

THE CONSTITUTION 5th AMENDMENT CASE

Khandker Delwar Hossain, Secretary, BNP & another vs. Bangladesh Italian Marble Works & others 62 DLR (AD) 298

Introduction

This judgment has reshaped the constitutional landscape of Bangladesh. Following this judgment on 03.07.2011, the Parliament passed the Constitution (Fifteenth Amendment Act), 2011¹ and resorted to the provisions of the original constitution to a considerable extent. Our apex Court invalidated the existence of Martial Law in our constitutional dispensation and bid farewell to all kinds of extra-constitutional adventure forever.

Short Facts

On 10 December 2000, the company and Managing Director, Moon Cinema Hall filed a Writ Petition challenging the vires of Fifth Amendment Act of the Constitution as being contrary to the supremacy of constitution, independence of judiciary, power of judicial review and basic structures of the constitution. They also sought possession of Moon Cinema Hall. The High Court Division on 11.12.200 issued *Rule Nisi* calling upon the Respondents to show cause as to why the taking over possession of Moon Cinema Hall and purported 'ratification and confirmation' of Regulation No. VII of 1977 and Proclamation Order No. 1 of 1977 with regard to insertion of paragraph 3A to Fourth Schedule of the Constitution by paragraph 18 of the Fourth Schedule of the Constitution by the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979) should not be declared to have been made without lawful authority and is of no legal effect and further as to why the Respondents should not be directed to hand over the possession of Moon Cinema Hall to the company. The Respondents contested the Rule by filing Affidavit-in-Opposition. They submitted before the High Court Division that the Moon Cinema Hall is abandoned property; possessing and managing the same was ratified and confirmed by the Fifth Amendment; there was inordinate delay in filing the writ petition; and the writ petition is barred by *Res Judicata*. The High Court Division vide its Judgment and Order dated 29.08.2005 made the Rule absolute.² The High Court Division declared the Constitution (Fifth Amendment), 1979 illegal and void *ab initio* subject to condonation

¹ Act NO. 14 of 2011

² 62 DLR 70

and also declared ratification and confirmation of Regulation No. VII of 1977 having been without lawful authority and is of no legal effect. The High Court Division further directed the Respondents to hand over the physical possession of Moon Cinema Hall to the company. The High Court Division condoned some provisions which annulled the provisions of Fourth Amendment.

The Government and the Freedom Fighters Welfare Trust filed Civil Petition Nos. 1100 of 2006 and 1320 of 2007 respectively. Khondoker Delwar Hossain and another filed petitions praying for appearing as interveners in those Petitions. In early 2009, when the Government decided not to press those leave Petitions, the Interveners Petitioners prayed for time to file leave petitions. Accordingly, the Interveners filed Petitions for Leave to Appeal. Thereafter, the Appellate Division allowed the prayer of the Government and the Trust. In the leave Petitions, the Interveners challenged the Judgment and Order of the High Court Division. On 01.02.2010, the Appellate Division upheld the Judgment and Order of the High Court Division with few modifications and dismissed the leave petitions. The Government and the company filed Review Petitions. The Appellate Division vide its Order dated 11.05.2011 disposed of the review petition with some modifications in the operative portion of the Judgment of that Division.

Effects of the Fifth Amendment³

1. Abolition of one party system introduced by the Fourth Amendment.
2. Partial restoration of the independence of judiciary (Article 95 and 116) which was curtailed by the Fourth Amendment.
3. Restoration of the jurisdiction of the High Court Division to enforce fundamental rights as was provided in original Articles 44 and 102 of the Constitution.
4. Insertion of the provision of the Supreme Judicial Council (Article 96).
5. Abolition of the provision of absolute veto power of the President as introduced by the Fourth Amendment (Article 80).
6. Introduction of the provision of referendum in respect of amendment of Articles 142(1A), (1B) and (1C) of the Constitution.
7. The insertion of the words "Bismillahir Rahmanir Rahim" at the beginning of the Constitution i.e. above the Preamble.

³ Para-226

8. Amending the original Article 6 of the Constitution which provided that the citizens of Bangladesh would be known as '*Bengalees*' by the substituted Article 6 providing that citizens of Bangladesh would be known as 'Bangladeshis'.
9. Original Article 9 of the Constitution, which provided for unity and solidarity of the *Bengalee* nation, was also substituted by a new Article promoting local governmental institutions.
10. Omission of secularism as was provided in original Article 8(1) of the Constitution by the addition of the words "the principle of absolute trust and faith in the Almighty Allah" in Article 8(1) and also the insertion of a new sub article (1A) containing the words "Absolute trust and faith in the Almighty Allah shall be the basis of all actions" after amended Article 8(1).
11. Giving new explanation to "Socialism" as mentioned in original Article 8(1) that socialism would mean only economic and social justice.
12. Substitution of original Article 10 of the Constitution which guaranteed democracy and human rights by a new Article providing "Participation of women in national life" which has no nexus with the original Article 9.
13. Omission of the proviso to Article 38 from the original Constitution.
14. Addition of new Article 92A giving the President the power to expend public moneys in certain cases even without the approval of the Parliament.
15. Inserting of another new Article 145A providing that all international treaties would be submitted to the President who should cause them to be laid before Parliament by second proclamation.

Counsels

Mr. T.H. Khan, Mr. Moudud Ahmed Senior Advocates with Mr. Imran A. Siddiq, Advocate appeared for the Petitioners. On the other hand, Mr. Mahbubey Alam, Attorney-General, Additional Attorney Generals, Deputy Attorney Generals & Assistant Attorney Generals appeared for the Respondents. Further Mr. Ajmalul Hossain QC, Senior Advocate, Mr. ABM Siddiquir Rahman Khan, Advocate, Mr. Towfique Newaz, Senior Advocate, Mr. Mohshin Rashid, Mr. Mahmudul Islam, Mr. AFM Mesbahuddin, Mr. Yusuf Hossain Humayun, Mr. AM Amin Uddin, Mr. Abdul Matin Khasru, Mr. Sheikh Fazle Noor Tapash, Mr. Nurul Islam Sujon, Mr. Shahidul Karim Siddiki, Mr. SM Rezaul Karim & Mr. Momtazuddin Fakir appeared for their respective Respondents.

Submission of The Counsels

Mr. TH Khan⁴

1. Impugned Proclamations and Regulations can only be nullified by the legislation not by the Judicial Pronouncements.
2. Regulation No. VII of 1977 has already been given validity by the Appellate Division in the cases of *Halima Khatun*, *Nasiruddin* and *Ehteshamuddin*.
3. The Fifth Amendment ratified and confirmed the proclamations and regulations, which were transitional and temporary provisions, promulgated out of imperative necessity and those were kept out of the ambit of the jurisdiction of the Courts.
4. The High Court cannot pick and choose the provisions at its sweet will for giving validity.
5. The situation of the relevant time must be realized.
6. After 21 years of enacting the Fifth Amendment without assigning any reason of inordinate delay, the company cannot at its sweet will choose time to invoke the extraordinary jurisdiction of the High Court Division.

Mr. Moudud Ahmed⁵

1. The Judgment of the High Court Division involves interpretation of the Constitution and of public importance.
2. The writ petition could be disposed of without declaring the Fifth Amendment.
3. The High Court Division travelled beyond the terms of *Rule*.
4. Five successive and duly elected Parliaments in the years 1986, 1988, 1991, 1996 and 2001 have preserved and protected the Fifth Amendment and even judiciary have functioned and discharged their responsibilities under the Fifth Amendment.
5. The High Court has acted as legislature by rewriting the Constitution which could only be done by the Parliament under Article 65 of the Constitution.
6. The High Court Division has condoned some amendments and acts at its sweet will on a pick and choose basis without any legal grounds.
7. Identification of nationalism, socialism and secularism as basic structures of the Constitution has no legal foundation.
8. Judgment and Order of the High Court Division is violative of the Constitution.

⁴ Para-14

⁵ Para-15

Mr. Mahmudul Islam⁶

1. The submission of the petitioners that High Court Division ought to have granted certificate suo moto has no basis at all.
2. The instant Civil Petition is only concerned with the validity of the Fifth Amendment.
3. For Interpretation of Constitution, concentration should be on the text of the Constitution and then go to the history, if necessary.
4. Aim and objectives are in the preamble and a written constitution speaks of limited government and supremacy of the Constitution.
5. Basic features and structures of the Constitution are beyond the amending power of the Parliament.
6. Governance by the elected representative of the people not by any authority or by the members of military service.
7. Judiciary is vested with the power of judicial review.
8. Insertion of paragraph 18 in the Fourth Schedule of the Constitution is simply a fraud on the Constitution.
9. If the legislation is ultra vires, time does not run in favour of the validity of it.
10. Earlier decisions where Martial Laws and actions were considered by the Appellate Division cannot operate as binding precedents.
11. Estoppel cannot be pleaded against or in respect of a statute.
12. The doctrine of necessity cannot be applied for condoning the provisions of Fifth Amendment.
13. The instant writ petition could not be disposed of without deciding the constitutional question.

Mr. Ajmalul Hossain, QC⁷

1. Appeal may be brought with a certificate under provisions of sub-article 1(a) of Article 103 or with the leave of this Court.
2. There is conflict between the right to property as guaranteed under the Constitution and the infringement of this right by the Fifth Amendment.

⁶ Para-16

⁷ Para-17

3. The Court will always choose the Constitution as the supreme law and reject the law passed by the Parliament or some other body or authority.
4. Every functionary of the state is subject to the will of the 'People'.
5. Basic feature of the Constitution cannot be changed.
6. Members of the Armed Forces are the servant of the People and cannot be master of the People.
7. Bangladesh entered the Period of Delinquency in 1975 and it lasted long for 16 years.
8. "We, the people of Bangladesh" is a true pole star.

Mr. Taufique Newaj⁸

1. The perpetrator of an unconstitutional act has been granted judicial protection by the doctrine of necessity.
2. The doctrine of necessity provided a misconceived and misplaced judicial and unconstitutional justification for the benefit of the perpetrators of unconstitutional acts.

Mr. Mahbubey Alam, Attorney General⁹

1. As the intervener petitioners were not parties at any stage of the proceeding before the High Court Division, they cannot file the leave petitions challenging the Judgment of the High Court Division.
2. Petitioners cannot support the purported amendments of the Constitution made by the usurpers.
3. Principle of secularism in the Constitution is one of the basic characters of the Constitution.
4. Fifth Amendment cannot be treated as an Amendment of the Constitution because nothing has been mentioned regarding the Articles of the Constitution, which were to be added, altered or substituted in place of existing Articles.
5. As there are no provisions in the Constitution for ratification of earlier amendment, the Fifth Amendment is contrary to the provision of Article 142 of the Constitution.

⁸ Para-5

⁹ Para-19

6. Due to absence of Referendum, the Fifth Amendment cannot be treated as valid and legal.
7. Amendment made during the martial law regime cannot be a valid amendment.

Mr. MK Rahman¹⁰

1. Third party interveners/petitioners have no *locus standi* especially when no issue of public importance is involved.
2. Fifth Amendment of the Constitution is beyond the authority of Article 142 and hence invalid.
3. The Constitution did not empower any authority or power to impose Martial Law or the Military Rule.

Issues and Findings of the Court

Practice of Granting Certificate and Granting Leave¹¹

1. The petitioner is required to formulate constitutional questions based on which the High Court Division may grant certificate. It was held in the case of **Kazi Muklesur Rahman vs Bangladesh 26 DLR (AD) 44**, the High Court Division should not grant certificate without formulating the question of law.
2. The primary criteria or threshold for granting leave is that some “miscarriage of justice” has resulted or that an “evil precedent” has been or will be created or there are reasonable grounds for sustaining the appeal. In this regard, the Court referred to the cases of **Ekushey Television Ltd. vs Chowdhury Mahmood Hasan, 54 DLR(AD) 130** and **Bangladesh Bank vs. Administrative Appellate Tribunal, 44 DLR(AD) 239**.

Doctrine of Judicial Restraint¹²

1. In the context of submission of the principle of judicial restraint, the Appellate Division held that the High Court Division was very much aware of the above principle.

¹⁰ Para-20

¹¹ Para-24&25

¹² Pra-30-33

2. To protect its property, the company has no other alternative but to file the present writ petition challenging the vires of the Fifth Amendment. There is clearly a conflict between the right to property and the infringement of that right. In the facts and circumstances of the instant case, it cannot be said that the writ petition could be disposed of without deciding the constitutional question i.e. whether the Fifth Amendment is ultra vires or not.

***Suo Motu* Consideration of the Constitutionality of a Statute¹³**

1. The Court can consider the Constitutionality of any provision in course of a litigation brought before it. It is not for the aggrieved persons but for the Judges to apply the correct provisions of the Constitution and the laws.
2. This is the position in the USA and India. The same should be in Bangladesh.

Binding Effect of Earlier Decisions (Halima Khatun, Joynal Abedin, Ehteshamuddin & Nasiruddin)¹⁴

1. The petitioners submitted that the decisions of **Halima Khatun vs. Bangladesh**, 30 DLR (SC) 207, **Hazi Joynul Abedin vs. Bangladesh**, 32 DLR(AD) 110, **Kh. Ehteshamuddin Ahmed vs. Bangladesh**, 33 DLR (AD) 154 and **Nasiruddin vs. Govt. of Bangladesh**, 32 DLR (AD) 216 bind the later cases involving the validity of the Fifth Amendment. In the above-mentioned cases, the Appellate Division considered the laws and actions of the Martial Law authorities. In this circumstances, the Court held that though this Division discussed Martial Laws and actions to some extent, those laws will not attain validity.
2. In none of those cases, the validity of the Fifth Amendment was challenged and those cases cannot operate as precedent for the validity of the Fifth Amendment.
3. In order to apply the principle of binding force under Article 111, an issue must be raised and settled.
4. Binding precedent is the ratio of a decision and not the finding of a fact or the conclusion reached by the Court. The Court also referred to the cases of **Dalbir Singh vs. India**, 1979 AIR 1384 and **Bangladesh vs. Mizanur Rahman**, 52 DLR (AD) 149.

¹³ Para-68

¹⁴ Para-79, 105, 106 & 108

5. The role of *Stare Decisis* in constitutional interpretation is also very insignificant particularly when the earlier decision is manifestly illegal.
6. The doctrine of precedent cannot control questions involving the construction and interpretation of the Constitution. It does not apply same force to the decisions on constitutional questions.

Application of Principle of Waiver and Acquiescence to this Case¹⁵

1. What should be done in the interest of justice must be done even if it was not done earlier.
2. "If the Constitution is wronged, it is a grave offence of unfathomed enmity committed against each and every citizens of the Republic. It is a continuing and recurring wrong committed against the Republic itself. It remains wrong against the future generations of citizens. As such, there cannot be any plea of the acquiescence in respect of unconstitutionality of a provision or an Act of Parliament."
3. The Court referred to the cases of **Lois P Myers vs. United States 272 US 52 (1926)**, **Proprietary Articles Trade Association vs. Attorney-General of Canada 1931 All ER 277 PC**, **Grace Brothers Proprietary Limited vs. Commonwealth (1946) 72 CLR 269**, **Frederick Walz vs. Tax Commission of New York 25 L Ed 2d 697 (397 US 664) (1970)**, **Motor General Traders vs. State of Andhra Pradesh: MANU/SC/0293/1983: AIR 1984 SC 121** wherein the Court declared statute invalid after many years of its enactment.
4. "... the plea of waiver or acquiescence is no ground in considering the vires of a constitutional amendment or for that matter any law. Validity of an Act of Parliament effecting an amendment of the Constitution is to be considered on its own merit as to whether such an amendment violates the Constitution itself even on a remote manner or not, but delay in challenging any such amendment, on its own, is not a valid objection to such a challenge."
5. There cannot be any acquiescence to hold valid an otherwise invalid law.

Application of Principle of Res Judicata to this Case¹⁶

¹⁵ Para-113-123

¹⁶ Para-126

1. Regarding the question of *res judicata* it appears that the order dated 7-6-1994 passed by the High Court Division in Writ Petition No. 802 of 1994 and the Judgment dated 5-7-1999 passed by the Appellate Division in Civil Appeal No. 15 of 1997 also show that the Constitution (Fifth Amendment) Act, 1979, was not judicially considered earlier. As such, there is no reason as to why we would not consider not only the legality of the Martial Law Proclamations etc. but also its legalization, ratification, confirmation and validation by inserting paragraph 18 in the Fourth Schedule to the Constitution by virtue of section 2 of the Constitution (Fifth Amendment) Act, 1979, especially when the Rule was issued in that manner and form.

Whether the Principles of Nationalism, Socialism, Secularism are the Basic Structures of the Constitution of Bangladesh¹⁷

1. The High Court Division held that provisions relating to nationalism, socialism, secularism were not only basic features of the Constitution but also the ideals for struggle for liberation, the cornerstone of our constitution.
2. The Appellate Division endorsed the above view of the High Court Division.
3. The Appellate Division also held that from the contents of the proceedings of the Constitutional Assembly it appears that for days elaborate discussion was made in respect of secularism, nationalism and socialism and those were incorporated in Chapter 11 of our Constitution, which contained the fundamental principles of State of Policy.

Whether all the Legislative Measures i.e. the Proclamations, Martial Law Regulations and Orders, were promulgated/made during the period from 15 august, 1975 up to April 9, 1979 by legally constituted authority or by usurpers and if by usurper - whether those Legislative Measures were illegal, void and non-est.¹⁸

1. "In modern times, the purpose of a Royal proclamation was confined and restricted to notify the existing law but can neither make law nor abrogate

¹⁷ Para-130-153

¹⁸ Para-154-178

any.....But by proclamations, laws cannot be made and in all the Constitutions of the civilized world the power to legislate is always with the concerned legislative body or authority as spelt out in the respective Constitutions.”

2. “The Constitution or any other law did not provide so. Besides, the concept of Martial Law is totally absent in our Constitution or in any other law or jurisprudence. The Constitution, the supreme law of the country, does not provide it nor any other law of our country. There is no place or office of CMLA in our jurisprudence. Obviously, the then Chief Justice of Bangladesh, completely ignored these legal realities for reasons best known to him but for that reason his taking over as the President of Bangladesh and assumption of the powers of CMLA would not become legal. Even a Chief Justice is not above the law.....”
3. “Justice Sayem was a usurper to the Office of the President of Bangladesh and his assumption of powers of CMLA, a legally nonexistent office, was void and non-existent in the eye of law. Consequently, all his subsequent actions taken by way of amendment of the Proclamation dated November 8, 1975 MLRs, MLOs and Ordinance, issued from time to time being beyond the ambit of the Constitution, were also all illegal, void ab initio and non est.”
4. Justice Sayem became President of Bangladesh on being nominated by Khandaker Mushtaque Ahmed. Justice Sayem similarly nominated Major General Ziaur Rahman, BU as the next the President of Bangladesh. But there is no provision for nomination to the office of the President in the entire Constitution. This is a disgrace and insult to the Nationhood of Bangladesh. But this insult was ratified by the second Parliament in the Constitution (Fifth Amendment) Act.
5. “A proclamation is not a law and by proclamation neither a law can be made nor a law can be abrogated not to speak of the provisions of the Constitution. As such, the First Proclamation along with clause (aa) is non-est in the eye of law and the nominations of both Justice Sayem and Major General Ziaur Rahman as President were in total violation of the Constitution, without jurisdiction and without lawful authority.”

Whether the situation as it existed on August 15, 1975 necessitated the imposition of Martial Law¹⁹

1. In erstwhile Pakistan, Martial Law was imposed in 1958 and in 1969. In both occasions some pretext were raised for declaring Martial Law. But while imposing Martial Law on August 15, 1975, Khandaker Mushtaque Ahmed did not raise any such pretext.
2. "While discussing the Proclamation dated April 6, 1979 we have already stated that on August 15, 1975 the Parliament was very much in existence and Vice-President was also available. Accordingly, in view of the killing of the then President, the constitutional machinery should have automatically come into effect and the Vice President should have taken over as Acting President until a fresh election was held for the choice of a successor. The political machinery would then have moved according to the Constitution and the Parliament could have taken steps to resolve the crisis."

Whether Fifth Amendment negates the Constitution, and repugnant to the Basic Feature of the Constitution and *ultra vires* the Constitution²⁰

1. "Our Constitution is supreme and under the Constitution all the powers and functions of the Republic are vested in the three organs of the Government, namely, Legislature, Executive and Judiciary and since all these organs owe their existence to the Constitution, which is the embodiment of the will of the people as held by the superior Courts, the basic features of the Constitution cannot be changed by Proclamations, Martial Law Regulations or Orders."
2. "From the analysis of Proclamations, MLRs and MLOs and the findings of our Apex Court as stated above, it is crystal clear that the Constitution was made subordinate and subservient to the Proclamations dated August 20, 1975, November 8, 1975 and November 29, 1976 and the Martial Law Regulations and Martial Law Orders made there under and as such those are *ultra vires* the Constitution. There is no provision in the Constitution, which is 'Supra Constitutional', or to put it mildly, 'Extra Constitutional'. All laws or provisions and actions taken thereon must, without any exception, conform to the.

¹⁹ Para-179-180

²⁰ Para-183,185,186, 195, 198, 199, 200

Constitution. Any law or provision, which is beyond the ambit of the Constitution, is ultra vires and void and as such non-est in the eye of law. The doubtless supremacy of the Constitution is far above all institutions, functionaries and services it created.”

3. “...the power to amend the Constitution is an onerous task assigned to the Parliament, which represents the will of the people through their chosen representatives. It is to be carried out in accordance with the procedure prescribed in Article 142 of the Constitution and by no other means, in no other manner and by no one else. Suspending the Constitution in the first place, and then making amendments in it by one man by the stroke of his pen, that is to say in a manner not envisaged or permitted by the Constitution, are mutilation and/or subversion of the Constitution simpliciter and no sanctity is attached to such amendments *per se*. Indeed, the Constitution is an organic whole and a living document meant for all times to come.”
4. “.... the Parliament though may amend the Constitution under Article 142 but cannot make the Constitution subservient to any other Proclamations etc. or cannot disgrace it in any manner since the Constitution is the embodiment and solemn expression of the will of the people of Bangladesh, attained through the supreme sacrifice of nearly three million martyrs. Further the Parliament, by amendment of the Constitution cannot legitimize any illegitimate activity.”
5. “Accordingly we hold that since the Constitution is the Supreme law of the land and the Martial Law Proclamations, Regulations and Orders promulgated/made by the usurpers, being illegal, void and *non-est* in the eye of law, could not be ratified or confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or orders.”
6. Moreover, the Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of judiciary and its power of judicial review.”

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

Whether to prevent chaos and confusion and to avoid anomaly and to preserve continuity, the actions and the legislative measures taken during Martial Law period needs to be condoned/ cured by the principles of doctrine of necessity²¹

1. "since there are limits to the application of such doctrine of necessity, in occasions, the Parliament to come out of this position, resorted to the private law contrivance of ratification of unauthorized actions of agents by principals. But there is an inherent limitation even in respect of such ratification as life cannot be given to a prohibited transaction by ratification. Again by the device of ratification the Parliament or any authority cannot increase its authority. It can ratify only those actions of others, which it can lawfully do. Thus parliament cannot, by resorting to the device of ratification, ratify and render valid an amendment, which, itself, cannot do because the same will lead to the infringement of the basic features of the Constitution."
2. "This doctrine of State necessity is no magic wand. It does not make an illegal act a legal one. But the Court in exceptional circumstances, in order to avert the resultant evil of illegal legislations, may condone such illegality on the greater interest of the community in general but on condition that those acts could have been legally done at least by the proper authority."
3. The Appellate Division upheld the views of the High Court Division with few modifications in this regard. Regarding condonation, High Court Division held as follows:
 - a. The turmoil of crisis in the country is no excuse for any violation of the constitution or its deviation on any pretext. Such turmoil or crisis must be faced and quelled within the ambit of the Constitution and the laws made there under, by the concerned authorities, established under the law for such purpose.

²¹ Para-202, 203, 209, 224, 225

- b. Violation of the Constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate forever, however, on the necessary of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims *Id quod Alias Non Est Licitum. Necessitas Licitum Facit, salus populi est suprema lex and salus reipublicae est suprema lex.*
- c. As such, all acts and things done and actions and proceedings taken during the period from August 15, 1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever.
- d. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble Articles 6, 8, 9, 10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation Order No. IV of 1976, is declared valid and retained.

As it appears, the High Court Division accepted the doctrine of condonation as was done in *Asma Jilani's* case and in order to avoid chaos and confusion in the society and preserve continuity condoned all acts and things and proceedings taken during the period from August 15, 1975 to April 9, 1979 as past and closed transactions and in para 21 of its summary the High Court Division condoned all the provisions which deleted the various provisions of the Fourth Amendment.

Whether the High Court Division can exercise the 'legislative power' by way of condonation²²

1. "...it is now settled to avoid anomaly and also to preserve continuity, the Courts have to pass consequential orders. No exception can be taken to it. Illustrations of such judicial power may be found in the Eighth Amendment case wherein the

²² Para-127

Appellant Division ordered prospective application of the invalidity of the Eighth Amendment. Further while declaring any law ultra vires, the Court often applies the doctrine of severability to limit the application of the judicial verdict. This is not legislative act though such a decision modifies or even destroys a legislation."

How did the provisions of fourth amendment act of the constitution destroy the democratic character of the constitution²³

The following changes amongst others were made by the Fourth Amendment and impaired the democratic character of the Constitution:

- a. In place of the Parliamentary system, the Presidential system was introduced by substituting chapter I and I of Part IV of the Constitution.
- b. The impeachment and removal of the President was made tougher.
- c. The power of the Parliament was reduced by amending Article 80.
- d. The power of the High Court Division to enforce fundamental rights was curtailed by substituting Article 44.
- e. The independence of judiciary was curtailed by amending Article 95.
- f. One-party political system was introduced by adding part VIA in the Constitution.

Comment on ancillary matters²⁴

1. It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible.
2. The sovereignty of "we, the people of Bangladesh" is preserved forever as a "pole star"

Operative Portion

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: -

²³ Para-125

²⁴ Para-239&241

- a) All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved;
3. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:
- a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;
 - b) the actions not derogatory to the rights of the citizens;
 - c) all acts during that period which tend to advance or promote the welfare of the people;
 - d) all routine works done during the above period which even the lawful government could have done.
 - e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;
 - (ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.
 - (iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;
 - (iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it relates to substituting Bengali text of Article 44;
 - (v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and
 - f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution.

While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The

perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament, which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure forever.



Mohammad Shishir Manir

Advocate

Supreme Court of Bangladesh