

The Fifth Amendment

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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. Were the two Martial Law regimes legal under the constitutional dispensation of Bangladesh? Were they justified under the Kelsenian doctrine of efficacy or the doctrine of state necessity? If the Martial Law Proclamations and all activities of Martial Law regimes were legal then why did they require validation at the time of their termination? 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, lastly to be decided by a division bench of the High Court Division of Supreme Court. The High Court in its historic judgement declared the Fifth Amendment illegal and unconstitutional.



It legality of first martial law regime

A group of unruly army officers, breaking chain of command assassinated the President of the country, Bangabandhu Sheikh Mujibur Rahman, along with his family members, on August 15, 1975 and Martial Law was proclaimed. Major (Retd.) Shariful Hossain Dalim, one of the coup leaders, announced the Martial

Law. Subsequently Khandoker Moshtaque Ahmed, by a Proclamation, placed the whole of Bangladesh under Martial Law.

Khandoker Moshtaque Ahmed's swearing in as the President of Bangladesh was clear violation of the Constitution. Article 55 of the Constitution provided that the Vice-President would succeed the President if there is a vacancy until a new President was elected. Khandoker Moshtaque Ahmed was not the Vice-President. Moreover, he was sworn in as the President of Bangladesh by the acting Chief Justice Syed A.B. Mahmud Hossain, though Form I of the Third Schedule of the Constitution required the President to be sworn in by the Speaker of the House.

Khandoker Moshtaque Ahmed handed over power to Justice Abu Sadat Mohammad Syem, who finally left the office in favour of Major General Ziaur Rahman. The first Martial Law regime, installed on August 15, 1975, continued till April 6, 1979.

The declaration of Martial Law in Bangladesh in 1975 cannot be considered legal as the 1972 Constitution, supreme law of the country, does not recognise Martial Law, and no reference has been made to Martial Law throughout the text of the Constitution. The Constitution does not permit Martial Law even for the sake of restoring law and order. Thus, it is submitted that the declaration of Martial Law in Bangladesh in 1975 was illegal. Moreover, Martial law was proclaimed in Bangladesh in peace time and there was no question of suppressing riot, rebellion or insurrection. So, the Proclamation of Martial Law on August 15, 1975 did not fulfil the requirements of the doctrine of state necessity and as such, was unjustified.

In fact, Martial Law was proclaimed in Bangladesh as a means to implement a coup d'etat and to obviate any public opposition to extra constitutional acts of the coup leaders. Being an upshot of that Proclamation the whole first Martial Law regime lacked validity.

The Constitution (Fifth Amendment) Act

The Constitution was amended several times during the Martial Law regime of about four years (1975 to 1979) through four major Martial Law Proclamations and various Proclamation Orders were made thereunder. It may be noted that the Constitution (Fifth Amendment) Act was passed when the Constitution was not fully revived.

The second parliamentary election was held in 1979 through which the Martial Law Administrator General Ziaur Rahman's newly created political party secured two-thirds majority. The first session of the new Parliament was convened on April 1, 1979 and on April 6, the Constitution (Fifth Amendment) Act, 1979 was passed to legally validate the actions taken by the Martial Law Government during the period between August 15, 1975 and April 9, 1979. The Act amended the Fourth Schedule to the Constitution by an addition of new paragraph 18 thereto which provided, that "all Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders, and other laws made during the period between August 15, 1975 and April 9, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in the Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, ...are hereby ratified and confirmed and are declared to be 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 Fifth Amendment brought about, inter alia, the following changes in the Constitution:

1. In the Preamble the words "a historic war for national independence" were substituted for the words "a historic struggle for national liberation."

2. In the original Constitution it was provided in article 6 that the citizens of Bangladesh would be known as "Bangalees". This was changed to provide that citizens would be known as "Bangladeshis".
3. One of the four major fundamental principles of state policy "secularism" was omitted.
4. Another fundamental principle of state policy, "socialism", was given a new explanation to the effect that "socialism would mean economic and social justice."

Constitutionality of the fifth amendment

Article 142 of the Constitution has clearly stated the procedure how the constitutional provision can be amended. The amendments of the Constitution by a process different from that provided by Article 142 is difficult to accept as valid and legal. Article 142 provides that any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by an Act of Parliament and the concerned Bill must be passed by the votes of not less than two-thirds of the total number of members of Parliament. The Fifth Amendment was not made in line with the constitutional provision, rather it was made to remove the stigma of illegality and unconstitutionality of the Proclamations, Regulations, and Orders proclaimed during the first Martial Law regime. Within a time span of around four years some provisions of the Constitution were amended on several occasions by the Martial Law Proclamations. A stamp of legality was put on those alterations by the Fifth Amendment.

The changes made by the Fifth Amendment cannot be held valid in the light of basic structure principle of Constitution. The Judgement in the Eighth Amendment case [Anwar Hossain Chowdhury v. Bangladesh, 1989 BLD (Spl) 1.] reaffirmed the doctrine of basic structure, as old as the making of the Constitution as expounded by Chief Justice Marshall in Marbury v. Madison [2 L.Ed. 60.] case. In written Constitutions there are certain provisions, written or implied, which are basic and constitute foundation and structure of the Constitution.

The negation of these provisions would negate the Constitution itself and hence cannot be amended. So, any amendment by way of addition, alteration, substitution or repeal which aim to destroy the basic structure of the Constitution is void. The Fifth Amendment changed some of the basic principles of the original Constitution which cannot be made by a constitutional amendment.

Concluding remarks

Martial Law of 1975 was declared in peace time; the then civil government and civil courts were functioning smoothly and there was no questions of suppressing riot, rebellion or insurrection. Hence, the Martial Law of 1975 cannot be justified under the Common Law doctrine of state necessity. During the first Martial Law regime the Constitution was amended several times by Martial Law Proclamations which are clearly unconstitutional as the Constitution cannot be amended by any process other than that which is provided in Article 142 of the Constitution.

Moreover, a seal of legality had been put on the first Martial Law regime and its actions by the Fifth Amendment. This Amendment undermined the supremacy of the Constitution, destroyed the secular character of the Constitution, changed the Preamble and some of the fundamental principles of the Constitution which are beyond the domains of any amendment. Hence, the Fifth Amendment cannot be considered valid.

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