

Legitimacy of the Interim Government of Bangladesh**Ehsan A Siddiq¹**

The legitimacy of the Interim Government², sworn in on 8 August 2024, has sparked debate. Some justify it using the doctrine of necessity or Kelsen's "Grundnorm" shift, both of which have historically been used to support military takeovers.³ However, theories that fail to differentiate between a people's revolution and a military coup are unconvincing. This paper argues that the Interim Government, born from a mass uprising, stands on stronger foundations—those derived from the people, not from abstract legal doctrines. In this paper it is argued that the Interim Government was formed and has obtained its legitimacy from a pre-constitutional power – the constituent power.

The Bangladesh Constitution was framed and adopted in 1972 by the Constituent Assembly in exercise of its constituent power. According to Bangladeshi and Indian jurisprudence, this constituent power belonged to the people and was exercised on their behalf by the Constituent Assembly.⁴ In the hands of the people, the constituent power comprised the legislative, executive and judicial powers. There was no demarcation between the three powers as the doctrine of separation of powers did not apply to the constituent authority. According to Joel Colón-Ríos, this approach emphasizes constituent power as a power found outside the domain of law, incapable of legal regulation.⁵ It is seen as a pre-political force that becomes juridically irrelevant once a constitutional order is in place. According to Colón-Ríos constituent power is not the concern of lawyers.⁶ And hence we see a failure of lawyers to appreciate the events of August 2024. While adopting the Constitution, the Constituent Assembly distributed the constituent powers held by the people between the three organs of the State. According to Indian jurisprudence, once distributed, the people cannot thereafter exercise the constituent power.⁷ This view is supported by the German scholar, Martin Kriele who argues in favour of “silencing” the constituent power after it brings a constitution into effect, to protect the

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³ Harris, J. W. (1971). When and why does the Grundnorm Change? *The Cambridge Law Journal*, 29(1), 103–133 at 103.

⁴ *Anwar Hossain v Bangladesh*, (1989) BLD Spl 1 (para 342).

⁵ Colón-Ríos, Joel, *Constituent Power and the Law*, Oxford Constitutional Theory (Oxford, 2020; online edn, Oxford Academic, 21 May 2020), <https://doi.org/10.1093/oso/9780198785989.001.0001>, accessed 15 Oct. 2024.

⁶ *Ibid.*

⁷ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 (para 1615).

constitution from political unpredictability.⁸ According to this theory of constitution-making, once the Constitution is established, no constitutional order can exist that contradicts its provisions.⁹ Therefore, by this reasoning, the interim government, along with the positions of advisor and chief advisor, which are not recognized by the Constitution, lack legitimacy.

However, the idea that constituent power ends with the framing of the constitution is a legal fiction and has been described by a former Judge of the Federal Constitutional Court of Germany, Ernst-Wolfgang Böckenförde as a “juristic sleight-of-hand”.¹⁰ Ernst-Wolfgang Böckenförde argues that constituent power, as a political force, continues to exist and cannot be dismissed even after the constitution is in place.¹¹ Böckenförde observes that “it is a peculiar notion that the necessary legitimation of the constitution could be condensed into a single point, its (revolutionary) creation, from which the constitution is then valid in a virtually self-sustaining process, independent of the continued existence of this legitimation.”¹² He argues that constituent power, as a political force, continues to exist and cannot be dismissed even after the constitution is in place.¹³

Similarly, the 20th century German legal theorist, Carl Schmitt argued that constituent power can be exercised while a constitution is already in existence.¹⁴ The people's constituent power remains present alongside and above any established constitutional order. Thus, Schmitt observes that “constitution-making power is not thereby expended or eliminated, because it was exercised once.”¹⁵ Hèctor Lopez Bofill also indicates how scholars view constituent power as a continuous process of reconstruction, not just a one-time event during the initial framing.¹⁶ Therefore, the events of July and August 2024 are best explained in terms of a continuing constituent power. Without the concept of constituent power, the constitutional relevance of the July and August revolution cannot be fully explained and nor can the constitutional changes it has brought about be appreciated.

In August 2024 we saw a new constitutional order established not under the existing constitution, but in exercise of the constituent power of the people. It is wrong to look for legitimacy of the Interim Government under the present constitution. Members of the government describe themselves as advisors being led by a chief advisor.¹⁷ None of these posts

⁸ Böckenförde, Ernst-Wolfgang, Mirjam Künkler, and Tine Stein, *Constitutional and Political Theory: Selected Writings* (Oxford, 2017).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Rubinelli, L. (2020). *Constituent Power*. In *Constituent Power: A History*. Cambridge: Cambridge University Press.

¹⁵ *Ibid.*

¹⁶ Bofill, H.L. (2021). *Law, Violence and Constituent Power: The Law, Politics And History Of Constitution Making* (1st ed.). Routledge. <https://doi.org/10.4324/9781003054801>

¹⁷ BBC (2024). Yunus sworn in as interim Bangladesh leader. <https://www.bbc.com/news/articles/clyg7we8xvno>, Accessed 30 August 2024.

exist in the constitution or any other law of the land. The posts can be best explained by having been created in exercise of constituent power. The historical-political events of August 2024 led to the exercise of such constituent power by the people to establish a new constitutional order. The exercise of constituent power does not necessarily imply abrogation of the constitution. The existence of the constitution is in no way contrary to the wielding and exercise of constituent power by the people.

According to Böckenförde, the constituent power can erode the constitution “piece by piece in individual steps”.¹⁸ Thus, the historical-political processes of July and August 2024 have led to the exercise of constituent powers by the people to establish a new constitutional order which may erode aspects of the existing Constitution. The interim government, made up of advisors and a chief advisor, operates because it was established by the people through the exercise of their constituent power. This as scholars argue is pre-legal power and it is incorrect to look for a legal basis for its exercise in the constitution or any other law. The historical-political processes of 2024 can be argued to have invested the people with the necessary constituent power of framing a new Constitution.

Colon Rios acknowledges that constituent power can manifest through revolutionary means, breaking the chain of legality between the old and new constitutional orders.¹⁹ In such cases, the exercise of constituent power is seen as purely factual and not governed by legal principles.

The other two competing doctrines are inappropriate for describing the July Revolution. They have been criticised as legitimising military dictatorships. The doctrine of necessity has been used to justify certain actions that are otherwise illegal or unconstitutional, based on the need to prevent greater harm or preserve public order. It has been invoked in various constitutional crises to legitimize emergency measures or military takeovers. In the Seventh Amendment case, the doctrine was criticised by the Appellate Division as justifying unconstitutional acts and it observed that the doctrine cannot “make an illegal act a legal one.”²⁰

Kelsen's theory of “Grundnorm” shift provides a framework for understanding legal transitions following revolutions or coups.²¹ The theory treats military takeovers and people's revolutions in the same manner. In the Eighth Amendment case, the Appellate Division noted with dismay how the Supreme Court of Pakistan had used this theory to legitimise unconstitutional acts.²² One Bangladeshi scholar has attempted to go around this problem by describing the Grundnorm

¹⁸ Böckenförde, Ernst-Wolfgang, Mirjam Künkler, and Tine Stein, *Constitutional and Political Theory: Selected Writings* (Oxford, 2017).

¹⁹ Colón-Ríos, Joel, *Constituent Power and the Law*, *Oxford Constitutional Theory* (Oxford, 2020; online edn, Oxford Academic, 21 May 2020), <https://doi.org/10.1093/oso/9780198785989.001.0001>, accessed 15 Oct. 2024.

²⁰ Siddique Ahmed v Bangladesh, 33 BLD (AD) 129.

²¹ Harris, J. W. (1971). When and why does the Grundnorm Change? *The Cambridge Law Journal*, 29(1), 103–133.

²² Ibid.

²³ Muhammad Ekramul Haque (2024). The Legality of the Interim Government. *The Daily Star*. <https://www.thedailystar.net/opinion/views/news/the-legality-the-interim-government-3678131> Accessed on 30 August 2024.

as the “will of the people”.²³ But the Grundnorm is not the “will of the people”. According to J W Harris, the Grundnorm is a theoretical construct used to explain legal validity, rather than a reflection of actual societal preferences or decisions.²⁴ Kelsen’s theory focuses on the logical structure of legal systems rather than popular sovereignty or will of the people.

Thus, it can be concluded that the Interim Government finds its legitimacy not through the current constitutional framework but through the exercise of the people’s constituent power. While competing theories like the doctrine of necessity and Kelsen’s “Grundnorm” shift offer explanations for legal transitions, they fail to distinguish between military coups and people’s revolutions. The mass uprising of 2024 demonstrates that the people’s constituent power remains active, capable of reshaping constitutional orders without necessarily abrogating the Constitution, as noted by scholars like Böckenförde. This people’s mandate creates a new constitutional legitimacy.

The need for honesty about the events of July and August 2024

Some lawyers are trying to fit the events of 5 August 2024 within the existing constitutional framework. It is being suggested that Sheikh Hasina resigned. This suggestion is being made in order to establish a constitutional basis for the interim government. The assertion that Sheikh Hasina resigned is not only misconceived but will lead to constitutional complications in the future, especially as leading members of the government have stated quite clearly that Sheikh Hasina did not resign but was removed from power.

In fact, Sheikh Hasina did not resign on the 5 August. She fled the country, given just 45 minutes to pack her bags. She was forced out of power by the people. She did not relinquish power under any provision of the Constitution. The people forced her out in exercise of a revolutionary power wielded by them and possessed by them due to the political and historical circumstances prevailing at the time. This is what scholars call a “constituent power.” Her government too was forced out of power, it did not resign. This is also the view of some members of the Interim Government. Consider, the views of Nahid Islam one of the influential co-ordinators of the July movement (who is now an Advisor in the Interim Government), who clearly stated that Sheikh Hasina did not resign but was removed from power. On the 23 October 2024, at an event organised at Jahangirnagar University, he stated that:

By creating this misconceived narrative of Sheikh Hasina’s resignation, the interim government has shot itself in the foot. The fact is it does not matter if she has resigned or not. The legitimacy of the Interim Government does not depend on the whether Sheikh Hasina handed a resignation letter over to the President. To tie the legitimacy of this government to her resignation is to deny the importance of the movement and the sacrifices that were made to remove her government. The legitimacy rests on far surer foundations. The Interim Government is there by the will of the people.

²⁴ Harris, J. W. (1971). When and why does the Grundnorm Change? *The Cambridge Law Journal*, 29(1), 103–133.

The other important fact that we get from Nahid Islam's comments on 23 October 2024 is that the certain parts of the Constitution have in fact been abrogated.²⁵

Once again, Nahid Islam was simply stating the obvious: the interim government holds no validity under the Constitution. It exists solely because it has been established by the constituent power. However, it's worth clarifying that not all of the Constitution has been abrogated—only the parts that conflict with the exercise of constituent power by the people in forming the interim government are set aside. This view aligns with Böckenförde's perspective, which suggests that an existing Constitution can be "eroded" through the people's exercise of constituent power.

Nahid Islam also provides a reason why the President was retained. According to him the reason for carrying on as if the Constitution was still in operation and the President was still in office, was to ensure stability of the new government.²⁶

Finally, he says, if necessary, people have the power to set up a new constitutional order.

Constitutional Reform: Fresh Draft or Amendment

A Fresh Constitution

As argued above, we are now in a pre-constitutional stage. The interim government exists by the exercise of constituent power of people who have put them in power and not under any provision of the Constitution. It is misleading to look for legitimacy of this government within the Constitution.

It is understood by the people that the constitution has become ineffective. This has also been admitted in public by one of the advisors of the government. Thus, the logical next step is for the people to exercise their constituent power and frame a new constitution.

And moreover, a new constitution is needed to reflect the historic events of the July and August 2024. Badruddin Umar has described these events as the most extensive, profound, and aggressive since the events of 1952.²⁷ And as such it is only natural that we should have these events incorporated into our Constitution. A country's constitution reflects the social contract agreed upon by its citizens, and the Preamble should clearly articulate the constitution's philosophy, aims, and objectives. The Preamble serves as a vital tool for interpreting the constitution. Yet, the current Preamble of the Bangladesh Constitution does not capture the aspirations of the people who toppled the autocratic regime. It lacks any mention of the

²⁵ The Business Standard (2024). (23 October 2024) <https://www.tbsnews.net/bangla/%E0%A6%AC%E0%A6%BE%E0%A6%82%E0%A6%B2%E0%A6%BE%E0%A6%A6%E0%A7%87%E0%A6%B6/news-details-269751>

²⁶ Ibid.

²⁷ Badruddin Umar (2024). India hasn't been able to accept the fall of Hasina's Govt. Prothom Alo (19 October). <https://en.prothomalo.com/bangladesh/na0odexd3p>. Accessed on 30 October 2024.

cherished freedom of expression—a right reclaimed during the July Revolution. It does not reflect the demand for a society which values hard work and merit. The term “brave martyrs” in the Preamble feels incomplete without honouring the 1400 martyrs of Summer 2024. It fails to acknowledge the dreams of the students for a discrimination-free country, the sacrifices of martyrs like Mir Mughdo and Abu Sayeed, or the suffering endured by their families. The Preamble only partially reflects the values that the people of Bangladesh hold dear; it does not fully represent who we are as a nation.

One of the methods being proposed for drafting a new constitution is to frame a Presidential Ordinance for setting up a Constituent Assembly. This Ordinance will pave the way for elections to Constituent Assembly. The Ordinance shall state that the members of the Constituent Assembly are to be elected solely for the purpose of drafting a new constitution and they will lose their posts as soon as the new constitution has been adopted by the people in a referendum. After the drafting of constitution by the Constituent Assembly, the same is required to be adopted in a referendum by the people. After adopting of the Constitution, the Constituent Assembly will dissolve automatically.

Amendment of the Constitution

The interim government can only gain legitimacy under a new Constitution, as there is no provision in the current one to support its validity. Suggestions have been made to legitimize this government by amending the Constitution, but, constitutionally, only a parliament has the authority to make amendments. Since there is currently no parliament, any amendment to grant legitimacy would rest in the hands of the next democratically elected government.

There are two possible scenarios for how this could unfold:

First Scenario: The newly elected government may choose not to amend the Constitution to validate the interim government’s existence. This could be due to a desire to avoid being entangled in the legitimacy issue of the interim government, particularly given arguments that the interim government effectively bypassed or even abrogated the Constitution. Judicial precedents, such as in the 5th and 7th Amendment cases, suggest that the Supreme Court could easily strike down any amendment attempting to retroactively legitimize an interim administration that operated outside constitutional bounds.²⁸ Refusing to pursue constitutional amendments would leave members of the interim government, including those in the executive, without any protection for their roles. Under Article 7A, anyone who approved, supported, or was associated with the interim government’s actions could potentially face severe consequences, even punishment up to execution for perceived subversion of the Constitution.²⁹ Although Article 7A was declared unconstitutional by the High Court Division on 17 December

²⁸ See Siddique Ahmed v. Bangladesh, 33 BLD (AD) 129

²⁹ Article 7A, Constitution of the People’s Republic of Bangladesh.

2024, there always remains the possibility that such declaration may be set aside in an appeal to a higher forum, with a change in the government.

Second Scenario: Even if an amendment is passed to legitimize the interim government, there remains a substantial risk that the Supreme Court could strike down such an amendment. Articles 7A and 7B³⁰ served as a formidable legal barrier, designed to prevent any unconstitutional attempts to bypass or overturn constitutional structures. Although both Articles have now been declared unconstitutional, they could be reinstated in an appeal. This means that any constitutional amendment crafted to protect the interim government could still be challenged and invalidated by the Court.

If either scenario occurs, every member associated with the interim government could face severe legal consequences, including, in the most extreme interpretation, the death penalty. The interim government operates outside the constitutional framework, and as such, its actions may be construed as subverting the Constitution—tantamount to sedition. Any person supporting, aiding, or even voicing approval for the interim government's actions could be considered an accomplice to sedition, facing penalties for undermining the nation's supreme law.

Article 7A was declared unconstitutional by the High Court Division on 17 December 2024. But the decision could be appealed to the Appellate Division and then reviewed. This has precedent, as demonstrated in the 13th Amendment case, where appeals and reviews have prolonged the final decision. So, the possibility of Article 7A being revived with a change in government would remain a real concern.

Even if appeals and reviews were ultimately resolved in favour of the unconstitutionality of Article 7A, the issue might resurface in future cases. In the 5th Amendment case, which initially concerned a cinema hall, Justice A.B.M. Khairul Haque made broad declarations that had significant constitutional implications beyond the ownership of the cinema hall.³¹ Similarly, any ruling on Article 7A might not be definitive, as legal avenues—particularly through creative arguments by lawyers—could reopen it despite the principle of *res judicata*, which aims to prevent issues from being litigated repeatedly. Additionally, a future judiciary sympathetic to a returning administration could, in theory, revive Article 7A, thereby reopening the door to these issues with profound consequences for those associated with the interim government.

Thus, granting legitimacy to the interim government by way of a constitutional amendment would not protect its members from future prosecution for sedition. The interim government should thus ready itself for preparing the way for drafting a new Constitution for Bangladesh.

³⁰ Both Articles 7A and 7B were declared to be unconstitutional by the High Court Division on 17 December 2024.

³¹ *Bangladesh Italian Marble Works v. Bangladesh*, 62 DLR (2010) 70.

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