

AN ANALYSIS OF THE SUPREME COURT JUDGMENT ON THE FIFTH AMENDMENT OF THE CONSTITUTION OF BANGLADESH

Wali-ur Rahman*

In the words of Justice Holmes, “a page of history is worth a volume of logic”. The history of Bangladesh is epoch-making in the sense that it is a saga of bloodshed, tears and sacrifices of millions of people. Since its independence, Bangladesh is a democratic People’s Republic and it is the mandate of the people that it is only the Constitution itself is the solemn expression of the people’s will and no other laws. But it is the irony of the nation’s fate that since the adoption of the Constitution, it has undergone so many amendments that it hardly has its original spirit, the spirit which motivated the Drafters to draft the First Constitution of Bangladesh after its glorious birth through a long liberation struggle.

An unenviable feature of the 'constitutional development' of Bangladesh is that it had to withstand two extra-constitutional, i.e., Martial Law, regimes. Later on the Fifth and the Seventh Amendments to the Constitution validated the Martial Law regimes, which raise a series of questions concerning their legality, both substantive and procedural. Can Parliament validate anything, which is otherwise invalid from its very beginning? Can a Martial Law Proclamation amend any provision of the Constitution and can the Parliament give legal coverage to that amendment? Can Parliament amend any provision of the Constitution which is considered as a basic structure of the Constitution? All these questions have been in the discussion for long 30 years. In 2000 through a writ petition¹ the validity of the first Martial Law Regime was challenged, so was challenged the authority of the Martial Law Administrator and lastly in September, 2005 by a division bench of the High Court Division of Supreme Court, the Court in its historic judgment declared the Fifth Amendment illegal and unconstitutional. Apart from declaring the 5th Amendment illegal and ineffective, the judgment has also declared illegal and void the martial law proclamations, including the Martial Law Regulation 7 of

* Wali-ur Rahman is Director of the Bangladesh Institute of Law and International Affairs. He is a Former Secretary, Ministry of Foreign Affairs. Mr. Rahman did his sabbatical at Trinity College, Oxford. In his long diplomatic career he served in Jakarta, Jeddah, Geneva, Rome, and at the UN Headquarters in New York. He is a former Visiting Fellow of Queen Elizabeth House, Oxford. Mr. Rahman is Member of International Institute of Strategic Studies (IISS).

¹ Writ petition no 6016 of 2000.

1977 that deals with abandoned property, and all actions done under the martial law between 15th August, 1975 and April 1979. The court held that usurpation of the state power through martial law proclamation, particularly by Khondoker Mostaque Ahmed, Justice Abu Sadat Mohammad Sayem and Major General Ziaur Rahman was unconstitutional. This case was again revived in 2009 and the recently the Appellate Division has upheld the Judgment delivered by the High Court Division.

This epic judgment delivered by the High Court Division has received its high accolade and well acceptance from all classes of people in Bangladesh because this judgment is the pure projection and reflection of people's rudimentary aspiration that they will no longer be in any subjugation or in the hands of the usurpers within an independent State. Apart from these the Judgment has farsighted impacts in the constitutionalism in Bangladesh.

1. The constitution shall be the supreme law for all times and nothing can be done which is brings about a violation of the constitution and its basic features:

The constitution of Bangladesh being the embodiment of the will of the Republic of Bangladesh, is the supreme law and all other laws, actions, proceedings must conform to it and any law or action or proceeding, in whatever form and manner, if made in violation of the Constitution, is void and non-eat. In Bangladesh there prevails Constitutional Supremacy and Article 7 in its unique feature declares the supremacy of the Constitution. So a parliament cannot legislate in any manner that actually infringes the supremacy of the Constitution. It also cannot ratify, confirm or validate any act which is unconstitutional and which has destroyed the basic feature of the Constitution.² The Martial Law Proclamation is in itself against the nature of Constitution and when through this Proclamation any change is made in the constitution it puts double illegality. So a parliament cannot ratify such acts, it is not within their authority.

The constitution has always been in a dynamic nature; it grows and grows steadily over time in response to the demands of socio-political life of the society. So amendment of the constitution may be the demand of time but that amendment cannot be done without the mandate of the Constitution. So an unconstitutional proclamation cannot have the effect of amending the Constitution, neither it has the authority to change its basic

² Anwar Hossain Chowdhury v State 1989 BLD (Spl) 1

feature. In this regard the rationale may be given in the words of Thomas Paine that a Constitution is not the act of government, but of a people constituting government. So people's will cannot be a toy of some number of people, nor can it be the subject of ratification by the Parliament where they take oath to uphold supreme wish of the people..

2. Martial Law Proclamation is a seditious offence and cannot be legitimate in any time:

Every man is born equal and free. The concept of independence is not only to free a community from an alien subjugation but if necessary, also to free itself from the subjugation of its own people. Mere political independence of a country is not enough unless the independence cannot be achieved in its entirety within the community itself. As such to be independent in real sense, the government must be with the consent of the people to be governed. In case of existence of a written constitution, such consent of the people must be strictly in accordance with the provisions of the constitution, which is the embodiment of the will of the people, otherwise, it is no consent and the government, however powerful may be, is an illegal one.

“A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making.”³

This classic judgment in the Fifth Amendment Case has its tremendous impacts in the culture of usurping powers by the military in the name of Allah and the willingness of people. Ours is a country where Constitutional Supremacy is prevailing as the solemn expression of the people's will. The original Article 7 of the Constitution says that

(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 and other law shall, to the extent of the inconsistency, be void.

It is the ordain of the Constitution that The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected

³ Justice A B M Khairul Haque cited in his judgment