conviction and then Lieutenant General Hussain Muhammed Ershad, as the Chief Martial Law Administrator, confirmed the judgment and order on 20th March 1986.

The petitioner remained at large till 2nd August 2006, on which date he was rounded up and then produced before a Metropolitan Magistrate in Dhaka, whereupon the Magistrate sent the earlier to the prison and transmitted the records to the Court of Session's Judge, Dhaka. The said Court in turn, issued a warrant of conviction against the petitioner. The petitioner has, thence, been languishing in jail for a period in excess of 3 years.

To substantiate his prayer, the petitioner contended that the Constitution being the Supreme Law of the land, nothing done in derogation to it's command, can enjoy any recognition through the conduit of law, and as such, the purported suspension of the Constitution by Hussain Muhammed Ershad was thoroughly barren of authority as was his de-facto assumption of power through a purported proclamation of martial law, which was a nullity. A fortiori, everything that stemmed , including the so called instruments through which the courts were purportedly brought into being, were also stale, which, of necessity follows that any purported order of conviction by any of those legally vacuous entities were, ipso facto, non starters.

The petitioner further contended that the so called proclamation of 24th March 1982 and all other instruments, were void ab-initio being repugnant to the basic structures of the Constitution, and that being so, the purported attempt by the

subsequent Parliament to infuse life into a still born entity, as the Parliament purported to have done through Section 3 of the Constitution (Seventh Amendment) Act, 1986, was out and out devoid of lawful authority. It was barren of vires because procedure prescribed by Article 142 of the Constitution was not adhered to and also because through it attempts had been made to accord credibility to the illegal deeds of the usurper although those deeds really constituted an offence of high treason proportion.

The petitioner furnished an epitome of the extra-constitutional rule that reigned following a proclamation to that effect, General Hussain Muhammed Ershad, on 24th 1982, issued. According to the version, the petitioner scripted in his affidavit, General Ershad, the Chief of Bangladesh Army at that moment, proclaiming himself as the chief martial law administrator, declared that he had assumed all and full governmental power of the Republic. The language he used in his endeavour to offer a justification, was in no way at variance with the prototype, all military adventurers , including Iskander Mirza, Ayub Khan, Mushtaq, Ziaur Rahman, Suharto, Pinochet, Franco, Idi Amin, Ziaul Haque, had resorted to: one that was impregnated with the ludicrous pretence that, the greater interest of the country, in the verge of catastrophe , made it incumbent upon him to assume full power, failing which the country would have been plunged into oblivion. The General cunningly gave the people to believe that he had emerged as their messiah to salvage them from total annihilation, just as all other frenzied despots before him,

did, almost all of whom were, at the end of the day, thrown into the black hole of history.

Having thus, jettisoned constitutional charade, the General de-facto ruled the country with authoritarian fists for four incessant years, during which time the Constitution was forced to a state of suspension, people were not allowed to enforce their fundamental rights through the Constitutional device, the Courts were forcibly stripped of their inherent and constitutional power to call into question the proclamation or any instrument purportedly made under it, all courts, including the Supreme Court were reduced to a state of subjugation and virtual servility. Hosts of martial and special martial law courts were set up all over the country to try not only specially created martial law offences but also prevalent general law ones. Those martial law courts tried and convicted thousands of people during the life span of the usurping regime.

This extra constitutional rule, however, came to an end on 11th November 1986. By that date, vide Constitution (Partial Revival) Order, the Constitution was parochially restored, while, vide the Constitution (Final Revival) Order 1986, the Constitution was fully put set. During the intervening period, through a process of election in accordance with the provisions of the Constitution, the 4th Parliament assumed it’s existence. That Parliament on 11th November 1986, passed the impugned Section 3 of the Constitution (Seventh Amendment) Act 1986. The said Section purported to ratify and confirm the proclamation of 24th March 1982 by inserting paragraph 19 into the Fourth

Schedule to the Constitution, the text of which paragraph is reproduced below, verbitame;

”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 I 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 of 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 I OF 1966), 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 that form set out in the Third Schedule.

(5)All appointments made by the Chief Martial Law Administrator during the said period to any officer 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 be 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 receive or restore any right or privilege which was not existing at the time of such revocation and withdrawal.

(9) the General Clauses Act, 1997, shall apply to the said Proclamation, and all other Proclamation, 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 Regulation, 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.”

The petitioner's case is indeed based on the assumption that it was beyond the Parliament's competence to enact Section 3 of the Constitution (Seventh Amendment)Act 1986, accordingly validity to the martial law instruments and actions taken thereunder and the said purported piece of legislation should , be set aside as being ultra vires the Constitution.

As the Rule matured for hearing, Mr. Hassan M. S. Azim, appearing for the Petitioner, came up with exhaustive profferment on the issues that arose out of his client's averments. The core aspect of his submission revolved round the theme that unlike the British Parliament our one does not enjoy untrammeled power and can not legislate as it wishes, for it's power is circumscribed by limitations the Constitution, the Supreme law of the land , has imposed. He went on to submit that as there is no provision in our Constitution on 'martial law', the proclamation in question was unlawful ab-initio and remained so all along and, because of the very same reason, purported adoption of the same by the Parliament was unlawful and ultra vires, equally well. According to him if the proclamation is held ultravires, it will necessarily lead to the inevitable introspection that the so called special martial court that tried, convicted and sentenced the petitioner, was bereft of authority and was not, as such, a court in the eye of law, wherefor the purported order of conviction is bound to founder. He relied heavily on the Appellate and the High Court Division's judgment in the case of Bangladesh Italian Marble Works Ltd. –v- Government of Bangladesh and others, popularly known as the Fifth Amendment

case (BLT 2006 Special Issue), henceforth referred to as the Fifth Amendment case.

Mr. Mahbubey Alam, the learned Attorney General, on his turn, to table his oration for the State, enlightened us with calendar wise particulars of the events that preceded the, and proceeded from the proclamation in issue. Launching an all round and impassioned tirade on extra Constitutional power grabbing, terming the same as the enemy of progress and civilization, the learned Attorney General vouched that successive martial laws irretrievably maimed the country's journey to achieve economic, political and social progress, and the same left the country swamped with multifarious vices. According to him, because of the sinful greed and diabolical ambitions of self centered despots, democracy remained deprived of the nourishment it required to attain in-frangible excellence. The learned Attorney General was in irreversible agreement with the concept that our Parliament does not and can not enjoy British like omnipotence and this Division does not only have the power but, is also saddled with inerrant and inescapable duty to strike off any legislation which is repulsive to any express provisions of the Constitution. He subscribed, without any equivocality, to the view that Section 3 of the Constitution (Seventh Amendment) Act 1986, can not pass the test of Constitutionality and is, hence liable to be spurned without any display of compassion. Revealing some aspects of the history of intrigue and treachery, the learned Attorney General branded Khandaker Mushtaque and General Ziaur Rahman as the primordial assailant of democracy, and that General Ershad followed the suit, plunging the country into a

state of havoc. He recalled, with a heavy heart, the events, that followed the dastardly killing of the Nation's Father. The learned Attorney General placed insusceptable argument chastising Mushtaque/Zia's role in embarking upon the impiety to destroy not only the democratic norms, but also the pillars upon which the war of liberation was fought, adding that Ershad followed the path Zia/Mushtaque paved. He lent undistorted support to the assertion that inviolable measures should be on board to quell and deflect all kinds of extra Constitutional adventurism. The learned Attorney General submitted that during both the martial laws the basic features of the Constitution were disdainfully unraveled. He further submitted that although General Ershad did not make any perennial intrusion into the Constitution, by allowing to continue the treacherous changes General Ziaur Rahman brought about, General Ershad must also be deemed to have been a party to impinge upon the Constitution. The learned Attorney General went on to submit that although the nature of two martial laws differed in the sense that during Zia's martial law the constitution was not suspended but was reduced to a subservient status, while Ershad suspended the Constitution from top to toe, the end result was no different- in both the circumstances the Constitution was subjected to reproachable foray . "There is no way", submitted the learned Attorney General, "through which validity can be granted to the Constitution (Seventh Amendment) Act, 1986, because by the said Act the Parliament purportedly validated the martial law proclamations etc., which act was beyond the Parliament's competence." The learned Attorney General continued his submission by suggesting that the very nature and the

composition of the Parliament have been drastically altered by the military autocrats of the past in that the authoritarian military rulers introduced corruption and anarchy in the political arena of the Republic. The learned Attorney General in this regard reminded us of that reprehensible utterance of General Ziaur Rahman, which reads, “I shall make politics difficult for the politicians”. According to the learned Attorney General, General Zia did not stop with this utterance only, he also acted upon this theory and inducted into our political realm such elements who were in fact openly opposed to our liberation. The learned Attorney General emphatically echoed the view that infallible measures are indispensable to thwart possible attempts by future adventurists’ to foil the constitutional device in bringing about change of government. He further submitted that both the martial laws pushed the country backward by many decades in economic, political, social and cultural terms.

Mr. M. K. Rahman, the learned Additional Attorney General, also representing the Respondent No 1, very painstakingly provided us with a self composed booklet, containing a treasure trove of information on successive military take over in Pakistan and Bangladesh. His thesis divulged that Ayub Khan’s martial law was not really the first one in Pakistan, as there was a regional martial law in the City of Lahore in the year 1953, with longevity of just over two months, from 6th March to 13th May 1953, with Major General Azam Khan as the Martial Law administrator. Recalling the darkest episode of our history, and terming the same as ignominious, Mr. M K Rahman contended that the ominous assassination of the Founding Father of the

Nation by a small bunch of disoriented and ambitious soldiers, came as the first hurdle on our way to achieve wholesome test of democracy, which, as saint Abraham Lincoln pronounced is, by, for and of the people. Mr. Rahman reckoned that exemplary punishment for the perpetrators of all extra constitutional usurpation will work as a deterrent against all adventurists. Arguing with all prudence, Mr. Rahman posited that Kelsen's theory of state necessity was cowardly, impudently and distortedly resorted to by Munir CJ, only to invent a device to accord validity to Ayub's whim. He went on to submit that this is about time that the superior Courts should demonstrate rigid and inexpugnable stand against the perpetrators of yesterday, in order to deter those who may nurture any perilous design for tomorrow. Mr. Rahman submitted that the Fifth Amendment judgment has opened a new horizon of judicial activism in our part of the world, which all the judges should take advantage of, to insulate the people against any devilish transgression. The Fifth Amendment judgment will receive fresh flame to cremate the last traces of extra constitutional ambition if we do pour in residual fuel through a vibrant judgment in this case. He concluded saying with all probity that Marshall CJ paved the foundation of the doctrine of judicial review of legislation, which shall never parish from the domain of democracy.

Mr. Murad Reza, the learned Additional Attorney General, with his well researched and prodigious output, which was reduced into writing in precise form and submitted before us for guidance, advanced wide spectrum submission on the improvisation the superior Courts in the sub-continent,

inclusive of Bangladesh, have accomplished, to outlaw military rule. By very helpfully taking us through varying aspects of Pakistan Supreme Court's voluminous judgment in the case of Sindh High Court Bar Association –v- Federation of Pakistan (PLD 2009 SC), Mr. Reza infused wisdom into our thinking process as to the horizon of the High Court Division's realm in judicially reviewing an act of Parliament. Reminding us of our ineluctable obligation of being the custodian of the Constitution, Mr. Reza orated that we must act with the same degree of valiance as the Pakistani superior Courts had done in the aforementioned case, and of course this Division had done in the historic Fifth Amendment case. He was no less enthusiastic in relishing the view that unassailable steps should be on the card to affix the last nail in the coffin of all kinds of despotic rules, extra constitutional wagering. He had no hesitation to say that all extra-constitutional adventurism must be quelled mercilessly and dispassionately and, be equated with felonies, attracting capital punishment. Mr. Reza explained, drawing our attention to various paragraphs of the above cited case, how the so-called 'doctrine of state necessity' have been misinterpreted from time to time only to appease the whims of the military rulers. While he fully endorses the idea of bringing to the book, all those who were instrumental to bring erosion to our coveted institution by superimposing their coercive device, deflecting the constitutional track of power transfer, his resolute view was that it should be left with the government and the legislature as to how the perpetrators should be taken to task. Mr. Reza, reminiscing the heinous tragedy of the gruesome killing of the

Father of the Nation, emphasized that through this judgment an undistorted message should be beaconed so that none can indulge upon even any hallucination of grabbing power extra constitutionally. He read over to us the observation Chief Justices Hamoodur Rahman, Iftekhar Muhammed Chowdhury and Anwarul Haque of Pakistan and Justice ABM Khairul Haque, as he then was (presently A B M Khairul Haque CJ) recorded to castigate the concept of martial law and those who try to thrive upon it. Mr. Reza made an elaborative submission to strike an analogy between the salient features of the Fifth Amendment Judgement and the Sindh High Court Bar Association Case, emphasising that in both the Cases the doctrines of "State Necessity" was construed in its appropriate context, and in both the cases, it have been emphatically stated that extra constitutional assumption of power can never be justified by the touch stone of state necessity. In both the cases their Lordships made this point clear that Parliament cannot ratify martial law instruments, because those instruments were issue by 'usurpers' and as such, are void ab-initio. On the question as to our power to review a legislation, Mr. Reza submitted that this point was firmly established in our jurisdiction through the decision in the case of Anwar Hossain Chowdhury vs. Bangladesh, 41 DLR (AD)165 and lately through the Fifth Amendment case, stating further that in both the cases the ratio pronounced by Marshall C.J. in Murbury-v-Madison(1 Cranch 137 1803), as well as in a myriad of other cases from all over the globe, have been cited with approval. Finally, Mr. Reza did remind us of the necessity of giving serious consideration to the theory of "past and closed transaction" in

respect to the petitioner’s case, submitting that his case is incapable of resurrection now, and it’s de novo re-opening may entail grave repercussion.

Mr. M. Amir-ul-Islam, who, at our invitation, came forward to assist us, with his ingenious wisdom and long trail of experience, was quite explicit in reprimanding those who contaminated the national ecology of constitutionalism with the leprous dusts of military rule, terming them as venomous. He put on card his own experience of the 1975 martial law that followed the premeditated killing of the Nation’s Father, and echoed the view that the time is ripe to weed out all the malignant stem cells containing microbes of martial law from the blood steam of our beloved soil once and for all, and it is the superior Courts that can perform this surgery without gullibility, as no usurper can survive unless blanketed by judicial stuffing. With his resplendent submission, Mr. Islam asserted that through cyclic martial law, attempts were made to undo the principles on which the war of liberation was fought. He stated that General Ziaur Rahman, assisted by Khandakar Mushtaque and his band wagon were primarily responsible for sowing the seed of military autocracy in the country. Mr. Islam by referring to authorities from different parts of the World, submitted that Martial, CJ laid down a very strong foundation on which the whole concept of judicial review of legislation stands and it is now the duty of the present generation judges to renovate and revamp the structure, because it is the doctrine of judicial review, on which the future of rule of law depends. Mr. Islam submitted that after the pavid retreat by Munir, CJ in Dosso, Pakistan Judiciary recouped with resilience

and rose to the occasion to renounce Dosso decision and military usurpation of power. He went on to submit that those who are familiar with academic jurisprudence and had gone through all the works of Hans Kelsen, knows it very well that Kelsen never advocated extra constitutional assumption of power and that his theory was misapplied by Munir, CJ as the latter was looking for a pretext to justify Ayub's martial law. Mr. Islam concluded, saying that it is encouraging to see that the whole world has now come to the realisation that Kelsen's theory cannot be applied to justify deviation from constitutional course. In this respect he made particular reference to our Supreme Court's Decision in the Fifth Amendment Case and Pakistan Supreme Court's decision in Asma Jilani.

Mr. AFM Mesbah Uddin, the learned Senior Advocate, appearing as an amicus curiae, quite vehemently submitted that in order to root out the last microbe of unconstitutional adventurism, stern action must be taken against all the usurping players of yesterday. They must face dire consequences for their depraved actions. He reminded us of, in his language , 'the enormous power under our disposal' and said unless we rise to the occasion with required firmness when situation so warrant, a bleak future will ensue for which future generation will not forgive us. He reiterated that it is the superior Courts that can assume singular responsibility to obliterate the ominous ghosts of all adventurers. He went on to submit that the Fifth Amendment judgment has opened a new era of judicial activism, taking advantage of which this Court now

must proceed to protect the Constitution and the rights of the people it has guaranteed.

Mr. Abdul Matin Khashru, also at the invitation of the Court, very helpfully supplied us with a couple of rara a-vis books, he did some how manage to procure, to depict how invincible measures had been adopted in the United Mexican States and Argentina, suggesting that we should engrave similar provisions to protect our Constitution. He was quite unequivocal in saying that it is the heinous killers of the Father of the Nation who, for the first time, injected the micro-organism of martial law, which must be drained out of our system in totality, for all time to come. Re-orchestrating the claim that it were Mushtaque-Zia duettist, who planted the dreadful weeds of military rule for the first time, which was then followed by Ershad, he went on asserting that all of them deserve to be curarised for plunging the nation deep inside quicksand.

Mr. Yusuf Hussain Humayun, who also made his eloquent and mind blowing submission, being invited by us to act as an amicus curiae, jogged his own memory of 1975, and stated that had the Father of the Nation not been killed by the plotters who brought military despotism for the first time, our history would have been differently written, the dream of Golden Bengal, would have , by now come true. It is the martial law rulers, who brought our country to the verge of wreckage from time to time, and hence the horrendous omen of martial law must be buried ceremonially. Attracting our attention to the unwarranted debate that has recently been ignited on the question as to whether an Act of Parliament, which is

invalidated by this Court, needs further Parliamentary attention for the invalidation to be brought into effect, Mr. Humayun submitted that this issue should also be addressed so that the unnecessary debate is put to an end.

Mr. Zead Al Malum, during the course of hearing made a submission to vilify the role of Major General Ziaur Rahman. Mr. Malum in support of his claim that it was General Ziaur Rahman, who put the first stumbling block on the path to democratic progression, read over to us certain passages from a book titled 'South Asia History Power Legitimacy Bangladesh Perspective'; authored by noted historian Prof. Muntasir Mamun, which are reproduced below, verbatim;

> "We have observed the same mindset when military ruler Ziaur Rahman usurped governmental power. He banished secularism from the Constitution of the country and redefined Bengali nationalism. This was an inclination in favour of using Muslim history to serve his personal purpose. Within two years of taking over power, General Zia replaced Bengali Nationalism amending the Constitution. On the face of it the matter may appear to be trivial. But trivial as it is, it divided the otherwise homogeneous people of Bangladesh into two divisions. Zia wanted to create this division to lengthen his rule and perpetuate his power. By this division he made an attempt to justify the seizure of governmental power by himself in a historical light. This event testifies the denigrating deceit that he wrought upon the nation. At the other end, the same event proved that he had joined the liberation war under duress. Despite so many evidence to prove his unwilling participation , for the sake of honour and prestige of the war of liberation and of the freedom fighters, none wanted to expose him or his doings."

The averments and submissions the learned counsels tabled, gave rise to a number of questions that we are enjoined to address in order to meticulously dispose of this petition. They are 1) whether our Constitution knows or recognises anything called martial law 2) whether the proclamation of 24th March 1982 was in concord with any provision of our

Constitution 3) whether such instruments as martial law regulations, orders, directions, rules, made under the purported authority of martial law proclamation, had any validity in the vision of law 4) whether courts created under such instruments had any existence de jure 5) whether the Parliament was within it's competence to enact Section 3 of the Constitution (Seventh Amendment) Act 1986 6) whether this Court is equipped with necessary power to judicially review any Act of Parliament in general and Section 3 of the said Act in particular and strike it off 7) what relief, if any the petitioner can obtain 8) how to infernally annihilate the curse of extra-Constitutional take over, 8) whether and under what provisions of law the perpetrators of the 24th March 1982 coup d'tat should be brought to the book.

History leading to Our Independence and Bangabandhu's Assassination

In view of the Constitutional importance of this case, and, as the assertion to protect the Constitution from all kinds of evil encroachments have found a paramount abode in this case, we reckon it is incumbent on our part to portray a succinct version of our history, leading to the Glorious War of Independence, projecting the circumstances that necessitated the said War, the resultant establishment of Constitutional Rule , as well as the frenzied events of repeated onslaught on our Revered Constitution that ravaged it on two intermittent occasions.

As we all know, a theologically conceived country, Pakistan, came into being in 1947 on the synthesis of the so called two nations theory when the curtain of the British empire in the sub- continent dropped. The debate as to whether the Lahore resolution of 1940, moved by Sher-e Bangla, which paved the genesis for the future journey that eventually culminated in the creation of Pakistan, contemplated two independent states or just one single entity, may never be resolved this way or the other, but, the fact that a conjoined proposition put forward by a triumvirate comprising late lamented Hussain Shaheed Suhrawardi, Sharat Chandra Basu and Abul Hashem for the creation of an Independent, United Bengal, was mercilessly and selfishly crucified by late Mohammad Ali Jinnah in connivance with some leaders of the Indian Congress, including Ballab Bhai Patel, remains beyond qualm. It is, in this context, worth reproducing the following passages from Prof. Muntasir Mamun's book, 'South Asia History Power Legitimacy Bangladesh Perspective';

> "There have been attempts at controlling history in India, Pakistan and Bangladesh all the time. These have been made by various interest groups, political parties, government sponsored writers and historians adhering to particular beliefs. One reason for this is easy to comprehend: history can play a role in social mobilization of people or social organization of an assemblage, provide a back-drop for usurping governmental power and a capacity for legitimizing the same over time. An example or two may be cited.
>
> Before 1947 the Muslim leaders in this subcontinent tried to focus on historical principles in order to organize social mobilization. They spoke and wrote about Muslim Kings quite distinguished in courage exercise of power. They pointed out, the Indian Muslims were but their progeny and successors. To them the period of Islamic rule was golden---the very best. In their assessment, the Muslims have been reduced to the lower stratum of the society as a result of conspiracy against them hatched by the British and Hindus (represented by the Congress). They thought, the Muslims would be able to escape out of this

> low position if separate arrangements and provisions are made for them. The spectrum of economic deprivation was major element in this thought. The use of history in this way had its contribution in mobilizing the Muslim youth and building up psychological support for Pakistan. The equations in the subconscious minds were simple: Pakistan was the sum total of two elements: the Muslims and Islam while India was composed of only the Hindus. The drummed up psyche was so pronounced and sharp that the Muslims of even to day could not get out of its pervasive blind-fold. That is why perhaps the proposal for a separate independent Bengal as made by Sarat Bose and Suhrawardy in those critical days before 1947, did not receive attention or importance it deserved. The Muslim League could use the Islamic myth to its advantage in support of Pakistan-to-be."

Pakistan as one state , nevertheless, emerged with all notions of artificiality : two wings being hundreds of miles apart, two sets of people ethnically and anthropologically divergent in wide spectrum ,having virtually nothing in common between the people of the two geographically disintegrated provinces, save the religion, heralding temporarily the triumph of much canvassed 'two nation' theory. The honeymoon, however, did not, take much longer to wane. The Bengali populace of the then Pakistan did not have to wait inordinately to come to the reckoning that the Muslim League leadership at the western part resorted to a surreptitious game in bringing us under one canopy in the pretext of Islamic Brotherhood, that it was purely and simply a bluff. Our ancestors were fortunate and endowed enough to be able to call the bluff within a year of the creation of Pakistan. The first evidence of the ploy transpired as Mr. Mohammed Ali Jinnah, while addressing a special Convocation of the Dhaka University on 24th March 1948 , impudently stressed that Urdu, hardly understood, let alone spoken by the Bengalis, would be Pakistan's national language. This misadventure bounced back in no time. According to Dr. P C

Chakravarti, the Vice Chancellor of the day, who sat by Mr. Jinnah, expressed that Mr. Jinnah's imbecile statement provoked immediate verbal commotion from the audience, who raised question as to the very unity of Pakistan. Mr. Jinnah's dream of linguistic suzerainty over us tumbled in utter humiliation, but in the process, Dhaka streets got inundated with the blood of language martyrs.

Economic asphyxia proceeded in equal pace as did the invasion on our culture. Abortive attempts were made to alienate us from our pride, poet laureate Rabindranath Tagore, while our rebel poet, Kazi Nazrul Islam, a life long crusader against communalism and fundamentalism and, an icon of staunch secular idea , was masqueraded as a poet of parochial religious conduit: many of his poems were distortedly reproduced to display him as a poet of communal disposition-- all with the only object of stripping ourselves of Bengalism, to compel us to be content to accept Pakistani mastery.

Resistance to West Pakistani aggression boomed from the very dawn. Students in collaboration with other intellectual groups ,had to take the lead. Sheikh Mujibur Rahamn, a young student leader of that period, who was subsequently crowned with the title Bangabandhu, and who eventually Fathered our Nationhood, was, obviously the torch bearer. The struggle that began in the decades of 40s(later part of that decade) and 50s extended to that of 60s with greater vigour, and again it was none other than Sheikh Mujibur Rahamn, upon whom the responsibility to lead the people fell. During that decade students, academics, intellectuals, literati, artists and cultural activists in East Pakistan forged unity to repel

cultural invasion from West Pakistani rulers: Dhaka University students defied the rulers' edict by celebrating Tagore's Birth Centenary with spectacular array. Numerous institutions of high profile, to impart lessons on Tagore songs were set up with a view to preserve the sanctity of Bengali culture. Cultural workers took to the streets to project their inflexible determination to resist West Pakistani military rulers' arbitrary move to impose cultural blockade and, proclaimed their divine and inalienable right to preserve and promote Bengali culture, tradition and heritage. All these stirred nationalistic sentiment in the mind of the people: they arrived at the ultimate realisation that they are quite distinct from the people in the West Pakistan.

General Ayub Khan clamped down with repressive legislation and torments on the East Pakistani Universities, only to add further fuel to the pre-existing flame. Sheikh Mujibur Rahman, by then the undisputed leader of the Bengalis, structured inviolable estrade of defence to thwart West Pakistani economic and cultural invasion.

So, the Pakistani rulers' ploy ,did not go Scot free. Stalwarts of this soil vowed with cult of fire to emasculate Pakistani invasive onslaught, whether economic, linguistic or cultural. Sheikh Mujib, however, had to languish in jail for years together for not giving in to West Pakistani demand or to be allured by their olive branch.

Since the emergence of Pakistan, Jute was known as 'golden fiber' for being by far the highest source of foreign exchange earning for the whole of Pakistan. Outbreak of military hostility in the Korean peninsula rocketed jute price sky high,

causing a boom in Pakistan’s economy. The Eastern part, however, hardly gained much from this jute oriented affluence. Enormous development projects were undertaken in the Western part with the money jute fetched, while the people in the Eastern part kept regressing towards poverty. At that juncture Bangabandhu Sheikh Mujibur Rahman, an all time soldier for the emancipation of the Bengali people, put forward his historic 6 point programme. The alarmed rulers in Pakistan, defiantly took a stand against it, apprehending this would allow the Bengali people the economic and political autonomy they have been craving for, to the detriment of the west Pakistani interest. A reign of terror in the form of persecution was unleashed on Bangabandhu: he was interned for infinite period. But nothing could detract the Bengali people: they kept rallying round Bangabandhu with enhanced zeal. Bangabandhu was indicted with Agartala Conspiracy Case, that , if allowed to continue, would have landed him under the gallows. But nothing could de-base resolute Bangabandhu from his track. In the wake of incomprehensible popular uprising of the proportion, rare in human history, Bangabandhu was freed with glory, the event that utterly flabbergasted Pakistani military ruler Field Marshal Ayub Khan and his Rasputins in the East. Cyclone and tidal bore in the year 1970 revealed how helpless we were in the hands of Pakistani rulers. They eventually succumbed to our demand for a general election, yet as the subsequent events showed, even that was a ploy. Bangabandhu’s Party came out with a majority as sweeping as the victory of the allied forces in the second world war. Bangladesh and Bangabandhu became world’s focal point. Despite the unprecedented majority, Pakistani rulers

took an obstinate stance not to the allow us to enjoy the fruit of the electoral victory. In the pretext of negotiation, Pakistani rulers continued to ferry their army to the then East Pakistan to prepare themselves for the ultimate crackdown. Simultaneously the Bengalis also flocked round their Mentor, Bangabandhu Sheikh Mujib, to achieve ultimate goal--total independence. Bangabandhu became the de-facto ruler of the land. It was him at whose command the whole of East Pakistan moved during the period from early 70s. On 7th March 1971 Bangabandhu, while addressing a mammoth congregation – an ocean of people in what was then the Race Course field, declared in no clumsy terms that the struggle this time is for total independence. People in response to Bangabandhu's call for independence began to train and groom themselves for the D-Day. On 25th March 1971 Pakistani soldiers let lose the hell on the Bengali people, unleashing a holocaust that even belittled Nazi atrocities in Germany, that resulted in the genocide of hitherto unknown proportion. Several thousands of human species were slaughtered in one single night. India, under the leadership of Srimoti Indira Gandhi, and the countries of the former Soviet Block came forward in our aid. Millions of people took refuge in the Indian states of West Bengal Assam and Tripura. World opinion, even in the countries which did not support our resolve to independence, gathered momentum in our support. At the conclusion of fierce war between our Freedom Fighters, supported by Indian army on the one side and Pakistani soldiers on the other, for a period extending over 9 months, we succeeded to make Pakistani soldiers swallow the bitter pill of total surrender on the red letter day of 16th

December 1971. But during the 9 moth period, some 3 million Bengalis were killed and 3 hundred thousand women were ruthlessly violated by the Pakistani forces with the direct accompli of some Bengali stooges. Our Constituent Assembly, composed of directly elected people from all over the country , under Bangabandhu's direct leadership and supervision, presented us the Constitution on 4th November 1972, that made the people the ultimate supremo.

During the war of liberation a Government was formed in the first liberated area of the land, called Mujib Nagar, with Bangabandhu as the President. Even after our independence the Pakistani government's trickery did not end. They cooked a new recipe , to annihilate Bangabandhu this time though under relentless international pressure, mounted at the instance of Srimoti Indira Gandhi , they were compelled to forsake the harrowing plot, and, finally to set Bangabandhu free. Bangabandhu came back as the President of the new Secular, Democratic Republic. But the **Hyenas did not relinquish their resolve, their sinful acts witnessed no regression or remorse, they remained well around to mortify the** reign of tranquility and progress and, they accomplished their horrendous design dastardly assassinating the Architect of the Bengali nation, Bangabandhu Sheikh Mujibur Rahman.

Aftermath of Bangabandhu's Killing:History of extra-Constitutional power game

It was a draconian task to build the war ravaged country. While the government, headed by Bangabandhu, was making all out efforts to salvage the country from the wreckage, the war

left behind, and retrieve it's economy, defeated anti liberation forces, who went into hibernation and docility after 16th December 1971, recrudesced with their intrigues to foil the fruits of the liberation, and, being fortified with help from abroad, re-siled to destroy the spirit of our liberation and, thence committed one of the most heinous offence in the human history by killing the Father of the Nation along with all the members of his family, two daughters excepted, they having been abroad, including Bangabandhu's young son, as young 4 years, and his other close relatives. It was clearly aimed to wipe out the spirit of the liberation war. They achieved transient success in this respect. Khandakar Moshtaque, who, axiomatically, led the contrivance, declared himself as the president through usurpation, although he was not constitutionally poised to do so. With the help of some disgruntled army officers, he proclaimed the first martial law on 20th August 1975 with retroactive effect from 15th August 1975, and thereby set forth the legacy of military autocracy in Democratic Bangladesh. The Constitution was neither abrogated nor suspended, but it was made subservient to the martial law instruments. General Ziaur Rahman, replaced General K. M. Shafiullah as the Chief of the Army. Mushtaque was , however , not destined to stay there long, and was deposed as the then Chief Justice Abu Sadat Md. Sayem was placed on the president's chair on 6th November 1975, and was, from behind the veil, made the chief martial law administrator on 8th November 1975. General Zia was one of the deputy chief martial law administrators and remained so until the veil was lifted when Justice Sayem in turn, handed over, first, the chief martial

law administratorship and then the presidency to General Ziaur Rahman on 29th November 1976 and 7th April 1977, respectively. The First Parliament was dissolved with effect from 6th November 1975. By then the balaclava of behind the curtain actors flew away. The period under the usurping, despotic rule of Mushtaque and Major General Ziaur Rahman, witnessed the most polymorphous events of destructivity and enigma. Soon after usurpation to the helm of the state affairs, Ziaur Rahman unraveled the historic Bengali language “Joy Bangla” slogun, which sparked and kept immortalised the Bengali People’s vigour and zeal to commence and continue with the Sacred War of Liberation, the slogan that kept the entire populace awake during the whole period of war, the slogan that was the source of aspiration and inspiration for the freedom fighters and hope for the entire population, the slogan that inspired us to vanquish virtually invincible, well organised and heavily armed Pakistan’s occupation army . General Zia substituted that with Pakistani oriented “Urdu” (Persian) language slogan “Jindabad”, which slogan was denounced by the Bengali people long ago as being alien to our cultural identity, having it’s nativity in the land of our occupiers. Other lucid Bengali Words that went hand in glove with the “Bangali Nationalism,”, like Bangladesh Betar, Bangladesh Biman” were also erased from our vocabulary, albeit that they are words of Bengali language, the language for which we shed blood profusely.

General Ziaur Rahaman, soon after getting hold of the steering of power as an usurper, not only rehabilitated those who conspicuously collaborated with Pakistan army and thereby devastatingly increased our wretchedness during the war of

liberation, but also appointed as his Prime Minister, Shah Azizur Rahman, who to the knowledge of the whole world, was one of the master collaborators whose duty during the war was to try to mould international opinion against the freedom fighters and the idea of liberation.

Colonel Mustafizur Rahman(who acted as the IO in Agartala Conspiracy case),A S M Suleiman and Abdul Alim were three of many other obnoxiously known Pakistani collaborators to had been inducted into Ziaur Rahman's cabinet. Zia deployed many other anti liberation figures in different important posts. He paved way for all those anti liberation foes to return, who fled the country clandestinely after our victory or just on it's eve. He allowed communalism oriented politics, deserted by Bangabandhu, to stage a come back. He converted Suhrawardi Uddyan, which stands as the relic of Bangabandhu's 7th March Address and Declaration as well as that of the Pakistani soldiers' surrender to the joint forces, combining the Freedom Fighters and the Indian Army, into Children's Park. He erased Secularism and Bengali Nationalism from our Constitution. He shattered the basic structures of the Constitution. Justice Mustafa Kamal, in his book Bangladesh Constitution: Trend and Issues, observed that the first martial law destroyed and damaged some basic structures of the Constitution.

Changes forced upon the Constitution by the first martial law regime , altered the original fundamental principles of state policy, destroyed the secular character of the constitution, and allowed religion based politics to be re-dwelled. General Zia, as an unprecedented move , also provided sanctuary to the killers of the Founding Father of the Nation

by purportedly immunising them from indictment. He glorified them with prestigious diplomatic assignments.

Before revoking martial law, Ziaur Rahman, following prototype pattern, all other dictators followed, obtained support from the newly elected Parliament, vide which the Constitution was purportedly amended, whereby he attempted to secure validation to all the paws he inflicted on the Constitution through so-called martial law proclamations, regulations, orders etc., inclusive of changes to two of the basic themes on which the war of liberation was fought, namely , secularism and Bangalee Nationalism. General Zia's attempts to secure legality to all martial law instruments and actions, however, ended in fiasco, as this Division in the Fifth Amendment case, supra, explicitly declared the amendment to have been without lawful authority. The Appellate Division, subsequently, affirmed the High Court Division's judgment with some modification, which has resulted in the return of the original Constitution framed in 1972 almost unimpaired.

2nd Military Power Game

Democratic government restored through the general election held in 1979 was, however, not blessed with longevity. It faced the same foray from another military adventurer, named, General Hossain Mohammed Ershad, as the first Constitutional Government of the Republic faced form Mustak-Zia duo.

As a sequel of General Ziaur Rahman's assassination, Vice President Justice Abdus Sattar succeeded in the normal Constitutional way, but could not last very long as the then army Chief General Hussain Mohammad Ershad appeared with his true colour to seize State power on 24th March 1982, by bending

the Constitutional 0rder, as his predecessors, Mostak-Zia bi-nucle-ate did previously. By way of some difference however, unlike Mostak-Zia, General Ershad suspended the Constitution in it's entirety and de-facto ruled the country with the ostensible authority of the proclamation, regulations and orders that followed. As before, this army autocrat nakedly interfered with the judiciary, not only by purportedly striping people of their imperishable freedom to enforce fundamental rights through judicial review, but also by unlawfully interfering with the performances of the subordinate judiciary. He, like his previous peers-in usurpation, set up a number of martial law tribunals, where apparent, rather than real, justices were delivered with scant regard to the rules of evidence and procedure, reflective of kangaroo trial.

Unlike his precursor, Ershad did not, during his authoritarian rule, dig any perennial trench into the Constitution through martial law instruments, although he retained and acted upon the changes Mushtaque-Zia twin impregnated into the sacred Constitution. The Constitution, hence, returned to force with the same shape as it was on 23rd March 1982, when the façade of suspension was eventually removed. During the de facto martial law period, however, martial law instruments were given purported supremacy over all other laws, and all Courts, inclusive of the Supreme Court, albeit allowed to function, were made amenable to martial law edicts.

About Martial Law Generally

Does Martial Law owe an existence in the domain of jurisprudence? Answer to the above inquisition necessitates a survey to trace the meaning and **connotation attributable to the phrase,** ‘law’.

Jurisprudentially, it remains beyond duality that till date no universally acceptable answer to the question as to what law connotes or denotes , has been located.

Scholars and jurists of global acclimation have endeavoured from time immemorial, even from days of Aristotle, Socrates , Manu, Chanakya, Grotius, etc, to define law , but only with partial success.

Definitions as expostulated by them have generated basically four broad schools of thoughts, namely, (1) Natural law theory ,(2) Positivist theory , (3) Neo Positivist theory, and, (4) Realism theory. These four conceptualities do, however, have , sub-fractions.

The Natural Law theory, propounded by H L Hart, amongst others, is hoisted on the grooming that in reality law consists of rules in accordance with reason and, nature has formed the basis of a variety of natural law theories, ranging from classical times to the present day. The centrifugal notion is that there exists objective moral principles, which depend on the essential nature of universe and which can be discovered by natural reason and, that ordinary human law is truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules of human conduct are logically connected with the truths concerning human nature. This connection enable us to ascertain the principles of natural law

by reason and common sense and thus, the natural law differs from rules of ordinary human law (positive law) which can be found only by reason to legal sources such as constitution, codes, statutes and so on (The concept of law).

The theory of positivism, propounded by Austin, Hobbes, Bentham, Bodin etc, on the other hand portrays a diametrically opposite view , which stands on the equation that law is the command of the sovereign. The progenitors of this concept seek to distinguish the question whether a rule is a legal rule, from the question whether it is a just rule, and, argues that law can be defined not by reference to it's content but according to the formal criteria, which differentiates legal rules from other rules such as those of morals, etiquettes and so on. Austin embodied three characteristic to the positive (also known as imperative law) theory saying (i) it is a type of command, (ii) it is laid down by a political sovereign, (iii) it is enforceable by a sanction.

It fails to take moral consideration into account. Positivists argue that to qualify as law, a command must have been given by a political superior or a sovereign.

Now, who is, in the positivists' contemplation, the sovereign?

According to Austin, sovereign is a person or a body of persons, whom the bulk of a political society habitually obey. In the context of England, the sovereign is a composite body comprising the Crown, the House of Lords and the House of Commons. Austin concluded that the real sovereign is that body which consists of the Crown, the House of Lords and the "Commons themselves." As a matter of fact, positivism regards

law as the expression of the will of the state through the medium of the legislature.

Modern Positivism, expounded by HLA Hart and Hans Kelsen, insist on the clear separation between what the law is and what it ought to be.

Hart insists that law is a social, human invention, though legal rules generate genuine allegiance, they are not straightforwardly moral rules. Their authority derives, not from their content, but from their source, which lies in the distinctly institutionalised system of social recognition.

The rule of Hart’s theory is the startlingly simple idea that law is a system of rules, structurally similar to the rules of games.

Kelsen, unlike Hart, puts coercion back into the centre stage of law. He said, “It follows that legal order may be characterized as a coercive order, even though not all it’s norms stipulate coercive acts; because norms that do not stipulate coercive acts (and hence do not command, but authorise the creation of norms or positively permit a definite behaviour), are dependent norms, valid only in connection with norms, that do stipulate coercive act” (Pure Theory of Law).

Kelsen expressed, “Law is the primary norm which stipulates the sanction.” He believed that all norms depend purely on coercive power. According to him the “fundamental difference between law and moral is: Law is a coercive order, that is, a normative order that attempts to bring about a certain behaviour by attaching to the opposite behaviour a socially organized coercive act; whereas moral is a social order without such sanctions.” According to him all legal norms

are, in essence, in and of themselves, nothing more than normative directions to officials to coerce. The enforcement of that form of coercion might, in the end, require the sanction of a court official and the use of a state's monopoly of force but those factors are beyond the implicit nature of legal knowledge.

"The human behaviour," stated Kelsen, "against which the coercive act is directed, is to be considered as prohibited, illegal"(Pure Theory of Law).

Realism Theory:

Legal Realism regards law as the expression of the will of the state through the medium of the legislature. Theories of Legal Realism too (Holmes: Path of the law , Gravy: The nature and source of law 2nd edition, Friedman: Legal Theory 4th edition), like positivism look on law as the expression of the will of the State, but see this as made through the medium of the Court. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges: for the realist, the sovereign is the Court. One version of Realism was held by Salmond (Salmond: Jurisprudence 7th edition 1924, by sir John Salmond). Salmond argued all laws are not made by legislature. In England much of it is made by the law Courts. But all law, however made, is recognised and administered by the Courts and no rules, which are not recognised or administered by the Courts, are rules of law. It is therefore to the courts, and not to the legislatures, that we must go in order to ascertain the true nature of the law. Accordingly he defined law as the body of principles recognised

and applied by the State in the administration of justice, as the rules recognised.

A much more pragmatic version of legal realism is that, which originated with Holmes, which has wielded enormous influence in the United States. This Theory is posited on the theme that all law are in reality, judge made.

So, while Austin defines sovereign in terms of obedience, pure positivism regards law as the expression of the will of the state through the medium of legislature, the realists look on law as the expression of the will of the state, attained through the medium of the Courts.

Like Austin, a realist also looks on law as the command of the sovereign, but his sovereign is not Parliament, but judges. Holmes, Gray or even Salmond subscribe to the realists theory.

Holmes opined; “the life of law has not been logic, it has been experiences” (Holmes: the Common Law 1).

A more sophisticated suggestion is that of Kelsen (General Theory of Law and State: Pure theory of Law (1934)50 LQR 474,) who considers the systematic character of the Legal System to consists in the fact that all it’s rules (or norms) are derived from the same basic rule or rules (Grundnorms). Where there is a written Constitution, the Grundnorm will be that the Constitution ought to be obeyed.

American Jurist Rosco Pound (The scope and purpose of Sociological Jurisprudence (1910-11)-24 HLR 591) said that the law is a species of social engineering, whose function it is to maximize the fulfillment of the interests of the community and it’s members and to promote the smooth running of the machinery of society.

Now, although the theorists named above differ as to the source of the rule, they are, nevertheless, in consensus in viewing law as compositions of rules. Such rules are regarded by natural law proponents as dictates of reason, by positivists as decree of the sovereign and by the exponents of realism as the practice of the courts. None of these jurists suggested, even obliquely or remotely, that an usurper can be the sovereign or the commandant.

The theories that emanated from jurists of high preponderance, discussed above, do not encompasses “martial law” within the definition of law. This absence unambiguously reflects the view that the jurists never considered ‘martial law’ as having any place in the realm of jurisprudence.

The advocates of “Positivism”, according to whom law is the command of the sovereign, do not argue that the sovereign is an usurper. To them ‘sovereign means’, in the context of England, the monarch in assimilation with both the Houses of Parliament. In fact Austin even went far enough to surmon that sovereign means the Monarch with the totality of the population, which is identical to that Article 7 of our Constitution proclaims. Even Hans Kelsen, who championed the doctrine of coercion, a direct spectator of Nazi autocratic rule, never advanced any theory to grant sanction of law to any coercive norm stemming from a usurper. His ‘Pure Law Theory’ is erected on the infrastructure that coercive orders must propel from the legally founded and recognised authority of the State, not from a person or a group of persons that seizes state power without following the norms. In fact by his ‘Legal Grundnorm’ theory, Kelsen asks all to “obey the historically first

constitution", so extra constitutional rule is totally abhorrent to his perception.

The assertion, " Martial Law in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals , is unknown to the law of England,"(An Introduction to the Study of the Law of the Constitution, A V Dicey, with Introduction by E. C. Wade, Tenth Edition, page 287)", was iterated by none other than that 0xford Don of infinite acclaim, Professor A V Dicey, who remain immortalised for his unimpeachable treatise on the sovereignty of British Parliament and the Rule of Law.

Martial Law as viewed by the Courts in Pakistan and Bangladesh

As observed above, it has been recognised by the theorist of all the schools that at the fag end of the day, legal validly depends on the sanction of the Court, irrespective whether the rules emanate from reason, command of the sovereign legislature, or the judges. It has been emphasised by Sir Ivor Jennings and other contemporary theorist that the only fundamental law in the British system, namely that the Parliament is Sovereign, thrives because that dogma has been receiving continued judicial sanction. The House of Lords also so expressed in British Railway Board –V- Pickin (1974 AC 765). From that point of view it is imperative that we examine how the Courts look at martial law, particularly in our part of the globe.

As would be seen, the constitutional Courts in this part of the world passed through phases of disarray at different

points of time: So although the Pakistan Supreme Court began with a cowardice defeatism in total wilderness, it did nevertheless, then, progressively recomposed itself and moved forward to a robust state of intrepid resilience through a benignant process of evolution.

The first case in the list is, obviously, that of Muhammed Omar Khan-v-Crown, reported in 5 DLR (WP Lahore) (1953) 73). One Omar khan , in that case, challenged the conviction, a martial law court, created during the said 1953 martial law, passed upon one Moulana A. Sattar Khan Niazy, engaging Section 491 of the Code of Criminal Procedure. That case ended in nihility when a Bench of Lahore High Court, presided over by it's the then Chief Justice Mohammed Munir, proclaiming that the Martial Law authority was the supreme one and hence, a conviction passed by a court created under the martial law, was beyond challenge. Legal veterans like H.S. Suhrawardi and Nazir Ahmed Khan stood for the petitioner, but in vain.

That regional martial law was, however, promulgated as per the provisions of the Government of India Act, 1935, amended by the Indian Independence Act, 1947, so it was not a case of usurper's martial law.

The next case, which reflects a pathetic tale of humiliating judicial retreat, and indeed by which the Pandora Box of all the maladies to infest our democracy and constitutional governance was wide opened, was that of State-v-Dosso, reported in 11 DLR (SC) 1. It was again Chief Justice Mohammed Munir, this time as the Chief Justice of the whole of Pakistan, who **quite sentiently,** gave in to the desire of the obscurants, who had under their command the force of gun

powder. This exemplified the melancholic defeat of Constitutionalism to muscle power, defeat of faculty to obnubilation, by purportedly relying on the obscure theory postulated by Hans Kelsen, Supra, known as the doctrine of "State Necessity". Repeating this dogma, Justice Munir this time granted full validity to the imposition of Iskander/Ayub's 1958 Martial Law. That impuissant judgment stirred wave of resentment of sunami proportion in the mind of righteous people all over the country. It was dismayingly looked upon as an act of utter betrayal, of ignominious and appeasing submission by the judges of the Apex Court, who were oath bound to ensure inviolability, sacrosancty and the invincibility of the Constitution, to the armed usurpers. It is worth mentioning that the Court, as has been clarified by the same Supreme Court in subsequent cases, under Chief Justice Munir thoroughly misconstrued the so-called doctrine of necessity. This judgment literally heralded the inception of the most ignoble chapter in the history of Pakistan. It was generally perceived that had the Judges of the Supreme Court taken a bold step to follow the true spirit of law, remaining loyal to the terms of their oath and thereby acted in defence of the constitution by declaring usurpation illegal and void, Pakistan's history would have, in all possibilities, been written differently.

It did not, however, take too long for wisdom to return. So, in the next two cases, involving the question of the validity of martial law, i.e. the cases of Asma Jilani-vs- The Government of Punjab and Mst. Zarina Gauhar-v-The Province of Sindh and two others ((PLD) 1972 (SC)139), the full Bench of the Pakistan Supreme Court, headed by the then Chief Justice

Hamoodur Rahman, with a total summersault, put Dosso principle topsy turvy, holding that the ratio expressed in that case did not go hand in gloves, with the established principles of law. The Supreme Court entertained no hesitation whatsoever to condemn martial law proclaimed by General Yahiya Khan as illegal and to declare unconstitutional the latter's usurpation to the helm of the Republic's affairs. In his endeavour to construe the so called 'doctrine of necessity', Chief Justice Munir purportedly invoked to lend justification to martial law, in it's proper context, Hamoodur Rahman CJ, in the two above cited cases observed, "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 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 acts of the usurpers were illegal and illegitimate." In Asma Jilani and Zarina Gauhar, this doctrine was used only to avert chaos confusion and anomaly left behind by authoritarian rule and to preserve continuity and consistency after martial subsided.

The Pakistan Supreme Court in Begum Nusrat Bhutto-v-Chief of Army Staff ((PLD) 1977 (sc) 657) staged a U-turn, through a rather paradoxical decision , the Court in one breath, with reference to Kelsen's pure theory of law, said, "Not only has this theory has not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or

criterion of legality, it excludes from consideration sociological or morality and justice which contributes to the acceptance or the new legal order" and stated, yet with the another breath, "That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity...." No wonder Pakistan Supreme Court in Sindh High Court Bar Association –vs- Federation of Pakistan (PLD 2009, SC Spl), not only parted company with the ratio in Nusrat Bhutto case, but came down with a rather pageant, outspoken comment about the judges who would recognise usurpers in future , in following language, "We lay it down firmly that the assumption of power by an authority not mentioned in the Constitution would be unconstitutional , illegal, void ab-initio and not liable to be recognised by any court, including the Supreme Court." Anwarul Haque CJ attempted to say that Asma Jilani ratio was meant to be confined to Yahya martial law situation, the notion that the Supreme Court, in Sindh High Court Bar Association case, found no reason not to deviate from diametrically.

In Nusrat Bhutto case the Court, taking General Ziaul Haque's assurance on board, expressed the expectation that the dictator would soon hold a general election.

That expectation, however, subsequently appeared to had been utopian. That futile expectation failed to dispel the obfuscation and misery that loomed over Pakistan's Constitutional horizon, as the said autocrat, instead of sticking to his promised election, virtually torn apart the Constitution, and thence stripped the High Courts of their power of judicial review, as well as of the power to pass any order on martial law.

This adventure, did not go unimpeached, however, as the Baluchistan High Cour under it's the then Chief Justice Mir Khuda Baksh Mari in the Chair, by a rare display of bravery, reminiscent of Sir Edward Coke's verdict against further proliferation of Crown Prerogative in the cases of Proclamation (1611, case 12 Co Rep 63) and Prohibition Del Roy (1607, 12 C Rep 63), unequivocally declared martial law illegal. But at the end of the day the judges themselves lost their battle to the shrewd General's trickery when the latter, most heinously and by an exhibition of unprecedented despotism, virtually superimposed a new Constitution that required the superior Court judges to subscribe to fresh oath. The then Chief Justice of Pakistan, Anwarul Haq CJ, along with two of his peers, chose to step down rather than swallowing the humble pie the fascist ruler offered , the appeal, as a result, ended in futility.

The said foray, could not, however, maim Pakistan's resilient judiciary. Judges wasted no time to augment their resolve to restore authority, to speak for the law and to stand as the Unicorn, in order to protect the sacrosanctity of their Constitution and, accordingly, seized the opportunity to do so vide the case of Sindh High Court Bar Association-v-Federation of Pakistan, supra. With yet more robust exhibition of authority, the Supreme Court of Pakistan expressed, "At the time of every military take over, the Army Chief, while abrogating or holding in abeyance the Constitution , as the case may be, would assume all the powers saying 'the Constitution had become unworkable' or ' a situation had arisen for which the Constitution provided no solution', make all

offices including the office of the President subservient to himself.....and would ultimately leave the country in a black hole, taking it once more to square one i.e. virtually at the point where he had begun."

The Court went to assert, in addition to it's comment on the Nusrat Bhutto's case, quoted above, that "whenever power is assumed in an extra Constitutional manner by an authority not mentioned in the Constitution, , then it must amount to usurpation in all events," ... "an authority not mentioned in the Constitution, assuming power would be treated as usurper". The Court put on record the following observation, "In our country, during sixty years of independence after partition, to the misfortune of people, several times the Constitution framed by the Legislative Bodies were desecrated. Sovereignty of people was not allowed to flourish and get deep rooted in the polity of our country. Prior to 3rd November 2007, the Constitutions were either abrogated or put in abeyance and the democratic system of government was put to an end. ..... On 5th July 1977, once again martial law was imposed throughout the country by the then head of army viz. former General Muhammad Ziaul Haq, who, vide proclamation of martial law ....put the Constitution in abeyance.....When the Constitution was revived , it was undeniably, in a mutilated form by the notorious Eighth Amendment."

Although it was not quite in relation to martial law, what nevertheless, the Supreme Court expressed in Muhammad Nawaz Sharif-vs- President of Pakistan(PLD 1993 SC 473) is also applicable in martial law perspective, because the Court held that the theory of total breakdown of constitutional machinery

as the only ground for dissolution of National Assembley is not tenable. Similarly, in Khawja Ahmed Tariq Rahim-vs-Federation of Pakistan (PLD 1992 SC 646), majority in the Pakistani Apex Court held that once the evil is identified , remedial and corrective measures within the Constitutional framework must follow. The majority in Supreme Court endorsed this view in Benazir Bhutto –vs- President of Pakistan PLD 1998 SC 735). It is worth noting that all , without any exception, autocratic usurpers invariably try to delude the people with the pretext that the constitutional machineries have become unworkable.

The Bangladesh Scenario

In our jurisdiction, though the question of the validity of martial law itself was never directly put on the fence, peripheral questions arising out of martial law proclamation, regulations, etc. however, came under judicial scrutiny on several occasions.

The case of Halima Khatun –vs- Bangladesh and others, (30 DLR (sc) 207), was the maiden one where the Appellate Division had to adjudicate upon an issue that obliquely involved the question of the validity of martial law. The Apex Court headed by Fazle Munim CJ, in addressing the question as to whether the writ petition abated because the decision challenged was taken on the strength of a martial law regulation, displayed a Dosso style obsequious retreat and accorded unqualified recognition to the army autocrat’s proclamation, holding that the Constitution of the Republic had been placed to a status of subordination to that of the proclamation and martial law instruments, whereby the concept of the supremacy of the Constitution has been derogated. The Appellate Division went

even far enough to ordain that though Article 7(2) of the Constitution, which proclaimed that the Constitution, as the solemn expression of the will of the people, the supreme law of the Republic, it must be taken to have lost some of it's importance and efficacy, and that no Constitutional provision can claim to be sacrosanct and immutable.

The ratio in the case State-v- Haji Joynal Abedin (32 DLR AD 110) yielded no dissimilar harvest. In that case, again, the question of the validity of martial law itself was not put on the scale. The question, as ignited by the petition was, almost identical to the one the instant petitioner has raised before us, viz, whether an order of conviction passed by a special martial law court was ornamented with legal authority. While the High Court Division declined to accord legality to the order of the so called special martial law court, the Appellate Division found no exorcism to eject the ghost of Halima Khatun decision, and instead, replicated Halima Khatun ratio even with greater emphasis. Ruhul Islam J expressed, "I find it difficult to accept the argument advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammeled by martial law regulations.....The moment the country is put under martial law the .....constitutional provisions along with other civil laws of the country loses it's superior position".

The case of Kh. Ehteshamuddin Ahmed –v- Bangladesh (33 DLR AD154) sprang to provide yet another opportunity to our Apex Court to take an unambiguous stand on the question of validity of martial law. In that case also the question of validity of martial law proclamation or that of the Constitution (Fifth

Amendment) Act, 1979, by which all martial law instruments were attempted to be validated on the eve of martial law's departure, was not directly put forward for exploration, although that question was intrinsically glued with the issue raised. Here again the legality of an order of conviction passed by a special martial law court was brought under review. The Apex Court, once more, missed the boat and held that the supremacy of the Constitution can not, by any means compete with the proclamation issued by the chief martial law administrator. Ruhul Islam J proceeded to express, 'The High Court being creature under the Constitution, with the proclamation of martial law and the Constitution allowed to remain operative subject to proclamation and martial law regulations, it loses it's superior power to issue writ against the martial law authority or martial law courts.'

His Lordship underscored that as neither the authority of the person who proclaimed martial law nor the vires of martial law was or could be challenged , no reason existed to make any reference to Asma Jilani case, supra, which was relied on by the petitioner.

The above cited decisions depict a rather pathetic scenario of judicial disavower by the Appellate Division at that time. Instead of rising to the occasion, which was the desperate cry of the day, which could have turned the events of the history to a diversely different, and, no doubt, **benevolent** dimension, the Appellate Division again allowed martial law proclamation to have precedence over the Constitution.

The ratio of the decision in the case of Kh. Ehteshamuddin Ahmed has it that even after the cessation of martial law, it's provisions would remain supreme.

In adjudicating upon the question as to whether, in the back drop of the Constitution (Fifth Amendment)Act 1979, it was open to the High Court Division to examine the validity of the proceeding of a Special Martial Law Court, at a time when martial law was no longer in the vogue. Ruhul Islam J, insisted that it would be in-apt to say that with the cessation of martial law and the proclamation, the embargo put on the High Court Division's jurisdiction to examine proceedings that took place in martial law courts, during the martial law period, also waned. The Appellate Division continued by expressing that paragraph 18 of the Fourth Schedule to the constitution and clause (h) of the proclamation of 6th April 1979, leaves no scope for airing the view that the withdrawal of martial law and the lifting of the proclamation of 20th August, 1975 and 8th November 1975 and the third proclamation of 29th November 1976, together with all other proclamations and orders, amending or supplementing them, would enable anyone now to challenge, by invoking writ jurisdiction, the order of the Chief martial law administrator, or the proceedings in the martial law courts or the orders of the review authority.

Pitiably enough, the Apex Court, at that time, remained inclined to accept the constitution's inferiority, even after the phantom of the extra constitutional regime had quitted, and remained inclined to grant fiat of superiority to the military dictators' commandments even after their reign went into obsolescence.

The case of Nasiruddin-v-Government of the Peoples Republic of Bangladesh (32 DLR AD 216), was another one that was decided after the 1st martial law was revoked. Like it's above discussed predecessors, validity of martial law itself was not directly challenged in that case either. Like that in Halima Khatun, it was concerned with a property declared as an abandoned one, but unlike the question involved in Halima Khatun, the issue here was whether the phrase 'purported exercise' in the validating clause of the fifth amendment of the Constitution, can give impunity from judicial reviewability. On this occasion, the Appellate Division, headed by Kamaluddin Hossain, CJ, came out with some kind of a revised, progressive version , stating that the said phrase can not accord immunity from challenge to an act which is manifestly without jurisdiction, or in case of a judicial or quasi judicial act which is coram non judice, or if the act is malafide, provided malafide is specifically pleaded. The Appellate Division, however, did not fully deviate from it's previous stand as to the superior status of martial law proclamation.

Now, what is axiomatic from the decisions cited above, is that although the Courts refrained from disturbing the validity of the orders, actions issued/taken under martial law instruments, the validity of the martial law proclamation itself or any instrument thereunder, was not directly or specifically challenged in any of them.

In this respect it may be worth reproducing what Hamoodur Rahman CJ stated in Asma Jilani, supra, which runs like this, "The learned Attorney General however, insists that even this regime has received the legal recognition of this Court and

therefore it had acquired de-jure authority to make laws. Reference in this connection has been made to two decisions. The first was in the case of Muhammad Ismail –vs- State in which case the judgment was again delivered by myself. The only question raised in this cases was as to whether after promulgation of martial law on 25th March 1969, and the enactment of the Provisional Constitution Order on the 4th April 1969, this Court continued to retain the jurisdiction conferred upon it by the Constitution of 1962 to entertain petitions for special leave to appeal in criminal proceedings in view of the fact that that the Provisional Constitution Order did not specifically provide for any appeal by special leave. No question was raised in this case as to the validity of the Martial Law or the Provisional Constitution Order.....There was no question, therefore, of any conscious application of the mind of the Court to the question of the validity of the regime or the legality of the Provisional Constitution Order nor was this Court called upon to give any decision thereon as the latter order had manifested no intention to alter that jurisdiction and there was no conflict between the two. It is not correct, therefore, to say that this decision in any way constitutes a conscious recognition in law of the new regime. Questions in dispute in these cases were entirely different and had nothing whatever to do with the question now before us..... It is incorrect, therefore to say that this Court had given any legal recognition to the regime of General Aga Mohammad Yahya Khan. The question, therefore, is still at large and has for the first time now been raised before this Court in this specific form. The learned Attorney General’s contention that

even the tacit approval given by this Court by not questioning suo motu the various Martial Law Regulations made by the regime concerned during this period of 2 ½ years is itself sufficient to preclude this Court from going into this question now, is not, in my opinion , tenable. The Courts , as I have already indicated, are not called upon to suo motu raise controversy and then decide it. They only do so if only a litigant raises the controversy in a concrete form as it has now been done before us."

The Revolutionary Fifth Amendment Judgment

Behind the curtain of the decisions discussed above ,a judicial revolution was quietly, but steadily, in the offing. It did eventually found a charade to permeate into our jurisdiction through the universally revered case of Bangladesh Italian Marble Works Ltd-v-Government of Bangladesh, popularly known as the Fifth Amendment Case,(BLT 2006, Special Issue), cited as the Fifth Amendment case. A Division Bench of this Division, comprising ABM Khairul Haque and ATM Fazle Kabir JJ presented the nation with a judgment that the nation can quite aptly be proud of, and, for the reason that this judgment brought an end to the previously pervasive stalemate on a topical question, it can quite congruously be equated with that of Marbury –v- Madison supra, in it's own arena, as Marbury also liquidated a state of flux on a topical constitutional impasse. In plunging extra-constitutional rules to nihility, this decision went far ahead of what Hamoodur Rahamn CJ , proclaimed in Asma Jilani. The Appellate Division , with minor modifications, affirmed, the intrepid decision this Division

handed in. In the aforementioned case, both the Divisions of the Supreme Court, for the first time, availed the long awaited opportunity of reviewing the question of legality and the Constitutionality of martial law, and of course that of the Constitution (Fifth Amendment)Act 1979, and then unambiguously ordained that both were thoroughly vacuous of legal authority, ultra vires the Constitution and ,is hence, non est through the vision of law.

The petitioner in the Fifth Amendment case asked for a direction upon the respondents to hand over to it the physical possession of a cinema hall named Moon Cinema, engaging the grounds, amongst others, that the martial law regulation upon which the authorities relied to justify their action of seizing the cinema was ultra vires the Constitution and, was hence, of no effect.

After a protracted hearing, the aforementioned Division Bench made the Rule absolute holding; “1)Bangladesh is a Sovereign Democratic Republic, governed by the government of laws, not of men, 2) The Constitution of Bangladesh being the embodiment of the will of the Sovereign people of the Republic , is the Supreme Law of the Republic, and all other laws , actions and proceedings , must conform to it and any law or action or proceeding , in whatever form and manner, if made in violation of the Constitution , is void and non est. 3)The Legislature , the Executive and the Judiciary are the three pillars of the Republic, created by the Constitution , as such are bound by it’s provisions . The Legislature makes laws, the Executive runs the government and the Judiciary ensures the enforcement of the provisions of the Constitution. 4) All

functionaries of the Republic and all services owe their existence to the Constitution 5) State of Emergency can only be declared by the President on the advice of the Prime Minister, in case of imminent danger to the security or economic life of the Republic 6) The Constitution stipulates a democratic Republic, run by the elected representatives of the people and any attempt by any person or group of persons , how high so ever, to usurp an elected government, shall render themselves liable for high treason. 7) A proclamation can only be issued to declare an existing law under the Constitution, not for promulgating law or offence or for any other purpose 8)There is no such law in Bangladesh as martial law and no such authority as martial law authority ,as such if any person declares martial law , he will be liable for high treason against the Republic. Obedience to superior order is no defence. 9) The taking over of power with effect from 15th August 1975 by Khandakar Mushtaque Ahmed , a usurper, placing the Republic under martial law and his assumption of office of the President of the Republic, were in clear violation of the Constitution , as such illegal without lawful authority and without jurisdiction 10) The nomination of Justice Abu Sadat Mohammed Sayem, as the President of Bangladesh on 6th November 1975 and his taking over the Presidency and his assumption of the power of the chief martial law administrator and his appointment of the Deputy Chief Martial Law Administrator, by the proclamation of 8th November 1975 were all in violation of the Constitution. 11) The handing over of the office of martial law administrator to Major General Ziaur Rahman through the third Proclamation dated 29th November 1976, was beyond the ambit of the

Constitution. 12) The nomination of Major General Ziaur Rahman to become the President of Bangladesh by Justice Sayem and Major General Ziaur Rahman's assumption of the office of the President of the Republic were without lawful authority and without jurisdiction 13) All proclamations , martial law regulations, and martial law orders made during the period from 15th August 1975 and 9th April 1979 were illegal, void and non est because:

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

ii)The Constitution was made subordinate and subservient to those proclamations, martial law regulations and martial law orders.

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

iv) That during the period between 15th August 1975 and 7th April 1979, Bangladesh was ruled not by the representatives of the people but by usurpers and dictators whereby the country lost it's sovereign republic character and was under subjugation of the dictators:

v) From November 1975 to March 1979 Bangladesh was without any Parliament and was ruled by dictators and as such lost it's democratic character for the said period.

vi) The proclamation etc destroyed the basic character of the Constitution, such as change of the Secular character, negation of Bengali Nationalism, negation of Rule of law, ouster of jurisdiction of Court ,Court's jurisdiction , which acts constituted the offence of sedition:

15) Paragraph 3A was illegal as it sought to validate the proclamations, MLRs and MLOs which were illegal, and secondly , Paragraph 3A, made by Proclamations Orders , as such, itself was void.

16) The Parliament may enact any law but subject to the Constitution. The Constitution (Fifth Amendment) Act 1979 is ultra vires , because Section 2 of the Act enacted paragraph 18 for it's insertion in the Fourth Schedule to the Constitution, in order to ratify , confirm and validate the proclamations, MLRs and MLOs etc. for the period from 15th August 1975 to 9th April 1979. Since those proclamations, MLRs ,MLOs were illegal and void , there were nothing for the Parliament to ratify, confirm and validate. Secondly , the proclamations etc being illegal and having constituted criminal offences, their ratifications, confirmations or validations by the Parliament were against common rights and reason. Thirdly , the Constitution was made subordinate and subservient to the proclamations etc. Fourthly those instruments destroyed the basic features of the Constitution. Fifthly the ratification, confirmation or validation do not come within the ambit of amendment as prescribed by Article 142 of the Constitution. Sixthly, lack of long title ,which is a mandatory condition ,made the amendment void. Seventhly the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the people of Bangladesh and it's Constitution.

17) The Fourth Schedule as envisaged under Article 150 is meant for transitional and temporary provisions, since Paragraph 3A and 18 were neither transitional nor temporary,

the insertions of those paragraphs in the fourth Schedule are beyond the ambit of Article 150 of the Constitution.

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

19) Violation of the Constitution is a grave legal wrong and remains so for all time to come . It can not be legitimised and shall remain illegitimate for ever , though , however for the necessity of the State , such legal wrongs can be condoned in certain circumstances, invoking the maxim, 'Id Quod Alias Non Est Licitum, Necessitas Licitus Facit Salus Populi Est Suprema Lex and Salus Republicae Est Suprema Lex.

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

21) Condonation of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble, Article 6, 8, 9, 10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of

any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation 0rder No. IV of 1976, is declared valid and retained."

This Division further expressed:

> "The Constitution (Fifth Amendment) Act, 1979 (Act I of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above.
>
> The "ratification and confirmation" of The Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No.VII of 1977) and Proclamation (Amendment) 0rder, 1977 (Proclamation 0rder No.1 of 1977) with regard to insertion of Paragraph 3A to Fourth Schedule of the Constitution by Paragraph 18 of the Fourth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979), is declared to have been made without lawful authority and is of no legal effect."

Their lordships directed the respondents to handover the physical possession of Moon Cinema Hall at 11, WiseGhat, Dhaka, in to the petitioner, within 60 days from the date of the receipt of the copy of this judgment.

Their Lordships were quite mindful to iterate that although a number cases, that were adjudicated upon by the Appellate Division, revolved round the question of the status of the Constitution during martial law period, the question of Constitutionality of martial law or martial law proclamation, was never advanced in any of those cases and hence this question was raised as a maiden one before them in the Fifth Amendment case.

The High Court Division's judgment was taken to the Appellate Division where the full Bench, after exhaustive hearing, declined to issue leave to appeal, though their Lordships in the Appellate Division made some inroads into it by way of some modification. The ratio and most of the observation expressed by this Division remained unwrapped.

The Appellate Division, while rejecting the application for leave to appeal, made the following observation and modification;

'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 no subverted, it is not mutilated, and to say the least, it is not held in abeyance and it is not amended by any authority not competent to do so under the Constitution.

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

We, therefore, sum up as under:

1. Both the leave petitions are dismissed;
2. The judgment of the High Court Division is approved subject to the following modifications:-
   (a) All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved;
3. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:
   (a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;
   (b) the actions not derogatory to the rights of the citizens;
   (c) all acts during that period which tend to advance or promote the welfare of the people;
   (d) all routine works done during the above period which even the lawful government could have done.
   (e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;

(ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.
(iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation order No. IV of 1976) and the Second Proclamation (Tenth Amendment) order, 1977 (Second Proclamation order No. 1 of 1977 so far it relates to amendment of English text of Article 44 of the Constitution;
(iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it relates to substituting Bengali text 44;
(v) The Second proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2),(3),(4),(5),(6) and (7) of Article 96 i.e. Provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the constitution, and
(f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution.

While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure for ever."

Does martial law have a Place in our Constitution

We have noted Dicey's irrefutable statement that martial law, by which assumption of state power by usurping the constitutional government by use of the barrel of guns is referred to, is not known to English Law.

Is his version attributable to our Constitution as well? We are not required to dissect all of the 153 Articles of our coveted Constitution to locate the immaculate answer to this question. Firmly speaking, the answer is no different form the one Dicey voiced. The concept of martial law is as alien to our Constitution as it is to the English system. Our Constitution,

an autochthonous one, framed in the backdrop of a blood swamped war of liberation, is structured upon four principles, the most important of them, being democracy. In reflection of the said primordial principle, Article 7 proclaims in the most unequivocal terms that “All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of this Constitution. This Constitution is, as the solemn expression of the will of the people, supreme law of the Republic, and if any other law shall, to the extent of the inconsistence, be void.”

While Article 11 surmons, “The Republic shall be democracy in which fundamental human rights and freedoms for the dignity and worth of the human persons shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured,” Par III of the Constitution contain inalienable fundamental rights, which can be enforced by recourse to Article 102, and, which cannot be overridden by any legislation.

Article 48 emphatically proclaims that the President shall be elected by the members of Parliament (who are themselves to be elected directly by all the adult citizens of the Republic.), who shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by other law, and that, save in appointing the Prime Minister and the Chief Justice, the President shall act in accordance with the advice of the Prime Minister.

Article 55(2) has it that the executive power of the Republic shall, in accordance with this Constitution, be

exercised by or on the authority of the Prime Minister while 55(3) says “the cabinet shall be collectively responsible to Parliament.”

Article 56(3) dictates, “The President shall appoint as Prime Minister, the member of Parliament who appears to him to command the support of the majority of the members of Parliament,” while proviso to Article 56(2) says that not less than nine-tenths of the ministers shall be appointed from among members of Parliament. Article 57 (e) lays that the office of the Prime Minister shall become vacant if he ceases to be a member of Parliament, while Article 57 proclaims that in the event the Prime Minister of the day ceases to retain the support of the majority of the members of Parliament, he shall either resign or advise the President to dissolve Parliament, and if the President is satisfied that no other member of Parliament commands the support of the majority of the members of Parliament, dissolve the Parliament.

Article 58(B) contains provisions as to a Non-party Care-Taker government for the election period to ensure free and fair election to the Parliament.

Article 93 confers limited law making power upon the President by way of Ordinances, only when urgency so ordains.

Article 118 makes provisions for the formation of an independent Election Commission, which body shall, under Article 119, be responsible for the superintendence, direction and control of the preparation of the electoral rolls as well as for the conducting election of the of President and Members of Parliament in accordance with the Constitution.

These Constitutional provisions have been mirrored above for the sole purpose of vindicating the assertion that (1) martial law or any similar usurpation of power has no threshold under our Constitution (2) our Constitutional scheme, from the top to the toe, owes it's existence to the will of the people (3) it is the Parliament, elected through popular vote, which is the centrifugal body for all democratic activities (4) the Head of the Executive Government , along with his colleagues, survive so long as they command the support of the majority members of Parliament (5) members of Parliament, who alone enjoy prerogative to legislate, with the only exception of parochial and short lived legislative power of the President, and who do effectively and virtually form the electoral college for the formation of the Executive Government, are all elected directly by the people, (6) a set of fundamental rights, which corresponds to the Universal Declaration of Human Rights, 1948, and other U N Covenants on human rights, remain stoutly erected as the Constitutional Arch Stone to insulate every individual's fundamental rights (7) there is a Supreme Court, comprising two hierarchical Divisions, to act as the invincible vanguard, to shield the sacrosanctity of the Constitution by performing the sacred duty of being it's Guardian and to protect and enforce the fundamental rights, firmly and inflexibly secured by the Constitution and, most importantly, to act as the inviolable bastion to keep the Constitution immune from extra-Constitutional infringement and also to ensure that no law, contravening any provision of the Sacred Instrument, is passed. The responsibility of interpreting the Constitution also lies on the Supreme Court.

The Constitution also stipulates comprehensive device for transmission of power through democratic process only.

The Doctrine of State Necessity Re Visited

What is, then that musical chair theory, the so called Doctrine of State Necessity, by relying on which Munir C J heretically exhibited judicial kow-tow to the military rulers?

Admittedly it is Hans Kelsen, one of the pioneers of the Positivist's (coercionist)theory, who harbingered this theory, propounding that necessity makes lawful which otherwise is unlawful.

Long before Kelsen came up with his theory of 'state necessity' however, the English court gave support to a similar connotation in the case of Ship money (R -v- Hampden, 1637 3St Tr 825) where the necessity of the state was depicted as the supreme law. In that case One John Hampden refused to pay Ship money, a tax levied for the purpose of furnishing ships in time of national danger. Counsel for Hampden accepted that sometimes the existence of danger justify taking the subjects goods without his consent, but only in actual, as opposed to threatened emergency. The crown conceded that the subject could not be taxed in normal circumstances without the consent of parliament. A majority of the court of Exchequer Chamber gave judgment for the King saying that the defense of the realm is the highest law.

In Begum Nusrat Bhutto –v- Chief of Army staff(PLD 1977 SC 657), Anwarul Haq, CJ, referring to the ratio of the decision in Dosso's case held that the legal character or validity of any abrupt political change, brought about in a

manner not contemplated by the preexisting constitution or legal order, could not be judged by the sole criterion of it's success or effectiveness by Kelsen's pure theory of law. He observed that not only had that theory not been universally accepted or applied, it was also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excluded from consideration sociological factors or morality and justice which contributed to the acceptance or effectiveness of the new legal order.

In the case of Jamat-e-Islami –vs- Federation of Pakistan (PLD 2009 SC 549), Sardar Muhammad Raza Khan J, rejecting out right Mr. Abdul Hafiz Pirzada's oblique suggestion that allowing General Pervez Musharaf to contest the election staying in the army, would be justified by necessity , as it would pave way for smooth transition from the Army rule to a pure democratic rule, observed that the doctrine of necessity is neither just nor legal and was violative of the injunction of the Holy Quran. '

His Lordship went on stating, "Doctrine of necessity is neither law nor any rule nor regulation. It is a state of affairs where, in the given circumstances, unfair is justified in the name of expediency. Most of philosophers, scholars and pseudo intellectuals in the west have been floating various ideas from time to time sparking debates world over. Genuine things are adopted and promoted in the developed countries while underdeveloped are duped into the fantasies of in genuine, which unfortunately are followed as a sacred commandments. Later category includes Hans Kelsen's doctrine of

necessity, Machiavelli's Prince, cherished in the under developed country like Pakistan, despite being damagingly hypocritical. The theories are by no means universally accepted nor do they form basis of modern jurisprudence." His Lordship also referred to Hamoodur Rahman CJ's critical observation in Dosso to the effect that the Supreme Court not only misapplied the doctrine of Hans Kelsen , but also fell into error in holding that it was a generally accepted doctrine of modern jurisprudence.

In Sindh High Court Bar Association –v- Federation of Pakistan (PLD 2009 SC Spl.), also the Supreme Court of Pakistan explicitly denounced the idea of invoking the doctrine of state necessity to justify unconstitutional assumption of power, expressly proclaiming again, with reference to 5th July 1977, the date on which Ziaul Haque usurped power, " the action of 5th July 1977 and the principle of necessity was invoked for the destruction rather than preservation of the constitution." Expressing further" The Constitution is the cementing force of the sate and the society. By making a Constitution the society has already used and applied such a force and brought into existence a state and 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 means." The Court lent unqualified support to the theme that illegal assumption of power is not contemplated by Kelsen's or Blackstone's doctrine of necessity. Their Lordships continued, stating, "That is the destruction of constitution and if the constitution were to be destroyed, state and the society in the

modern times could be preserve in no manner. Shall the constitution of Pakistan continue to meet such a treatment in the garb of the ‘civil and state necessity’?” His Lordship continued , “It is held and declared that the doctrine of civil and state necessity and maxim ‘salus poluli est suprema lex’ were not applicable to all or any of the unconstitutional, illegal and ultra vires acts taken by General Pervez Musharraf..... because they were not taken in the interest of the state or for the welfare of the people. It is further held and declared that the doctrine of necessity and the maxim ‘salus populi est suprema lex,’ as elucidated in the cases of Begum Nusrat Bhutto absolutly have no application to an unconstitutional and a 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 or proclamation of Martial Law, proclamation of Emergency....”

It is also worth recording that Kelson himself, on whose so-called concept of ‘state necessity’, Munir CJ derived aspiration to accord validation to martial law, advocated for court’s power to denounce extra constitutional assumption of power in following terms;

> “If the legal order does not contain any explicit rule to the contrary, there is a presumption that every law-applying organ has this power of refusing to apply unconstitutional laws. Since the organs are entrusted with the task of applying “law”, they naturally have to investigate whether a rule proposed for application has really the nature of a law. Only a restriction of this power is in need of explicit provision.”

In fact Kelsen's doctrine of 'Grund Norm' commands that where there is a written constitution, it ought to be obeyed.(Pure Law Theory 1934 , supra.)

Interpretation advanced by the Privy Council and the Cyprus Court are so obscure that they provide no assistance.

This theory has also been discussed in the Fifth Amendment case, whereupon this Division arrived at the clear conclusion that it was never meant to justify extra constitutional assumption of power.

The law as to judicial review of Acts of Parliament

Supremacy of Parliament-v-Written Constitutions

In questioning the legality of the conviction under review, the petitioner has indeed put on the fence the very question of the vires of the martial law proclamation itself as much as the lawfulness of the so-called Constitution (Seventh Amendment) Act, 1986. Speaking succinctly, what the petitioner really asked for is a declaration to the effect that the so-called legislation by which purported attempt was made to accord Constitutional and legal validity to the martial law Proclamation of 24th March 1982, was a nihility in the perception of law, and hence convictions passed by military courts are of no consequence.

The question is are we competent enough to invalidate the said Act , if the same is found to be ultra vires?

Before proceeding to step onto this particular legal stair, to locate answer to the question posed, it is necessary to explicate that although martial law instruments themselves were purportedly made while martial law was still in subsistence, at a time when the Constitution remained de-facto

suspended, the Constitution (Seventh Amendment) Act 1986 itself was, nonetheless, enacted by a duly constituted Parliament, elected through popular vote in accordance with the provisions of the Constitution, not by any martial law decree. So on the face of it, the said enactment enjoys rebuttable presumption of validity as an Act of Parliament, and such a presumption will continue until and unless the said legislation is declared ultra vires the Constitution or of any express provision thereof.

This exercise requires us to judicially review the question of the constitutionality of the subject enactment.

Judicially reviewing an executive actions or omission can be undertaken using a much simpler yardstick engaging Article 102 of the Constitution, because such a review may only lead to the effacement of an executive action, decision or activation of an omission. Reviewing an Act of Parliament, however, requires, extensive and meticulous attention because of what it entails- invalidation of an Act passed by the Parliament. It is, in this regard, incumbent on our part to elucidate, with reference to judicially pronounced authorities of high and impeccable preponderance-- they are in abundance any way-- on this subject, which have attracted wide and extensive public inquisitiveness. This analyses would invariably require us to under take a thorough dissection of the concept known as the ‘legislative supremacy of Parliament’: The two concepts being mutually irreconcilable, being step siblings to each other, they deserve to be discussed by being placed in juxtaposition.

It is indeed axiomatic and, does not espouse any obfuscation, that the Parliament in a written Constitution

regime, does not enjoy the same width of power as the Parliaments in the countries with unwritten constitution, like the United Kingdom, New Zealand and Israel, do. Parliaments in these countries are supreme in law making arena in the sense that they enjoy untrammeled power; they can theoretically do anything they wish to ; as Sir Ivor Jennings, the Cambridge Don and a Bencher of Grays Inn, blessed with universal acclamation, enunciated; “In theory the British Parliament can make all men women and all women men.” In so saying he renounced De Holmes’ remark that “Parliament can do anything except make a man into a woman and a woman into a man”, expressing further that like many of the remarks De Holmes made, it is wrong, for if Parliament enacted that all men should be women, they would be women so far as the law is concerned. “In speaking of the power of Parliament” said Sir Ivor Jennings, “we are dealing with legal principles, not with facts. Though it is true that Parliament cannot change the course of nature, it is equally true that it can not in fact do all sorts of things. The supremacy of Parliament is a legal fiction, and legal fiction can assume anything” (Sir Ivor Jenning: The law and the Constitution: 5th Edition, page 170).

Prof. A.V. Dicey, another 0xbridge Don, immortalised for his treatise on the uniqueness of various aspects of the British Constitution, who is in fact that jurist who patriarched the phrase “Sovereignty”, to make it attributable to British Parliament, and divided sovereignty into (1) legal sovereignty and (2) political sovereignty and conceptualised the theme that the British Parliament enjoys legal sovereignty (the political sovereignty being with the people, the electros), in the sense

that it's power to legislate is untrammeled. According to Dicey, Sovereignty of British Parliament has three aspects; (1) it can pass any law on any subject as it wishes (2) there is no authority in the realm which can question the validity of an Act of Parliament (3) no Parliament can bind it's successor.

Sir Ivor Jennings and Sir Lesley Stephen, another jurist of universal repute, variedly expressed that theoretically, British Parliament can pass a law to execute all blue eyed babies or all those who would smoke on the streets of Paris.

Reason for the British Parliament's Omnipotence is explicable. It is so because it has no progenitor to be dictated by. It owes it's birth to history alone, not to any authority ; it does not, hence, have to listen to any creator, it can act as it likes, even whimsically or irrationally, if it so wants, as it does not have an animator . As Prof. Salmond explains; "All rules of law have historical sources . As a matter of fact and history they have their origin somewhere , though we may not know what it is.....But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; it's source is historical only, not legal...It is the law because it is the law, and for no other reason that it is possible for the law to take notice of. No statute can confer this power upon Parliament , for this would be to assume and act on the very power that is to be conferred" (Jurisprudence 10th Edition 155).

According to Prof. Hilaire Barnet, who cites Hans Kelsen, John Austin and J L Hart, "When one comes to search for the ultimate higher authority which itself validates the basic norm, a logical impasse is reached..... On a domestic basis we

find this validating force in ‘juristic consciousness’—in other words , the acceptance of legal validity by the judges,”

This concept has received, at least until recently, overwhelming judicial recognition, as is reflected by Lord Reid’s following observation; “In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete.”(Pickin-v-British Railway Board, 1974 AC 765).

Now, necessarily, a Parliament under a written Constitution regime does not, to put it more precisely, cannot, enjoy the sort of unbuckled power, the British Parliament does. As G. Marshal explains ,where autochthony exist , the authority for the Constitution arises from the people . The phrases , ‘We the people’ has powerful psychological and legal force , and the resultant document, the Constitution, will be supreme.(Marshall G, Constitutional Theory, 1971, Oxford: Clarendon).

Sir Ivor Jennings had this to say; ”A written Constitution is thus the fundamental law of a country , the express embodiment of the rule of law in one of it’s senses. All public authorities –legislative, administrative and judicial—take their powers directly or indirectly from it.” (The Law and Constitution, page 62). AT page 151 of the same book, Sir Ivor Jennings States; “Indeed, in modern constitutional law it is frequently said that a legislature is ‘sovereign within it’s power’. This is, of course, a pure nonsense if sovereignty is

supreme power, for there are no ‘powers’ of a sovereign body ; there is only the unlimited power which sovereignty implies.”

K C Whear has insisted that to give omnipotence to a Parliament in a written constitution regime would be tantamount to giving the deputy greater importance than his principle, to put the servant above his master, and to place the representatives of the people in a position above that of the people themselves(K C Whear, Modern Constitution).

So, our Constitution, an ‘autochthonous’ one, representing the sovereign will of the people, is the supreme entity, which alone posses sovereignty and, all the organs of the State are , but it’s offsprings, and as such, subservient to it. Our Parliament like those in other countries with written Constitution, can not posses the sort of unbridled power as it’s British counterpart does, simply because, unlike the British one, our Parliament is indeed a progeny of our Constitution, which instrument has, additionally made the following explicit commandments: “This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution, that other law shall, to the extent of inconsistency, be void.” (Article 7(2)): “All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution” (Article 26(1)): “The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the existent of such inconsistency, be void”, Article 26(2).

Obviously, the creature Parliament cannot rise above it's creator and hence, it's freedom in respect to legislation is seriously impaired by the express provisions of the Constitution to the effect that it cannot pass any law which would be inconsistent with any of the express provisions of the Constitution. The legislative jurisdiction of our Parliament is not, hence, unbridled, which follows that the Diecyan doctrine of legislative sovereignty of Parliament has no place in our system. Marbury –v- Madison, supra, suggests that the position would not have been any different even if Article 7 or 26 were not there.

In Britain, Parliament does not have a patriarch. As Sir Ivor Jennings said, "Dicey himself admitted, by speaking of legal sovereignty that it came form the law, but failed to prove that law made the King in Parliament a sovereign law making body. Nor has anybody else succeeded in doing so" – (Sir Ivor Jenning, supra, page 156).

A W Bradley(Emeritus Professor of Constitutional Law) and K D Ewing(Professor of Public Law) in their book Constitutional and Administrative Law, 15th Edition, expressed, " The doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limits on the legislature and entrusts the ordinary courts or a constitutional court to decide whether acts of the legislature comply with the constitution.

In Marbury –v- Madison, the U.S. Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the Constitution".

G Marshall, an authority on the Constitutional Law of the Commonwealth countries, in his book, ‘Parliamentary Sovereignty and the Commonwealth (1957 Oxford, Clarendon), quite distinctively narrated that the concept of Parliamentary Supremacy in the Diceyan sense can not have an abode in a written constitution country within the Commonwealth.

The erudite Indian jurist, Dr. Basu, in his book, ‘Commentary on the Constitution of India’ wrote, ” A written Constitution, thus, provides the organic or fundamental law, with reference to which the validity of the laws enacted by the legislature are to be tested. A law enacted by the legislature can not transgress or violate the provisions of the fundamental law. Thus the Parliament under the Indian Constitution can not be said to be a sovereign legislature in the dicean sense.”

During the Proceeding of a ‘Joint Colloquium of Commonwealth Lawyers Association on Parliamentary Supremacy and Judicial Independence,’ held in June 1998, Law Lords, Judges, Academics and lawyers of elevated profile from different member states of the Commonwealth, delivered eloquent lectures on the supremacy of Parliament and the law relating to judicial review. Prof. James Read of the Commonwealth Legal Education Association, an outstanding professor of Constitutional Law, in the First Plenary Session on 15th June 1998, in providing an overview of the respective rules of Parliament and the judiciary, reminded the participants that throughout the Commonwealth three institutions were established by written constitutions which were subject to judicial interpretation.

He went on; “The Supremacy (or even misleadingly, “sovereignty”) of parliament has long been one of the doctrines

offered by British Constitutional lawyers, including Dicey..... In any case, it could not survive transplantation into the political order of a new state established by a written constitution which imposed a variety of limitations upon the legislative power; for example by enforceable guarantees of fundamental rights; or in some cases, by federal structures or other forms of devolution of legislative power.

Commonwealth Parliaments are established and empowered by Constitutions as the seats of constitutional authority, but those constitutions also set limits to their powers."

Prof. Read kept saying, "Unlike the traditional British concept of the judicial role, written constitutions inevitably enhance judicial authority by instituting a power of judicial review, because it falls to the judges (usually the express provision) to determine questions which arise as to the exercise of Constitutional functions and, in doing so, to interpret the constitutional provisions.

This function normally includes the power even to 'over rule' parliament by declaring primary legislation (Acts of Parliament) to be invalid for breach of Constitutional provision (for example, fundamental rights provision)."

In the same colloquium Rt. Hon'ble Lord Irvine made the following observation: " The British Constitution, largely unwritten, is based firmly on the separation of powers. Parliament makes the law; the judiciary interprets them; and the judiciary develops the common law..... It is for the courts to ensure that those powers are neither exceeded nor abused, but exercised lawfully. Judicial review – a subject I know you will be discussing during the next few days – promotes

the rule of law.... The court does not substitute its opinion for that of the decision maker on whom parliament has conferred the power of decision. The court rules only on the legality of a decision – not its correctness. In doing so, the court is not acting against the will of parliament, but in support of it. That is how it should be."

The Hon. Justice Pierre JJ Olivier, of South Africa stated; "...the doctrine (parliamentary supremacy) has been abandoned in many commonwealth states and replaced by the doctrine of constitutional supremacy of the court, or, simply put, the power of courts to tests or review parliamentary laws against the constitution. There is an ever – present and abiding reason why the doctrine of parliamentary sovereignty cannot be sustained even in a democratic, multiparty parliamentary system. It lies in the inherent human trait of some interest and selfishness which, projected into the institution of parliament, inevitably results in the ruling party favoring the partisan interest of its own supporters through its policies and actions while denying even the reasonable claims of others. Such a system cannot guarantee justice, and, in the words of Barker (Barker, E, Principle of social and Political Theory, 1951 P202) 'The Supreme Sovereign which stands in the background of any politically organized community is justice'. ..... It was America's good fortune to lead the World into the new constitutional paradigm. In a unique creative, inspired two-year period, they conceived and gave birth to a constitution which solved the problem that was seen as the greatest difficulty.....the Founding fathers achieved this ideal by enacting a democratically elected

parliament, whose powers were limited by a justiciable Bill of Rights, enforced by a constitutional system of courts with the power to review all legislative and executive acts in the light of the constitution.....American jurist are justifiably proud of their constitutional legacy to the World. In a remarkably frank and erudite essay entitled the Parchment Barriers, Cahn, the American legal philosopher, shows that only justiciable constitutional limitations on parliamentary powers can guarantee that judges can uphold justice and fairness in the face of a sovereign parliament that abused its powers to enact unreasonable and oppressive laws. His theme is that every democratic nation owes a solemn obligation to its judges to curb parliament's power and to adopt a written bill of rights beyond the reach of the legislature or executive."

By referring to the present constitutional system in his own country, South Africa, Justice Olivier observed, "All these has been changed by the miracle of the transition in our country. In the 1993 interim constitution and again in the 1996 constitution, which is intended to be our permanent constitution, we have done away with parliamentary sovernty. The constitution now includes a modern, extensive Bill of Rights, placed out of easy reach of parliament for the executive, and justiciable and enforceable by all the courts." Justice Rasheed A Razvi of Pakistan, projecting the scenario in his country said; " Nevertheless , Pakistan is governed by a written constitution with guaranteed fundamental rights which enable the courts to strike down a law repugnant to such rights. These courts of law have come to the rescue of the nation by upholding the supremacy of the guaranteed fundamental

rights over ordinary legislation.” He furnished a catalogue of numerous cases in which the superior courts invalidated laws enacted by Parliament.

Nobody can entertain any duality on the assertion that the credit for putting the doctrine of judicial review of legislations on a firm and secure footing is attributable to the ingenuity of Chief Justice John Marshal. His celebrated brainchild, Marbury-v-Madison was, beyond qualm, the one where the first comprehensive judicial analyses of the theory and scope of judicial review took place. Yet that is not to say that the theory found it’s maiden animation in the womb of Marbury. Ironically, it was first fertilised in that country, the only one today, with the less significant exceptions of Israel and New Zealand, which eventually declined to give it a threshold, ie, the United Kingdom. Almost two centuries prior to Marbury case, Chief Justice Sir Edward Coke of England, whose contribution to pave the path that led to the glorious revolution in 1688, is singularly reminisced, was indeed the first judge that laid the foundation stone of this theory by proclaiming, in Dr. Bonham’s case(1610 8 Co Rep 114a,) way back to the year 1610; “It appears in our books , that in many cases , the Common Law will control acts of Parliament and some times judge them to be utterly void: for when an act of Parliament is against common right and reason ,or repugnant , or impossible to be performed, the Common Law will control it and adjudge such act to be void.” Coke CJ, was of the view that a law clearly superior to legislative acts was in existence and that was the law that spoke through the agency of judges. Cokes dictum was repeated in 1615 and 1702 , respectively, by the

Chief Justices of that time Sir Henry Hobart and Sir John Halt. It did , however, get obliterated from it's natal home, through the efflux of time, primarily because the political scenario in 17th century England, orbiting round the campaign to curtail the Tudor Rulers' absolutism, in which the Parliament was the centre-forward player, with everyone's desire to enhance it's power ,the period was hardly conducive to put any restriction on the growing power of Parliamentary. So William Blackstone found it right to rebuke Coke's theory, saying, "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it."

The Embryogenesis and the Evolution of the Doctrine Judicial Review : The US Scenario

Routed from it's nativity, the concept of judicial review of legislation , nevertheless, succeeded to cross the Atlantic, and recouped in a surrogated motherland, America, which really became it's naturalised home, after a protracted period of dormancy, quite a time before Marbury case could even be conceived of, but not in a full swing.

Truly, it was James Otis of Massachusetts,(James Otis ,'Speech on the Writs of Assistance', February 24 1761 The Works of John Adams , ed Charles F Adams 10 vol), who was the pathfinder in this arena, after Dr. Bonham of England in 1610. Otis was brave enough to argue before the Massachusetts superior court in 1761, years before the revolution, that "an Act against the constitution is void." This heralded the first colonial challenge to the conventional idea of absolute parliamentary supremacy . His contention was, of course turned down, as the same was not acceptable within the British legal

system under which the superior court of Massachusetts was organised.

A few years later, in 1766 a Court in Virginia held that “the law of Parliament, imposing stamp duties in America was unconstitutional”. In the same year Judge William Cushing , who , later became one of the original judges of the US Supreme Court, asked a jury to ignore a particular Act of Parliament, declaring the same void and inoperative(Berger, Congress –v- The Supreme Court p27n, also The Works of John Adams ed Charles F Adams , Boston : Little Brown 1850-56 ,9:390-91). So within 5 years of Otis’ first prophetic oration the idea of judicial review of the Acts of Parliament received momentum in America. Although With the coming of independence, the American idea of judicial review fell quietly into desuetude, and remained docile for a while, with the coming of the revolution and home rule, the resilient idea that the constitution is ‘higher’ or ‘fundamental law’, nevertheless, reincarnated. The theme of higher law or, in political term, ‘constitutionalism’, had, however, yet to wait a few more years to receive the recognition it deserved.

In 1786 a new trend emerged, based on the principle of constitutionalism through the case of John Weeden of Rhode Island, who refused to accept paper bills rather than gold or silver for the meat sold in his market. Under a Rhode Island law these amounted to an offence. Weeden (in Trevett-v-Weeden, Williams W Crosskey, Politics and Constitution, University of Chicago Press 1953, 2:965), argued that the law was unconstitutional because the legislator overreached its legitimate power and violated the recognized principle of jury

trial. The superior court of Rhode Island studiously avoided a declaration that the law was unconstitutional, but dismissed the complaint, holding that the case was not cognisable before them, implying thereby, that the judges had in fact adjudged the Act to be unconstitutional. Absence of explicit words in that case reveals that as in 1786 the idea of judicial review of legislation was still in a state of flux.

In 1784 i.e. a couple of years before the case of Trevett - Vs-Weeden, supra, a New York Court, in Rutgers-v-Waddington,(New York 1784 : also Crosskey , Politics and the Constitution,2:968, supra) disregarded a state law that allowed persons whose property was invaded during the war to recover damages.

In 1780, the Supreme Court of New Jersey reversed a statute calling for 6 jurors in certain cases instead of 12. The verdict in that case, Holmes –vs- Walton, (Crosskey, Politics and the Constitution, 2:948-52, supra) was deemed to be a clear act of judicial review.

In 1787 a few legislations passed by the New Hampshire legislature were also reversed (collectively known as the Ten Pound Act Cases, Crosskey, Politics and the Constitution 2:968-70, supra,).

The state of incoherence, however, finally subsided, paving way for a fully crystallised conceptuality, with the revolutionary decision in Marbury-vs-Madison, supra,. Chief Justice Marshal’s view in that case was that since the constitution is superior to ordinary legislation, an Act repugnant to the constitution is void, and since it is the duty of the judicial department to say what the law is, when two

laws do conflict, it is the duty of the judges to enforce only the paramount law. He was also of the view that acceptance of congressional opinion, regarding the correctness of Congress's own legislation, would subvert the very foundation of all written constitutions, for it would not leave congress limited in its power but rather would invest it with both practical and real omnipotence.

Marshall CJ ordained; "It is too plain to be contested that the constitution controls any legislative act repugnant to it; or, the legislature may alter the constitution by an ordinary act. Between these two alternatives ,there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means , or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative is true , then a legislative act, contrary to constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people , to limit a power in it's own nature illimitable."

Thus, the supremacy of the Constitution, the doctrine of judicial review and the principle of constitutionalism, eventually found a permanent fortress, never to be evicted therefrom.

The most intelligible aspect of Marbury case is not that it secured the principles of judicial review for future generation, but the way it sought to secure that power, by invoking the doctrine of implication(to President Jefferson's surprise, nevertheless), as no express language in the

Constitution conferred upon the Supreme Court this power of review. To the question; ‘who gave the court the right, more than the congress, to say what is and what is not constitutional?’ Marshall assiduously replied, “It is emphatically the province and duty of the judicial department to say what the law is. And the congress is bound to accept that and the court is the body empowered to bind.” In Marshall’s analysis, review by the judges of legislative Acts exists by reason of the nature of the Act, for judges have the inherent obligation to say what the law is.”

Marshal showered sanity on all those who were broadly critical to judicial power, posing the stark question; “To what grantor will you look for protection from an infringement on the Constitution, if you will not give power to the judiciary?”

He went on: “If then the Courts are to (consider) the Constitution; and (if) the Constitution is superior to any ordinary Act of the legislature; the Constitution, and not such ordinary Act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in Court, as paramount law ..... must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitution.”

“Chief Justice John Marshal never overlooked an occasion to press his profound conviction,” stated Chief Justice Warren Burger, “that Article 111 of the Constitution created a power of judicial review authorising-indeed commanding-federal Courts to invalidate a legislative or executive act that they found to be contrary to the Constitution.”

Remarkably the power of judicial review is nowhere expressly granted in the constitutional text. Not long after ratification, the power was successfully claimed by judges, who inferred it's existence from the fact that the constitution of the United States is, by it's own terms, law indeed, the supreme law of the land.

Judges exercising the power to invalidate legislation as unconstitutional commonly deny that the power they exercise is, properly speaking, political. They insist their rulings simply give effect to the law set forth in the constitution. They sit, after all, as judges, not as "philosopher kings" empowered to substitute their own policy judgments for the contrary judgments embodied in law by democratically accountable legislators'.

In response to the criticism that through judicial review the courts were functioning not as interpreter but as "super legislature", the courts' defenders argue that review are fully justified for giving effect to guarantees, even if merely implicit ones, of the constitution. While cavities see it as an usurpation of democratic authority by electrocally unaccountable judges, the defenders see it as judges' spell bound duty in acting as the guardians of the Constitution against the depredations of legislative majorities.

Walter Murphey, James Fleming and Sotiorios Barber in their book, American Constitutional Interpretation, (2nd Edn 1995 page 306), observed, "Marshall's cunning handling of Marbury-V-Madison was a master piece of political strategy."

Although Supreme Court struck down a number of State laws, it did not invalidate another significant piece of Federal

Legislation until it intervened in 1857 through the case of Dred Scott-v- Sandford (60 US at 93, 405 1857, also 19 Howard 393 1857 , concurrence 490) in which the Supreme Court held that congress lacked affirmative power to restrict the slave owners' right deprived them of their property without due process of law. This highly controversial decision in the socio-political sense, was the first case since Marbury to invalidate a federal legislation and is plausibly said to be the real exercise of the power of judicial review, this is the case in which the doctrine of 'substantive due process' was gestated.

Subsequently the Supreme Court invalidated Civil Rights Act 1870 on the ground that Congress had no authority under the Constitution to enact it.(the cases of United States –v- Reese, United States –v- Cruikshank and on some later dates the cases of Hodges –v-United States 203 US 1 1906, Butts-v- Merchant and Mines Transportation Company,230 US 126, 1913). Congress, in effect, acquiesced in the court's judgment as to it's limitation.

In 1905, a conservative Supreme Court arrived at decisions, which the whole world came to regard as conservative judicial activism :the so-called Lochner (Lochner-v- New York, 198 US 45 1905) era of American Constitutional jurisprudence began as the Court handed down a decision invalidating a New York State law limiting to 60 the number of hours in a week that the bakery owners could require their employees to work for, declaring that worker protection legislation breached the right to freedom of contract which was implicit in the 14th Amendment guarantee of due process of law.

During Lochner era, the Supreme Court and other Federal Courts struck down plentitude of State and Federal laws. Even during great depression, the Supreme Court did not hesitate to strike down extremely popular new deal programmes, provoking frustrated President Franklin Roosevelt to float the idea in Congress of increasing number of Supreme Court Justices so that he cold 'pack the Court' with enough new judges to insure a majority for upholding his programmes.

In 1973 the Supreme Court, in Roe-Vs-Wade(410 US 113 1973),and Doe –v-Bolto(410 US 179 1973) invalidated a long standing state prohibition on abortion.

In 1954, the case of Brown-v-Topeka Board of Education (347 US 483 1954) came up before the Supreme Court for testing legality of an Act of parliament and the Court invalidated it holding that the racial segregation in American public Schools violated the equal protection laws.

In 1982 the Supreme Court in Elyler-v-Doe(457 US 202 1982) invalidated as unconstitutional a Texus statute denying free public education to children of non-citizen, illegally present in the country.

In League of United Latin American Citizens-v-Wilson (908 F. Supp. 755 C.D. CAL. 1995),the federal court invalidated a proposition, titled proposition 187, which was approved by the voters in 1994, declaring it unconstitutional and barred the state officials from enforcing it.

The assertion that the courts had the power of Judicial review was hardly resisted. The Constitution's framers assumed that the new national Courts would have the power to hold statute unconstitutional, reckoning that the power was inherent

in a written constitution, adopted by all the people together , which was superior to any statues adopted, not by all the people, but by their representatives only.

Some of Marshall CJ's words opened the way to a broader view of the court's power. So in Department of Human Resources-v-Smith (494 US 872 1990), The Supreme Court held that the 1st Amendment's free exercise clause invalidated the statutes that were intentionally designed to burden religious practices and did make natural laws of general applicability unconstitutional.

In 1958, in Cooper –v-Aaron(358 US i 1958 17), the Supreme Court, in the face of a challenge to its authority from the State's Governor, asserted that Marbury declared the basic principle that the federal judiciary is Supreme in the exposition of law of the constitution. Calling that principle a permanent and indispensable feature of the US constitutional system, the court, expressed that the interpretation of the constitution enunciated by this court in the Brown's case(as a sequel of which Cooper-v-Aaron arose) is the Supreme law of the land.

This case particularly exemplify the assertion of judicial supremacy : The court asserted that a century and a half of judicial review had led many Americans to believe that court's constitutional interpretation were of Supreme necessity.

In E.I. Aptheker-V- Secretary of State (378 U.S. 500 1964), the U.S. Supreme Court declared void an Act passed by the Congress, on the ground that the statute imposed unconstitutional restriction on the communists' rights to obtain passport for traveling.

The U.S. Supreme Court in Osborne-v- Bank of the United States(9 Wheaton 738 1824 866), applying the General Principle of Constitutional law, repeating Marbury principle that an unconstitutional law is, in reality, no law and is wholly void and hence, does not impose any duty, creates no rights and confers no power or authority and justifies no act performed: The doctrine of judicial review of legislative Acts did not only thrive unabated in the United States, it also flared beyond it's territory and is , today almost universally recognised as a 'basic structure' of respective Constitutions.

The Privy Council and some other countries

Although British Courts have, consistently been recognizing (Note , however, ex-parte Factortame, below) it's Parliament's omnipotence in legislating, the Privy Council, an integral part of the British system, have, nevertheless endorsed the colonial Parliament's subordination to their Constitution. Hence, in Liyange-V-R (1967 1AC, 259), and in Hinds-v- R (1977 AC 195)it declared void an Act passed by Sri Lanka Parliament, creating special machinery for trying leaders of an unsuccessful coup, in breach of the 'separation of power' provision implied in that country's Constitution.

In Ali –V- R (1892, ALL E R 1), the Privy Council declared void an Act on ground of breach of the principle of separation of power.

In Harris-v-Ministry of Interior (1952(2) SA 428), the South African Apex Court declared invalid an Act of Parliament as it was passed in derogation of the conditions the Constitution laid down.

Wind of Change in British Judicial Attitude

So far Britain has virtually been the main, if not the only, country where judicial review of legislation could not set a step, because it does not have written constitution, because the British Parliament is supreme. But does that attribute still hold good?

Although it is still too early so predict with absolute exactitude this way or the other, fact remains that the Diceyan version that there is no authority in the realm where an Act of Parliament can be questioned, has seriously been dented in the recent period.

A new dimension has scrolled in enabling the House of Lords , discarding the firmly entrenched and at least four hundred years of precedents, to place an order of injunction on an Act of Parliament in the case of R-v- Secretary of State for Transport, ex-parte Factortame(1989 AC 603). It is to seen how far this trend flows to—after all , as Salmond observed , the Parliamentary supremacy survives in the UK because of the continued judicial stamping, the concept has been receiving.

Permeation into the Sub-Continent

The wave of the doctrine of judicial review of legislation faced no hurdle to inundate our part of the world, crossing seven-seas from it’s place of birth , America. After the twilight of the British Raj finally dwindled, the Constituent assemblies of the then united Pakistan and India framed written Constitutions.

Unlike Article 7 of our Constitution, neither the Indian Constitution, promulgated in 1950, nor the Pakistan’s Constitution of 1956 and then 1973, contain anything in

explicit term to proclaim the supremacy of the Constitution, but since the Constitutions of both the countries and, indeed all other written Constitution countries, are the progenitor of all institutions, including the judiciary and the Parliament, supremacy is implied: no formal declaration is needed, for a father is not really required to pronounce his fatherhood. The courts in the Sub-Continent are fully inflated with precedents hoisting the theme that Parliament can not pass an Act which divulges repugnancy towards any provision of the Constitution, and can not amend the Constitution if such an amendment alters the ‘basic structures’ or ‘basic features’ of the Constitution, which include the notion, ‘Supremacy of the Constitution,’ and a host of other factors.

Judicial Review of Legislation: Indian perspective

The supremacy of the Indian Constitution and it’s Superior Court’s indomitable power to judicially review Acts of Parliament had been established through a myriad of decisions. In all of the following cases, the superior courts assumed jurisdiction to judicially review Acts of Parliament.

In Keshawar-v-Bombey (AIR 1951 SC 128) and Behran-v-Bombey (AIR 1955 SC 123), it was proclaimed that with the coming into force of the Indian Constitution, any provision in any pre-existing law that conflicted with any fundamental right provision, became void and unenforceable to the extent of inconsistencies although they were valid prior to the commencement of the Constitution.

In Dupchand-v-UP,(AIR 1959 SC 648) and in Keswar-v-Bombay (AIR 1951 SC 128) it was expressed that any law, enacted subsequent to the proclamation of the Constitution, that

conflicts with any fundamental right provision, is void ab-initio, and anything done, whether closed, completed or inchoate, will be wholly illegal.

In M.P.-V-Bharat Singh (AIR 1967 SC 1170) it was iterated that such an invalid law is not revived by any subsequent event.

In Golak Nath-v-State of Punjab (AIR 1967 SC 1643), the Indian Apex Court held that the power conferred upon the Parliament to amend could not be extended to the power to amend a fundamental right because of the express restriction on their amendments, and the superior court would strike off such an amendment.

In Narasimha Rao-v-State of Andhra Pradesh (AIR 1970 SC 422), the Indian Supreme Court struck off Section 3 of the Public Employment (Requirement of Residence) Act 1957 on the ground that the said Section was violative of Cl (3) Article 16 of the Constitution.

In R.L. Kapur-v- State of Tamil Nadu (AIR 1972 SC 850), the Indian Supreme Court expressed that in view of Article 215 of the Constitution, the High Court, as a Court of Record, possesses inherent power and jurisdiction, which is a special one, not arising or derived from contempt of Courts Act and that no law made by a Legislature can take away the jurisdiction conferred on the High Court, nor could confer it afresh by virtue of it’s own authority, necessarily implying that such an Act of Legislature would be struck down by the High Court.

In a number of other cases the Indian Supreme Court proclaimed that the Parliament is incompetent to abridge the

power the superior courts enjoy to punish those who commit contempt of Court.

In Delhi Judicial Services Association,-v-State of Gujrat (AIR 1991 SC 2176) the Indian Supreme Court, reiterating the Legislature's lack of competence to pass law to abridge or extinguish the jurisdiction or the power conferred on it, expressed, "But the central legislature has no legislative competence to abridge extinguish the jurisdiction or power conferred on this Court under Article 129 of the Constitution; the Parliament's power to legislate in relation to law of contempt relating to Supreme Court is limited." The same Court further observed in the same case, "The amplitude of power of this Court under these articles of the Constitution cannot be curtailed by law made by Central or State Legislature."

In Keshvananda Bharati-v-State of Kerala (AIR 1973 SC 1461), the Indian Supreme Court declared supremacy of the Constitution as one of the basic structure of the constitution and that by Article 13, Indian Constitution imposed restriction on Parliament's power to enact law in contravention of the guaranteed fundamental rights.

In Indira Nehru Gandhi-v-Raj Narain (AIR 1975 SC 2299) the Indian Supreme Court was specific enough to proclaim that amendment to any of the basic structures of the Constitution is void.

The Supreme Court of India through it's comprehensive judgment in the leading case of Minerva Mills Ltd.-v-Union of India (AIR 1980 SC 1789), literally left no query unanswered on Parliamentary limitation in making law and in amending the

Constitution, as well as the superior courts' power , including the source of their power , to judicially review Acts of Parliament. The gist of the Indian Supreme Court's judgment in that case is reproduced below;

> "Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including it's basic structure and even to put an end to it by totally changing it's identity. It will, therefore, be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for it the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure, would be violative of the basic structure and hence outside the amendatory power of Parliament."

> It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives it's power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of the Government are divided; the Executive, the Legislative and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that the 'concentration of powers in any one organ may' to quote the words of Chandrachud,J. (as he then was) in Smt. Indira Gandhi's case (AIR 1975 SC 2299) 'by upsetting that fine balance between the three organs, destroy the

> fundamental premises of a democratic Government to which they were pledged.' Take for example a case where the executive which is in charge of administration, acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of it's powers. Such a question obviously cannot be left to the executive to decide for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature."

Their Lordships continued to observe;

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that 'the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.
>
> The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to any mind, part of the basic structure of the Constitution."

In P. Sambamurthy and others-v-State of Andhra Pradesh (AIR 1987 SC 663), the Indian Supreme Court struck down part of an Act of Parliament, namely, the Constitution (Thirty-second Amendment) Act 1973, by which the thirty-second amendment to the Indian Constitution was purportedly occasioned, through which a new clause was introduced to Article 371-D, namely

clause (5) conferring upon the government of Andhra Pradesh the freedom either to accept or annul a verdict pronounced the Administrative Tribunal of that State. The same was found by the Indian Supreme Court to be unconstitutional, and hence, void, because the Indian Supreme Court found the text of the said clause "clearly subversive of the principle of justice" as it gave power to one of the litigating parties (i.e. the State government) to reject the Administrative Tribunal's judgment. The Supreme Court was inquisitive as to "How can a party to the litigation be given the power to override the decision given by the tribunal in the litigation, without violating the basic concept of justice?" It further stated ; "It would make a mockery of the entire adjudicative process." (per Bhagawati,J.).

In Subash Charma-v-Union of India (AIR 1995 SC 1403) the Indian Apex Court expressed that it is judicial review that makes Constitutional provisions more than mere maxims of political morality.

In A.K.Kaul –vs- Union of India(AIR 1995 SC 1403), the Supreme Court had yet another opportunity to be emphatic on it's implicit power to review the constitutionality of an Act of Parliament under the Indian Constitutional scheme, in following language;

> "The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touchstone of the constitution in order to ensure that the authority exercising the power conferred by the constitution does not transgress the limitations placed by the Constitutions on exercise of that power. This power of judicial review is, therefore,

> implicit in a written-constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution."

In the case of Raja Ram Pal v. Speaker, Lok Sabha [(2007) 3 SCC 184] the Court observed;

> "We have a written Constitution which confers powers of judicial review on this Court and on all High Courts. In exercising power and discharging duty assigned by the Constitution, this Court has to play the role of a 'sentinel on the qui vive' and it is the solemn duty of this Court to protect the fundamental rights guaranteed by Part III of the Constitution zealously and vigilantly."

This is to be remembered that the Indian Constitution expressly allows judicial review so far as the fundamental right provisions are concerned, and from that point of view the decisions cited above were not within the purview of the explicit provision. Jurisdiction in these cases were assumed by invoking the power inherent in the superior Courts in written Constitution countries, as was assumed by the U.S. Supreme Court in Marbury and other cases.

Pakistan: Pre '71 Scenario

The 1962 Constitution of Pakistan, through Article 6, scripted express provisions to impede enactment of such law as would be violative of the fundamental rights provisions of the Constitution.

Decisions cited under this head do have binding authority on us. In all these cases superior courts in Pakistan assumed power to review Acts of Parliament.

In East Pakistan-v-Mehdi Ali Khan (11 DLR SC 319), the then Pakistan Supreme Court, in dealing with a pre-constitution law and following the line, adopted by the American Supreme Court in Marbury, as well as other cases, pinpointed the limitation

the Parliament is handicapped by, so far as it's legislative power is concerned.

In Abul A'la Moudoodi-v-West Pakistan (17 DLR SC 209), the Pakistan Supreme Court, drawing a distinction between pre-constitution and post-constitution laws, observed that contravention of fundamental rights would render a post-constitutional law void ab-initio, stating, "In case of a law made after the declaration of fundamental rights the Constitution has placed a complete bar on the power of the legislature to make any law which takes away or abridges any right conferred by the constitution itself. Such law, if made in contravention of Clause (2) of Article 6, is to be void ab-initio."(per Hamoodur Rahman, J.).

Hamoodur Rahman J further stated, "Having come to the above conclusion, I have no hesitation in agreeing with the High Court of East Pakistan that it became the duty of a High Court under Article 98 of the Constitution to uphold the Constitution and to enforce the freedom by holding that the Criminal Law Amendment Act was void and inoperative, and therefore could no longer empower the Provincial Government to continue to impose the restriction imposed by it.."

In Fazlul Quader Chowdhury-v-Abdul Haq (18 DLR SC 69), the Supreme Court was robust enough to apply the doctrine of judicial review of legislation, as was first fully inducted into the judicial vicinity by the Supreme Court of the United States.

In Fazlul Quader Chowdhury, the Supreme Court, presided over by Chief Justice A.R. Cornelius, boldly and bluntly held, "The question of constitutional validity in relation to an act of a

statutory authority is strictly a question lying within the jurisdiction of the Supreme Court" (per Cornelius C.J.) : S A Rahman J expressed; "The interpretation of the Constitution is the prerogative as well as the duty of the superior Courts as recognised by Article 58 of the Constitution." His Lordship went ahead to continue; "Cases of conflict between the supreme law of the Constitution and an enactment might come for adjudication before the Courts and in such cases, it would be the plain duty of the superior Courts, to declare the enactment in question as invalid to the extent of it's repugnancy with the Constitutional provisions." The Supreme Court rejected outright the Attorney General's profferment that the Constitution envisaged immunity for all enactments of the legislature in the country from judicial scrutiny. Discarding the submission that Pakistan Parliament should be equated with it's British counterpart in legislative omnipotence, the Supreme Court expressed, "Enough has been said above to indicate that this claim cannot be sustained on the letter and spirit of our Constitution."

In that case the validity of a law allowing ministers in Ayub Khan's cabinet to answer questions in Parliament, was successfully challenged.

It is interesting to note that the Pakistan Supreme Court assumed jurisdiction for judicial review of legislation holding , as Marshall CJ did, that such a power is inherent in the Constitution, it being a written one. Cornelius CJ, in that context, emphasised, "In my opinion the matter can be placed on a mere general ground, namely, the ground that a written Constitution necessarily connotes the existence of Courts which

will, in graded hierarchy, examine and finally decide the questions, which are certain to arise in great member, whether an act of a statutory authority or a law passed by a law making authority under the Constitution is, or is not in contravention of the Constitution..... and these two Courts are bound by their acts and duty to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat and harm, and to stand firm in defence of it's provisions against attack of any kind."

In Khan Abdul Gaffar Khan-v-Deputy Commissioner, Peshwar,(PLD 1957, Peshawar,100),the whole of Frontier Crimes Regulation 1901, was invalidated.

In Fazal Ahmed Ayubi-v-West Pakistan Province (PLD 1957,Lahore 388) a couple of Sections of the Punjab Control of Goods Act 1951 were struck off being ultra vires.

In Waris Miah-v-The State,(PLD 1957 SC 157),the Supreme Court invalidated certain Sections of the Foreign Exchange Regulations Act 1947 as being ultra vires.

In Jubendra Kishore-v-The Province of East Pakistan(PLD 1957 SC9), the Supreme Court invalidated the East Bengal State Acquisition Act 1950 in it's entirety.

In Mahmud Zaman-v-District Magistrate , Lahore,(PLD 1958 Lahore 651)a Section of the Press (Emergency Powers) Act 1931, was struck off for inconsistency.

Pakistan Scenario: Post '71

In Benazir Bhutto-v- Federation of Pakistan(PLD 1988 SC 416), a few Sections of the Political Parties Act 1962 were invalidated. The Supreme Court expressed, "Therefore, there is

the power to declare the law to be void.....The Parliament in our Constitution does not enjoy the supreme status like the British Parliament which is not governed by any written constitution. In our Constitution the legislative authority of the Parliament is governed and limited by the provisions of the Constitution. The Indian Constitution is similar to our Constitution."

In Sharaf Faridi-v-Federation of Islamic Republic of Pakistan,(PLD 1989 (Kar) 404 (FB)), it has been stated that the interpretation of the Constitution is a prerogative and a duty of the superior Courts.

In Imamur Rahman-v-Federation of Pakistan and others(1992 SC MR 563), a Section of the Foreign Exchange(Prevention of Payment) Act 1972 was struck off.

In Al-Jehad Trust –v- Federation of Pakistan(PLD 1996 (SC) 324,) the Pakistan Supreme Court emphasised that the power of judicial review must exists in the superior Courts of the country. It stated; "The legislature has to legislate, the Executive has to execute laws and the judiciary has to interpret the Constitution and the laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the state exercise their power and authority within their limits."

The Court went on expressing that the Supreme Court is a creature of the Constitution and does not claim any right to strike down any provision of the Constitution, but does claim right to interpret the Constitution and that this right is not acquired dehors the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself and

that for this purpose it is not necessary to invoke any divine or super-natural right but this judicial power is inherent in the Court itself. It further stated that interpretation of Constitution, given by the Supreme Court, is binding on the executive.

The Supreme Court also reiterated that the interpretation of the Constitution is a prerogative and the duty of the Supreme Court.

In Mahmood Khan Achakzai and others -vs- Federation of Pakistan(PLD 1997 (SC) 426), the Pakistan Supreme Court stated that Courts are bound to interpret the Constitution as the Parliament has no power to change or rewrite it.

In Wukala Mahaz Barai Tahafaz Dastoor-v- Federation of Pakistan(PLD 1998 (SC) 1263) the Supreme Court has emphasised that the judiciary has inherent right and power to interpret the Constitution to find out it’s true meaning and purpose, which power cannot be abridged or ousted. It went on to say that the Courts established under the Constitution have to make every effort to preserve the Constitution together with it’s basic features.

In Syed Masroor Ahsan and others –vs- Ardeshir Cowasjee and others(PLD 1998 (SC) 823) the Supreme Court observed that comprehensive interpretation of the Constitution is not only inherent prerogative of the superior Courts but is also their obligation under the Constitution. It said “Judiciary enjoys ultimate authority of judicial review, when Parliament at any stage endeavours to transgress it’s limit by infringing upon the jurisdiction of other organs and thereby effecting the grund norms the basic structure or broad features of objective

resolution.” On this point, the Court made it’s view abundantly clear by laying down the following observation; “In a set up where the Constitution is based on trichotomy of power, judiciary enjoys a unique and supreme position within the framework of the Constitution as it creates balance amongst various organs of the state and also cheeks the excessive and arbitrary exercise of power by the Executive and the Legislature. Judiciary has been termed as a watch dog and sentinel of the rights of the people and the custodian of the Constitution. It has been described as the ‘safety valve” or the ‘balance wheel’ of the Constitution.

In the most important of the recent cases, i.e., the case of Sindh High Court -Vs-Federation of Pakistan, PLD 2009 (SC), the Supreme Court of Pakistan was quite unequivocal to express that the power of judicial review of administrative acts as well as legislation, is a cardinal principle of the Constitution. The Court went on to elaborate; “it is the duty of the judiciary to determine the legality of executive action and validity of legislation passed by Legislature.”

Judicial Review of Legislation in Bangladesh

Our High Court Division’s jurisdiction to declare void an Act, purportedly passed by the Parliament, is no different from that of the superior courts in other countries with written constitution. Indeed, the unique presence of Article 7 put our Constitution’s Supremacy, as pointed out by BH Chowdhury and M H Rahman JJ in Anwar Hossain Chowdhury-vs- Bangladesh (41 DLR AD 165), quoting Syed Ishtiaq Ahmed, the lamented jurist, now deceased, on a doubly secured position.

It is clear enough from Article 102(1) as well as Article 102(2)(ii),read with Article 7 that an act, (legislative Act not excluded) can be declared void by this Division, if done or taken without lawful authority (It can not be gain said that purported passage of an Act of Parliament, in breach of any explicit provision of the Constitution, is not done without lawful authority), and so, judicial reviewability is not confined to executive acts only. If an Act of Parliament depicts repugnancy with any provision figured in Part 111 of the Constitution, this Division can invalidate such an enactment engaging Article 102(1), while same consequence would ensue if such an enactment, including an enactment designed to amend the Constitution, be confrontive with any express provision of the Constitution, even beyond Part 111.

In our post liberation era, the ratio in the case of Anwar Hossain Chowdhury-vs-Bangladesh, supra, popularly known as the Eighth Amendment case, henceforth cited as such, is obviously a case of Pole Star status in our jurisdiction, in which judicial wisdom, ingenuity and activism assimilated with glowing and spectacular pageantry.

Badrul Haider Chowdhury J, one of the most radiant luminaries in our legal meridian, in his exquisite judgment, laid down comprehensive and all embracing principles of law on judicial review of legislation, explaining elaborately, the limitation the Constitution has imposed upon the Parliament’s freedom to legislate as well as defining the horizon of the Supreme Court’s power to review.

The majority in the Appellate Division had no hesitation to endorse the doctrine of “basic structure”, and interpreting the Constitution on the basis of it’s spirit. This decision heralded aloud the supremacy of the Constitution as one of it’s ‘basic features’, within which the independence of the judiciary and the rule of law developed.

The Apex Court cited with approval the ratio in Marbury-v-Madison, the case that really incubated the doctrine of judicial review of legislation and then eternalised and internationalised it. In that case the power to review was secured from the doctrine of implication.

B. H Chowdhury J, describing the Preamble as a part of the Constitution, also emphasised the importance of Article 7, positing that while Article 26 empowers this Division to declare void an Act of Parliament if the same is found to be inconsistent with any of the fundamental rights provisions of the Constitution, Article 7 operates over the whole jurisdiction to say that any law, found to be inconsistent with any provision of the Constitution, and that ‘law’ also includes any amendment of the Constitution itself, because Article 142 says that amendment can be made by Act of Parliament, will also be liable to be invalidated. In this context he observed; “Therefore if any amendment which is an Act of Parliament, contravenes any express provision of the Constitution that amendment Act is liable to be declared void. So says Article 7.”

Terming Article 7 as the pole star of our Constitution, his Lordship observed; “....all powers flow from this Article , namely Article 7” and “Article 7 stands between the Preamble

and Article 8 as statute of liberty, supremacy of law and rule of law...” B H Chowdhury J expressed; “Necessarily , the amendment passed by the Parliament is to be tested as against Article 7 because the amending power is but a power given by the Constitution to Parliament;”

The Appellate Division placed immutable reliance on Article 7,8, 26 and the Preamble.

The majority of their Lordships came up with the finding that by amending Article 100, the basic structure of the Constitution was changed in that the High Court Division’s plenary judicial power over the entire Republic became non-existent and that such an amendment is not permissible. B H Chowdhury expressed, “Now, some of the features are basic features of the Constitution and they are not amendable by the amending power of the Parliament. In the Scheme of Article 7 and, therefore of the Constitution, the structural pillars of Parliament and judiciary are basic and fundamental. It is inconceivable that by it’s amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic.” His Lordship further expressed, “Now if any law is inconsistent with the Constitution (Article 7) it is only the judiciary that can make such declaration. Hence, the Constitutional scheme, if followed carefully, reveals that these basic features are unamendable and unalterable. Unlike some other Constitutions, this Constitution does not contain any provision as to ‘to repeal and replace’ the Constitution and therefore can not make such exercise under the guise of amendment.”

In reiterating this Division's inviolable and inherent power to judicially review Acts passed by the Parliament, B H Chowdhury J explicated the legal position in following words; "Therefore if any amendment ...contravenes any express provision of the Constitution that amendment Act is liable to be declared void.....But by whom this declaration is to be made? It is the executive which initiates the proposal for law. It is the legislature that passes the law. Then who will consider the validity or otherwise of the law—obviously the judiciary."

It goes without saying from his lordship's above quoted observation that this Division's power to judicially review an Act of Parliament is inherent in the judicial organ of the state under our written constitutional scheme, which contemplates a 'trichotomy' of power structure , dividing the state's power between it's three distinctive organs , as Montesquieu canvassed .

Reiterating the limitation, the Constitution has imposed upon the legislature, as well as the unavoidability of Article 7, 8 and the Preamble, B H Chowdhury J expressed, "Secondly Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the Structure itself. For this reason the Preamble, Article 8, had been made unamendable.....The Preamble says 'it is our sacred duty to safeguard , protect and defend this constitution and maintain it's supremacy as the embodiment of the people of Bangladesh....That shows that the 'law' in Article 7 is conclusively intended to include an amending law. An amending

law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution.” He asserted that Article 142 “can not be given the status for swallowing up the constitutional fabric.”

Shahabuddin,J expressed, “There is no dispute that the Constitution stands on certain fundamental principles, which are it’s structural pillars and if these pillars are demolished or damaged the whole Constitutional edifice will fall down. …….. As to implied limitation on the amending power, it is inherent in the word “amendment” in Article 142 and is also deducible from the entire scheme of the Constitution. Amendment is subject to the retention of the basic structure. The Court therefore has power to undo an amendment if it transgresses it’s limits and alters a basic structure of the Constitution.”

On the legislature’s limitation in amending the Constitution, His Lordship went on to state, “Before an amendment becomes a part of the Constitution, it shall have to pass through some test, because it is not enacted by the people through a constituent assembly.” He stated that one of the tests is that “it is not so repugnant to the existing provision of the Constitution that it’s co-existence therewith will render the Constitution unworkable.”

His Lordship included in the list of basic features the following notions; sovereignty of the people, supremacy of the Constitution, democracy, republican government, unitary state, separation of powers, independence of judiciary, and fundamental rights .

M.H.Rahman J, reckoning ‘fundamental aim of the society’ as of utmost importance, expressed that the “basic structure” principle was still in a half baked state, as the same has not yet received universal acceptance.. He went on to emphasise that since the Parliament does not posses the power by itself to amend the preamble, which has become the touchstone, it cannot indirectly impair or destroy the fundamental aim of the society.

M.H. Rahman,J. further stated that if any amendment causes any serious impairment on the powers and the functions of the Supreme Court, then the validity of such an amendment will be examined on the touchstone of the preamble.

On the basic structure doctrine and the principle enunciated in Marbury case, M H Rahman J, expressed; ”The doctrine of basic structure is a new one and appears to be an extension of the principle of judicial review. Although the US Constitution did not expressly confer any judicial review, Marshall C J, held in Marbury-vs- Madison,.... that the Court , in the exercise of it’s judicial function, had the power to say what the law was , and if it found an Act of Congress conflicted with the Constitution, it had the Duty to say that the Act was not law.” He did also reject the contention that because the basic structure principle was not invoked in the past, it could not be considered.

His main area of concern was the rule of law, and to him it is the Preamble that is the guiding entity in considering whether an amendment passes the test of validity, as is reflected from the following passages, ”In this case we are concerned with only one basic feature, the rule of law, marked

out as one of the fundamental aims of our society in the preamble." He expressed that the validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic features, on the touchstone of the preamble itself. He fully concurred with the view that Parliament's power is not unbridled.

On the supremacy of the Constitution and the import of Article 7, His Lordship expressed, "It appears that Article 7 was inserted in the Constitution to emphasise the supremacy of the Constitution because, even without that Article the Constitution, the fundamental law of the country, would have been supreme."

In Fazle Rabb-v- Election commission (44 DLR 14) this Division, obiter, recognised the doctrine of Basic Structure, but held that since reserved seats for woman in Parliament was there in the original Constitution it could not be argued that the Constitution (Tenth Amendment) Act, which extended the tenure of the reservation, was in violation of the "basic structure."

The Fifth Amendment case, supra, is obviously the latest, and by far, the strongest authority to demonstrate this Division's competence and obligation to judicially review Acts of Parliament, including Acts aimed to cause amendment to the Constitution.

So, what is abundantly and absolutely clear from above analyses are that 1)in Bangladesh, as in other countries with written constitution, supremacy lies with the Constitution , not with the Parliament, 2) the British concept of Parliamentary supremacy can not have a foothold in a written

constitution country like Bangladesh, 3)the doctrine of judicial review of Acts of Parliament is an inseparable attribute of every written constitution country, inclusive of Bangladesh,4)this Division is fully equipped with, not only the constitution mandated power, but also with the constitution mandated responsibility, to review Acts of Parliament, which embraces such Acts that are geared to amend the Constitution, and, invalidate the same if found to be confrontive to any express provision of the Constitution.

Does Invalidation of an Act of Parliament Necessitate Subsequent Parlimentary Intervention?

The question posed above is, in our view, a rather un warranted one, although it has become a topical one recently. In our written Constitutional regime, where supremacy lies with the Constitution, where the distribution power is structured on the notion of 'trichotomy of power', the Constitution , the ultimate supremo, finely demarcates the realm of authority of each organ of the State. Under such demarcation, the judiciary can not, and does not make any law—such an action is beyond it's competence: It is the Parliament alone which enjoys the exclusive prerogative to legislate (save Ordinances), which of course includes, an Act propelled to amend the Constitution itself. However, what goes without saying is that once an Act is passed, Parliament's job is over, Parliament is left with nothing to do with an Act after it is passed, because the residual responsibility of enforcing an Act so passed, slips on to the two other organs of the state- the executive and the judiciary-to enforce it, and on to the judiciary exclusively, to interpret it, which duty may entail such a draconian action

as invalidation of the Act. The Constitution has conferred this power and, imposed this responsibility, on the judiciary-not on the Legislature. When this Division invalidates an Act of Parliament, that enactment loses it's status as an Act of Parliament, nothing can be done by any reliance on it, as if it never existed. That shall be the case irrespective of whether the executive organ reprints the Constitution to make it up to date or not.

Every individual in the Republic, inclusive of all state functionaries, will remain bound to obey it because, Article 112 of the Constitution so dictates. Obviously, the Constitution will be required to be reprinted to allay any confusion as well as to follow the commandment in Article 112 of the Constitution. It is also to be remembered that when the Supreme Court passes an order, invalidating an Act of Parliament, it transmits required direction to the Executive organ of the State, not to Parliament, because at that stage the Parliament is left with nothing to do with such an Act. The case of Eighth Amendment provides with the most glaring example to support this contention. After the Eighth Amendment was declared void, the Executive government reprinted the Constitution in line with the Appellate Division's directions without any reference to the Parliament.

The following passages from Shabuddin J, in the Eighth Amendment case, will surely dispel any obfuscation that may have been prevailing;

> "In view of this decision, the impugned amendment will go off the Constitution and the old Article will stand revived along with it's provision for holding of sessions."

In addition, there are abundances of foreign authorities to illustriously and impeccably back up this notion, and they are; P. Sambamurthy Vs. State of Andhra Pradesh, supra, I R Coelho(Dead)By L Rs-v- State of Tamil Nadu and others,(AIR 2007 S C 861), Keshavananda Bharti-v-State of Keral,supra, Al-Jehad Trust-v- Federation of Pakistan, supra, League of United Latin American Citizens –v-Wilson, supra, Mahmud Khan Achakzai-v-Federation of Pakistan, supra.

Holding otherwise would really be tantamount to ignoring altogether Article 102 and Article 112 of the Constitution, the concept of the supremacy of Parliament and, indeed, to question the High Court Division's very power to judicially review an Act of Parliament.

The conundrum that have been tumbling behind the maze, in our reckoning, may find a place for siesta once it is understood that by invalidating an Act , this Division does not make any law, but simply removes from the statute book, a law the Parliament passed, because the law concerned can not stand the test of constitutionality as it is at odd with one or more express provisions of the Constitution. Since such invalidation, like all other surviving orders passed by this Division, is binding upon all concerned without further ado, because of Article 112, no Parliamentary intervention is called for to give effect to the invalidating order this Division passes—such a statute loses it's virility in any way, irrespective of whether the concerned people reprints the Constitution or not, although reprinting is indispensable to transmit to the people at large the message of changes that this Division's order has occasioned.

Does the Constitution (Seventh Amendment) Act 1986 Pass the Test of Constitutionality?

Now, that, it is established beyond any qualm that martial law is no law whatsoever, assumption of power through extra constitutional device is illegal, felonious and void from the very inception, the stark question, in the backdrop of our overriding finding as to our power and obligation to judicially review Acts of Parliament, including Constitution amending Acts, is, whether the Act under review passes the test of constitutionality.

Fortunately, again, there is no dearth high profile authorities around, which, we can take judicial guidance from.

The first one that deserves to be followed in this context, is obviously the Fifth Amendment case. In that case this Division observed without any rider, unaffected by the Appellate Division, that the Constitution Act 1979 and paragraph 3A of the Fourth Schedule to the Constitution was illegal because they sought to validate the proclamations, MLRsand MLOs which were illegal and also because paragraph 3A ,introduced by the proclamation order is itself void. This Division also held that the Constitution (Fifth Amendment) Act 1979 is ultra vires , because by Section 2 it enacted paragraph 18 for it's insertion in the Fourth Schedule to the Constitution ,in order to ratify confirm and validate the Proclamations, MLRs, MLOs, etc, during the period from from 15th August 1975 to 9th April 1979 and since those proclamations , MLRs, MLOsetc., were illegal and void, there were nothing for the Parliament to ratify. Their Lordships also emphasised that since the proclamation etc were illegal and constituted offence

,ratification , confirmation and validation were against common right and reason, stating further that they were repugnant to the Constitution, also because the Constitution was made subordinate and subservient to the proclamation etc, because the proclamations destroyed the basic features of the Constitution, because ratification,confirmation and validation is not contemplated by the phrase 'amendment' as contained in Article 142, because the provision of Article 142 was not adhered to as the long title was missing, because the amendment was made for a collateral purpose, which constituted a fraud upon the people of Bangladesh and it's Constitution.

In Asma Jilani and Zarina Gauhar, supra, also, Hamoodur Rahman CJ quite categorically and unambiguously enunciated that the legislature can not validate an invalid law if it did not posses the power to legislate on the subject to which the invalid relate, the principle governing validation being that validation being itself legislation, one could not validate what one could not legislate upon.

Asma Jilani ratio was followed in a host of other cases, including the Sindh High Court Bar Association case, supra.

All the reasons assigned by this Division in the Fifth Amendment case and, by Hamoodur Rahman CJ in Asma Jilani and Zarina Gauhar, are squarely applicable to the case before us. True it is that General Ershad did not himself make any inroad into the Constitution, but he retained, and acted upon' the mutilation Mushtaque-Zia unleashed on the Constitution, destroying it's basic feature. This would vindicate the finding that General Ershad was guilty in the same degree as he was a party to keep some 'basic features' of the Constitution in

a destroyed state, destruction having previously been commissioned by General Ziaur Rahman.

The Fourth Schedule and it's Present Status

Fourth Schedule to the Constitution, which was impregnated into Article 150, was enacted to cater for purely temporary, short lived measure, only to give effect to such provisions as existed before the Promulgation of our Constitution, which pre Constitution provisions were necessary to be incorporated into our Constitution. So it, did necessarily lost it's efficacy and necessity when the First Parliament met in 1972. The Fourth Schedule itself, along with Article 150, uses the words, not ambiguously, 'transitional and temporary provisions'. It is more than obvious that the military usurpers to power, on both the occasions, purportedly used(rather abused) Fourth Schedule to the Constitution as a vehicle to accord validation to all their misdeeds and unlawful instruments.

Clause 3A to the Fourth Schedule had already been discussed in the Fifth Amendment judgment. Some Other provisions of the Part of the Fourth Schedule is reproduced/ narrated below.

FOURTH SCHEDULE
(Article 150)

TRANSITIONAL AND TEMPORARY PROVISIONS

1. *Dissolution of Constituent Assembly.* Upon the commencement of this Constitution, the Constituent Assembly, having discharged its responsibility of framing a Constitution for the Republic, shall stand dissolved.

2. *First elections.* (1) The first general election of members of Parliament shall be held as soon as possible after the commencement of this Constitution and for this purpose the electoral rolls prepared under Bangladesh Electoral Rolls Order, 1972 (P.O. No. 104 of 1972) shall be deemed to be the electoral rolls prepared in accordance with article 119.

(2) For the purpose of the first general election of members of Parliament, the delimitation of constituencies

made for the purpose of elections to constitute the erstwhile Provincial Assembly, and published in 1970, shall be deemed to be made under article 119, and the Election Commission shall, after incorporating such changes, as it may consider necessary, in the nomenclature of any constituency or any subdivision or thana included therein, publish, by public notification, the list of such constituencies:

Provided that provision may be made by law to give effect to the provisions relating to seats for women members referred to in clause (3) of article 65.

3. *Provisions for maintaining continuity and interim arrangement.* (1) All laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been made, exercised and done according to law.

(2) Until the day upon which Parliament first meets pursuant to the provision of this Constitution, the executive and legislative power of the Republic (including the power of the President, on the advice of the Prime Minister, to legislate by order) shall, notwithstanding the repeal of the Provisional Constitution of Bangladesh Order, 1972 be exercised in all respects in the manner in which, immediately before the commencement of this Constitution, they have been exercised.

(3) Any provision of this Constitution enabling or requiring Parliament to legislate shall, until the day upon which Parliament first meets as aforesaid, be construed as enabling the President to legislate by order, and any order made under this paragraph shall have effect as if the provisions thereof had been enacted by Parliament.

3. *President.* (1) The person holding office as President of Bangladesh immediately before the commencement of this Constitution shall hold office as President, as if elected to that office under this Constitution, until a person elected as President under article 48 enters upon office:

Provided that the holding of office under this paragraph shall not be taken into account for the purposes of clause (2) of Article 50.

(2) The persons holding office as Speaker and Deputy Speaker of the constituent Assembly immediately before the commencement of this Constitution shall, notwithstanding that Parliament has not yet been constituted, be deemed to hold office respectively as Speaker and Deputy Speaker until an election to each of those offices is made under clause (1) of article 74.

5. *Prime Minister and other Ministers.* The person holding office as Prime Minister, immediately before the date of the commencement of this Constitution shall, until his successor appointed under article 56 after the first general election held under this Constitution enters upon

> office, hold office as Prime Minister as if appointed to that office under this Constitution, and the persons holding offices as Ministers immediately before that date shall continue to hold office as Ministers until the Prime Minister otherwise directs, and nothing in article 56 shall prevent the appointment of other Ministers on the advice of the Prime Minister.
> 6. *Judiciary.* (1) The person holding office as Chief Justice immediately before the date of the commencement of this Constitution and every person who then held office as judge of the High Court constituted by the Provisional Constitution of Bangladesh Order, 1972, shall as from that date hold office as if appointed under article 95 as Chief Justice or, as the case may be, as judge.
> (2) The persons (other than the Chief Justice) holding office as judges pursuant to sub-paragraph (1) of this paragraph shall at the commencement of this Constitution be deemed to have been appointed to the High Court Division, and appointments to the Appellate Division shall be made in accordance with Article 94.

Sub clauses (3),(4),(5),(6)and(7) were there to cause all pre-existing legal proceedings, pending in the High Court, to stand transferred to the High Court Division and to give effect to pre-pronounced judgment of the High Court, to cause transfer of pre-existing cases to the Appellate Division and to give effect to pre-existing judgments of the Supreme Court, and to give effect to the jurisdiction conferred by the Provisional Constitutional Order 1972, respectively, while clause 7, 8, 9 10, 11, 13,14, 15, and 16, stood to save pre-existing rights of appeal notwithstanding any limitation period, to validate pre-existing Election Commission, Public Service Commission, to save provision as to oath, taxation interim financial arrangements, to save the audit of past accounts, to save government’s rights and obligations as to property and assets, pre-existing proceeding and pre-pronounced judgments of the Appellate Division. Article 17 was there in order to confer power upon the President to cause adoption of laws and removal

of difficulties in laws in order to ensure conformity with the Constitution.

Having perused the text of the Fourth Schedule, paragraph 3 in particular, which are very lucidly written, we are left with no doubt whatsoever, that the said Schedule was meant to be of transient existence.

The Appellate Division in the Fifth Amendment Case, reversed this Division's findings and the ruling on the Fourth Schedule to the Constitution.

So, we are in a state of enigma, because on the one hand we can see totally unambiguous text in the subject Schedule, clearly and undistortedly surmoning that the said Schedule came into being for a trivial, short lived period to perform a very limited, time framed purposes, and on the other hand we remain bound by the clear dictation that stemmed from Article 111, proclaiming the unavoidability of the doctrine of Stare Decisis.

In view of the unambiguity of the text, it is, with all the obsequiousness we owe to the Apex Court, and all respect, our reckoning is that the text in it's true perspective was not brought to the notice of the Appellate Division. With that view, we are inclined to invoke the doctrine, "Per-Incuriam", and hold that, as it was the clear and explicit desire of the framers of the Constitution that the said Schedule was designed to cater for limited purposes.

In engaging the doctrine, "Per-Incuriam," we relied on the following decisions and held that the phrase "Law" in Article 111 connotes and denotes that concept which satisfies the 'Stare Decisis' rule i.e, when a decision is not hit by the

rule, 'Per-Incuriam': (1) Young –vs- Bristol Aeroplane Co. Ltd (1944 KB 718), (2) Morelle –vs- Wakeling (1955 2 QB 379), (3) Dixon –vs- BBC (1979 QB 546), (4) Bnulami –vs- Home Secretary (1985 QB 675), (5) Rickards –vs- Rickards (1990 Fam 194), (6) Re Probe Data System (No. 3) (1992 BCLC 405), (7) R. -vs- Parole Board, ex p. Wilson, 1991, 1 QB 740.

In view of our above finding paragraph 19 of the Fourth Schedule must be effaced, as the same was illegally introduced to the Constitution by an usurper to achieve his personal gain.

Why is the Constitution (Seventh Amendment) Act, 1986 Ultra-Vires the Constitution?

Having dissected the authorities pronounced in the Fifth Amendments case and in Asma Jilani case,, we are swayed to the introspective and irreversible equation that the Constitution (Seventh Amendment)Act 1986, miserably failed to cross the threshold of constitutionality and, is as such void ab-initio, because of the under cited reasons;

1) The said Act purportedly enacted Paragraph 19 to inject it into Fourth Schedule to the Constitution with a view to accord ratification, confirmation and validation to the martial law instruments, issued during the period between 24th March 1982 and 10th November 1986, which instruments having been void, and illegal from the very beginning, there was nothing before the Parliament to ratify, confirm or validate and , as such, the purported ratification, confirmation or validation was an action in wilderness, having no existence at all in the eye of law, and,

2)because, the martial law proclamation, dated 24th March 1982, and all subsequent martial law instruments that followed,

which were purportedly validated by the Constitution (Sevnth Amendment)Act 1986, were totally barren of any lawful authority, as they were purportedly made/issued by the person who, in total derogation to the Constitutional device, by resorting to muscle power, illegally assumed the state power, de-facto, as a usurper, illegally suspending the Constitution, the sacrosanct document that represents the solemn will of the people, and,

2)because as all the instruments that were purportedly validated and ratified by the Parliament through the subject Act, were illegal, being bereft of lawful authority, it was beyond the Parliament's competence to ratify and validate them and, then infuse them into the Fourth Schedule to the Constitution through the legality non existent device of paragraph 19. Obviously our controlled Parliament, with Constitutional limitation on legislation, can not pass a law to accord validity to some thing, which it could itself not pass, because the legislature can not validate an invalid law, the principle governing validation being that validation itself is legislation , one could not validate what one could not legislate upon, and ,

3) because of the maxim 'quad initio no valet, fraction temporise non valet:' (What is void in the beginning does not become valid through efflux of time. Obviously the dead entities, the martial law instruments, can not be resurrected; they being dead from their inception, and

4) because ratification, validation and confirmation does not fall within the contemplation of Article 142, as the phrase 'amendment' therein can not presuppose ratification, validation

or confirmation et: the phrase amendment has it's own meaning and peculiarity--it is incapable of importing any new theme, unknown to it, not associated with itand,

5) because , as B H Chowdhury J, citing Hart's, explicated in Eighth Amendment case, supra, that an 'amendment' of the constitution is not a Grund norm because it has to be according to the method provided in the Constitution, and as S.Ahmed J, stated that an amendment means change or alteration subject to retention of the basic structures of the constitution, and as it has been held in Kandon-v-US(193 US 457-48 ED.747)that power to amend must not be confounded with power to create, the Constitution (Seventh Amendment) Act 1986 can not be ranked as an amending Act, and,

5)because through the said purported action, the Parliament, only in order to appease the whim of the person who diabolically usurped the governmental power, showing scant regard to the Order of the Constitution, perpetrated fraud upon the people at large, and their sacred Constitution, and,

6) because, the person, the author of the abhorent instruments, who previously ravaged the Constitution, can not, at a later stage, take in aid the same Constitution to legalise his outrageous acts and deeds, nor can he seek salvation under the Constitution, he tried to tear apart, and,

7) because endorsing the said purported enactment would render the Constitution unsafe as such an action may allure future reprobates, adventurists, to follow suit, and

8) because the purported amendment was not in compliance with Article 142 as the mandatory 'long title' was missing, and

9) because the purported amendment can not pass the ‘touch stone’ of either Article 7 or of the Preamble, and

10)because, by deceitfully procuring the passage of the subject Act, the military tyrant simply tried to get away with the sin and the delinquency he committed by heinously suspending the Constitution, something that he can not obtain from the very same Constitution, and

11)because the Fourth Schedule to the Constitution , was illegally used by the usurpers,

Our above finding that the Constitution(Seventh Amendment)Act 1986 is and has always been void for being affronting and repugnant to the Constitution, necessarily follow that all deeds done, all actions taken , inclusive of the formation of the so called martial law courts of all kind, were also barren of lawful authority.

Where Does the Petitioner Stand ?: Condonation:

So, where does the petitioner stand in the backdrop of our unequivocal findings as figured above, particularly in the light of the synthesis that martial law courts were bereft of authority as much as the martial law itself was? This would, a fortiori, entail that convictions passed by such purported courts are of no effect in the eye of law. In view of the fact that such a finding can create in-surmountable administrative problems, and can ,to some extent, import confusion, wilderness and anarchy, this Division, in the Fifth Amendment case, granted condonation to a number of circumstances and events, which was endorsed by the Appellate Division with some modification, to which the learned Attorney General and Mr. Murad Reza, the learned Additional Attorney, drew our

attention. The Appellate Division's version, is reproduced below, verbitame;

> "In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:
>
> (a)all executive acts , things and deeds done and action taken during the period from 15th August 19975 to 9th April 1979, which are past and closed;
>
> (b)the actions not derogatory to the rights of the citizens;
>
> (c) all acts during that period which tend to advance or promote the welfare of the people;
>
> (d) all routine works done during the above period which even the lawful government could have done;
>
> e)(i) The Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;
>
> (ii) The Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.
>
> (iii) The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;
>
> (iv) The Second proclamation (Fifteenth Amendment) Order, 1978 (Second proclamation Order No. IV of 1978) so far it relates to substituting Bengali text of Article 44;
>
> (v) The Second proclamation (Tenth Amendment) Order, 1977(Second proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2),(3),(4),(5),and (7) of Article 96 i.e. provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the constitution, and
>
> (f) All acts and legislative measures which are in accordance with, or could have been made under the original Constitution."

The above index of condonation being binding upon us, there is no need to repeat them, save saying that so far as the instant case is concerned the index shall apply mutatis mutandis.

Having thus auto incorporated the above list in this judgment, our view is that the said list does not apply to the petitioner. As his sentence is still executory, he cannot be compartmentalised within the 'past and closed' criteria. Additionally, his case involves question of his 'citizen's

right', protected by clause(b) in the Appellate Division's catalogue, printed above.

The petitioner's entitlement to have access to fair justice in accordance with the provisions contemplated by the Constitution, i.e, through the Courts created by statutes in accordance with Constitutional commandments, not through kangaroo courts, set up by extra-Constitutional means, is indeed his Constitutional right as secured by Articles 27, 31,32,33,35.

That said, however, it is our well meditated view that the petitioner must, if he is so advised, seek relief from a different forum, not from us.

Is a Criminal Matter Judicially Reviewable?

We are not, however, abdicating jurisdiction to act in matters with criminal overtures under Writ jurisdiction-- far from that. We have no hesitation to say that in appropriate cases, we are duty bound to intervene by engaging Article 102 even in criminal matters. We do, in this respect note that the history of the evolution of the doctrine of judicial review reveals that the egg of judicial review was incubated in the womb of criminal matters, even before the Tudor period, as certiorari were issued by the King's Bench to quash judgments or orders passed by the 'Justices of the Peace'(Henderson, Foundation of English Administrative Law: de Smith, Judicial Review of Administrative Action 4th Edition 584: de Smith Wolf and Jowel 14-001: Holdsworth, History of English Law, 228, 658: Caenegem, Royal Writs in England from the conquest to Glanville: R-vs-Lowle 1759 2Bnrn 834)and, even today that trend persists. So in In R-vs-Hereford Magistrate Court ex-

parte Rowlands (1998 QB 110)the Queens Bench Division quashed an irregular conviction on judicial review notwithstanding the petitioner's right of appeal to the Crown Court.

In R-v- Wandsworth JJ ex-parte Read (1942 1KB 281, in which Chief Justice Lord(Viscount)Caldecott in refuting the argument that judicial review would not lie as it was open to the petitioner to challenge the criminal conviction by lodging an appeal or by resorting to the device known as 'Case Stated' , (similar to our Section 561A Cr.P.C. procedure), observed, "It remains to consider the argument that the remedy of certiorari is not open to the appellant because others were available. It would be ludicrous in such a case, as the present, for the convicted person to ask for a case to be stated. It would mean asking the court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence. This is so extravagant an argument as not to merit a moment's consideration".

The House of Lords decision in Leech –vs-Deputy Governor of Parkhurst Prison (1988 AC 533) also provides strong, persuasive though, authority to lend support to this contention. In R-v-Reading Crown Court, ex p. Hutcbinson (1988 QB 384), R.v. Devizes Justices, ex p. lee(1988 QB 384, DPP-v- Head (1959 AC 83), R-v- Smith (Thomas George) (1984 Cr. L R 630) and in R-v-Oxford Crown Court ex p Smith (1989 2 Admin Law Report), the various English courts, inclusive of the House of Lords, judicially reviewed Magistrate court's and Crown Court's decision to ignore the plea raised by the accused that the criminal courts concerned were obliged to examine the validity of the by-laws, validity /applicability of the orders, under

which the accused persons were prosecuted. In Boddington v. British Transport Police(1998 2WLR 639) the House of Lords judicially reviewed a Magistrate court's decision to refuse to examine the vires of a bye-law, though , at the end held that the by-law was valid.

True it is that unlike ours, in Britain there is no written constitution to dictate that the High Court Division may interfere, "if satisfied that no other equally efficacious remedy is provided by law". But it is equally true that the area of the Common Law principle, upon which the English doctrine of judicial review is founded, is no way different from our written Constitutional mandate. It is also very much an English Common Law requirement that judicial review may not normally be available where alternative, effective, statutory remedies are in hands. In any event, when fundamental right is invoked, question of alternative remedy becomes a matter of discretion only because unlike Article 102(2), Article 102(1) does not speak of efficacious alternative remedy.

The Indian Supreme Court in State of Hariana-v-Bhajan Lal, (AIR 1992 SC 604), vigilantly discarding the idea that writ jurisdiction can not be invoked in a criminal matter, expostulated seven types of situation, not exhaustive though, where the High Courts may review a criminal matter under writ jurisdiction.

Even our Appellate Division did not find any reason to debase itself from the above disclosed principles. So in Government of the Peoples Republic of Bangladesh and others –vs- Iqbal Hasan Mahmood Tuku, 60 DLR AD 147) the Appellate Division declined to endorse the contention that a criminal

matter cannot be agitated through writ jurisdiction because of the existence of alternative remedy under Section 561A of the Cr.P.C.

The Appellate Division in M A Hai –vs-TCB (40 DLR AD 206) arrived at similar conclusion.

Reasons for Our Disinclination to interfere with the Petitioner's Conviction and Sentence

Our above observation notwithstanding, we are still not inclined to interfere with the conviction, with the reckoning that this is not the proper forum because of the following reasons:

Firstly, although the conviction was handed by a void forum, a military court, original cognisance was, nevertheless, taken by a properly constituted Court viz, a Court of Session, and hence, the notion of justice will be frustrated if, through a writ of certiorari the conviction is completely set aside, because in that event he will go scot free without facing a fresh trial de-novo. Secondly, other complicated issues are also blended with this case, such as whether a second FIR is recognised by the Cr.P.C., and what consequences would flow if it is not recognised, which issues are not apposite for a writ Bench, and, thirdly, question of bail is also involved. Had it been a straight forward case of setting a conviction aside, by issuing a writ of certiorari, we could have explored that possibility without hesitation.

Our refusal to intervene also means cessation of the petitioner's bail privilege .

How to Take Ershad and other Perpetrator(s) to Task?

Now, how about the perpetrator, General Ershad, who dared to unleash illegal and outrageous impingement on our Sacrosanct entity, our hard earned Constitution? Can he be reprieved, after committing such a heinous felony as putting the Constitution in abeyance for years together, plundering the divine rights of the people, thereby plunging them to grave predicament? History will impeach us should we fail to address this question in conduciveness with desire of the people—people want to see him tried and that is what it ought to be. Not only General Ershad, but all his accomplices, as well as such perpetrators of 1975 martial law, who may still be alive, Mushtaque-Zia-Sayem having already had died, must face the wrath of ultimate justice. In this respect we note with whole-hearted approbation the Pakistan Supreme Court's observation in the Sindh High Court Bar Association case, supra, which reads as follows: "We lay it down firmly that the assumption of power would be unconstitutional.....not...to be recognised by any court including the Supreme Court. Henceforth, a judge playing any role in future in recognition of such assumption of power would be guilty of misconduct within the ambit of Article 209." We also remind ourselves that Oliver Cromwell was notionally tried, his skeleton hading been exhumed, years after he was buried, and that was done only to transmit an undistorted message to possible adventurists. So, we do endorse the view M/s. M. Amir-Ul Islam, A F M Mesbah Uddin learned senior advocate, advanced. We are, simultaneously, in all four with the suggestion the learned Attorney General, Mr. Mahbubey Alamm and Mr. Murad Reza, Additional Attorney General, put forward to the effect that the question as to how General Ershad should be

dealt with should best left with the government. We subscribe to the overriding view that booking the perpetrators will act as a deterrent against future adventurers and that is why it is all the more essential that all the martial law perpetrators and those who were ‘par-delictum’ with them should be thrown to the long arms of justice. The Appellate Division, in the Fifth Amendment case, has quite discernibly expressed that the government and the Parliament should come up with infallible legislation to ensure appropriate punishment for such disgruntled people, and we are in no doubt, in order to protect the Constitution from future vultures, which must be the prime obligation of the government as well as of the representatives of the people, such move shall be forthcoming. The government may also explore whether there are sufficient evidence to indict the perpetrator(s) under any existing provision of the Penal Code, particularly Sections 121A and section 124 and 124A, or under any provision of any other special law. Our memory must not betray us in reminiscing that usurpers like Suharto, Pinochet, Gortiary, Idi Amin had to face the harsh music of law, while destiny steered Hitlar, mussolini, Franco, Mirza, Ayub, Yahya, Ziaul Haque and Musharaf to dire eventualities. There exists no reason why those who dared to play with the fate and the destiny of our people should not face same obnoxious consequences—no crime should go unpunished.

Bangalee Nationalism

During the hearing of this petition Mr. M. Amir-ul-Islam, who is one of the framers of the Constitution, submitting that one of the most ruthless casualty of successive martial law

usurpation was the guillotining of the aspiration of our liberation war, pointed out that General Zia disparagingly throttled , after illegally assuming power, the word ‘Bangalee Nationalism’ from our Constitution, ostensibly with communal afterthought, although, said Mr. Islam, the Liberation War was fought to secure the recognition of ‘Bangalee Nationalism’ and an independent country for Bangalee Nation. Mr. Islam further contended that the phrase Bangalee Nationalism was figured in Article 6 of the original Constitution of 1972, because the entire population of the country wanted the victory to ‘Bangalee Nationalism’ and as such, scripting of this phrase in their Sacred Constitution reflected the overwhelming will of the people. Mr. Islam contended that although it was Zia who ejected this phrases from our Constitution, General Ershad is no less to blame as he continued with it,

We could not agree more. The whole world knows that we fought our War of Liberation to hold the flag of ‘Bangalee Nationalism’ high. It is also true that everyone in Bangladesh, including people of all ethnicity are also Bengalees too. They also speak in Bangla, fought valiantly for the liberation of Bangladesh. Mr.Islam thought a clear message should be beaconed from this Court in this respect.

This question found a place for consideration in the Appellate Division at the time the Fifth Amendment Case was before their Lordships. Reproduced verbatim, the Appellate Division’s modifying order, stands like this; “Regarding Nationalism though express the view that being political issue , Parliament is to take decision in this regard, but if in place of ‘Bangladeshi’ the ‘Bangalee’ is substituted, in term

of the judgment and the order of the High Court Division, then all passports , identity cards, nationality certificates issued by the Government .....will have to be changed, reprinted or re-issued.....Bangladeshi nationals will who will return to Bangladesh as well as those travelling abroad, will also face serious complications with immigration authorities abroad. Apart from the above.....this change of nationality will also cost millions from the public exchequer. So for wider public interest the substituted Article 6 is retained."

What is abundantly clear from the Appellate Division's modification is that the retention of substituted Article 6 was not meant to be perennial, or ad-infinitum, and not absolute but flexible, and was meant to be for a finite duration subject to the political decision of the government, and the decision to modify was taken considering the questions of the problems that would spring from what are presently scripted in our passports and other documents etc, as well as considering the question of expenses.

So, the government should take steps to remove the countervailing factors the Appellate Division cited, which stand as hurdles on our way to restore unimpaired Article 6 , with a view to eventually restore unimpaired Article 6 , which reflected sovereign will of the people and of Bangabandhu.

There is no doubt, and keeping in mind the question of expenses and the necessity of the changes that are to be brought about, as viewed by the Appellate Division, and the Appellate Division's ruling, we can gradually proceed to eventually restore uninflicted Article 6 and bring back 'Bangalee Nationalism' in our Constitution, which was the

commitment of the historic War of Liberation and the cherished desire of the people and Bangabandhu himself. The government should take the initiative to make that happen without delay by commencing the process forthwith.

Mr. Khasru, with all earnestness supplied copies of Argentine and Mexican Constitution to depict the measures these countries have taken in order to insulate their Constitution. This would definitely be a commendable action on the part our legislators to follow such move. Pakistan has also taken similar steps. After all, nobody wants to see any more martial law. This outlaw and abhorrent demon must find a perpetual exit from our land.

The Ultimate Summing Up

Our judgment may be summed up in following terms;

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.

3) The killing of the Father of the Nation, which was followed by successive military rules, with a few years of

intermission, was not an spontaneous act-it resulted from a well intrigued plot, harboured over a long period of time which was aimed not only to kill the Father of the Nation and his family, but also to wipe out the principles on which the Liberation War was fought.

4) During the autocratic rule of Khandaker Mushtaque and General Ziaur Rahman, every efforts were undertaken to erase the memory of the Liberation War against Pakistan.

5)Two military regimes, the first being with effect from 15th August, 1975, and the second one being between 24th March 1982, and 10th November 1986, put the country miles backward. Both the martial laws devastated the democratic fabric, as well as the patriotic aspiration of the country. During Ziaur Rahman's martial law, the slogan of the Liberation War, "Joy Bangla" was hacked to death. Many other Bengali words such as Bangladesh Betar, Bangladesh Biman were also erased from our vocabulary. Suhrawarddi Uddyan, which stands as a relic of Bangabandhu's 7th March Declaration as well as that of Pakistani troops' surrender, was converted into a childrens' park. Top Pakistani collaborator Shah Azizur Rahman was given the second highest political post of the Republic, while other reprehensible collaborators like Col. Mustafiz(I O in Agartala conspiracy case), A S M Suleiman , Abdul Alim etc were installed in Zia's cabinet. Many collaborators, who fled the country towards the end of the Liberation War, were allowed, not only to return to Bangladesh, but were also greeted with safe haven, were deployed in important national positions.

Self- confessed killers of Bangabandu were given immunity from indictment through a notorious piece of purported legislation. They were also honoured with prestigious and tempting diplomatic assignments abroad. The original Constitution of the Republic of 1972 was mercilessly ravaged by General Ziaur Rahman who erased from it, one of the basic features, Secularism and allowed communal politics, proscribed by Bangabandhu, to stage a come back.

6) During General Ershad’s martial law also democracy suffered devastating havoc. The Constitution was kept in abeyance. Doors of communal politics, wide opened by General Zia, were remained so during his period. Substitution of Bengali Nationalism by communally oriented concept of Bangladeshi Nationalism was also allowed longevity during Ershad’s martial law period.

7) By the judgment in the Fifth Amendment Case all the misdeeds perpetrated by Mushtaque-Zia duo have been eradicated and the Constitution has been restored to its original position as it was framed in 1972.

8) It is about time that the relics left behind by martial law perpetrators be completely swept away for good.

9) Steps should be taken by the government to remove the impeding factors, the Appellate Division cited, in order to restore original Article 6, i.e, Bangalee Nationalism.

10) Those who advised Ershad, including his law minister and Attorney General during his martial lawperiod to keep the Constitution suspended, should also be tried.

Rule made absolute in part

For the reasons assigned above, the Rule is made absolute in part. The Constitution (Seventh Amendment)Act 1986 is hereby declared to be thoroughly illegal, without lawful authority, void ab-initio and the same is, hence invalidated forthwith through this judgment, subject however, to the condonation catalogued above, where they would apply.

Paragraph 19 of Fourth Schedule to the Constitution, is herby declared extinct wherefor the same must be effaced from the Constitution without delay.

The Respondents are further directed, having regard to the Appellate Division's modifying Order in the Fifth Amendment case, to take steps to clear the impediments, cited by the Appellate Division, with a view to eventual restoration of original Article 6.

The Respondents No.1 is directed to reflect this judgment by re-printing the Constitution.

No Order, however, is made to interfere with the petitioner's conviction or the sentence for the reasons stated above and hence he must surrender to his bail.

The learned counsel for the petitioner applied for a certificate under Article 103(2) (a) of the Constitution and, as the case raises a substantial question of law as to the interpretation of the Constitution, we have no hesitation to issue the certificate asked for, which is hereby issued.

There is however, no Order as to cost.

Sheikh Md. Zakir Hossain, J:

I agree