Chapter 1

PRE-CONSTITUTIONAL DOCUMENTS

1. The Proclamation of Independence

The Proclamation of Independence in Mujibnagar on the 10th day of April, 1971 heralded the birth of a new country with an old history and long memories. This document, the Proclamation of Independence, is the first constitutional document with which the new country made a constitutional start. It contains in itself the genesis of its creation and it graphically describes the rationale of its birth in the following words :

"THE PROCLAMATION OF INDEPENDENCE

Mujibnagar, Bangladesh

Dated 10th day of April, 1971.

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971 to elect representatives for the purpose of framing a Constitution.

Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution,

AND

Whereas the Assembly so summoned was arbitrarily and illegally postponed for an indefinite period.

AND

Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war.

AND

Whereas in the facts and circumstances of such treacherous conduct Bangabandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million people of Bangladesh in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh.

AND

Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, among others, on the civilian and unarmed people of Bangladesh,

AND

Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government,"

Then comes a clean break from the past, an unshackling of the bondage of a past statehood and a self-proclaimed assumption of all power.

AND

Whereas the people of Bangladesh, by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh.

We, the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by people of Bangladesh, whose will is supreme, duly constituted ourselves into a Constituent Assembly, and having held mutual consultations, and in order to ensure for people of Bangladesh equality, human dignity and social justice.

declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman, and

do hereby affirm and resolve that till such time as a Constitution is framed, Bangabandhu Sheikh Mujibur Rahman shall be President of the Republic and that Syed Nazrul Islam shall be the Vice-President of the Republic, and

that the President shall be the Supreme Commander of all the Armed Forces of the Republic.

shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon.

shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary.

shall have power to levy taxes and expend monies.

shall have the power to summon and adjourn the Constituent Assembly, and do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.

We, the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable

to exercise his powers due to any reason whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilities herein conferred on the President.

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the Charter of United Nations.

We further resolve that this proclamation of independence shall be deemed to have come into effect from 26th day of March, 1971.

Thus, Bangladesh was born in the wake of a constitutional break. She started being free from any trace of subordination to or any link with the former state of Pakistan. The constitutional instrument of the Proclamation of Independence was given a force of law through its own native authority.

The Preamble to our Constitution, made effective from the 16th December, 1972, brings into sharp focus the native character of this authority.

> "We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and through a (historic war for national independence) (substituted for the words "a historic struggle for national liberation" by Proclamation Order No. 1 of 1977), established the independent, sovereign People's Republic of Bangladesh; ... ...

the source of all power. Article 7(1) of the Constitution makes the point clearer, "All powers in the Republic belong to the people". The people's exercise of their own power is not dependent upon the consent, concurrence or approval of any external agency.

2. Laws Continuance Enforcement Order, 1971 and Provisional Constitution of Bangladesh Order, 1972.

On the 10th April, 1971, along with the Proclamation of Independence, Laws Continuance Enforcement Order was issued, providing that "all laws that were in force in Bangladesh on the 25th March, 1971, shall subject to the Proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh. ... ..."

This was the provisional arrangement made for the governance of the People's Republic of Bangladesh which governed the field till the 10th January, 1972.

On the 11th January, 1972, the President of the People's Republic of Bangladesh, in exercise of powers conferred on him by the Proclamation of independence (namely, the President "shall exercise all the Executive and Legislative powers of the Republic ... ...") promulgated the Provisional Constitution of Bangladesh Order, 1972 providing therein that there shall be a Cabinet of Ministers which will be headed by a Prime Minister who will be a member of the Constituent Assembly and that the President shall in exercise of all his functions act in accordance with the advice of the Prime Minister. The President also promulgated the Constituent Assembly of Bangladesh Order, 1972 (P.O. No. 22 of 1972) on the 22nd March, 1972, making provisions for the functioning of the Constituent Assembly constituted by the Proclamation of Independence.

The President of Bangladesh thus exercised all legislative powers of the Republic, without the legislation being necessary to be debated or voted upon by any Parliament from the 16th December, 1971 (to be more precise, from the 26th March, 1971) till the Constitution came into force on the 16th December, 1972, and as we shall see presently, even after coming into force of the Constitution. These Presidential Legislative Decrees came to be termed as President's Order. The Acting President of Bangladesh (till the return of Sheikh Mujibur Rahman) passed four Acting President's Orders and the President passed as many as 154 Presidents Orders during the period from the 17th January, 1972 to the 15th December, 1972. These legislations are varied and all-embracing in scope and content and may be said to have laid the foundation of the new legal order in Bangladesh.

The Rule by Presidential decree was not, however, over when the Constitution of Bangladesh came into force on the 16th December, 1972. Paragraph 3(2) of the Fourth Schedule to the Constitution authorised the President to legislate as before till Parliament first meets after the first general election. The President promulgated 7 President's Orders in 1972 and 37 President's Orders in 1973 in exercise of that power. Out of these 202 President's Orders in total, some stand repealed, 26 stand protected from challenge under Article 47 read with the First Schedule to the Constitution and the rest are still existing laws of the country, with or without amendments.

Thus a bulk of the laws with which the country is being governed today, was not made by Parliament.

A. The case of A. K. M. Fazlul Hoque v. State, 26 DLR (SC) II. Decided on August 22, 1973.

In this case the Bangladesh Collaborators (Special Tribunals) Order, 1972, was challenged as a nullity, not being promulgated by an authority competent to do so.

It was argued that the Proclamation of independence envisaged a Presidential system of Government, but the Provisional Constitutional Order sought to alter the same to a Parliamentary or Cabinet system. It was contended that the President could have no authority to make constitutional provisions at least of the nature of clauses (5) to (8) of the Provisional Constitutional Order bringing about an alteration in the system of government, which resulted not only in violation of the mandate contained in the Proclamation but also in the self-effacement of the President himself and abdication of power by him in favour of the Prime Minister inasmuch as in the new system the President was to be appointed by the Cabinet and was again required to act in exercise of all his functions on the advice of the Prime Minister. It was urged that clauses (5) to (8) of the Provisional Constitutional Order which sought to alter the system of Government from the Presidential to the Cabinet system being invalid and the second President Mr. Justice Abu Sayeed Chowdhury having been appointed under clause (8) thereof, he was not the President contemplated in the Proocl amation; and as such the laws promulgated by him under the Provisional Constitutional Order were invalid and the Collaborator Order being one such law was a nullity.

The Proclamation of independence has earlier been quoted in full. Clauses (5) to (8) of the Provisional Constitution Order, 1972 were as follows :

"(5) There shall he a Cabinet of Ministers, with the Prime Minster at the head.

(6) The President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.

(7) The President shall commission as Prime Minister a member of the Constituent Assembly, who commands the confidence of the majority of the members of the Constituent Assembly. All

other Ministers, Ministers of State and Deputy Ministers shall he appointed by the President on the advice of the Prime Minister.

(8) In the event of a vacancy occurring in the Office of the President at any time prior to the framing of the Constitution of the Constituent Assembly, the Cabinet shall appoint as President a citizen of Bangladesh who will hold the office of President until another President enters upon the office in accordance with the Constitution as framed by the Constituent Assembly."

On the submissions made, the Appellate Division (judgment by A.S.M. Sayem, C.J.) held as follows :

"It is not necessary to pass any opinion on the validity of the submission that the Proclamation envisaged a Presidential system of Government. But it cannot be disputed that the Proclamation clothes the President designated by itself with all the powers of the State. The Provisional Constitution Order, on the other hand, sought to shift the focus of power to the Prime Minister from the President who was thereunder to be appointed by the Cabinet and was required by clause (6) thereof to act in the exercise of all his functions on the advice of the Prime Minister. Thus the Provisional Constitution Order brought about a change in the system of Government."

"The question, therefore, is whether the Proclamation had invested the President designated by it with the power to make a legislation affecting the system of Government."

"It was contended that the Legislative powers conferred by the Proclamation on the President designated by it was not intended to extend to changing the system of Government or to the making of a constitutional piece of legislation, even of an interim nature. It will, however, be seen that in addition to

conferring on the President all other powers including the executive powers, the Proclamation, after having noticed the prevailing circumstances invested him with all the "Legislative powers of the Republic". Obviously, the expression "Legislative powers of the Republic" is of the widest amplitude and admits of no limitation. The Proclamation, in our view, empowered the President designated by it to make any law or legal provision, even of a constitutional nature. We looked for but found no indication in the Proclamation to the contrary. On the other hand, assurance is lent to this view by the further provision in the Proclamation which empowered the President to do everything necessary to give the people of Bangladesh an orderly and just Government, including the power to appoint a Prime Minister and other Ministers. The impugned clauses (5) to (8) of the Provisional Constitution Order were thus authorised by the terms of the Proclamation."

"Other exceptions taken to the aforesaid clauses of the Provisional Constitution Order, namely, that they resulted in self-effacement of the President and in abdication of power by him, call for no separate discussion. Suffice it to state that such exceptions can be relevant only in cases involving complaints relating to unauthorised delegation of Legislative powers to external authorities. In the instant case the President designated by the Proclamation promulgated the Provisional Constitution Order in exercise of his plenary Legislative powers which, we have held, included the power to make interim Constitutional provisions. The submissions relating to abdication of power by the President or his self-effacement are thus out of place in this case."

"The impugned clauses of the Provisional Constitution Order, namely, clauses (5) to (8) thereof, not being, in our 10

view, in excess of the powers conferred on the President designated by the Proclamation, the validity of the appointment of the second President which was under clause (8) cannot be disputed. The Collaborators Order was thus promulgated by an Authority competent to do so."

B. The case of Dulichand Omaraolal vs. Bangladesh, 33 DLR (AD) 30, decided on June 18, 1980.

The question at issue in this case was whether the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 was continued by Laws Continuance Enforcement Order, 1971. The Appellate Division (judgment by K. Hossain, C.J.) held as follows :

"In the present case, however, as we have said, we are to look for the validity of the Laws from the sources indicated earlier. A combined reading of Proclamation of Independence, Laws Continuance Enforcement Order, the Constitution of Bangladesh, President's Order No. 29 of 1972, President's Order No. 48 of 1972 and Act XLV of 1974 as amended by Act XCIII of 1976 clearly indicates, that Ordinance 1 of 1969 continued as a valid piece of legislation which has been repealed by Act XLV of 1974. No further argument or speculation is necessary."

C. The case of Md. Yahya vs. Govt. of Bangladesh 35 DLR (HCD) 182, decided on Feb. 3, 1982.

Yet another application of Laws Enforcement Order, 1971 is illustrated by this case. Under Martial Law Regulation No. 81 promulgated by the Chief Martial Law Administration of Pakistan currency notes of 500 and 100 rupees denomination

were demonetized on 7-6-71. It was held by the High Court Division (judgment by Sultan Hossain Khan, J.) that in the light of the Proclamation of Independence, Laws Enforcement Order, 1971 and Paragraph 3(1) of the Fourth Schedule to the Constitution, any Martial Law Regulation by the Martial Law Administrator of Pakistan in between 26-3-71 and the commencement of the Constitution cannot be treated as an existing law in Bangladesh. The Bangladesh Bank has no liability for the demonetized notes surrendered under MLR 81 of 1971.

D. The cases of Mullick Brothers vs. Income Tax Officer, 31 DLR (AD) 165, decided on 30-11-78 and Chittagong Textile Mills Ltd. vs. Bangladesh, (1979) 3 BSCR 440, decided on 6- 6-79.

Laws Continuance Enforcement Order, 1971 provided that all laws that were in force in Bangladesh on March 25, 1971 and were subject to the Proclamation of Independence, continued to be in force with such consequential changes as were necessary. Income Tax (Correction of Return & False Declaration) Regulation, 1969, M.L.R. No. 32 of 1969 was made by an authority, i.e., Martial Law authority of Pakistan, against whom the Proclamation of Independence was directed. This authority could not legislate for Bangladesh if such legislation was inconsistent with the Proclamation of Independence. Upon this reasoning the Appellate Division (judgment by K.M. Subhan, J.) in the case of Mullick Brothers vs. Income Tax Officer, 31 DLR (AD) 165 declared action taken according to its terms to be without lawful authority.

Similarly the Appellate Division held that the War Risk Insurance Ordinance, 1969 is inconsistent with the existence of independent Bangladesh. By virtue of the proclamation of Independence and in terms of the Laws Continuance Enforcement

Order, 1971 it is not an existing law in Bangladesh. Notices of demand issued in 1970 for payment of premium under the said Ordinance are not valid notices. (Chittagong Textile Mills Ltd. vs. Bangladesh, (1979) 3 BSCR 440).

E. Proclamation of Independence and its effect upon the State of War between India and Pakistan.

An unreported decision of the Appellate Division is illuminating on this question. In the case of Moniruddin Ahmed Chowdhury vs. Ranadhir Shyam, C.P.S.L.A. Nos. 4 and 5 of 1979, decided on 8-6-79, the plaintiff decree-holder-petitioners instituted an execution case which was contested by respondent no. 1 under section 47 C.P.C. Two of the decree-holders were residing in India and since 1965 they became alien residents. The Appellate Division observed that the High Court Division rightly noticed that sec. 83 C.P.C. was no longer operative in the present case and that the execution case in its entirety may proceed at the instance of the decree-holders irrespective of their respective residence. The Appellate Division held that whatever was the state of affairs between India and Pakistan since 1965, by the Proclamation of Independence on the 10th April, 1971 there was no continuance of such state of affairs between India and the territory which emerged as Bangladesh.

Chapter 2

CONSTITUTION – ITS BASIC FEATURES

1. Introduction

The Constitution, as the saying goes, is what the judges say it is (not when they deliver a lecture, as one of them is doing now, but when they pronounce a judgment sitting on the Bench).

From the political scientists' point of view, one can catalogue some non-fundamental provisions in 152 Articles of our Constitution and in the Four Schedules which follow. Perhaps all constitutions contain them. As Carl J. Friedrich said in Constitutional Government and Democracy (Revised Edition, 1950) :

> "Some things in a Constitution are "fundamental". Oliver Cromwell used to insist, while others are "circumstantial". A provision in the Instrument of Government had set aside £ 200,000 for the civil officers, that is the administration, with which to pay the judges and other officials, to defray the charges of the council in sending their embassies, to support the governor-in-chief and so forth. This provision Cromwell called a circumstantial thing, "to be regulated as occasion shall offer." He freely admitted that there were many such circumstantial things in the Instrument "which are not like the laws of the Medes and Persians" but a "matter of consideration between you and me". Many modern "constitutions", that is, documents containing a real constitutional system of restraints, will, along

> with this system of restraints, contain such "circumstantial" provisions. Ordinary legislation within the confines of a "constitution" is particularly notorious in the State Constitutions of the United States" (p. 144)

From the standpoint of constitutional law it will be totally unacceptable to divide a written Constitution into provisions which are binding like the laws of the Medes and Persians and those which are a matter of consideration between you and me. Article 7(2) of our Constitution proclaims, "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." All the provisions of the Constitution taken together is the Supreme law of the Republic. The Constitution does not contain ordinary legislation.

Yet even constitutional lawyers and judges may discern some fundamental structural designs in a Constitution, as when an architect views a building. They can see the schematic structure of the constitutional edifice, the basic pattern into which the constitutional fabric has been woven. Call it basic structures or structural pillars or by whatever name they are there and in my eyes they are principally the following in our Constitution.

2. A Unitary, Independent, Sovereign Republic

The Constitution expresses itself on one of its basic structures in Article 1. "Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh". The independent and sovereign character of the country stem from the Proclamation of Independence declaring and constituting Bangladesh "to be a sovereign People's Republic". Article 1 distinguishes Bangladesh from a dependency or a colony or a federating unit. Bangladesh has opted for a republican form of

government. So any kind of monarchy, oligarchy, aristocracy or dictatorship is an anathema to its republican character. Article 7 of the Constitution emphasises two aspects, one, the people as the repository of all powers in the Republic and the second, the supremacy of the Constitution. It says,

> "7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
>
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The implication of Article 7 will be considered in more details later while discussing the Constitution 8th Amendment Case.

The unitary feature of the Republic is reflected in all the three organs of the State, legislature, executive and the judiciary. All the "legislative powers of the Republic" are vested in a single Parliament (Article 65). There is no other co-ordinate or territorial law-making body. All the powers of Government are conferred upon a single central Government and all territorial administrative units and local governments derive their power and jurisdiction from this single authority. All judicial powers of the Republic are vested centrally in the Supreme Court of Bangladesh, comprised of two Divisions, the Appellate Division and the High Court Division. Thus all the legislative, executive and judicial powers are vested in a single set of authorities. The outstanding feature of the unitary system of government, as the name implies, is unity and the Constitution carefully built up a single, unified and centralised command structure from where the territorial units will receive their law, administration and justice. In a federal structure, the federating units do not derive their

authority from the federal legislature, federal executive and federal judiciary. Partly the federal constitution and mainly the State Constitution are the source of their authority. This is an important distinction to remember.

3. Separation of Powers

The Constitution assigned to the legislature, executive and the judiciary clearly-demarcated roles, each controlled by constitutional provisions and no one organ generally overlapping with the other, although some overlappings are inevitable. Article 65 of the Constitution vests the legislative powers of the Republic in Parliament in express terms. Article 55(2) of the Constitution originally provided that "the executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister". With the introduction of Presidential system of government, Article 55(2) had undergone some changes later, but it was restored in full by the Constitution (Twelfth Amendment) Act, 1991 with effect from 18-9-91.

But there is no express vesting of judicial power in the Supreme Court in the Constitution. In the case of Mujibur Rahman vs. Bangladesh, 44 DLR (AD) 111, Mustafa Kamal, J. approvingly quotes the observations of Lord Diplock, expressing the majority view in Hinds & others vs. The Queen (1976) 1 All ER 253, as follows :

> "As respects the judicature, particularly if it is intended that the previously existing Courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power on the judicature. Nevertheless, it is well established as a rule of construction applicable to constitutional instruments under which the governmental structure is adopted that the absence of express words to that

effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable by the legislature, by the executive and by the judicature respectively."

Mustafa Kamal, J. then points out that our Constitution expressly provides in paragraph 6 of the Fourth Schedule the continuity of the incumbent Chief Justice and the Judges of the erstwhile High Court of Bangladesh in the new dispensation and the transfer of legal proceedings from the previous Courts to the two Divisions of the Supreme Court. Until the provisions of Chapter II of Part I are implemented, the Constitution provides that the matters provided for therein shall be regulated in the manner in which they were regulated immediately before the commencement of the Constitution. He holds,

"Our Constitution, therefore, expressly intended that the previously existing superior Courts shall continue to function, albeit in a new dispensation and the subordinate courts too shall continue to function. Although the Constitution itself omitted to confer judicial power on the Supreme Court and the Subordinate Courts by any express provision, there can be no doubt whatsoever that the Supreme Court and the Subordinate Courts are the repository of judicial power of the State, because they have been previously existing and the Constitution allows them to function, although in a new form." (Para 71).

A. Is Parliament free to legislate as it chooses?

(i) Supremacy of the Constitution

The short answer is, no. The doctrine of legislative supremacy in the United Kingdom is not available in a written Constitution which contains a constitutional system of restraints giving the superior court a power of judicial review. A written constitution is a mandate for limited government, each organ of

the State limited and controlled by the jurisdiction conferred on it by the Constitution and thereby obliged to act within the limitations imposed by the Constitution. No organ of the State is superior to the other. It is the Constitution which is superior to all the organs of the State. The supremacy of the Constitution articulated in Article 7(2) – "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic" is the cornerstone of the Constitution of Bangladesh.

(ii) Constitutional Limitations

The Constitution itself places limitations on the power of Parliament to make ordinary laws. Article 65 vests Parliament with "the legislative powers of the Republic" but the vesting is "subject to the provisions of this Constitution". In the case of Mofizur Rahman Khan vs. Bangladesh, 34 DLR (AD) 321. K. Hossain, C.J. points out the limitations on the uncontrolled exercise of legislative power :

> "It is first to be observed that Bangladesh Parliament by virtue of Article 65 has plenary or supreme legislative power conferred upon it and this power is exerciseable subject to the Constitution. The Constitution puts two bars on the legislative power of the Parliament, one is that the Constitution being the supreme law of the State and any other law inconsistent with it, shall to the extent of inconsistency be void. The second is set out in the Fundamental Rights chapter or Bill of Rights chapter. Article 26 at the beginning of the Chapter of Fundamental Rights says that all existing laws inconsistent with the Fundamental Rights shall, on the commencement of the Constitution, to the extent of inconsistency, become void, and the State shall not make any law inconsistent with the Fundamental Rights, and any law so made shall to the extent of the inconsistency be void."

Article 135 of the Constitution gives some constitutional protection to persons holding civil posts in the service of the Republic. Parliament cannot pass any law evading or overriding these protections. It has been held in the case of Dr. Nurul Islam vs. Bangladesh (per Ruhul Islam, J.), 33 DLR (AD) 201, "Article 135 provides the constitutional protection to the government servants, who have title to the office, against arbitrary and summary dismissal or removal. From this it can be safely held that the Government or the Legislature cannot by framing a Rule or by enacting a law evade the guarantees provided under the Fundamental Rights and the protections provided under Article 135 of the Constitution". (para 104).

Articles 59 and 60 of the Constitution deal with local government and it bas been held by the Appellate Division in the case of Kudrat-i-Elahi Panir vs. Bangladesh, 44 DLR (AD) 319, that Articles 59 and 60 restrict the plenary legislative power of Parliament to enact laws on local government to the extent that Parliament cannot transgress overlook and ignore the constitutional provisions prescribing the manner and method of establishing local government, its composition, powers and functions including power of local taxation. Some words in a repealing Ordinance were found to be *ultra vires* the Constitution. Also it has been held that Articles 59 and 60 cannot remain as dead letters in the Constitution. At a given point of time there must be some form of local government in terms of Articles 59 and 60.

"It is", however, as observed by M.H. Rahman, J. in the case of Mujibur Rahman vs. Bangladesh, 44 DLR (AD) 111, "a settled principle of interpretation that an expression used in a constitutional enactment conferring legislative powers must be construed not in any narrow or restricted sense, but in a sense beneficial to the widest possible amplitude of the powers".

(para 40). Article 117(1) empowered Parliament by law to establish one or more administrative tribunals to exercise jurisdiction in respect of *inter alia* the terms and conditions of persons in the service of the Republic and the proviso to Article 117(2) empowered Parliament by law to provide for appeals from or the review of decisions of any such tribunal. It was held that Parliament's power to "provide for appeals" include the power to create an appellate forum. The doctrine of implied powers and the doctrine of incidental and ancillary powers were held applicable to this case. For a full review of these doctrines see paragraphs 85-88 of the report in the judgment by Mustafa Kamal, J.

(iii) Limitations by Judicial Decisions

Proviso to Article 65 authorises Parliament to delegate to any person or authority by Act of Parliament power to make orders, rules, regulations, bye-laws or other instruments having legislative effect. This is not to say that Parliament can abandon its essential lawmaking function and delegate to any person or authority its essential legislative powers. Self-effacement of Parliament or abandonment of its lawmaking power or excessive delegation of legislative power has often rendered legislation invalid by judicial decisions.

The power of the President to adopt the provisions of a written constitution for a specified period by way of modification, addition or omission for the purpose of removing any difficulties that may arise in bringing a written constitution or any of its provisions into operation is subject to limitations by judicial decision – it cannot alter the system of government itself. Fazlul Quader Chowdhury vs. Md. Abdul Haque. PLD 1963 (SC) 486.

There is limitation on the power of Parliament to pass "legislative judgments". Inherent in the concept of separation of

powers is the well-established judicial principle that the legislature cannot make direct inroad into the judicial power of the State. It cannot pass a legislative judgment. When the court declares a law to be invalid, Parliament cannot pass a law declaring that the judgment is invalid or that the action taken under the invalid statute shall be deemed to be valid retrospectively. Parliament cannot by a legislation ask anyone to disregard or disobey the Court's decisions.

What power Parliament possesses or does not possess in respect of validation of an act found invalid earlier is the subject-matter of the case of Mofizur Rahman Khan vs. Government of Bangladesh, 34 DLR (AD) 32.

First, what Parliament does not possess. "It is another canon of interpretation that granted the legislative competence", says K. Hossain, C.J. (that) "it is not sufficient to declare that the decision the Court shall not bind, for that amounts to reversing the decision and is the exercise of judicial power which the legislature does not possess. It cannot by validating a law promulgate a legislative decision ... ." para 6. Shahabuddin Ahmed, J. who wrote the main judgement says, "The legislature cannot reverse or set aside the Court's judgment, order or decree ... ." (para 22).

Secondly, what Parliament possesses. As the supreme legislative authority Parliament may pass any law on any subject, not prohibited by the Constitution, both prospectively and retrospectively. Similarly, it can validate, subject to the Constitution, any law earlier found invalid either prospectively or retrospectively. K. Hossain, C.J. expressed himself thus :

> "Parliament has the power to validate a law declared by a Court illegal by removing the cause of illegality or infirmity. The basic condition of validation is that Parliament must posses the

power to legislate on the subject and having the legislative competence Parliament can validate a law by removing the infirmity and, in so doing, has the power of giving it a retrospective operation, prospective operation always being presumed.

The validity of a validating law is to be judged by three tests. The first, is to see whether Parliament is clothed with the legislative power on the subject. The second is whether by validation, Parliament has removed the defect which the Court had found in the earlier law. And thirdly, whether the validating law is consistent with the provision of the Constitution. When all the three tests have been fulfilled, the validation law may operate retrospectively. if Parliament so expresses it in the validating enactment. The invalidity of a law may be owing to some legislative incompetency or to its repugnancy to any of the fundamental rights and they can be cured in the manner set out above."

Shahabuddin Ahmed. J. is of the same view. He says, "The legislature cannot reverse or set aside the courts judgement, order or decree but it can render the judgement, order or decree ineffective by removing their basis. This may be done by in making a valid law with retrospective operation and the making an action valid retrospectively by deeming this action to have been taken under the new Act."

In Mofizur Rahman Khan's case (supra) the Appellate Division found that a valid law was made with retrospective operation and the impugned action was deemed to be taken under the new Act. The facts of the case are that section 9(2) of Act XII of 1974 provided that the Government may, at any time, retire from service a public servant who has completed twenty-five years of service without assigning any reason. One Mofizur Rahman Khan and one Borhanuddin Ahmed were so retired under

section 9(2). Section 9(2) was declared *ultra vires* the Constitution being violative of Articles 27 and 29 of the Constitution by the Appellate Division in the case of Dr. Nurul Islam vs. Government of Bangladesh, 33 DLR (AD) 201. By Ordinance No. VI of 1981, section 9(2) was amended with retrospective effect. The same power became exercisable by the Government "if it considers necessary in the public interest". Under section 5 of the Ordinance, a validation provision was made as follows :

> "5. Validation.– Notwithstanding to the contrary contained in any other law for the time being in force or any judgment, decree, order or decision of any Court, including the Supreme Court, all orders of retirement made or purporting to have been made under sub-section (2) of section 9 of the said Act before the commencement of this Ordinance shall be deemed to be, and to have always been made validly, lawfully and in the public interest and under the said sub-section as substituted by this Ordinance; and no such order of retirement shall be deemed to be illegal, invalid, void or ineffective, or ever to have become illegal, invalid, void or ineffective, by reason only of the fact, or shall be called in question in any Court, including the Supreme Court, or Tribunal, merely on the ground, that at the relevant time such order was made in exercise of a discretionary power conferred by the said sub-section without any principle or guideline for the exercise thereof or that at that time the said sub-section was not valid."

The validation provision was challenged in the Appellate Division in Mofizur Rahman Khan's case (supra). The Appellate Division found the retrospective validation "to be a constitutionally valid legislation", for the reason given above.

Shahabuddin Ahmed, J. however, hastened to say, obviously in respect of the bar imposed in the second part of section 5, that

"even in a case where retirement is made under the amended law and the order expressly shows that it has been made in the public interest, yet the court shall have the power to see whether the order is in colourable exercise of power or is *mala fide* or whether it has been made by the person by whom it was purportedly made or the person who made it had authority or jurisdiction to make the order. So in the case of an action validated by the new law, the court certainly got power to see that the order does not suffer from any such infirmities." The Appellate Division in fact looked into the cases of both Mofizur Rahman Khan and Borhanuddin Ahmed and found that the order of premature retirement passed against Mofizur Rahman Khan was in the public interest but the one passed against Borhanuddin Ahmed cannot be taken to be an order in the public interest in accordance with section 9(2) as it stands amended. The order of retirement passed against Mofizur Rahman Khan was maintained, but that against Borhanuddin Ahmed was set aside.

(iv) Limitations on the Power of Amendment of the Constitution.

In amending the Constitution, Parliament passes a law, but is the power unlimited? The Appellate Division by a majority judgment answers the question in the negative. Relying on the Preamble and Article 7 of the Constitution it declared the 8th Amendment of the Constitution, amending Article 100 along with consequential amendment of Article 107 of the Constitution as *ultra vires* and invalid (Anwar Husain vs. Bangladesh. 1989 BLD (Spl. 1). This case which I shall discuss in details later extended the sphere of limitations on legislative power. Even an amendment of the Constitution cannot run counter to the Preamble and Article 7 of the Constitution.

B. Immunity of Parliament and its members from interference by Courts.

To keep Parliament and its members immune from the interference of Courts in so far as their internal workings are concerned, which again is an illustration of the doctrine of separation of powers inherent in the Constitution. Article 78 provides the following :

"78. (1) The validity of the proceedings in Parliament shall not be questioned in any court.

(2) A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.

(3) A member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof.

(4) A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.

(5) Subject to this article, the privileges of Parliament and of its committees and members may he determined by Act of Parliament."

The Court and the two Houses of Parliament in England have a long history of direct conflict. The conflict and the present position is summarised in Halsbury's Laws of England, 3rd Edition, Volume 28, p. 467. as follows :

SUBJECT (3). The Courts of Law and the Privileges of the Houses.

"917. The position of the courts of law. Each House claims to be the sole and exclusive-judge of its own privilege and of

the extent of that privilege. In opposition to this claims in the courts of law, while allowing the existence of privileges essential to the discharge of the functions of the two Houses, assert that they have judicial knowledge of the extent of privilege and that they are not bound by resolutions of either House declaratory of privilege; and they have maintained mainly in relation to the Commons that they are bound to decide questions confine before them which involve a contravention of the law of the land, even if privilege is concerned."

"918. Limits of agreement regarding jurisdiction. In spite of this dualism of jurisdiction, a large measure of agreement on the respective spheres of the two Houses and the courts has been reached, which has, since the mid-nineteenth century, prevented the direct conflicts of earlier years."

"Although the Houses have never directly admitted the claim of the courts of law to adjudicate on matters of privilege, they appear to recognise that neither House is by itself entitled to claim the supremacy which was enjoyed by the undivided High Court of Parliament. Furthermore, it is admitted by both Houses that neither House can by its own resolution claim a new privilege."

"For their part the courts of law acknowledge that the control of each House over its own proceedings is absolute and not subject to judicial jurisdiction; and the courts of law will not interfere with the interpretation of a statute by either House so far as the proceedings of the House are concerned. Neither will the courts of law inquire into the reasons for which a person has been adjudged guilty of contempt and committed by either House, when the order or warrant upon which he has been arrested does not state the causes of his arrest; for in such cases it is presumed that the order or warrant has been duly issued unless the contrary appears upon the face of it."

4. Independence of the Judiciary

A. The Supreme Court

The Constitution in its original form devised a scheme of completely independent judiciary. The independence of the judiciary can be measured by the provisions a constitution contains in the matter of selection and appointment of judges, security of tenure, remuneration and other privileges, irremoveability except on proved misbehaviour or misconduct, independence in the exercise of judicial functions, the assurance of compliance with the judge's decisions and the meat and substance of power and jurisdiction that it confers upon the judiciary.

(i) *The Appointment of Judges*

Article 95(1) provided that "the Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice". The Constitution (Fourth Amendment) Act, 1975 took away the provision of consultation. As it stands now, "the Chief Justice and other Judges shall be appointed by the President". The element of consultation in the selection of other judges was a major safeguard against political and expedient appointments. The metamorphosis of Article 95(1) renders the highest judicial appointments in the country subject to valid objections. A Judge's appointment is now an exclusive privilege of the Chief Executive. The office of the President was the office of the Chief Executive from 1975 to 1991. Since 1991 the President is a titular head. As Article 48(3) stands now, the President has the power to appoint the Prime Minister and the Chief Justice without the advice of anyone, but in all other matters he "shall act in accordance with the advice of the Prime Minister". The Prime Minister is now the

Chief Executive, on whose advice the President is obliged to act. Therefore, it is in fact the Chief Executive who advises the President to appoint the other Judges of the Supreme Court.

The original Article 95(1) contained a constitutional acknowledgement of the role of the Chief Justice in the matter of appointment of the Judges of the Supreme Court. It implied a tacit recognition of the premises that appointments to the highest judiciary need to be above political considerations and that the Chief Justice being head of the Judiciary is the most competent person to opine who is most suitable for such appointment. Consultation with him was therefore made a constitutional imperative. The withdrawal of consultation is tantamount to a negation of that premise. However, inspite of this constitutional change in 1974, all appointments as Judges of the Supreme Court have in fact been made in consultation with the Chief Justice. One departure was made in February, 1994 when 9 Additional Judges were appointed to the High Court Division without consultation with the Chief Justice. Following a protest, the Notification was rescinded and fresh appointments were made, recognising in the fresh Notification itself, that the appointments were made in consultation with the Chief Justice.

(ii) The Selection of Judges

In the original Article 95(2), a citizen of Bangladesh being an advocate of the Supreme Court of not less than ten years standing or a citizen holding Judicial office or being an Advocate for not less than ten years in the territory of Bangladesh and having exercised the powers of a district Judge for not less than three years, was eligible for appointment as a Judge. The qualification was relaxed from time to time during Martial Law dispensation, obviously to accommodate appointments not enough to meet the original constitutional requirement. As at present, after all these

changes, a citizen of Bangladesh being an advocate of the Supreme Court of not less than ten years standing or a person holding judicial office for not less than ten years in the territory of Bangladesh or having such other qualifications as may be prescribed by law (no law having been made so far) qualify for appointment as a Judge.

(iii) Security of Tenure and Irremoveability

The Judges have a constitutionally fixed tenure of office, which was sixty-two years originally and now sixty-five years (Article 96(l)). Under the original Article 96(2) a Judge was irremoveable except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of "proved misbehaviour or incapacity" The Constitution (Fourth Amendment) Act, 1975 amended clause (2) and made a Judge removable by order of the President on the ground of "misbehaviour or incapacity" after a show cause. The entire Chapter I on Supreme Court was substituted by the Second Proclamation Order No.I of 1977 with effect from 1-12-77. The substituted Article 96(2) and (3) provide that the Judges are removable on the ground of "incapacity or gross misconduct" on a report by the Supreme Judicial Council consisting of the Chief Justice and the two next senior Judges. The substituted provisions are perhaps better than the original ones, in that the grounds of removal are on a more sophisticated plane and in that a Judge who holds a high constitutional office has now been saved from the ignominy of holding an office removable by the Chief Executive and has also been saved from the ignominy of a public exposure in a popular forum. The substituted provisions accord more with the constitutional scheme of separation of powers. No Judge has however been removed from office following the procedure in Article 96, but some Judges have been removed under Martial Law dispensation.

(iv) Remuneration and other Privileges

The remuneration, privileges and other terms and conditions of service of a Judge shall not be varied to his disadvantage during his term of office. This provision in Article 147 of the Constitution remains unchanged.

The remuneration payable to the Judges of the Supreme Court and the administrative expenses of, including remuneration payable to, officers and servants of the Supreme Court shall be charged upon the Consolidated Fund, which may be discussed in, but shall not be submitted to the vote of Parliament. The original provisions of Articles 88 and 89 of the Constitution have not been changed.

(v) Independence in the Exercise of Judicial Functions

Article 94(4) of the Constitution provides, "Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions". There is no analogous corresponding provision in the Indian Constitution or the Constitution of Pakistan (1973).

(vi) Supreme Court to be aided

As the Supreme Court itself has no machinery to execute its own decisions, Article 112 provides: "All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court".

(vii) Powers and Jurisdiction of the Supreme Court

There is no dearth of powers and jurisdictions conferred by the Constitution upon the Supreme Court to make it any the less effective and efficacious than any other comparable judiciary in any other written Constitution. The Court at the apex, the Appellate Division, has the jurisdiction to hear and determine

appeals from judgments, decrees, orders or sentences of the High Court Division. But appeal lies as of right only where the High Court Division certifies that the case involves a substantial question of law as to the interpretation of the constitution, or has sentenced a person to death or to imprisonment for life or has imposed punishment on a person for contempt of that Division and in such other cases as may be provided by Act of Parliament. In all other cases an appeal shall lie only if the Appellate Division grants leave to appeal (Article 103). The Appellate Division has the power to issue directions, orders etc., for doing complete justice in a case (Article 104). It can review its own judgments and the President may refer a question of law to the Appellate Division for its opinion (Articles 105 and 106).

It is indeed the High Court Division round which the superior judicial machinery revolves. The High Court Division shall have such original, appellate and other jurisdiction, powers and functions as are or may be conferred on it by the Constitution or any other law. There has never been any paucity of laws which do not confer on it a multitude of such original, appellate and other jurisdictions. As far as the Constitution is concerned, Article 102(1) confers on the High Court Division the jurisdiction to issue directions or orders for the enforcement of the fundamental rights conferred by Part III of the Constitution. Article 44, which is in Part III, provides that "the right to move the High Court Division in accordance with clause (I) of Article 102 for the enforcement of the rights conferred by Part III is guaranteed". The right to move the High Court Division for enforcement of fundamental right is itself a guaranteed fundamental right. Article 102(2) of the Constitution contains the power of judicial review of the High Court Division. This is by now an oft-used, much-used power and I need not elaborate this power at this stage. Article 109 gives the High Court Division power of superintendence and control over all courts and tribunals subordinate to it. Article 110

gives it the power to transfer cases from subordinate courts to itself. The Supreme Court is a Court of record (Article 108) and the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it (Article 111).

The Constitution (Fourth Amendment) Act, 1975 made the first surgery on the powers of the High Court Division. Its power under Article 102(1) to issue directions, orders etc., for enforcement of fundamental rights was taken away, gone was the fundamental right to move the High Court Division for enforcement of fundamental rights under Article 44. Fundamental rights were to be enforced (in future) by a constitutional court, tribunal or commission which may be established by Parliament by law.

It was a Martial Law legislation, Second Proclamation Order No. IV of 1976, which restored Articles 44 and 102(1) to their original shape. There they stand now.

These are the provisions in the Constitution which taken together seek to give the judges of the Supreme Court an independence in the discharge of their judicial functions. Some changes in the original Constitution are no doubt improvements, but not all.

END

B. The Subordinate Courts

As noticed earlier, along with the Supreme Court the subordinate courts of the country wield the judicial power of the Republic. Officers in the judicial service or magistrates exercising judicial functions never had any constitutional protection in so far as their security of tenure, salary and other privileges, superannuation and control and discipline are concerned. Those were governed by statutory rules, but the original Constitution bestowed upon the

subordinate courts a status and entity which was aptly commensurate with their assigned role as the wielder of judicial power of the Republic. The original Article 115 conferred the power of appointment of judicial officers and magistrates exercising judicial functions upon the President, but he had to appoint district judges on the recommendation of the Supreme Court and in the case of any other person, in accordance with rules made by him in that behalf after consulting the appropriate public service commission and the Supreme Court. The district judge's qualifications were also set out. He must hold for not less than seven years judicial office in the service of the Republic or been an advocate for not less than ten years. The original Article 116 vested the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions in the Supreme Court.

The Supreme Court had thus a demonstrably consultative role in the appointment of district judges and in framing rules for the appointment of other persons in the judicial service. After appointment, however, the Supreme Court controlled the career and discipline of judicial officers and magistrates exercising judicial functions. The constitutional provisions in themselves constituted a built-in safeguard for the independence of the lower judiciary.

The interference with the original scheme came from the Constitution (Fourth Amendment) Act, 1975. Article 115 was substituted making appointments of judicial officers and magistrates an exclusive preserve of the President in accordance with rules made by him in that behalf. The Supreme Court lost its consultative role. Article 116 was also substituted. The control and discipline of judicial officers and magistrates now vested in the President. The Supreme Court lost all vestige of connection

with the subordinate court. An improvement was made during Martial Law dispensation by Second Proclamation Order No. IV of 1978. The control and discipline of judicial officers and magistrates continued to be vested in the President, but the power "shall be exercised by him in consultation with the Supreme Court".

Articles 115 and 116 remain in this substituted and changed form till today.

Ironically, the Constitution (Fourth Amendment) Act, 1975 which made a drastic inroad into the independence of subordinate courts introduced a novel Article 116A in the Constitution, namely, "Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions" which provision remains unchanged up-to date. This Article is no doubt a constitutional acknowledgement of the independence of sub-ordinate judiciary, but how far executive appointments under executive discipline are compatible with Article 116A and how far they accord with the constitutional scheme of separation of powers are undecided matters. Also undecided remain the nature, effect and efficacy of "consultation" that the President has to make with the Supreme Court under Article 116. Also not yet decided is the kind of appointment that the President can make under Article 115, which is an important question as these Presidential appointees exercise the judicial power of the Republic.

5. Parliamentary Democracy

In Part IV of the original Constitution, the constitutional provisions relating to the President and the Prime Minister and the Cabinet and in Part V concerning Parliament clearly and unmistakably designed a cabinet system of government for

Bangladesh, the Prime Minister heading the cabinet, the cabinet being collectively responsible to Parliament and the Prime Minister being obliged to resign or advice the President to dissolve Parliament if he or she ceases to retain the support of a majority of the members of Parliament. The Head of State, the President, was a titular head who had to act in accordance with the advice of the Prime Minister, save when he appointed the Prime Minister. The well-known characteristics of a Cabinet Government or a Parliamentary Democracy, in whichever name one may call it, were present in the original Constitution.

A radical assault to this system of government was made by the Constitution (Fourth Amendment) Act, 1975. It sought to establish a Presidential system of government with a President elected by direct election, for a fixed term of office, with a Vice-President appointed by the President, with a Council of Ministers to aid and advise the President and with a Parliament unable to remove the President or to bring about the fall of the Council of Ministers.

Successive Martial Law dispensations found the Presidential form of government introduced by the Constitution (Fourth Amendment) Act, 1975 to be highly conducive to good government and naturally persisted with it. It is only after the general elections held in February 1991 that the Presidential form of Government was dismantled and the original cabinet system of government re-introduced with some modification by the Constitution (Twelfth Amendment) Act, 1991. Act XXVIII of 1991, with effect from 18-9-91, after a referendum was held, as required under Article 142 (1A) of the Constitution.

6. Fundamental Rights

Like most constitutions framed after the Second World War, our Constitution too contains a Chapter on Fundamental Rights. The

Preamble declares that to realise "fundamental human rights an freedom" is a fundamental aim of the State. What is "the State" Article 152 gives an inclusive definition. It "includes Parliament, the Government and statutory public authorities." Article 26(1) and (2) not only makes all existing laws inconsistent with fundamental rights void to the extent of such inconsistency but also enjoins upon the State not to make any law inconsistent with fundamental rights and declares that "any law so made shall, to the extent of such inconsistency, be void." Article 26 is a fetter upon the law-making power of Parliament. Parliament is the supreme legislative authority, but very much obliged to legislate "subject to the provisions of this Constitution". Article 26 is one such limitation on the plenary power of Parliament. The executive, i.e., the Government and statutory public bodies are also within the ambit of Article 26. Having regard to the definition of "law" in Article 152, namely, " "law" means any Act, ordinance, order, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh" ... an order passed by the Government or any of its departments or by any statutory public authority having the force of law is subject to the provision of Article 26. Besides, under the proviso to Article 65 an Act of Parliament may delegate to any person or authority power to make orders, rules, regulations, bye-laws or other instruments having legislative effect. These "persons" or "authorities" are required to abide by Article 26 while making orders, rules, regulations etc. Any legal instrument having legislative effect shall follow the injunction of Article 26.

Whether the judiciary, i.e., judicial decisions, is also included within the term "the State" is an undecided question in Bangladesh.

Fundamental Rights is itself a subject worthy of the most detailed consideration and I have kept this subject outside of the purview of this Lecture. Pertinent questions like whether fundamental rights are amendable may perhaps be left for some future occasion for study.

7. Judicial Review

This basic structure of the Constitution will be discussed in some details in a later Chapter.

Chapter 3

CONSTITUTIONAL JOURNEY (1972-75)

The Constitution of Bangladesh embarked on its eventful journey from the 16th December, 1972 soon to run into troubled waters. The Constitution (First Amendment) Act, 1973, Act No. XV of 1973, was passed on the 15th July, 1973, amending Article 47 and inserting a new Article 47A, concerning trial of persons for genocide, crimes against humanity or war crimes. The Constitution (Second Amendment) Act, 1973 (Act No. XXIV of 1973) was passed on the 22nd September, 1973, effecting amendments in various Articles including Articles 26 and 142, the full implication of which will be discussed later and introducing Emergency Provisions, Article 141A-141C, which were singularly lacking in the original Constitution. Article 141C empowers the President to suspend enforcement of fundamental rights during emergencies. On the 28th November, 1974 came the Constitution (Third Amendment) Act, 1974, Act No. LXXIV of 1974, effecting changes in Article 2 concerning the territory of the Republic, following the Appellate Division's judgment in the case of Kazi Mukhlesur Rahman vs. Bangladesh (26 DLR (SC) 44).

During the period under consideration, fundamental rights were enforceable for only two years, from 1972 to 1974. A Proclamation of Emergency was issued by the President under Article 141A on the 28th December, 1974 and in exercise of powers under Article 141C enforcement of fundamental rights conferred by Articles 27, 31, 32, 33, 35, 36, 37, 38, 39, 40, 42 and 43 were suspended. The emergency was revoked five years later on the 27th November, 1979.

During the long period of 5 years from December, 1974 to November, 1979 the Supreme Court of Bangladesh was denied the jurisdiction to enforce fundamental rights. The law of fundamental rights, therefore, had very little scope to flourish in Bangladesh. Only a few cases on fundamental rights found their way to law journals during 1972-79.

On the 25th January, 1975 came the Constitution (Fourth Amendment) Act, 1975, Act No.II of 1975, changing the basic structures of the Constitution. The parliamentary form of government was abolished. The Constitution now provided for a Presidential form of government. An irremoveable President, except on impeachment, is to be elected by direct election for five years. He will appoint a Vice-President. The Council of Ministers will be appointed by the President to aid and advise him. They will hold office during the pleasure of the President. Under the original Article 72 there could not be an interval of more than sixty days between two sessions of Parliament. Now, only two sessions of Parliament in a year will suffice. The Fourth Amendment made a drastic inroad into the independence and jurisdiction of the judiciary, which has been considered in Chapter II. A one-party State was established. The person holding office as President immediately before this amendment ceased to hold the office and Sheikh Mujibur Rahman entered upon the office of President from the commencement of the Fourth Amendment Act, as if elected to that office.

It is unnecessary to dilate further on the Fourth Amendment overtaken as it was by a quick succession of events. On the morning of the 15th August, 1975 President Sheikh Mujibur Rahman was assassinated and Khandaker Moshtaque Ahmed placed the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh. He issued a Proclamation to that effect on the 20th August, 1975.

That was the end of parliamentary form of government and finally of constitutional government within 3 years.

During this short period of 3 years only a few cases, including cases on fundamental rights, of significant constitutional importance came up for consideration before the Supreme Court, of which two deserve a detailed consideration.

A. The cases of A. T. Mridha vs. The State, 25 DLR (HCD) 335, decided on 29-31 May, 1973 and Solicitor, Govt. of Bangladesh vs. A. T. Mridha, 26 DLR (SC) 17, decided on March 7, 1974.

After the Constitution of Bangladesh came into force on 16-12-72, the High Court Division asserted its supervisory role over the Courts subordinate to it under Article 109 of the Constitution in the case of A. T. Mridha vs. The State, 25 DLR (HCD) 335, decided on 29-31st May, 1973.

Before the Constitution came into force on 16-12-72 P.O. No. 50 of 1972 was promulgated on 22-5-72 setting up Special Courts, namely, Special Tribunal and Special Magistrate for trial of certain offences of grave nature. Article 12 of the said P.O. provided for an appeal to the High Court Division from an order of conviction passed by a Special Court and Article 15 provided that no action or proceedings taken or purporting to be taken under the said P.O. shall be called in question by any Court. Following a devastating fire on 15-11-72 in some jute godowns at Daulatpur, Khulna an F.I.R. was lodged with the police on the next day alleging that the local people strongly suspected that the petitioner A. T. Mridha and his people caused the arson. A.T. Mridha and some of his people were arrested followed by four months of investigation during which no tangible evidence could be found against them. They then filed two separate applications

under sections 435 and 439 read with sections 497, 498 and 561A Cr.P.C.

The State contended that the applications were not maintainable. It was argued that apart from Article 15 of the said P.O. Article 47(2) of the Constitution provided that "notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution". P.O. No. 50 of 1972 was specified in the First Schedule and so it was a protected legislation under Article 47(2). Although Article 109 of the Constitution provided at that time that "the High Court Division shall have superintendence and control over all Courts and tribunals subordinate to it", Article 15 of the said P.O. came into direct conflict with Article 109 of the Constitution and therefore, it was argued, Article 15 of the said P.O. will prevail over Article 109 of the Constitution by virtue of the protective provisions of Article 47(2) of the Constitution. The High Court Division has no power of superintendence over the Special Courts set up under P.O. No. 50 of 1972, it was claimed.

Badrul Haider Chowdhury, J. the author Judge in the Division Bench, mastered a massive rejection of the above plea. He traced the history of the superintending power of the erstwhile High Court and found that the power of superintendence had been handed down to the High Court Division since 1861 except for the period that the country was under Martial Law between 1958-62 and 1969-71. The learned Judge considered around 16 decisions of pre-partition Indian High Courts and of other jurisdictions and examined the nature and content of the

superintending power. He then found that P.O. No. 50 of 1972 was a pre-constitutional legislation and it is in the nature of a sub-constitutional law. It is well-settled, he held, that sub-constitutional law cannot knock out a jurisdiction that has been created and conferred by the Constitution itself. With regard to exercise of power under Article 109 the learned Judge observed:

> "We are led to the conclusion that the power of superintendence and control in article 109 shall be exercised in the interest of justice which involves a duty on the part of the High Court Division to keep all Courts and Tribunals subordinate to it within the bounds of their authority to see that they do what their duty requires and they did it in a legal manner. This means the High Court can interfere in cases of grave dereliction of duty, or flagrant violation of law or where grave injustice would be done unless the High Court interferes."

The learned author Judge then considered the ouster clause in Article 15, namely, "notwithstanding the provisions of the Code or of any other law for the time being in force". He found no inconsistency between sections 435 and 439 Cr.P.C. and P.O. No. 50 of 1972. "Any other law", he held, does not refer to the Constitution but to an "existing law" which is defined in the Constitution. The *none-obstante* clause in Article 15 does not refer to the Constitution at all, nor could it have so referred being a sub-constitutional legislation of pre-constitutional origin. The learned Judge proceeded to say :

> "We do not discover any inconsistency because the scope of P.O. 50 of 1972 is only for trial of certain grave criminal offences whereas, the field of activity of the High Court under Article 109 is the superintendence of the entire subordinate judiciary. The subjects of the two laws are different, field of

activity are different and they operate without encroachment and therefore no inconsistency arises in the exercise of respective functions as contemplated by the two laws."

The High Court Division quashed the proceeding but on appeal (Solicitor, Government of Bangladesh vs. A.T. Mridha, 26 DLR (SC) 17, decided on March 7, 1974) the Appellate Division set aside the judgment of the High Court Division mainly on the ground that the orders of remand to custody passed by the Sub-Divisional Magistrate under clause (3) of Article 13 of P.O. No. 50 of 1972 and the investigation by police in the concerned P.S. case, against which the respondents preferred the criminal revision applications, were not orders or actions of any "Court" or "Tribunal" subordinate to the High Court. As to the merit of the discussion on Article 109 of the Constitution the Appellate Division did not pronounce itself upon the same but observed that "the invocation of the article, in facts and circumstances of the present case, does not appear to be proper ... ..."

The basic decision in A.T. Mridha's case (supra) in the High Court Division is that a pre-constitution sub-constitutional legislation dealing with subjects other than those covered by Article 109 of the Constitution cannot override the express provision of the Constitution and that the inconsistency between a protected legislation under Article 47(2) of the Constitution and the Constitution itself is not to be readily inferred, but is to be gathered not only from the contents and subject-matter of the protected legislation but also from those of the Constitutional provision allegedly inconsistent with it. This basic decision has not yet been re-agitated or restated in different terms by either the High Court Division or the Appellate Division in any of the subsequent cases, which has led the learned author Judge to comment at a later stage when he retired as Chief Justice, as follows :

"But that decision (A.T. Mridha's case) was knocked down on a technical point that the cognizance was not taken by the Magistrate till then, therefore the jurisdiction of the High Court Division of the proceeding was not sufficiently laid down. In reversine however, the Appellate Division passed no opinion on the principles laid down by the High Court Division." (Evolution of the Supreme Court of Bangladesh, Kamini Kumar Dutta Memorial Law Lecture by Justice Badrul Haider Chowdhury, University of Dhaka, P. 83).

B. The case of Kazi Mukhlesur Rahman vs. Bangladesh. 26 DLR (SC) 44, decided on September 3, 1974.

In this case the petitioner Kazi Mukhlesur Rahman prayed before the High Court Division in a writ petition for a declaration that the agreement between the Government of the People's Republic of Bangladesh and the Republic of India signed on the 16th May, 1974 by the Prime Minister of the two countries, known as Delhi Treaty, which he claimed involved cession of Bangladesh territory, was without lawful authority and of no legal effect. His case was that under the Noon-Nehru Pact of 1958 the southern half of South Berubari Union No.12 together with the adjacent enclaves already became part of the territory of Bangladesh under Article 2(a) of the Constitution. The Delhi Treaty allows India to retain that territory. This is cession of Bangladesh territory which the Prime Minister cannot do under Article 55(2) of the Constitution in exercise of an executive authority. The petition stumbled in the High Court Division on the threshold question of *locus standi*. The petitioner was not a resident of any part of the territories involved in the Delhi Treaty. He has no interest therein which could be affected by the Treaty. Hence he was not a "person aggrieved" within the meaning of Article 102 of the Constitution. A certificate was however

granted to the petitioner under Article 103(2)(a) of the Constitution in the following words, "Certificate for leave, as prayed for, under Article 103(2)(a) of the Constitution is granted".

In the resulting certificated appeal, several questions of constitutional importance were decided by the Appellate Division. It was decided, first, that the Certificate granted by the High Court Division under Article 103(2)(a) of the Constitution is defective but in view of the fact that the appellant raised a constitutional question as to the treaty-making power of the Prime Minister under Article 55(2) of the Constitution, and in further view of the fact that the appellant also filed a petition for special leave to appeal raising the question under Article 55(2) the appeal is not incompetent on the score of defective certificate. Secondly, it was decided that the appellant had *locus standi* to raise the constitutional question even though he was not a resident of Berubari or the enclaves. Thirdly, the plea that treaty-making being an act of State, the Delhi Treaty was not amenable to judicial review was not accepted and lastly it was held that the application before the High Court Division was premature and the appeal, was liable to be dismissed on that ground alone. The judgment, however, did not stop there. Since the parties were heard on merits on the interpretation of Article 55(2) of the Constitution, the Court expressed its opinion on this question and held that the executive authority of the Prime Minister under Article 55(2) did not extend to a cession of Bangladesh territory and that the treaty cannot be implemented without amending Article 2(a) of the Constitution Which defines the territory of Bangladesh.

Now as to the first point decided, the Appellate Division clearly disapproved of the way the Certificate under Article 103(2)(a) of the Constitution was granted in this case. Its disapproval and its indication as to what a Certificate should contain is reflected in the following words :

> "In the instant case a certificate purported to be under Article 103(2)(a) is there, but it gives no indication of application of the judicial mind to the question as to whether the case is a fit one for appeal to this Division. It is not only that the question or questions of law as to the interpretation of the Constitution which the learned Judges might have thought needed our consideration have not been mentioned, the certificate speaks of "leave" which did not concern that Division at all. Strangely enough, the learned Judges thought the points raised in the application were so simple as to merit summary disposal and yet they granted the certificate. Such a mechanical approach cannot but call for strong disapproval. Indeed it was not that the appellant alone who felt aggrieved by the summary dismissal of his application by the High Court Division, the respondents also made the grievance that they were prejudiced by the summary disposal of the application since because of this they were denied the opportunity of filing an affidavit in that Division incorporating material facts."

The Appellate Division held the appeal not to be incompetent on the score of defective certificate and its reasonings are as follows:

> "In view, however, of the objection raised by the respondents against the form of the certificate, by way of abundant caution, the appellant filed a petition for special leave to appeal in which he raised the question whether Article 55(2) of our Constitution, by virtue of which the Prime Minister exercises the executive power of the Republic, authorises him to enter into an international agreement of the kind of Delhi Treaty. This is a constitutional question which also floats on the surface of the brief judgment of the High Court Division, summarily dismissing the appellant's application. We are,

therefore, of the opinion that the appeal before this Division is not incompetent, on the score of defective certificate."

Unfortunately the Appellate Divisions disapproval of the manner in which certificates are being issued by the High Court Division under Article 103(2)(a) of the Constitution still persists and in one of the recent decisions, Quzi Kamal vs. Rajdhani Unnayan Kartripakha, 44 DLR (AD) 291, Mustafa Kamal, J. observed as follows :

"Then abruptly without any discussion of any constitutional provision the High Court Division allowed the appellant's prayer for certificate under Article 103(2)(a) of the Constitution." ... ...

"Before turning to the respective submissions of the parties we must once again deprecate the persistent tendency in some judgments of the High Court Division to grant a certificate under Article 103(2)(a) of the Constitution without giving any indication of application of the judicial mind to the question as to whether the case is a fit one for appeal to this Division. Beginning with the case of Kazi Mukhlesur Rahman vs. Bangladesh, 26 DLR (SC) 44, this Division has been persistently holding that there must be an indication in the certificate as to the nature of the substantial question of law as to the interpretation of the Constitution. In the present case no Constitutional point was advanced in the High Court Division, no Constitutional point was discussed in the judgment and no question of law was referred for the decision of this Division. The grant of a certificate of fitness for appeal is a judicial function requiring care and cautiousness of a judicial mind. It is not a mere mechanical act. The High Court Division fell into an oft-repeated avoidable error in granting a certificate in this case.

As to the second decided question on *locus standi* this case will be referred to more fully in a later Chapter. The third point decided was on the plea of act of state. The Appellate Division says :

> "The respondents' third objection was that the treaty-making power being an act of state, the Delhi Treaty was not amenable to judicial review".

And after discussing what is an act of state, the Appellate Division finally says :

> "We are clearly of the opinion that in peace time the plea of act of state is not available in an action involving deprivation of rights and liberties of the citizen. The Courts have always intervened with a view to examining if the plea of act of state could be taken in defence against a citizen. The jurisdiction of courts cannot be excluded by merely raising a plea of act of state."

As to the last question decided, the Appellate Division ruled out the contention of the State that a citizen cannot be allowed to move the Court before the obligations under the treaty are performed. It rejected the State's contention that the mere making of a treaty does not affect the citizen who must wait till the performance of the obligations of the treaty. It held that the mere signing of the treaty has resulted in an impending threat to the appellant's rights as a citizen. The Appellate Division however accepted the contention of the State that the writ petition was premature, because the last article in the Delhi Treaty says that it is subject to ratification and that it would take effect "from the date of the exchange of the Instruments of Ratification". The Appellate Division held that there can be no question of a document being declared to be without lawful authority and of no

legal effect when the document itself stipulates that it will be effective only on the happening of a certain event in future, namely, the exchange of instruments of ratification. The writ petition was premature and therefore the appeal was liable to be dismissed.

There the appeal could have ended but in a rare exercise of the kind the Appellate Division proceeded to examine the merit of the appellant's case. It says, "This would suffice for disposing of the appeal which is liable to be dismissed on this ground alone. Since however, we have heard the parties on merits in relation to the question of interpretation of Article 55(2) of our Constitution, we feel that we should express our opinion on this question."

It then gives its opinion as follows :

> "Article 55(2) of our Constitution says, "The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister". The Prime Minister, or one on his authority, is thus required to exercise the executive power in accordance with the Constitution, and not otherwise. This is in keeping with the settled principle that Parliament has constitutional control over the Executive. Clause (2) of Article 143 of our Constitution says: "Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and the territorial waters and the continental shelf of Bangladesh". The Prime Minister cannot, therefore, unilaterally determine the boundaries of the country. This can only be done by law enacted by Parliament in that behalf."

It was held by the Appellate Division that consequent upon the India-Pakistan treaty of September 10, 1958, known as Noon-Nehru Pact, the southern half of south Berubari Union No.12,

together with the adjacent enclaves fell in the share of the then East Pakistan. On the advice of the Supreme Court of India under Article 143 of the Indian Constitution, vide AIR 1960(SC) 845, the Constitution (Ninth Amendment) Act, 1960 was enacted by the Indian Parliament incorporating the manner in which disputes relating to Berubari and the enclaves were resolved by the Noon-Nehru Pact. The physical possession of those parts of Berubari and other enclaves which were given to Pakistan could not be made over to Pakistan owing to litigations pending in the Indian Supreme Court, but "that cannot however, be of any consequence since the question of sovereignty over the portion of territory had already been settled and recognised by common consent and conduct of Pakistan and India. ... ..." The Appellate Division held that the retention by India, under the Delhi Treaty, of the southern half of south Berubari Union No.12 together with the enclaves cannot but involve cession of territory by Bangladesh, because they "formed an inseparable and integral part of the territory of Bangladesh in view of Article 2(a) of the Constitution which defined our territory as comprising the territories which immediately before the proclamation of independence on the 26th day of March, 1971, constituted East Pakistan."

The Appellate Division then considered a number of cases from the Journal of the International Court of Justice and some treatises on International Law and finally says as follows :

> "Ours is a written Constitution. We have already seen that the head of the Executive, namely, the Prime Minister cannot unilaterally determine the boundaries of Bangladesh which has to be done by a law of Parliament under Article 143(2) of our Constitution. It cannot but be more so when cession of territory is involved. This limitation on the part of the head of the Executive of Bangladesh is on the face of it such a "manifest and notorious" restriction on his treaty-making

power that any such treaty entered into by a foreign state with Bangladesh without the sanction of the Parliament of Bangladesh will be *ultra vires* and cannot pass title. This view finds authoritative support from authors of international repute on the subject." ... ...

"There can thus be no escape from the position that though treaty-making falls within the ambit of the executive power under Article 55(2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory, can only be concluded with the concurrence of Parliament by necessary enactment; in case of determination of boundary by an enactment under Article 143(2) and in case of cession of territory by amending Article 2(a) of the Constitution by taking recourse to Article 142."

"Had the Delhi Treaty involved a mere determination of the boundary between this country and our friendly neighbour India, it could be implemented by a simple enactment under Article 143(2) of the Constitution. In view, however, of our conclusion that it involves cession of territory by Bangladesh, we are clearly of the opinion that in order to implement this treaty, prior to ratification thereof it will be necessary to take recourse to Article 142, with a view to amending Article 2(a) which defines the territory of the People's Republic of Bangladesh."

The appeal was however dismissed.

After this judgment, Parliament enacted the Constitution (Third Amendment) Act, 1974, Act No. LXXIV of 1974, on 27-11-74 to give effect to the Delhi Treaty, by amending Article 2 of the Constitution.

Chapter 4

THE FIRST MARTIAL LAW (1975-79)

1. The Three Stewards

On August 15, 1975, Mr. Khandaker Moshtaque Ahmed assumed the Office of the President of Bangladesh and placed the whole country under Martial Law. He, however, did not assume the office of the Chief Martial Law Administrator. By a Proclamation dated the 20th August, 1975 the Constitution continued to remain in force, but it was made "subject to" the Martial Law Proclamation and the Martial Law Regulations and Orders and other Orders made by him. All Courts, including the Supreme Court, were denied any power to call in question or declare void or illegal the said Martial Law Proclamation, Regulation, etc. He made over the office of President to Mr. Justice A. M. Sayem, the Chief Justice of Bangladesh, on the 6th November, 1975. By another Proclamation (called the Second Proclamation) dated the 8th November, 1975 Mr. Justice A. M. Sayem assumed the powers of Chief Martial Law Administrator "for the effective enforcement of Martial Law" and made some amendments in the Proclamation of the 20th August, 1975 which he adopted subject to the modifications. Parliament was dissolved with effect from the 6th November, 1975 and some changes were made in the Constitution by this Proclamation. On the 29th November, 1976 Mr. Justice A. M. Sayem made the Third Proclamation under which he relinquished the Office of the Chief Martial Law Administrator and handed over the said office to Major General

Ziaur Rahman. On the 21st April, 1977 Mr. Justice A. M. Sayem resigned from the office of President after appointing Major General Ziaur Rahman as the President. Major General Ziaur Rahman continuing to hold the two offices together lifted Martial Law by a Proclamation dated the 7th April, 1979.

Each Martial Law at any given point of time is clothed with a rationale of its own, sometimes to seize power for the sake of power, sometimes to correct some imbalances in the body politic and sometimes with a plan and programme of its own, called "programmatic Martial Law". The First Martial Law in Bangladesh was headed by 3 different persons of different background, the first one a politician, the second a Chief Justice and the third an Army General. It is quite natural for them to administer Martial Law in the light of their own experience and background, but all three of them in varying degrees displayed a common intent and course of action, first, to dismantle the Fourth Amendment brick by brick and secondly, to introduce some permanent changes in the Constitution.

2. Dismantling the Fourth Amendment

The preceding Chapter contained a brief narration of the havoc wrought by the Fourth Amendment to the original basic structure of the constitution. The Fourth Amendment came into force on the 25th January, 1975. A new Part VIA was inserted in the Constitution, providing for the formation of a National Party to the exclusion of all other parties. Bangladesh Krishak Sramik Awami League was formed in pursuance of this constitutional provision. The District Administration Act, 1975 was enacted on the 10th July, 1975 for the administration of districts along totalitarian lines. All newspapers and periodicals, except a designated few, lost their declaration by the Newspapers (Amendment of Declaration) Act, 1975, made on the 19th July,

1975. Multiple political parties and independent newspapers and periodicals lost their existence before Martial Law was proclaimed on the 15th August, 1975.

Mr. Khandaker Moshtaque Ahmed did not restore the multi-party system. but prohibited altogether formation of political parties promulgating the Political Parties (Prohibition) Ordinance, 1975 on the 30th August, 1975. The only political party allowed under the Fourth Amendment, Bangladesh Krishak Sramik Awami League, was thus barred from functioning at all. By the Second Proclamation dated the 8th November, 1975 Mr. Justice A. M. Sayem omitted Part VIA of the Constitution, thus dealing a *coup de grace* to the very concept and provision of one-party state in the Constitution, never to be raised again. Mr. Justice A. M. Sayem also repealed the Political Parties (Prohibition) Ordinance, 1975 by promulgating Political Parties Regulation, 1976 (Martial Law Regulation No. XXII of 1976) on the 28th July, 1976 allowing a cautious and guided formation of political parties and thus paved the way for re-introduction of the multi-party system inherent in the structure of the original Constitution. Major General Ziaur Rahman made some amendments in the Political Parties (Prohibition) Ordinance, 1976 by promulgating the Political Parties (Amendment) Regulation, 1977 (Martial Law Regulation No. VIII of 1977) on the 13th October, 1977. On the 17th November, 1978 he promulgated the Political Parties Ordinance, 1978 (Ordinance NO. XLV of 1978). substantially re-enacting the Political Parties (Prohibition) Ordinance, 1976. It is thus a great irony of history that while the elected representatives of the people in a democratic dispensation banned all political parties except one, it was a Judge and later a General, who, under the cover of Martial Law, restored the multi-party system.

Mr. Khandaker Moshtaque Ahmed repealed the District Administration Act, 1975 by promulgating the District adminis-

tration (Repeal) Ordinance, 1975. Ordinance No. XLV of 1975 on the 27th August, 1975, thus giving the concept of a totalitarian one-party nominated district administration a decent burial. Mr. Justice A. M. Sayem repealed the Newspapers (Amendment of Declaration) Act, 1975 by promulgating the Newspapers (Amendment of Declaration) (Repeal) Ordinance, 1976, Ordinance No. L of 1976, on the 30th June, 1976. Newspapers were taken out of State control.

The series of acts detailed above knocked out the implementational aspects of the Fourth Amendment, but the First Martial Law operated on a deeper level and restored, in a large measure, though not fully, the original Constitution enacted in 1972 and also introduced some basic changes giving the Constitution a new look.

3. Constitution – experimentation, restoration and change

Mr. Justice A. M. Sayem. by Second Proclamation Order No. III of 1976 (3rd May, 1976) omitted the proviso to Article 38. which omission, a significant one, survives to this day. Article 38 is a Fundamental Right, it is Freedom of Association, and the proviso was follows :

> "Provided that no person shall have the right to form, or be a member or otherwise take part in the activities of any commercial or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose."

The omission of the proviso has radically altered the character of political activities in the country.

By the Second Proclamation Order No. IV of 1976 (28th May, 1976) Mr. Justice A. M. Sayem restored the original Article

44 – the guaranteed fundamental right to move the High Court Division for enforcement of fundamental rights – which also survives to this day. But his other attempt, to have a Supreme Court and a High Court, with two separate Chief Justices, having come into effect from 13-8-76, did not survive. By the Second Proclamation Order No. I of 1977 (27th November, 1977), Major General Ziaur Rahman restored with some changes the original Articles 94-113 of the Constitution with effect from 1-12-77 and the Supreme Court again started functioning with two Divisions, as originally provided, with one common Chief Justice.

Experimentations and restorations aside, the. First Martial Law lastly headed by Major General Ziaur Rahman effected some fundamental changes in the Constitution by Proclamations Order No. I of 1977 (23rd April, 1977). This legislation was a piece of advance thinking and although enacted in 1977, the far-reaching changes in the Constitution were to come into force on the revocation of the three Proclamations and the withdrawal of Martial Law, which were at the time of promulgation of this legislation, two years away. The Preamble of the Constitution will be preceded by "BISMILLAH - AR - RAHMAN - AR - RAHIM (In the name of Allah. the Beneficent, the Merciful)". The Preamble itself underwent two changes. For the words "a historic struggle for national liberation" the words "a historic war for national independence" was substituted in the first paragraph. In the second paragraph instead of "nationalism, socialism, democracy and secularism" as the "high ideals", "absolute trust and faith in Almighty Allah, nationalism, democracy and socialism meaning economic and social justice" was substituted and "the war for national independence" was substituted for "the national liberation struggle". The "fundamental principles of the Constitution" had undergone a fundamental change. Correspondingly analogous changes were made in the Fundamental Principles of State Policy, so as to bring them in

conformity with the changed Preamble. Article 8 was thus changed correspondingly. The original Articles 9 and 10 of the Constitution, containing Bengalee nationalism and socialism and freedom from exploitation were substituted by two other concepts – that of promotion of local government institutions and participation of women in national life. Article 12 of the original Constitution contained secularism and freedom of religion which was omitted altogether. The procedure for the removal of Judges of the Supreme Court was also changed which has been discussed in Chapter II. Throughout all these constitutional changes, the Presidential system remained in tact. Perhaps that was the only merit of the Fourth Amendment.

Parliament constituted after a general election passed the Constitution (Fifth Amendment) Act, 1979, Act No. I of 1979, on the 6th April, 1979 ratifying and confirming the three Proclamations, Martial Law Regulations etc., and making the same immune from judicial review, by adding paragraph 18 to the Fourth Schedule to the Constitution.

4. Extra-constitutional takeover

A. The Judges Dilemma

There are occasions when either the established constitutional machinery breaks down or an extra-constitutional force takes over the reins of administration, posing a dilemma for the Judges. Nearly all Constitutions require the Judges to take an oath to "preserve, protect and defend the Constitution and the laws" (see Article 148 and the Third Schedule of our Constitution). But when the Constitution is either abrogated or suspended and made subservient to the will of an extra-constitutional force, the Judges have to make a choice. An Argentinian Judge (Oyhanarte, J.) has aptly described the dilemma of Judges :

> "The Supreme Court cannot modify the course of history. It lacks the power necessary to do this. When it is faced with the overthrow of constitutional authorities and the installation of a Government of force by what have come to be called 'revolutionary' means, the judges of the court can do three things:
>
> (1) resign, thus transferring the responsibility of the decision to others,
>
> (2) simply accept the fact,
>
> (3) try to save those institutional values which can still be saved.

(Quoted from Snow, Judges and Generals: The Role of the Argentine Supreme Court during Periods of Military Government (1975), p. 617).

In R vs. Ndhlovu, [1968] 4 S.A.L.R. 515. Sir Hugh Beadle, C. J. expressed the dilemma this way:

> "The problem of whether a judge should stay or go is a matter of personal choice. ... ... The first duty of judges then, as I see it, is, 'whatever the political battle', to 'keep out of the main area of dispute' and to 'carry on their peaceful task of protecting the fabric of society and maintaining law and order,' provided, of course, their judicial independence is not tampered with. ... ... The judge is simply forced into a position of accepting the facts and the laws as they are, whether he likes them or not. He has, as I have said before, been overtaken by events."

Resignation of Judges in revolutionary situations has not been uncommon, but except for the ripple that it causes in the body politic neither the Judges by resignation *en masse* or in ones or twos have been able to deflect the revolutionary regime from following the course of action it chose to pursue nor have the

people at large carried the mantle from the Judges to overthrow the extra-constitutional force. On the other hand when Judges resigned in protest against a unconstitutional takeover or when Judges were removed because of (their obstruction to the wishes of the new authority, their successors on the Bench merely conformed to the wishes of the new regime and often they were also of so low a calibre that justice was no longer administered properly. On the other side it may perhaps be rightly argued that the continuance in office of the Judges gives the new regime a semblance of legitimacy.

In the recent Constitution 8th Amendment case, (1989) BLD (Spl) I, M.H. Rahman, J. offers his own choice in the following words :

> "The Court's attention has repeatedly been drawn to the oath the Chief Justice or a Judge of the Supreme Court takes under Article 148 of the Constitution on his appointment. Mr. Asrarul Hossain has pointed out the difference between the language of the oath the Judges of the Indian Supreme Court take "to uphold the Constitution", and that of the oath the Judges of our Supreme Court take "to preserve, protect and defend the Constitution". The import of the single word 'uphold' is no less significant or onerous than that of the three words 'preserve, protect and defend'. In either case the burden is the same. And the Court carries the burden without holding the swords of the community held by the executive or the purse of the nation commanded by the legislature. The Court could do so because all the authorities of the Republic act, as enjoined by the Constitution. under art. 112 in aid of the Court for securing obedience to its judgments and orders. When the Constitution is suspended or made subject to a non-law the Court is deprived of the aid of the relevant authorities of the Republic. When such an abnormal situation occurs a Judge has got two alternatives: either he would resign

or he would hold on to his post. One who has not lost faith in the rallying power of law may prefer a temporary deprivation of freedom to desertion. It is hardly necessary to point out that the Court will have no worthwhile power without the Constitution. The future of the Constitution lies in the commitment of the citizens who are obliged under art. 21 of the Constitution to observe the Constitution." (para 488)

Expectation from the Judges and the real position of Judges are highlighted in the monograph on Revolution in the Legal Systems of Third World States by F. Reyntjens (University of Antwerp) and L. Wolf-Phillips (London School of Economics) in the following words :

"When the judiciary is asked to 'stand up' against usurper it is too often forgotten that Judges may not have the means to do so. Often, but not always, the judicial branch is the only one left in tact in its composition (not generally in its powers) after a revolutionary take-over. Why should the Courts be able to resist the unconstitutional action if the deposed Executive, the dissolved Parliament, (a part of) the Army and the Police, the Trade Unions, ... cannot ? The Courts can never really be the "last bastion" against illegality because in terms of power to enforce obedience (physical, if need be) they constitute the weakest link. To large extent, therefore, De Smith is right when arguing that, in general, legal analyses of unconstitutional action are fundamentally political judgments dressed in a legalistic garb."

B. Two Approaches

Generally the Judges have approached the powers of the usurper in revolutionary situations in two broad ways, first, by applying the Kelsen doctrine of "revolutionary legality" and, secondly, by applying the "doctrine of State necessity".

As early as in 1925 Hans Kelsen in his "General Theory of Law and State (1949)" presented the legal effects of a revolution in a rational and systematic manner. To him a revolution means a successful revolution. To be successful the old order ceases and the new order begins to be efficacious, "because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. (p.118)

The first application of Kelsen's doctrine was made in the Pakistan case of the State vs. Dosso (PLD 1958 (SC) 533). Munir, C.J. held that the new legal order after a revolution should be judged by "reference to its own success" and the overthrown legal order by "the efficacy of the change". He said :

> "Where a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change is a revolution and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order irrespective of how or by whom such a change is brought about."

This interpretation of Kelsen's pure theory of law was followed in Uganda vs. Commissioner of Prisons. ex parte Matovu (Uganda 1966-67) and was referred to approvingly in the Appeal Court and Privy Council stages of Madzimbamuto vs. Lardner-Burke Rhodesia, 1966-68). It was not followed in E.K. Sallah vs. the Attorney General (Ghana, 1970) and roundly overturned in Asma Jilani vs. The Government of the Punjab (PLD 1972) (SC) 139). the last one saying. "The principle laid down in Dosso's case is wholly unsustainable and cannot be treated as

good law either on the principle of *stare decisis* or even otherwise."

The other approach made by the Judges to meet revolutionary situations is by application of the "doctrine of state necessity". When an unconstitutional action is taken by the incumbent authority and the legal order is only partly disregarded, the legal ruler himself has taken something like a revolutionary step not covered by the express words of the Constitution or even in conflict with it. This unconstitutional behaviour is taken to be necessary for the survival of the State. It is called a departure from the Constitution and it is sought to be justified in the interest of averting an impending disaster and preventing the State and society from dissolution. The "doctrine of state necessity" was followed in Special Reference No.1 of 1955 by the Governor General (PLD 1955 (FC) 435). Republic vs. Mustafa-Ibrahim (Cyprus 1964) and Begum Nusrat Bhutto vs. The Chief of Army Staff and the Federation of Pakistan (PLD 1977 (SC) 657). The upshot of this doctrine is that "in order to bridge the gap between the law and the facts of political life", and to avoid the possibility "that a State and the people should be allowed to perish for the sake of its Constitution" and to accommodate an action which was "undoubtedly an extra-constitutional step, but obviously dictated by the highest consideration of State's necessity and the welfare of the people", the doctrine of state necessity is to be read into a written Constitution and the constitutional deviations are to be upheld to preserve the State itself.

C. *Proclamation considered*

As we all know Martial Law was promulgated in our country as many as twice in a short span of 7 years, first, on the 15th August, 1975 and secondly on the 24th March, 1982.

Happily or unhappily for us, I do not know, the Kelsen theory of revolutionary legality or the doctrine of state necessity was neither directly mooted nor re-evaluated by way of any explicit or implicit challenge to the imposition of Martial Law in Bangladesh. Some fringe questions came up for consideration, but in considering the same the Appellate Division pronounced itself on the Constitution and Martial Law the broad sweep of which has a far-reaching significance and which will reverberate the corridors of constitutional debate for many years to come, should such situations recur.

On August 15, 1975, Mr. Khandaker Moshtaque Ahmed assumed the office of the President of Bangladesh and placed the whole country under Martial Law. He issued a Proclamation on the 20th August, 1975, clauses (d) – (g) of which came up for repeated consideration by the Appellate Division. These clauses are as follows :

> "(d) this Proclamation and the Martial Law Regulations and Orders (and other Orders) made by me in pursuance thereof shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force;
>
> (e) the Constitution of the Peoples Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders (and other Orders) made by me in pursuance thereof. Continue to remain in force;
>
> (f) all Acts, Ordinances, President's Orders and other Orders, Proclamations, rules, regulations, rules by-laws, notifications and other legal instruments in force on the morning of the 15th August, 1975, shall continue to remain in force until repealed, revoked or amended;

(g) no Court, including the Supreme Court, or tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order (or other Orders) made by me in pursuance thereof, or any declaration made by or under this Proclamation, or mentioned in this Proclamation to have been made, or anything done or any action taken by or under this Proclamation, or mentioned in this Proclamation to have been done or taken or anything done or any action taken by or under any Martial Law Regulation or Order (or other Orders) made by me in pursuance of this Proclamation."

Clause (j) of the 2nd Proclamation issued by Mr. Justice A. M. Sayem on the 8th November, 1975 provided that this (the second) Proclamation shall be deemed to be a part of the first Proclamation and shall have effect as modified by the Second Proclamation. Clauses (d) to (g) in the Proclamation of the 20th August, 1975 continued to remain in force upto the end of Martial Law.

D The case of Halima Khatun vs. Bangladesh, 30 D.L.R. (SC) 207 decided on Jan. 4, 1978

By Martial Law Regulation No. VII of 1977 the provisions of P.O. No. 16 of 1972 concerning abandoned property were made more stringent, even the Supreme Court was debarred to determine any question relating to the legality of Government action taken under the aforesaid P.O. and all judgments, etc. passed by any Court for the restoration etc. of any property which had been taken over as abandoned property under the said Order were annulled. Halima Khatun filed a writ petition challenging the taking over of her property as an abandoned property but the High Court Division discharged the Rule on the ground that it required the determination of disputed questions of fact. At the

hearing of her petition for leave to appeal before the then Supreme Court (now Appellate Division) it was argued that the Proclamation of the 15th August, 1975 did not authorise the Chief Martial Law Administrator to oust the jurisdiction of the Supreme Court by means of an enactment like Regulation No.VII of 1977. It was submitted that the constitutional jurisdiction of the Supreme Court can be taken away or curtailed only by a Proclamation. A Regulation is in the nature of an ordinary Act or Ordinance which cannot be used to alter or amend the constitutional provisions. The vires of the Regulation was challenged not because of want of authority in the Chief Martial Law Administrator but because it constituted an abrupt departure from a consistent practice. It was further argued that neither the Constitution nor the Proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and the power of the law-making authority is circumscribed by the limitation inherent in the Proclamation itself.

The Appellate Division negatived the contentions. It was held (judgment by Fazle Munim, J.) that the power to amend any constitutional provision is distinct from the procedure for making such alterations or amendments. The Proclamations have not provided any procedure relating to the amendment of the Constitution. Noticing clauses (d), (e) and (g) of the Proclamation the learned Judge observed :

> "It may be true that whenever there would be any conflict between the Constitution and the Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not seem to concede such superiority to the Constitution. Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as the supreme law of the country. There is no doubt an express declaration in Article 7(2) of the Constitution to the following

effect : "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void." Ironically enough this Article, though still exists, must be taken to have lost some of its importance and efficacy. In view of clauses (d), (e) and (g) of the proclamation the supremacy of the Constitution as declared in that Article is no longer unqualified. In spite of this Article, no constitutional provisions can claim to be sacrosanct and immutable. The present constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation."

The Appellate Division noticed clause (g) of the Proclamation of August 20, 1975, namely, no Court including the Supreme Court has any power to call in question in any manner whatsoever or declare illegal or void the Proclamation or any Regulation or Order, and held that "there is no vagueness or ambiguity in the meaning of the words used in the clause as regards the total ouster of jurisdiction of this Court" (para 19). It was the duty of the Judges to administer a 'harsh' or even an unjust law.

The argument that neither the Constitution nor the Proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and that the power of the law-making authority is circumscribed by the limitation inherent in the Proclamation itself was obviously aimed at achieving an equation of co-existence between the Constitution and the proclamation, but the Appellate Division put the Constitution in no uncertain terms as subservient to the Proclamation. There was no saving of judicial power at all.

E. The case of Sultan Ahmed vs. Chief Election Commissioner, 30 DLR (HCD) 291, decided on May 31, 1978

In the wake of Halima Khatun's case (supra), two important decisions were delivered by the High Court Division touching upon the same questions. Shahabuddin Ahmed, J. in the case of Sultan Ahmed vs. Chief Election Commissioner, 30 DLP (HCD) 291, observed as follows :

"On plain reading of these provisions of the Proclamation it is as clear as anything that the Martial Law is the Supreme law of the land and that though the Constitution has not been abrogated it has been made subordinate to the Martial Law and that the Constitution will continue in force subject to the Martial Law, that is to say, it will have effect so long it does not come in conflict with the Martial Law. We have, in this judgment, used the expression 'Martial Law' to include the Proclamations with various amendments. Martial Law Regulations and Orders and all other Orders made in pursuance of the Proclamations. Jurisdiction of all Courts including this court to question the validities of any of these Martial Law provisions or ally action taken thereunder has been ousted, except of course, the jurisdiction to examine whether any action allegedly taken under Martial Law has been actually taken thereunder. The Appellate Division has, in a recent case – C.P. No. 171/1977 along with C.P. No. 305/77. (Halima Khatun's case) confirmed this position of law. Relevant part of the judgment of the Appellate Division is quoted below :

"The validity of such legislation which may take the form of either a Proclamation or Regulation or Order cannot be challenged as invalid in any court of law including the Supreme Court. ... Mr. Khandaker Moshtaque Ahmed who

became the President of Bangladesh assumed full powers of the government and by clauses (d) and (e) of the Proclamation made the Constitution of Bangladesh which was allowed to remain in force, subordinate to the Proclamation, and any Regulation or Order as may be made by the President in pursuance thereof ... under the Proclamation ... the Constitution has lost its character as the Supreme Law of the country."

F. The cases of Haji Joynal Abedin vs. State, 30 DLR (HCD) 371 decided on May 4, 1978 and State vs. Haji Joynal Abedin, 32 DLR (AD) 110 decided on Dec. 20, 1978

In the other case decided by the High Court Division on May 4, 1978. Haji Joynal Abedin vs. State, 30 DLR (HCD) 371, a discordant note was struck. It appears that the Appellate Division's judgment in Halima Khatun's case (supra) decided on January 4, 1978 was not brought to the notice of the High Court Division.

I need not dilate upon the facts of the case. The High Court Division (judgment by Badrul Haider Chowdhury, J.) sought to extricate the 1975 Martial Law in Bangladesh from the clutches of the all-pervading doctrine of revolutionary legality and sought to brine it within the purview of doctrine of state necessity and constitutional deviation in the following words :

"We have already found that present Martial Law is completely different from that of 1958 or 1969. The Constitution has not been abrogated; only certain part of it has been circumscribed by the Martial Law Proclamation out of necessity. This Martial Law is a mere constitutional deviation and not one of Wellingtonian style".

The High Court Division propounded the concept of Martial Law Courts existing side by side with the ordinary Courts and was unable to accept the view that the jurisdiction of the superior Courts has been ousted in so far as Martial Law Courts are concerned. A sentence of death passed upon five condemned prisoners by a Special Military Court was declared to have been passed without lawful authority and of no legal effect.

The Appellate Division, in the appeal that followed, State vs. Haji Joynal Abedin, 32 DLR (AD) 110, decided on Dec 20, 1978, set aside the judgment of the High Court Division. The Appellate Division (judgment by Ruhul Islam, J.) observed as follows :

> "From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a position subordinate to the Proclamation, inasmuch as the unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial Law Regulation or orders and other orders; and the Constitution was amended from time to time by issuing Proclamation. In the face of the facts stated above I find it difficult to accept the arguments advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammelled by the Proclamation and Martial Law Regulations. ... ... The moment the country is put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position. Martial Law Courts being creatures either of the Proclamation or Martial Law Regulations, have the authority to try any offence made triable by such Courts."

This decision by a majority also foreclosed an exercise of judicial power by the superior Courts as lone as the bar under the Proclamation exists.

K. M. Subhan, J. however in his dissenting judgment, was clearly of the view that the Constitution and the Martial Law are co-extensive and that the Constitution is not subordinate to the Martial Law. The President still takes oath to "preserve, protect and defend the Constitution" and he has not determined, through express legislations, if the Martial Law Regulations or Orders shall have precedence over constitutional legislations. The writ jurisdiction of the High Court Division having neither been abrogated nor suspended and not being in conflict with Martial Law Regulations or Orders, the Martial Law Courts are amenable to the writ jurisdiction of the High Court Division whose jurisdiction shall be ousted only when it is shown that (i) the Martial Law Court has been properly constituted in accordance with the statute forming the Martial Law court, (ii) accused are subject to the jurisdiction of the Martial Law Court, (iii) the offence must be one triable by the Martial Law Court. and (iv) the jurisdiction. He relied upon the case of Zafar-ul-Ashan vs. Republic of Pakistan, 12 DLR (SC) 9.

It will be interesting later to see that the Appellate Division came round to the last-expressed views of the learned dissenting Judge in some subsequent cases.

G. *The case of Khandker Ehteshamuddin Ahamed @ Iqbal vs. Bangladesh 33 DLR (AD) 154, decided on March 27, 1980*

Shortly after the lifting of first Martial Law by the Proclamation of April 7, 1979 came up the above case before the Appellate Division which took note of the theory of revolutionary legality (State vs. Dosso) and the doctrine of State necessity (Begum Nusrat Bhutto vs. The Chief of Army Staff and the Federation of Pakistan), but did not consider it necessary to dilate on the two theories because there was no challenge to the

imposition of Martial Law in Bangladesh. What was challenged in the case under consideration was the trial of one Ehteshamuddin @ Iqbal under section 302 of the Penal Code by a Special Martial Law Court, and conviction and sentence of death passed thereunder, the order of the reviewing authority and the confirmation thereof by the Chief Martial Law Administrator. The attack was made on some fringe grounds which were rejected by the High Court Division and on leave to appeal by the Appellate Division.

As to the question whether the proceedings of the Special Martial Court could be examined by the High Court Division in exercising its constitutional jurisdiction after the passing of the 5th Amendment to the Constitution the Appellate Division noticed Paragraph 18 added to the Fourth Schedule to the Constitution by the Constitution (5th Amendment) Act. 1979 (Act I of 1979), ratifying and confirming all Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders or any other laws made during the period between August 15, 1975 and April 9, 1979. Paragraph 18 also confirmed, ratified and declared amongst others that any order made or sentence passed by any Court, Tribunal or authority in the exercise or purported exercise of the powers, derived from Proclamation etc., 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. The Appellate Division held that in view of the aforesaid Paragraph 18 read with the earlier Proclamations the proceedings before the Martial Law Court, the order of the reviewing authority and the order of the confirming authority are not now open to examination by the High Court Division in its writ jurisdiction. Ehteshamuddin's case therefore not only reiterated the subservience of the Constitution to the Proclamation etc., for as long as Martial Law of 1975 existed, but also beyond, after the Constitution was revived following the lifting of Martial Law.

In Ehteshamuddin's case the Appellate Division however made a small opening by way of keeping the proceedings of Martial Law Court subject to certain checks by the superior Courts. The Court (judgment by Ruhul Islam, J.) adopted the views of the Supreme Court of Pakistan in the cases of State vs. Zia-ur Rahman, PLD 1973 (SC) 49 and Federation of Pakistan vs. Saeed Ahmed, PLD 1974 (SC) 151 and held as follows:

> "The moment any Martial Law Court is found to have acted without jurisdiction, more precisely, has taken cognizance of an offence not triable by such Courts under the Martial Law Regulation, or the Martial Law Court is not properly constituted, the superior Courts' power to declare the proceedings wholly illegal and without any lawful authority in exercise of its power under Article 102 of the Constitution cannot be denied. The power of the Superior Courts can be extended to examine jurisdiction of Martial Law Court when it is found that it is *coram non judice.*"

But if the Superior Court is to decide whether the proceedings in a Martial Law Court are without jurisdiction, or *coram non judice* or *mala fide*, then necessarily this is an exercise of judicial power under Article 102 of the Constitution. The earlier decision in Halima Khatun (supra) and Haji Joynal Abedin's case (supra) foreclosed any exercise of judicial power in an application under Article 102 for at least as long as Martial Law existed. In Ehteshamuddin's case the Appellate Division veered round the view, at least after the Constitution was revived, that the judicial power of the Superior Courts extends to an examination of the proceedings of even a Martial Law Court with certain defined ends in view. Supreme Court was barred by clause (g) of the Proclamation to question in any manner whatsoever any Proclamation etc., which bar was continued by Paragraph 18 to

the fourth Schedule to the Constitution. There can be no case of treating the bar under the Proclamation to be superior to the bar imposed by Paragraph 18. If judicial power is available inspite of the bar under Paragraph 18, why should it not be available during a bar under the Proclamation?

Badrul Haider Chowdhury, J., while concurring with the unanimous decision of the Appellate Division in Ehteshamuddin's case placed his reliance upon the cases of Muhammad Ayub Khuro vs. Pakistan, PLD 1960 (SC) 237, Afzal Muhammad vs. The Commissioner, Lahore Division, PLD 1963 (SC) 401 and Zafur-ul-Ahsan vs. The Republic of Pakistan, 12 DLR (SC) 9 and held that there is a distinction between judicial power and jurisdiction. The superior Court has always the power to decide its own jurisdiction and this exercise is nothing but the exercise of judicial power.

H. The case of Jamil Huq vs. Bangladesh 34 DLR (AD) 125. decided on Sept. 1981

This was a case in which 29 persons were tried and convicted by a Court Martial convened by the Chief of the Army Staff under the Army Act. 1952. They were charged with the offence of mutiny under the Army Act. The mutiny took place in the night of 29/30th May, 1981 which resulted in the death of President Ziaur Rahman. Twelve persons were sentenced to death. The finding and sentence were confirmed by the Chief of Army Staff and their mercy petitions before the Acting President were also rejected. The twelve petitioners filed separate applications under Article 102 of The Constitution before the High Court Division which without issuing any Rule dismissed the petitions summarily on the ground that in view of sub-clause (5) of Article 102 of the Constitution the High Court Division has no jurisdiction to entertain these writ petitions. Sub-clause (5) of Article 102 is as follows :

> "102(5). In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies."

"The petitioners filed petitions for leave to appeal before the Appellate Division from the judgment of the High Court Division. In dismissing their petitions (judgment on Sept. 22, 1981) the Appellate Division carried Ehteshamuddin's case further by holding that even under sub-clause (5) of Article 102 of the Constitution the High Court Division has jurisdiction to interfere if the Court Martial convened under the Army Act is *coram non judice* (the Court is not properly constituted) or the proceedings are taken *mala fide* or if the Court Martial reaches a decision without any evidence or if the persons tried by the Court Martial are not amenable to the jurisdiction of the Court Martial at all or if the offences tried by the Court Martial are not triable by that Court at all. But the submission that the Court Martial is a Court amenable to the supervisory or superintending jurisdiction of the High Court Division under Article 109 of the Constitution was rejected. It was held that these Courts are creatures of the Army Act and are all ad-hoc Courts to be convened as and when necessity arises. The necessary supervisory hierarchy has been created by the Army Act itself and both the Constitution and the law have cautiously kept these Courts out of the ambit of the Civil Courts.

In Ehteshamuddin's case it was held that the proceedings of Martial Law Courts are not immune from interference if these are without jurisdiction, *coram non judice* or *mala fide*. In Jamil Huq's case this principle was extended to a Court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies.

1. *The case of Nasiruddin* vs. *Government of Bangladesh,. 32 DLR (AD) 216, decided on April 14, 1980*

In view of the gradual but perceptible appreciation by the Appellate Division of the necessity of existence and exercise of judicial power inspite of bars and prohibitions it became necessary to clarify the Appellate Division's earlier decision made in Halima Khatun's case. This was done in the case of Nasiruddin vs. Government of Bangladesh, 32 DLR (AD) 216, decided on April 14, 1990 and the Court (judgment by K. Hossain. C.J.) held as follows :

> "In Halima Khatun's case the decision is that if any action of taking over or vesting of a property comes within the mischief of Martial Law Regulation VII of 1977, any proceedings seeking to challenge the taking over or vesting of such property shall abate. The further observation that requires to be made is that abatement of the proceedings will follow in such cases, except where the taking over or vesting is without jurisdiction or *coram non judice* or if it is *mala fide* and, in such circumstances such action or order is not protected under the said Regulation. With this clarification in Halima Khatun's case and in conformity of the two decisions set out, is to be held that there cannot be any question of abatement of any legal proceedings taken by an aggrieved person to protect his legal right or interest in the property against which action has been taken or vesting order made which is without jurisdiction or *corarn non judice* or is *mala fide.*"

Nasiruddin's case is important also for enlarging the interpretation of the words "purported exercise" of power using which expression the Constitution (5th Amendment) Act ratified, confirmed and validated all Martial Law Proclamations and actions taken under it. In Ehtashamuddin's case the Appellate

Division made a cautious opening, but in Nasiruddin's case, it made its position clear :

> "It is to be observed that when an authority is vested with a jurisdiction to do certain acts and in the exercise of that jurisdiction he does it wrongly or irregularly the action can be said to be done within the purported exercise of his jurisdiction. But an act which is manifestly without jurisdiction, such as the property which not being an abandoned property within the meaning of Presidential Order 16 of 1972 is declared to be so, or in case of judicial or quasi-judicial act which is *coram non judice* the use of the expression "purported exercise" in the validating clause of Fifth Amendment of the Constitution cannot give such act the protection from challenge, it being *ultra vires*. It is true *mala fide* act is also not protected, but then *mala fide* is to he pleaded with particulars constituting such *mala fide* and established by cogent materials before the Court."

The Fifth Amendment to the Constitution therefore received an extended interpretation from the Appellate Division. The Supreme Courts' right to exercise judicial power, inspite of a bar and inspite of a protection given to "purported exercise" of power stands established.

J. *The case of Khandaker Moshtaque Ahmed vs. Bangladesh 34 DLR (AD) 222, decided on Feb. 17, 1982*

In concrete terms the Appellate Division decided in the case of Khandaker Moshtaque Ahmed vs. Bangladesh, 34 DLR (AD) 222, on Feb 17, 1982, how an order of conviction and sentence passed by a Special Military Court can be set aside and quashed on the ground of *mala fide*. The facts constituting *mala fide* were stated on affidavit before the High Court Division in an

application under Article 102 of the Constitution but the High Court Division discharged the Rule holding that these facts, however colourful *mala fide* might be, make the relevant Martial Law legislation immune from challenge in any Court.

The Appellate Division recounted its own decisions in Ehteshamuddin's case and Jamil Huq's case and held on facts that the apprehension of the appellant that the proceedings had been initiated *mala fide* cannot be brushed aside. The Order of the Special Martial Law Court and the Order of the Government on review were set aside.

K. The case of Meher Ali vs. A.K. Murshid, 42 DLR (HCD) 357, decided on May 25, 1989

The High Court Division, however, applied the *ratio decidendi* of Ehteshamuddin's case and Nasiruddin's case in the case of Meher Ali vs. A.K. Murshid, 42 DLR (HCD) 357, decided on May 25, 1989. A civil suit was transferred to a Summary Martial Law Court which was not set up for adjudication of civil disputes involving right to property, but which nevertheless passed some orders after trial in a landlord-tenant matter. The High Court Division held (judgment by F.H.M.H. Rahman, J.) that the order of transfer of the civil case from the Civil Court to a Summary Martial Law Court and trial thereof was without jurisdiction, *coram non judice*, nullity and void *ab initio*. The Summary Martial Law Court's decision was set aside.

L. The case of Bangladesh vs. Mahbubar Rashid, 1981 BLD (AD) 300, decided on January 5, 1981

Upon the respondent Mahbubar Rashid's conviction by a Special Martial Law Court under Regulation II of Martial Law

Regulations No. I of 1975, the proceedings of that case were submitted to the Government for review. In the meantime, Martial Law was lifted by a Proclamation dated April 7, 1979 before the review could be made. Clause (e) of the said Proclamation was as follows :

> "(c) The proceedings of every case tried and disposed of at any time before the commencing day by Special Martial Law Court or a Special Martial Law Tribunal, after the commencing day, be reviewed by the Government, hereinafter referred to as the reviewing authority, as if the said Martial Law Regulations and Martial Law Orders had not been repealed."

The Government by an Order dated April 19, 1979 informed the Martial Law Court that on review the Government did not find anything to interfere with the order of conviction and sentence. The High Court Division, on a writ petition, held the order of review to be illegal in the absence of any proper judgment. On appeal, the Appellate Division found that the Government applied its mind to the case and on that account the order of review should not have been interfered with. It was submitted on behalf of the convicted-respondent that by the Proclamation of withdrawal of Martial Law, not only the three Proclamations were revoked, but also this repealing Proclamation stood incompetent with the coming into force of the Constitution. Therefore, no further action under any of the revoked Proclamations or repealed Martial Law Regulations or Orders can be taken. In repelling this contention, the Appellate Division (judgment by Shahabuddin Ahmed. J. held.

> "This view is obviously incorrect for the last Proclamation (dated April 7, 1979) though it revoked all previous Proclamations dated 20th August, 1975, 8th November, 1975 and 29th November, 1976 and repealed all Martial Law

Regulations and Martial Law Orders, did not revoke itself. Revocation of this Proclamation will mean continuation of the Martial Law. Since this Proclamation has lifted the Martial Law which was declared on and from August, 1975, none of its provisions comes in conflict with the Constitution. In clause (e) this Proclamation has only provided for disposal of certain pending matter and this provision has been ratified by the Constitution (Fifth Amendment) Act which was enacted simultaneously with the last Proclamation. The contention fails."

The appellant-State had, however, raised an interesting question, namely, the ouster of jurisdiction of the Supreme Court. It was pointed out that Regulation 4 of Martial Law Regulations No. 1 of 1975 (under which the convict-respondent was tried) provided that the decision of the reviewing authority "is final and shall not be called in question in any manner whatsoever in, by or before any court including the Supreme Court". The Appellate Division only reiterated that Supreme Court can interfere with a decision of the Martial Law Authorities or Court in a case of total absence of jurisdiction or in a case of *mala fide* exercise of jurisdiction, but did not decide as to whether only the power of review in an undisposed of case survived or the said power along with the bar of jurisdiction of the Supreme Court also survived the withdrawal of Martial Law.

M. The end-result

In only Haji Jainul Abedin's case (supra), the imposition of Martial Law in 1975 was viewed by the Bar, the learned Judges of the High Court Division and the learned dissenting Judge of the same case in the Appellate Division as a "Constitutional deviation". They were, what an Argentinian Judge said, simply accepting the fact and trying to save those institutional values which can still be saved.

The Appellate Division "repelled the arguments advanced in support of the view that the Constitution as such is still in force as the Supreme Law of the country, untrammelled by the Proclamation and Martial Law Regulation" (Per Ruhul Islam, J. in Ehteshamuddin's case, supra, para 19). The broad words "The moment the country is put under Martial Law the above noted constitutional provision along with civil laws of the country loses its superior position" (Haji Joynal Abedin's case, supra) were modified by the subsequent decisions in Ehteshamuddin's case, Jamil Huq's case and Nasiruddin's case, but the basic decision of the Appellate Division – that of subservience of the Constitution to the Martial Law – remains unchanged. The Constitution (Fifth Amendment) Act, 1979, Act No. I of 1979, passed on the 6th April, 1979, giving a blanket cover to Martial Law Proclamations, Regulations etc., did not improve matters even after the lifting of Martial Law and restoration of the Constitution, except for some modifications as aforesaid.

Chapter 5

THE INTERLUDE (1979-82) AND THE SECOND MARTIAL LAW (1982-86)

1. The Interlude (1979-82)

Since the revocation of First Martial Law by a Proclamation dated the 7th April, 1979, constitutional government and the superior Courts' power of judicial review were restored in full. Following the assassination of President Ziaur Rahman on the 30th May, 1981, a Proclamation of Emergency was issued by the Acting President Mr. Justice Abdus Sattar on the 30th May, 1981, in exercise of powers under clause (1) of Article 141A which was approved on the 9th July, 1981 by Parliament by a resolution under clause (2)(c) of Article 141A. The Constitution (Sixth Amendment) Act, 1981, Act No. XIV of 1981, was passed on the 9th July, 1981 providing for some amendments in Articles 51 and 66 of the Constitution, of which the amendment in Article 51 has now been rendered irrelevant and the one in clause (2A) of Article 66 still survives, with a further amendment. Mr. Justice Abdus Sattar was elected President in a Presidential Election, but he was deposed in a military coup on the 24th March, 1982 when Martial Law was clamped for the second time in Bangladesh.

During the period from 1979-82 both the Divisions of the Supreme Court were confronted with constitutional cases touching upon the First Martial Law Proclamation, Regulations, etc., and Martial Law Courts. Ehteshamuddin's case, Nasiruddin's case, Jamil Huq's case, and Khandaker Moshtaque Ahmed's case were decided by the Appellate Division during this period. Few

other cases of constitutional importance, namely, on saving of certain laws (Article 47) Bangladesh vs. Haji Abdul Gani, 32 DLR (AD) 233; on fundamental rights (Articles 27 and 29) Dr. Nurul Islam vs. Bangladesh, 33 DLR (AD) 201, (Articles 31 and 35) Mofizur Rahman Khan vs. Bangladesh, 34 DLR (AD) 321; on Article 102(5) Bangladesh vs. Abdur Rab, 33 DLR (AD) 142 and Bangladesh vs. A.K.M. Zahangir Hossain, 34 DLR (AD) 173 and on some other constitutional questions as well were decided by the Appellate Division during this period which, however, I am leaving out for the present, in the hope of touching upon them later if possible.

It will be important to remember that the Supreme Court of Bangladesh had very little occasion and opportunity to interpret the Constitution in its various facets and phases owing to frequent eclipse of the Constitution itself and owing to frequent interruption with its constitutional jurisdiction. The Supreme Court interpreted the Constitution in fits and starts, as and when occasion permitted. The development of constitutional law in Bangladesh was thwarted in its infancy. But looking at the crop of constitutional cases which sprang up during the interlude (1979-82) one can safely conclude that had the Supreme Court been left free to do its work uninterruptedly the Constitution would have received a much more comprehensive and intensive interpretation in its hands.

2. Proclamation of the 24th March, 1982 and its effect

Lieutenant General Hussain Muhammad Ershad placed the country under Martial Law for the second time by issuing the Proclamation of March 24, 1982. This time the draftsman of the Proclamation took care to see that the Constitution and the Martial Law Proclamation do not compete for supremacy. Khandaker Moshtaque Ahmed's Proclamation of the 20th August

1975 provided that the Constitution shall continue to remain in force, subject to the Proclamation, Regulations, Orders etc. General Ershad's Proclamation is different.

He suspended the Constitution and by a later amendment of the Proclamation inserted a Schedule to the Proclamation containing a mini-constitution of his own device which he amended from time to time with wanton abandon providing that subject to his Proclamation and the Martial Law Regulations etc., the country will be governed in accordance with the said Schedule. Not to speak of the Constitution, which he suspended, even his own mini-constitution was subordinate to his Martial Law dispensation. He reserved the power to revive the Constitution in doses, which he did from time to time after 1985. All proceedings arising out of and in connection with writ petitions under Article 102 of the suspended Constitution shall abate. The usual bar of Court, including the Supreme Court, to question or declare illegal or void his Proclamation, Regulations etc., was duly incorporated in the Proclamation.

The Second Martial Law thus quitened the legal front effectively. The solitary case of Bangladesh vs. Md. Salimullah, 35 DLR (AD) 1, decided on June 30, 1982, was concerned with abatement of some proceedings. Referring to the mini-constitution contained in the Schedule to the Proclamation, Ruhul Islam, J. said,

> "The Proclamation of March 24, 1982 declaring that the whole of Bangladesh shall be under Martial Law and suspending the Constitution of the People's Republic of Bangladesh with immediate effect, both the Divisions of the Supreme Court, namely, the Appellate Division and High Court Division ceased to derive any power from the Constitution."

He then referred to the mini-constitution and observed,

"The language of sub-clauses (1) and (2) of clause (4) clearly shows that the High Court Division shall have such jurisdiction as is or may be conferred on it by law. The expression "by law" does not include the suspended Constitution, whereas, the Appellate Division of the Supreme Court shall have such jurisdiction as it had immediately before the Proclamation. The expression "such jurisdiction" includes jurisdiction conferred under Article 103 of the suspended Constitution. Notwithstanding the suspension of the Constitution by the Proclamation the Appellate Division continues to exercise all the jurisdiction exercised by it immediately before the Proclamation. The Appellate Division shall have jurisdiction to hear and determine appeals from the judgments, decrees, orders or sentences of the High Court Division. The respective jurisdiction as being now exercised by the High Court Division and the Appellate Division shows the difference, because the High Court Division has completely ceased to exercise any jurisdiction conferred upon it under Articles 44 and 102 of the suspended Constitution, but the Appellate Division continues to exercise the jurisdiction conferred under Article 103 of the suspended Constitution."

Article 102 of the Constitution, containing the power of judicial review, was revived by General Ershad in a highly truncated form on the 15th January, 1985 and the High Court Division was conferred the power and jurisdictions under Article 102, including the jurisdiction to enforce only six fundamental rights (Articles 28, 29, 30, 34, 40 and 41) from the said date. The Constitution was partially revived in doses and the final revival took place on the 10th November, 1986. On the same day Martial Law was withdrawn by a Proclamation of Withdrawal of Martial Law. On the 11th November, 1986 Parliament, constituted after a fresh election, enacted the Constitution (Seventh Amendment) Act, 1986 (Act No. I of 1986) ratifying and confirming the

Proclamation of the 24th March, 1982 and validating all orders and actions made or taken under the Proclamation, Regulations, Orders etc., by inserting paragraph 19 to the Fourth Schedule to the Constitution.

It can be seen that this entire period of Second Martial Law (1982-86) was a period of virtual inaction on constitutional issues, on the part of the Supreme Court. The High Court Division was fragmented into 7 places (more on this later) with a jurisdiction to decide run of the mill matters. The Appellate Division consequently had no appeal cases on constitutional matters during this period.

3. The fallouts of Martial Law

The Supreme Court had to deal with the aftereffects of Martial Law for quiet sometime after its withdrawal. A few cases may be of interest.

A. The case of Monoranjan Mukherjee vs. Election Commission, 41 DLR (HCD) 484, decided on April 30, 1989.

In this case the question was whether in the election of Union Parishads which was held in 1986 a candidate who was convicted and sentenced by a Summary Martial Law Court in 1984 was disqualified for election or nomination as a Chairman of the Union Parishad in view of section 7(2)(d) of the Local Government (Union Parishads) Ordinance, 1983 which provided that the candidate will be disqualified if he has been, on conviction for a criminal offence involving moral turpitude, sentenced to a term of not less than two years, unless a period of five years had elapsed since his release.

The High Court Division refused to acknowledge that the disqualification clause in section 7(2) of the said Ordinance is

referable to a conviction by a Martial Law Court. The reason given (by Mustafa Kamal, J.) was as follows :

> "Martial Law was withdrawn by a Proclamation of Withdrawal of Martial Law dated November 10, 1986. Sentences passed by the Military Courts, if not already executed, will be put into execution under the warrant of the Sessions Judge. Investigation of offences punishable under Martial Law Regulation or Orders shall be instituted or carried under the ordinary law and the trial after investigation shall be held by the ordinary Criminal Court in accordance with the ordinary procedure."
>
> "These are the salient consequences provided for in the Proclamation of Withdrawal of Martial Law dated November 11, 1986."

In Act No.I of 1986 which is the Constitution (Seventh Amendment) Act, 1986, it was provided in the newly-inserted clause (6) of paragraph 19 to the Fourth Schedule of the Constitution as follows :

> "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."

"Therefore, after the withdrawal of Martial Law on November 11, 1986 the Ordinance in question is to be read as an ordinary law and when it refers to "criminal offence" and also speaks about "conviction", it invariably refers to ordinary offences provided for by the ordinary laws of the country and also refers to trial and conviction by an Ordinary Criminal Court within the judicial hierarchy or a Special Tribunal created by ordinary law. The ordinary laws of the country cannot

even contemplate or visualize extra – constitutional offences tried by extra-constitutional dispensation. Nor is there any constitutional mandate to read Martial Law offences and Martial Law Courts whenever there is any reference to criminal offences and conviction in any general law of the land. It is well-settled that Martial Law is not a part of the constitutional scheme of this country. It is an extra-constitutional dispensation. It is a temporary measure, a short-term arrangement. It meets only an interim need. When it leaves, it usually legalises all past actions for purposes of immunity, with the tacit acknowledgement that its interference with the constitutional process is an aberration and needs to be condoned. But while leaving, the Martial Law does not leave a trail of disqualification. It is good is as long as it lasts, but with its departure it no longer casts a shadow upon the ordinary laws of the land."

"In that view of the matter we are clearly of the opinion that section 7(2)(d) of the Ordinance does not refer to a conviction of a Military Court and it also does not refer to an offence under the Martial Law Regulations or Orders. it simply refers to criminal offences as provided for by the ordinary laws of the land and conviction on trial by an ordinary Court of the country as provided in the judicial hierarchy or by Special Tribunals."

"Accordingly, we hold that the respondent No.6 did not incur any disqualification under section 72(d) of the Ordinance at all."

B. The case of Principal Secretary, President's Secretariat vs. Mahtabuddin Ahmed, 42 DLR (AD), 214, decided on January 20, 1990.

The respondent Mahtabuddin Ahmed was dismissed from service by the Chief Martial Law Administrator under Martial Law Order No. 9 of 1982 on 15-10-85. A criminal case was also instituted against him under Regulation 11 of Martial Law

Regulation No.1 of 1982. He filed an application to the Chief Martial Law Administrator on 16-5-86 praying for justice, apparently invoking the power of review of the Order made against him under Order 1A of MLO 9. The CMLA's Secretariat found that the allegations brought against him were of no substance and that the respondent had been removed from service on the basis of frivolous charges. The CMLA's Secretariat withdrew the criminal case but the respondents case for review and rescinding of the order of dismissal from service was not implemented. In the meantime Martial Law was withdrawn. Upon the respondents application under Article 102 of the Constitution the High Court Division held that under paragraph 5 of the Proclamation of Withdrawal of Martial Law, the President is empowered to create a forum for disposing of the review petition of the respondent filed under MLO 9 which was pending on the date of the commencement of the said Proclamation. Accordingly, a direction was given to place the papers in connection with the review application of the respondent to the President for disposal of the said application in terms of the Rule by creating an appropriate forum for the said purpose.

The Government preferred a petition for leave to appeal and in dismissing the same the Appellate Division (judgment by A.T.M. Afzal, J.) held as follows :

> "The General Clauses Act 1897 has been made applicable to Martial Law Orders by reason of sub-para (9) of para 19 of the 4th Schedule of the Constitution enacted by the Constitution (7th Amendment) Act, 1986. Under the Proclamation of Withdrawal of Martial Law, MLO 9 was repealed but the remedy of review provided under the said MLO survived the repeal. It is obvious that unless some provision was made for disposal of cases awaiting review the effect to the Proclamation could not be fully given. In order to harmonize the effect of repeal of the MLO

with the operation of the Proclamation of Withdrawal of Martial Law in the circumstances as in the present case, provision has been rightly made in para 5 of the said Proclamation enabling the President to make an order whenever necessary to which the High Court Division has referred."

C. The case of Nasrin Kader Siddiqui vs. Bangladesh, 44 DLR (AD) 16, decided on August 18, 1991.

In this case the appellant challenged the detention of her husband Abdul Kader Siddiqui in an application in the High Court Division under Article 102 of the Constitution. Following the assassination of Sheikh Mujibur Rahman on the 15th August, 1975 the detenu left the country and stayed in India. He came back to Bangladesh on the 16th December, 1990 and was arrested on the 17th January, 1991 at Jhenaidah. Upon demand he was shown an order of detention dated 13-1-91 under section 3(1)(a) of the Special Powers Act, 1974 which was challenged on various grounds.

The Government defended his detention on the ground that the order of detention under the Special Powers Act had already been withdrawn, but the detenu was being detained by virtue of a warrant of commitment dated 19-1-91 passed by the Additional District Magistrate and he was serving out a sentence of 7 years' rigorous imprisonment upon conviction by the Martial Law Court No. 1 in a Martial Law case decided on 24-7-74. The prisoner is in jail custody serving as a convict.

The Government could not produce any papers and documents in support of the order of conviction passed against the detenu in 1978 in a Martial Law trial. The High Court Division discharged the Rule and on appeal the Appellate Division found that the warrant of commitment was issued without lawful authority and was executed in an unlawful manner. In the Proclamation of

Withdrawal of Martial Law of April 7, 1979 it was provided that an unexecuted sentence of imprisonment passed by a Special Martial Law Court could be put into execution only under the warrant of the Sessions Judge of the area in which the person under sentence may be found, as if the sentence were passed by him. The constitutional significance of this case has been highlighted in one of the four judgments delivered in this case (that of Mustafa Kamal, J.) which is as follows :

> "Proclamation of Martial Law, creation of Martial Law offences and trial thereof by Martial Law Courts are not provided in the Constitution of Bangladesh. These are extra-constitutional measures outside of the scheme of our Constitution. As such when Martial Law comes to a close and the Constitution is revived it becomes necessary for Martial Law authorities (a) to revoke the Martial Law proclamations, (b) to repeal all Martial Law Regulations and Orders with provisions consequential and incidental thereto and (c) to make provisions in the Constitution itself for ratification and confirmation of its tenure and actions. This periodic exercise is a habitual feature of our short but eventful Constitutional history. Martial Law goes but its actions are ratified and the remnants of Martial Law are grafted into the Constitutional system."
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> "Therefore, the Proclamation of Martial Law, Martial Law offences and Martial Law Courts die a natural death when the Martial Law is revoked but its legacies and fallouts Continue to the extent and in the manner expressly provided by the saving clauses repealing Martial Law Regulations and Orders."
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> "It is in this light that I view the Proclamation, dated 7th April, 1979, revoking the Proclamations of the 20th August, 1975, 8th November, 1975 and 29th November, 1976 and repealing all Martial Law Regulations and Orders and making provisions consequential and incidental thereto." ... ...

"Proclamation of the 7th April, 1979 was both a repealing and saving legislation. Unexecuted sentences of Special Martial Law Court can be executed only in the manner and by the authority prescribed in the saving clauses. The question of these clauses being directory or mandatory does not arise at all. The remnants of Martial Law are either saved by following the saving clauses in full or they are not saved at all. The regular Constitution of the country will admit of a Martial Law hangover only by the express words of the saving clauses. The detenu was allegedly convicted and sentenced by a Special Martial Law Court. The sentence remained unexecuted for 14 years. If the sentence is to be executed now, it can only be executed by the authority and in the manner prescribed by the saving clauses and by no other authority and in no other manner whatsoever."

"The warrant of commitment issued by the Additional District Magistrate was still-born and was doomed to perish from the start."