

Constitutional Legitimacy in Crisis: Interim Governance and Executive Ordinances in Bangladesh

Md. Rahim Al Rohan 

Department of Law, Southeast University, Dhaka, Bangladesh

Email: mdrahimalrohan@gmail.com

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Abstract

In Bangladesh, constitutional continuity is upheld through the framework ensured by Article 7 of the Constitution of Bangladesh, which establishes the supremacy of the Constitution. The exercise of executive powers in times of political crisis raises questions about constitutional legitimacy, especially in the absence of a functioning Prime Minister. Article 48(3) of the Constitution mandates that the President act in accordance with the advice of the Prime Minister, but when this position is vacant, uncertainty arises regarding the authority of the President to make decisions. The power to issue executive ordinances under Article 93 further complicates the issue of governance during such interim periods. While this provision grants the President the authority to legislate in the absence of Parliament, it is constrained by the necessity of maintaining constitutional principles and avoiding infringement on the basic structure of the Constitution. In times of political paralysis, the use of ordinances must be justified within the framework of constitutional interpretation that prioritizes continuity over strict interpretations of the text. This study asserts that the legitimacy of executive ordinances in Bangladesh's interim governance context is grounded in constitutional principles, judicial observation, jurisprudential principles, international practice, and principles. These principles not only guide judicial reasoning but also serve as a framework for ensuring governance remains functional, transparent, and ultimately directed toward the restoration of representative democracy.

Keywords

Constitutional Legitimacy, Interim Governance, Executive Ordinances, Bangladesh Constitution, Constitutional Continuity

1. Introduction

A constitution ensures not only the written text but also the continuing framework that sustains the political and legal order of a state. As the supreme law of the state, it is structured to ensure that governance remains rooted in the will of the people, while providing mechanisms for the allocation of authority among the institutions of government (McIlwain, 2005). In Bangladesh, the absence of an elected prime minister raises fundamental questions about how constitutional legitimacy is preserved during interim governance. The problem is not confined to textual silence but extends to the interpretation of principles that keep a constitutional order alive in times of crisis (Barber, 2001). The main concern is how the power of promulgation of ordinances of the executive can be justified in moments when the usual chain of democratic accountability is suspended. Constitutions cannot be interpreted in a manner that paralyzes the state; instead, they must be read purposively to secure continuity and avoid constitutional deadlock (Allan, 1994). The jurisprudence of comparative constitutionalism also describes that transitional arrangements, even if temporary, may be tolerated when their aim is to restore democratic governance (Teitel, 2002). The exercise of executive ordinance-making power during an interim regime should be set within constitutional theories (Dicey, 1959). On this basis, constitutional silence does not imply institutional collapse; rather, it calls for flexible interpretation that harmonizes different provisions to prevent governmental paralysis (Grimm, 2016). Judicial precedents across common law jurisdictions have similarly interpreted that constitutional provisions must be construed to preserve state functions even in the absence of ordinary mechanisms (*Texas v. White*, 1868). In the international era, recognition of governments has often focused on the doctrine of effectiveness, where de facto authority may acquire legitimacy if it ensures stability and fulfills the obligations of state obligations (Talmon, 1998). The challenge for Bangladesh is to align the rigidities of its constitutional text with the realities of transitional governance.

1.1. Objectives

The main objectives of this research are to:

- a) Analyze the constitutional framework governing interim executive authority in Bangladesh, focusing on the interpretive challenges created by the absence of an elected Prime Minister and the use of presidential ordinances during such periods.
- b) Analyze the jurisprudential principles that provide theoretical justification for interim governance and assess how these have been applied in domestic and comparative contexts.
- c) Analyze the role of international legal principles in shaping the external and internal acceptance of interim administrations.
- d) Analyze judicial precedents from Bangladesh and other common law jurisdictions that have addressed constitutional gaps, identifying coherent standards for the exercise of ordinance-making power under exceptional circumstances.

e) Propose normative guidelines to balance constitutional continuity with democratic accountability, ensuring that any interim measures remain temporary, transparent, and directed toward the restoration of representative government.

1.2. Methodology

This study employs a doctrinal legal methodology, a methodological framework that is well-suited for the analysis and interpretation of legal norms, constitutional provisions, judicial decisions, and the principles that shape interim governance in Bangladesh. Doctrinal research is essentially about reading the law as it is written and making sense of how it applies in practice (Hutchinson, 2013). In a context like Bangladesh, where constitutional gaps and silences can leave difficult questions unanswered, this method allows us to uncover how the law adapts to crises.

The analysis proceeds in three steps. First, a textual analysis of the Constitution of Bangladesh is conducted, focusing on Articles 48(3) and 93, which govern executive advice and ordinance-making powers. These provisions are interpreted not just literally but purposively, considering how they work in times when no elected prime minister is in place. To ground this analysis, the key Supreme Court rulings are studied alongside longstanding legal principles.

Second, the study uses a comparative approach. The experience of Bangladesh with interim governance is placed in dialogue with other countries facing similar challenges, such as Pakistan's caretaker governments, Sri Lanka's presidential interventions, and South Africa's transitional constitutionalism. These jurisdictions were selected because of their shared common-law heritage, their historical encounters with constitutional crises, and the presence of interim or transitional governance mechanisms that are similar to Bangladesh. Comparative research helps show how legal systems may take different paths while aiming for similar goals: continuity, order, and democratic legitimacy (Van Hoecke & Ost, 1998).

Third, the research includes an evaluation of soft law instruments such as constitutional continuity, implied powers, and constitutional morality, which are not expressly written into the Constitution but carry significant interpretive weight. These principles, while soft in form, provide guidance in filling constitutional gaps and ensuring that governance remains accountable to democratic values.

In the final analysis, the present study integrates doctrinal insights with a normative evaluation of the legitimacy of presidential ordinances in the absence of a prime minister. This response is in alignment with a more extensive methodological appeal, which called for the incorporation of doctrinal legal research with real-world governance.

1.3. Significance of the Study

This study is significant for a number of reasons. First of all, it fills a scholarly gap in the literature on Bangladeshi constitutional law. While political instability and interim administrations have long been features of the nation's governance, the specific issue of a constitutional vacuum where no elected Prime Minister is in office

and presidential ordinances dominate has received little sustained academic attention. By directly engaging with this unprecedented situation, the study offers fresh insights into an underexplored dimension of Bangladesh's constitutional order.

Secondly, the study provides theoretical and doctrinal contributions by examining how constitutional silences and ambiguities may be addressed through jurisprudential principles. This framework helps to understand how governance can continue without undermining the legitimacy of the constitutional order, thereby deepening the theoretical discourse on constitutional resilience.

Thirdly, the research has clear policy relevance. In a state where interim arrangements have historically triggered questions of legality and legitimacy, this study offers normative guidance on how ordinance-making powers should be exercised during periods of crisis. Its findings highlight the importance of ensuring that such powers remain temporary, transparent, and accountable, providing a roadmap for both present and future policymakers in safeguarding democratic governance.

Finally, the study carries comparative and international importance by situating Bangladesh's experience within global debates on constitutional legitimacy in transitional contexts. By drawing lessons from South Asia, Africa, and beyond, it not only places Bangladesh's challenges in a wider framework but also contributes to international legal and constitutional scholarship on how fragile democracies cope with crises. The research extends the relevance of Bangladesh's constitutional experience to broader discussions of governance, legitimacy, and democratic continuity worldwide.

2. The Constitutional Architecture of Executive Power in Bangladesh

The Constitution of Bangladesh ensures the sovereignty and the rule of law (Parvin, 2019). The Preamble and Article 7 of the Constitution of Bangladesh proclaim that all state power originates from the people of Bangladesh and that the Constitution is the solemn expression of the will of the people (Fariha, 2022). This principle is similar to the doctrine of separation of powers, where the balance of the administrative power of the three organs of the state—the legislative, the executive, and the judiciary—is maintained (Kurland, 1986). For effective government, it requires separate legislative, executive, and judicial functions, warning that when legislative power is united with executive power in a single person, there is no liberty (Hossain, 2020). The Constitution of Bangladesh distributes these authorities so that no organ can unilaterally overstep its periphery (Hannan & Arifuzzaman, 2021). Each branch—Parliament, Executive, and Judiciary—has defined its roles. Absolute separation is not literal; the system relies on checks and balances to prevent abuse of power.

2.1. Concept of Interim Govt and Caretaker Govt

Caretaker and interim governments are both temporary executive authorities but carry different connotations. A caretaker government is a short-term, nonpartisan

administration with only routine powers (Adoo, Donald, & Bem, 2023). A caretaker cabinet handles ordinary public affairs if the democratic government is dissolved, elections are postponed, or in a crisis, only to avoid a governance vacuum until elections can ensure a new government (Elcock, 2022). On the other hand, an interim government arises in a deeper transition or crisis and is vested with a special, short-term mandate (Strasheim, 2017). An interim government is a formally constituted government holding an extraordinary mandate until a new ordinary or democratic government is elected (Arato, 2004). The caretaker cabinets limit themselves to daily matters, ongoing matters, and urgent matters and conduct a free and fair election (Dandoy & Terrière, 2021). The caretaker government's role is essentially custodial to keep government services running and assist electoral processes rather than pursue an agenda. Whereas interim regimes may be empowered for substantive reforms, interim administrations are tasked with constitutional drafting and other major reforms, as these governments carry out specified objectives beyond routine administration (Shain, Linz, & Berat, 1995).

In Bangladesh, the caretaker government was first introduced in 1990 (Azad, 2015). It was constitutionalized in 1996 by the Parliament by the 13th amendment of the constitution (Moniruzzaman, 2009). Over the year, six Chief Advisors have taken the responsibility of guiding the caretaker government in Bangladesh as shown in **Table 1**. The caretaker or interim government is headed by a Chief Adviser who enjoys the same power as the regular prime minister of the country (Azad, 2015).

Table 1. List of chief advisers of Bangladesh.

Name	Entered office	Left office	Birth and Death	Political party	Birth Place
Muhammad Habibur Rahman	30 March 1996	23 June 1996	1928-2014	Non-party	Murshidabad, British India
Latifur Rahman	15 July 2001	10 October 2001	1936-2017	Non-party	Jessore
Iajuddin Ahmed	29 October 2006	11 January 2007	1931-2012	Non-party	Munshiganj
Fazlul Haque	11 January 2007	12 January 2007	1938-2023	Non-party	Bangaon, British India
Fakhruddin Ahmed	12 January 2007	6 January 2009	1940-present	Non-party	Munshiganj
Muhammad Yunus	8 August 2024	Present	1940-present	Non-party	Chattogram

2.2. The Dual Executive in Bangladesh's Constitution

Bangladesh adopts a Westminster concept with a dual executive (Khan, 1992). Under Articles 55 to 59 of the Constitution of Bangladesh, the Cabinet of Ministers led by the Prime Minister holds formal executive power. Article 55 of the Constitution states that the executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister. Thus, the Prime Minister, a member of Parliament with clear majority support, is the real head of government. All other ministers serve under the Prime Minister,

who is appointed by the President but chosen by parliamentary confidence (Karim, 2023). On the other hand, as per Article 48 of the Constitution of Bangladesh, the President is head of state and shall act in accordance with the advice of the Prime Minister on nearly all matters. The Cabinet decisions are formally taken in the name of the President, but this is ceremonial (Jain, 2023). The President of Bangladesh is a nominal executive similar to the constitutional monarch in Britain (Chowdhury, 2023), where the President takes precedence over officials by rank but has no independent policy-making role (Haque, 2019). In routine times, the Prime Minister is often dubbed the sun around which other planets revolve (Mashreque, 1997).

The original 1972 Constitution of the country established a purely parliamentary government. However, the Fourth Amendment of 1975 reconfigured the state in a sweep of one-party and military rule; executive supremacy was vested in a powerful Presidency (Haque, 2017). From 1975 to 1990, Bangladesh was run as a virtual presidential system. The Twelfth Amendment of 1991 reversed course, restoring the parliamentary system. Since then, amendments have gradually upheld civilian rule; the Fifth, Seventh, and Thirteenth Amendments were set aside by the Supreme Court, and the Fourteenth Amendment abolished martial law provisions. At present, the constitutional powers of the President are limited and mostly exercised on Cabinet advice, while the Prime Minister leads the government and party (Haque, 2017). Bangladesh also experimented with nonpartisan caretaker governments from the mid-1990s until 2011. The constitutional amendment mandated a neutral interim administration to oversee general elections. This regime, headed by a Chief Advisor instead of a Prime Minister, was charged only with routine work and preparing elections. That caretaker system was abolished by the Fifteenth Amendment in 2011.

2.3. Prime Ministerial Advice and Impossible Duties

Article 48(3) of the Constitution of Bangladesh is the core provision vesting executive authority; in practice, it requires that, except for appointing the Prime Minister and Chief Justice, the President shall act in accordance with the advice of the Prime Minister. A strict textual reading makes this advice rule appear absolute; if no Prime Minister is in office to advise, the President would apparently be disabled from taking any action (Haque, 2011). Such an interpretation could produce a dangerous vacuum where a constitution cannot demand the impossible. Law does not compel the impossible (Raz, 1971). Article 48(3) of the Constitution of Bangladesh should be given a purposive reading when the Prime Minister's office is vacant. Although Article 48(3) of the Constitution bars unilateral presidential action, it must be understood in the context of the whole system. When an elected Prime Minister resigns or is otherwise unavailable, it would be irrational to leave the state leaderless. The Constitution itself provides continuity; Articles 57(3) and 58(4) of the Constitution provide that the Prime Minister who resigns continues in office until a successor is sworn (Ahasan Raisa

& Tarannum Susan, 2024). But if that is impossible, the law implies that someone must fill the advisory role. One solution borne out of necessity is for an acting body or council of advisors to advise the President until fresh elections. By a strict textual approach to Article 48(3), yet no workable solution in a crisis; instead, it must be harmonized with the Constitution's purpose of ensuring government continuity.

2.4. Ordinances in the Absence of Parliament

The power to issue an Ordinance is not an executive power, but it is the power of the executive to legislate (*Madras Bar Association v. Union of India*, 2021). Article 93 of the Constitution empowers the President as an extraordinary ordinance-making power. It provides that when Parliament is not in session or is dissolved, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and these have the force of law until Parliament reconvenes (*Ahmed*, 2020). Even the effect of an Ordinance did not cease when it lapsed (*State of Orissa v. Bhupendra Kumar Bose*, 1962). Article 93 of the Constitution temporarily vests legislative authority in the executive. By its terms, this power is exercised on the advice of the Prime Minister, but because it applies during parliamentary recess, it can involve laws of general effect. To guard against abuse, Article 93 of the Constitution contains clear limits: ordinances cannot contravene any provision of the Constitution, they cannot alter or repeal constitutional amendments, and they cannot revive earlier ordinances (*Ahmed*, 2020). But an ordinance cannot be struck down on such grounds as non-application of mind, mala fides, or that the prevailing circumstances did not warrant the issue of the ordinance (*Venkata Reddy v. State of Andhra Pradesh*, 1985). Any ordinance must be laid before Parliament when it reconvenes and will lapse if not approved in thirty days. Thus, ordinary legislative control is preserved in the long run.

Article 93 of the Constitution of Bangladesh has been implemented whenever the government claims urgent need. The satisfaction of the president regarding the existence of the circumstance requiring immediate action cannot be questioned in court (*Ahsanullah v. Bangladesh*, 1992). The 2007-08 caretaker administration under Emergency Rule was notable for its prolific use of ordinances for judicial, economic, and anti-corruption reforms. According to government data, that caretaker regime promulgated 122 ordinances during its tenure (*Shakhawat Liton*, 2009). Many of those measures were unrelated to preparing elections, exceeding the caretaker's narrow mandate. The succeeding parliament responded by ratifying only 54 of them as shown in **Table 2** and letting the rest expire (*Shakhawat Liton*, 2009). As guardian of the Constitution, the Supreme Court has also recognized that ordinances are permissible in genuine emergencies. In general, the President's satisfaction that immediate action is needed has been treated as non-justiciable (*Ahmed*, 2020).

Table 2. The ordinances passed by the Caretaker Government of 2007-2009, chosen to be brought in as Bills before the parliament for passage into law.

No.	Name of the Ordinance
1.	Upazilla Parishad (Amendment) Ordinance, 2009 for making them into laws
2.	Sylhet Metropolitan Police Ordinance, 2006
3.	Barisal Metropolitan Police Ordinance, 2006
4.	The Code of Criminal Procedure (Amendment) Ordinance, 2007
5.	The Code of Criminal Procedure (Second Amendment), 2007
6.	Speedy Trial Act (Amendment) Ordinance, 2007
7.	Criminal Law (Amendment) Ordinance, 2007
8.	Finance Ordinance, 2007
9.	Consolidated Fund (Supplementary) Ordinance, 2007
10.	Consolidated Fund (Advanced) Ordinance, 2007
11.	Bangladesh Biman Corporation (Amendment) Ordinance, 2007
12.	Public Procurement (Amendment) Ordinance, 2007
13.	Padma Multipurpose Bridge Project (land acquisition) Ordinance, 2007
14.	Money Laundering Prevention (Amendment) Ordinance, 2007
15.	Electoral Rolls Ordinance, 2007
16.	Bangladesh Flag Vessels Protection (Amendment) Ordinance, 2007
17.	The President's (remuneration and privileges) (amendment) Ordinance, 2007
18.	The Pesticides (Amendment) Ordinance, 2007
19.	Income Tax (Amendment) Ordinance, 2007
20.	Islamic University (Amendment) Ordinance, 2007
21.	Islamic University (Amendment) Ordinance, 2007
22.	Human Rights Commission Ordinance, 2007
23.	Income Tax (Second Amendment) Ordinance 2007
24.	Income Tax (Amendment) Ordinance, 2008
25.	Election Commission Secretariat Ordinance, 2008
26.	Bangladesh University of Professionals Ordinance, 2008
27.	Anti-terrorism Ordinance, 2008
28.	Finance Ordinance, 2008
29.	Appropriation Ordinance, 2008
30.	Appropriation (Supplementary) Ordinance, 2008

Continued

31. Rangpur University Ordinance, 2008
32. Representation of the People Order (Amendment) Ordinance, 2008
33. Representation of the People Order (Second Amendment) Ordinance, 2008
34. Representation of the People Order (Third Amendment) Ordinance, 2008
35. Right to Information Ordinance, 2008
36. Bangladesh Laws (Revision and Declaration) (Amendment) Ordinance, 2008
37. Citizenship (Amendment) Ordinance, 2008
38. Public Money and Budget Management Ordinance, 2008
39. Supreme Court Judges (Remuneration and Privileges) (Amendment) Ordinance, 2008
40. Fertilizer Management (Amendment) Ordinance, 2008
41. Members of the Bangladesh Public Service Commission (Terms and Condition of Service) (Amendment) Ordinance, 2008
42. Speedy Trial Act (Amendment) Ordinance, 2008
43. Local Government (City Corporation) Ordinance, 2008
44. Local Government (Municipality) Ordinance, 2008
45. Gram Sarkar (Repeal) Ordinance, 2008
46. National Board of Revenue (Amendment) Ordinance, 2008
47. Public Servants (Marriage with Foreign Nationals) (Amendment) Ordinance, 2008
48. Public Servant (Dismissal on Conviction) (Amendment) Ordinance, 2008
49. Bangladesh Telegraph and Telephone Board (Amendment) Ordinance, 2008
50. Consumers' Right Protection Ordinance, 2008
51. Dhaka Electricity Supply Authority (DESA) (Amendment) Ordinance, 2008
52. Real Estate Development and Management Ordinance, 2008
53. Grameen Bank (Amendment) Ordinance, 2008
54. Bangladesh Shilpa Bank (Amendment) Ordinance, 2008

Source: Datta (2009). *Caretaking democracy. Political process in Bangladesh*, 2006-08. Institute for Defence Studies and Analyses.

2.5. Harmonizing Articles 48(3) and 93 by Construction

At first, Article 48(3) of the Constitution of Bangladesh, which requires the advice of the Prime Minister, and Article 93, which empowers ordinance making, seem in tension when there is no Prime Minister and Parliament is dissolved. The constitution shows no literal solution; it neither names who advises the President in a vacuum nor clearly authorizes the President to legislate alone. Resolving this gap falls to harmonious construction. These provisions must be read together to up-

hold the integrity of the Constitution. The purpose of Article 48(3) of the Constitution is to ensure democratic accountability of the executive, while Article 93 provides a safety valve for emergencies. The constitutional structure presumes both will be enforced to the greatest extent possible without nullifying one another.

Functionally, one can read Article 48(3) as operative except in extraordinary situations. If an elected Prime Minister exists, all executive acts require the Prime Minister's advice. But when the Prime Minister's office is genuinely vacant, that advice requirement is impossible to fulfill. In such cases, an equivalent advisory mechanism must step in; for instance, a chief advisor or cabinet of advisors, as was done in earlier interim governments (Levush, 2024).

Moreover, structural interpretation requires viewing the constitution as an integrated whole (Sandalow, 1980). The executive power is vested in the Cabinet under the Prime Minister, but Article 93 of the Constitution authorizes the President to enact laws during recess. These must be reconciled. It may be considered that under Article 93 of the Constitution an ordinance may be issued on the advice of whatever executive authority is functionally present. In an interim setting, the President might act on the collective advice of a caretaking council, or even after seeking judicial opinion under Article 106 of the Constitution to justify extraordinary measures. This approach maintains continuity. The President does not remain properly silent and powerless during a crisis. The doctrine of harmonious construction means neither provision is given an absurd application. Article 48 of the Constitution provides that the rule is not an iron cage. It is interpreted to avoid deadlock when its literal terms cannot be met. The scope of Article 93 of the Constitution is not unbounded. Ordinances must still respect the Constitution and be temporary. A key safeguard is that any ordinances enacted must be ratified by the next elected Parliament. Promulgating an ordinance under Article 93 of the Constitution can legitimize an interim administration's actions, making them constitutionally ordained even before a new Prime Minister assumes office (Fariha, 2022).

3. Jurisprudential Foundations for Interim Governance Legitimacy in Bangladesh

The legitimacy of interim governance comes from principles designed to prevent the paralysis of the state during crises. The doctrine of necessity recognizes that in extraordinary times, exceptional steps may be required when ordinary laws fail to do so. The maxim *salus populi suprema lex* reminds us that the welfare of the people must come before rigid rules. The idea of constitutional continuity shows that government must carry on, while implied powers allow flexibility where the text is silent. Together, these principles provide a basis to justify temporary authority to preserve order and restore democracy.

3.1. Doctrine of Necessity

The doctrine of necessity is a classical principle which permits otherwise unlawful acts when they are essential to safeguard the constitutional order (Peirce & Peirce,

1892). It is derived from early common law and constitutional theory, as Lord Mansfield defined as an act which would otherwise be illegal becomes legal if it is bona fide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State, or society, effectively making lawful what otherwise is unlawful (*Rex v. Stratton and Others*, 1779). Even a successful revolution creates a new constitutional basis, thereby validating acts done under it (*Dosso v. Federation of Pakistan*, 1958). So emergency measures not strictly provided for in the constitution, so long as they restore legal order (*Wolf-Phillips*, 1979).

The legal structure of Bangladesh has similarly recognized the survival of the constitutional order as supreme, implying that extraordinary steps may sometimes be justified to preserve it. In 1989, the Court observed that key officials swear an onerous duty to preserve, protect, and defend the Constitution (*Chowdhury & Bangladesh*, 1989). The Supreme Court of Bangladesh has upheld a caretaker government's de facto formation on doctrine of necessity grounds during a crisis (*Khan*, 2025). In extreme circumstances, constitutional principles are flexible to maintain the rule of law and ensure justice, recognizing that rigidity in a vacuum would cause chaos (*Banik*, 2024). The core principle is that extraconstitutional acts can be validated if their purpose is to restore or preserve the fundamental legal framework (*Lobel*, 2011). Under state necessity, certain illegal measures may be condoned not because they are legal but in the interest of the Republic (*Khandker Delwar Hossain v. Bangladesh*, 2010). That is why in Bangladesh this doctrine has come to be understood that when no constitutional option remains, an otherwise unlawful step may be upheld if its aim is to avert disorder and safeguard the republic.

3.2. Salus Populi Suprema Lex

The maxim salus populi suprema lex, referring to the welfare of the people as the supreme law, establishes that public welfare can override strict legal formalities (*Down*, 1970). Its origin is from classical Roman law (*Taylor*, 1858). In constitutional emergencies, this doctrine has been used to justify measures taken for the greater good, even if they deviate from normal procedures (*Alford*, 2013). The spirit of the document demands giving effect to the public interest over procedural technicalities when a nation faces collapse.

In the 2011 judgment overturning the caretaker system, the Appellate Division affirmed that saving the people and state can justify exceptional actions (*Khan & Government of Bangladesh*, 2011). Similarly, in Pakistan, under Munir CJ, it had earlier been affirmed that the concept of the welfare of the people as the supreme law required validating emergency enactments to avert chaos (*Dosso v. Federation of Pakistan*, 1958). This means that, when faced with a constitutional void, courts may allow governance to proceed by invoking public welfare, as the maxim salus populi suprema lex is to protect the people (*Siddique Ahmed v. Government of Bangladesh*, 2011). The Supreme Court of Bangladesh recognizes a hierarchy of

norms; if strict adherence to form would disable the state's ability to protect its citizens, the maxim permits a purposive reading of emergency powers to prioritize the welfare and continuity of society.

3.3. Constitutional Continuity

One of the core tenets is that governance must be continuous and cannot ground to a halt simply because officeholders have resigned or are unavailable (Olsen, 2009). In other words, the state cannot remain without a government even if mechanisms to replace leaders are imperfect (Fiss, 1987). The government as an institution of the state must endure even amidst rebellion or crisis because the state cannot exist without continuous governance (*Texas v. White*, 1868). Although Bangladeshi law does not contain a clear provision for the sudden loss of all ministers, the principle of continuity implies that someone must fill the void (Rasmussen, 2014). A constitution is meant to be an operating framework; if it leaves the country helpless when its leader falls, the constitution defeats its own purpose. This logic, often called the principle of continuity, has been recognized in comparable systems (Chen, 2023). In India, the Supreme Court emphasizes that offices cannot simply lapse to anarchy; interim arrangements or de facto authority must temporarily fill gaps so long as basic order is maintained (*Kehar Singh v. Union of India*, 1989).

Bangladesh's interim setup draws on this idea. With no elected prime minister to advise the President, reading the constitution to paralyze the government would be absurd. One practical expression of this view is that existing ministers continue exercising core functions until replacements are found. As an interim minister observed in a related context, the state cannot remain without a government that is at least in charge of fulfilling its obligation until the new government is elected (Peters & Pierre, 2006). This captures the underlying rationale that absolute procedural rigor must yield to the imperative that state machinery keeps running.

3.4. Implied Powers Doctrine

The doctrine of implied powers refers to the idea that a constitution must be liberally interpreted to empower the government to function, even when specific texts are silent (Dodd, 1919). A classic precedent for this is the U.S. Supreme Court's 1819 decision, where Chief Justice Marshall noted that we must never forget that it is a constitution we are expounding (*McCulloch v. Maryland*, 1819). By this, he meant that the Constitution's means must adapt to achieve its ends. Similarly, the Constitution of Bangladesh vests executive authority in the President subject to intent (Huq, 1973). When a situation falls beyond the text, a purposive reading may imply the necessary authority.

This shows that the residual powers of the president include ensuring governance continuity via appointments when needed. Bangladesh once provided for the President to appoint a non-party chief adviser if an election-time government was

required (Islam, Ebrahimi, & Yusoff, 2017). Although that scheme was repealed, the expectation remains that the President may use implied constitutional authority as an interim head of government. The implied powers doctrine supports the legitimacy of an appointed chief adviser even if the text mandates the consent of the prime minister; that requirement becomes questionable when no such minister exists. In such an emergency, the Supreme Court could therefore allow the President to act unilaterally to appoint an interim cabinet, viewing this as an implied duty to preserve governance (Supreme Court of Bangladesh 2024, *Special reference no. 01/2024*. Appellate Division). A rigid clause should not be interpreted to destroy its object, so too the framework of Bangladesh can be read flexibly when strict literalism is impossible; the President's power to appoint a caretaker government may be inferred as necessary to carry out the constitutional mandate of rule by law.

4. Judicial Precedents and Comparative Legitimacy Models

The Supreme Court of Bangladesh has struggled with the absence of clear constitutional guidance for a caretaker or interim regime. In 2011, the Appellate Division of the Supreme Court declared the 1996 caretaker government amendment unconstitutional, finding it violated core democratic principles (Abdul Mannan Khan v. Government of Bangladesh, 2011). However, the Court reasonably allowed the caretaker system to complete two more elections under the doctrines of necessity and state safety. Basically, the court held that although the amendment had become void and ultra vires, the chaotic political context warranted temporarily upholding the caretaker scheme to ensure orderly elections. This shows that extraconstitutional measures could be judicially validated on necessity grounds.

Later, in 2024, Bangladesh faced a true constitutional vacuum when the elected prime minister resigned without a constitutional successor (Ethirajan, 2024). The President, empowered under Article 106, sought legal advice on whether an interim government could be formed, to which a full bench of the Appellate Division responded affirmatively, explaining that in the absence of parliament an executive can be maintained by appointing a neutral chief advisor and supporting advisors until fresh elections (Supreme Court of Bangladesh 2024, *Special reference no. 01/2024*. Appellate Division). Here, the court did not cite a specific constitutional provision for this arrangement, but it treated the de facto situation as comparable to the old caretaker model, thereby strictly relying on the same necessity logic. The Court emphasized that the existing constitutional text structured the outgoing prime minister and cabinet to act until successors assume office, but it acknowledged that these provisions were inoperative because the prior government had itself been formed in controversial circumstances. That is why the legal system of Bangladesh recognizes that when normal democratic mandates collapse, an interim authority may nonetheless be tolerated if its purpose is a return to constitutional order.

4.1. Comparative Jurisdictions

Other countries have faced similar situations when no elected executive is available. In Pakistan, the constitution requires a neutral caretaker administration between governments (Qureshi & Suddle, 2024), but provides no independent budget or clear powers. The Supreme Court of Pakistan has emphasized that such caretaker regimes possess limited powers and authority, noting that without a legislature in place, their accountability is absent (Democracy Reporting International, 2014). Pakistan's past practice shows that caretaker governments have sometimes promulgated urgent ordinances to maintain fiscal stability or public order when no political government could act (Usman, Hussain, & Amir, 2024). The judiciary of Pakistan tolerates these measures under a broad necessity theory. The judges of Pakistan generally uphold a caretaker order as valid *de facto* so long as it merely administers the state or prepares for elections, provided it does not irreversibly affect the incoming elected government's domain. After all, both international and Commonwealth scholars recognize that acts of an effective authority lacking formal title may be upheld if they are reasonably required for the ordinary running of the state and do not infringe citizens' fundamental rights (Commonwealth Secretariat, 2017).

The recent experience of Sri Lanka shows the flip side. A powerful president acting when the legislature is paralyzed. Under Sri Lanka's presidential constitution (Rasheed & Kuruwita, 2018), the President holds executive power (The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). In late 2018, a deeply divided Parliament was dissolved after the President dismissed the sitting prime minister and unilaterally appointed a new one who had no majority (BBC News, 2018). For a certain time, the President governed essentially alone, issuing instructions and attempting to govern by decree until the Supreme Court intervened. In December 2018, the Supreme Court of Sri Lanka unanimously ruled that the dissolution of Parliament by the President was unconstitutional, acknowledging that for a time the President had acted in the absence of a legitimate prime minister (Rasheed & Kuruwita, 2018). Although the Court restored the ousted prime minister, the interim period itself highlights that a president may in practice administer state affairs solo during a deadlock. Sri Lanka's case shows a form of executive emergency where the President can temporarily fill the vacuum, but must soon submit to judicial review (DeVotta, 2025).

South Africa offers another comparative model, born of transition rather than acute crisis. The post-apartheid Interim Constitution of 1993 preserved the continuity of government, which provided that, subject to this Constitution, all existing laws and institutions remained in force (Republic of South Africa, 1993). The Constitutional Court adopted a functionalist position to legitimize pre-constitutional arrangements until elections. The Court thus validated transitional bodies created by negotiation on the ground that they were indispensable for a peaceful handover (Maharaj, 2008). South African jurisprudence confirmed a doctrine similar to Madzimbamuto, where actions taken by those actually in control with-

out strict constitutional title could be recognized by courts so long as they were necessary to keep the state functioning and did not breach core rights.

4.2. International Legal Principles

International legal norms similarly support the idea that effective authority can determine legitimacy in emergencies. Under the classic Recognition of Governments doctrine, world practice stresses control over territory as the key criterion (Talmon, 1998). Effective control could justify de facto recognition even if the government has taken power unlawfully (*Great Britain v. Costa Rica*, 1923). Recognition often follows the effective control test, where an entity is treated as the government if it in fact exercises the powers of government over most of the nation (Crawford & Brownlie, 2019), whereas de jure factors are secondary (Briggs, 1939). That is why even a self-declared interim regime with no explicit constitutional basis may be accepted as legitimate by other states and international bodies if it obviously holds authority and is capable of upholding international obligations (*Luther v. Sagor*, 1921). The de facto & de jure distinction is central here; a de facto government in effective control may be recognized as legitimate for international purposes despite lacking de jure sanction (Talmon, 1998).

Another relevant principle is reflected in Commonwealth guidelines and constitutional theory, where courts applying the Latimer House Principles, which overview democratic norms, have observed that exceptional measures may be tolerated if temporary and aimed solely at restoring democracy (Bailhache, 2000). Similarly, long-standing common-law rules hold that acts by an extraconstitutional authority can be upheld if they serve only to maintain the ordinary running of the state and do not impair fundamental rights (Bailhache, 2000). The international view recognizes a hierarchy of values: preserving democratic governance and order may momentarily outweigh strict adherence to procedural formulas. Any deviation from normal constitutional process must be purely transitory, aimed at holding elections or peaceably transferring power. Taken together, these principles suggest that a caretaker or interim government, even if extra-constitutional, can attain legitimacy through effectiveness and temporariness. A de facto interim authority that ensures continuity of administration and promptly moves toward elections will usually be deemed acceptable internationally, so long as it does not arrogate permanent changes.

5. Constitutional Silence and the Problem of Indeterminacy

Constitutional silences refer to failures to address every contingency or even result in internal tension, leaving certain circumstances indeterminate (Lipkin, 1991). Constitutional silence defines the absence of explicit guidance in the text on a particular scenario, whereas indeterminacy refers to ambiguity or conflict within the existing text (Winter, 1990). Such silences are not necessarily accidental; in advanced constitutions, silences are intentionally tolerated as functional mechanisms for resolving deep conflicts over time (Loughlin, 2018). A constitutional

silence may show a deliberate decision to defer sensitive issues, preserving the legitimacy of the constitution by avoiding intractable disagreement. Indeterminacy, in which two provisions pull in different directions, is an inevitable feature of many constitutions, requiring creative interpretation to avoid paralysis (Lipkin, 1991). In legal view, this phenomenon invites purposive and harmonizing construction (Wheatle, 2019). The principle of legality may protect rights which are not expressly mentioned or preserve constitutional structure in the face of a lacuna (Supreme Court of Canada, 2013, R v Bedford). The fundamental reason is that constitutions must remain functional even if a literal reading of silence would render governance impossible; the law condones and even cultivates constitutional ambiguity as an acceptable strategy to allow adaptable government (Winter, 1990). The Constitution of Bangladesh does not provide a direct provision for an absent Prime Minister, so a purposive interpretation would hold that the spirit of Articles 48(3) and 93 of the Constitution allows temporary substitution. The implicit continuity doctrine, presuming that the people under Article 7 of the Constitution would not accept a total executive paralysis. The outcome is that the President may lawfully issue ordinances in the interim. The constitutional silence creates indeterminacy, but entrenched interpretive principles (Al-Atiyat, 2024).

5.1. Constitutional Resilience and Adaptive Capacity

Constitutional resilience refers to a system's ability to absorb shocks and continue functioning without permanent breakdown, emphasizing flexibility as well as stability (Roesler, 2023). In this view, a robust constitution is one that has built-in adaptive capacity, formal or informal scope for government bodies to function in emergencies. A constitutional order must encourage flexibility and adaptive capacity in institutions and laws (Roesler, 2023). This means accepting doctrines and practices that allow continuity of governance even under stress. A competent constitution upholds its core values, such as democracy, rule of law, and fundamental rights, over time by self-correcting after emergencies. This practice can be seen internationally, where many newer democracies adopted interim constitutions recognizing exceptional regimes until full order could be restored (Sunil Babu Pant v. Nepal Government, 2007). In established democracies, unwritten emergency powers are understood to be hidden, prioritizing union over formal suspension of norms (*Ex parte Merryman*, 1861). Resilience reflects public-spirited governance by reframing the Constitution as a living instrument (Cosens, Ruhl, Soininen, & Gunderson, 2020). Bangladesh has also adopted this while advancing good governance (Zafarullah & Huque, 2001). It is to say law should leave room for institutional innovation and steer systems to respond at the pace of change. In Bangladesh, this principle shows how the interim regime is held to account through other means even though it lacks the usual electoral mandate. Thus, constitutional resilience here means preserving the essence of democratic accountability while temporarily adapting internal mechanics.

5.2. Temporal Constitutionalism

Temporal constitutionalism refers to the situation in which constitutions may tolerate time-limited exceptions or transitional arrangements during extraordinary periods (Schäfer & Merkel, 2021). It recognizes that a normal constitution can produce a provisional regime, often with its own charter or implicit rules, until the actual democratic process is restored. This concept draws from transitional constitutionalism in post-conflict or revolutionary settings where constitutionalism may take an unconventional form (Khatiwada, 2008). Transitional constitutionalism describes necessary changes from usual norms during profound change by creating the foundations of transformation. This means applying a temporary constitution or reading provisions with a built-in expiration date; emergency powers, caretaker regimes, or provisional governments act as pseudo-constitutional entities.

Bangladesh has a history of temporary arrangements. Article 7 of the constitution of Bangladesh shows people's sovereignty, which gives legal force to such temporariness. The people's ultimate authority permits provisional institutions to govern only until the constitutional order resumes fully. The interim government of Bangladesh and its ordinance making can be understood as exercising temporal constitutionalism. The Cabinet of Advisers is a provisional body with powers justified only by necessity and subject to later democratic review.

5.3. Governance through Trust and Accountability

A legitimate government exercises its powers through the trust of the people and under norms of accountability. The actual authority of the Constitution ultimately rests on popular confidence. Article 7 of the Constitution ensures that all powers derive from the people of the country, implying that government actors must govern in the public interest or risk losing legitimacy (Jahan, 2015). This shows that even where the letter of the law is silent, officials of the government owe unwritten duties of restraint and fidelity to constitutional values (Frohnén & Carey, 2010). Constitutional morality includes that officials must act consistently with the spirit of the Constitution even if no specific rule commands it (Navtej Singh Johar v. Union of India, 2018). Thus, trust and accountability become guiding values when the text cannot specify conduct. In Bangladesh, this concept supports the interim government's legitimacy. Although the interim Cabinet is without an electoral mandate, it operates under public mandate and with an explicit promise of returning power to elected hands. This reflects a modern concept of constitutionalism where not everything good or necessary must be in the text, but actions must be guided by enduring principles of justice and openness (McIlwain, 2005).

6. Legitimacy of Presidential Ordinances in the Interim Context

The legitimacy of presidential ordinances in an interim regime arises from the interplay of constitutional text and supportive legal principles. Article 93 of the Constitution confers limited authority, but doctrines of necessity and effectiveness may sustain temporary governance. Such power, however, remains circumscribed

by parliamentary ratification, judicial scrutiny, and the inviolability of constitutional morality. Hence, ordinances are legitimate only insofar as they preserve constitutional continuity, respect democratic foundations, and operate transparently as instruments for restoring representative government.

6.1. Constitutional Grounding

Article 93 of the Constitution of Bangladesh empowers the President to promulgate ordinances when Parliament is dissolved or not in session and immediate action is needed. By its plain text, however, such ordinances are limited. The proviso to Article 93 of the Constitution prohibits any ordinance that alters or repeals any provision of this Constitution. In other words, an ordinance can approximate an Act of Parliament only to the extent that it stays within the existing constitutional framework (Riaz, 2014). Article 93(1)(ii) of the Constitution creates a clear textual check on executive power by barring constitutional change by decree. Another textual consideration is Article 48(3) of the Constitution, which provides that the President must act in accordance with the advice of the Prime Minister in exercising virtually all functions (Mashreque, 2014). This clause raises a question in the interim context: with no elected Prime Minister in office, on whose advice does the President act? Article 48(3) would ordinarily preclude unilateral action by the President without the guidance of the Prime Minister. The interim arrangement therefore faces an interpretive vacuum where the Constitution does not clearly mention a procedure for executive action in the absence of a Prime Minister. The text of the Constitution permits ordinances under Article 93 of the Constitution but with built-in restrictions, and the lack of a sitting Prime Minister creates an unprecedented ambiguity about proper authorization.

6.2. Jurisprudential Justification

In the absence of clear textual authorization in the Constitution, it needs to take the interim ordinances to refer to broader doctrines. Foremost is the doctrine of necessity, which holds that what is otherwise not lawful is made lawful by necessity when there is no alternative to prevent imminent harm (*Rex v. Stratton & Others*, 1779). It can even be argued on the basis of the doctrine of effectiveness. The idea is that a de facto authority must exercise power in line with constitutional values (Waskan, 1998). But this doctrine suggests that if the interim government is effectively governing, its ordinances will be viewed as lawfully preserving continuity (Lauterpacht, 1939). Generally, the doctrine of transitional justice has been referred to, and it emphasizes that in serious crises, severe measures such as the installation of transitional governments are required to prevent instability (Teitel, 2002). Under this view, the legitimacy of the interim government derives from its declared mission to restore democracy and ensure justice and the rule of law during the transition.

6.3. Structural Safeguards

Even if necessity is referred, the Constitution imposes procedural limits on ordi-

nance power as safeguards. Article 93(2) of the Constitution of Bangladesh mandates that every ordinance must be presented before Parliament at its next session, and will lapse unless clearly approved within thirty days of reassembly (Saha & Al-Faruque, 1998). This means the interim government's ordinances automatically expire on a tight timetable if a duly elected Parliament does not endorse them. Article 141A of the Constitution requires any state of emergency to end within 120 days absent parliamentary ratification. These rules ensure that any executive legislation is strictly temporary. Along with that, the Supreme Court retains the power to strike down any ordinance that is plainly inconsistent with the Constitution's fundamental provisions and basic structure (Supreme Court of India, 1973, Kesavananda Bharati). However, the subjective satisfaction of the President that immediate action is needed is not judicially reviewable (Ahmed, 2020). In other words, while a court cannot question the decision of the President to promulgate an ordinance, it can invalidate an ordinance that exceeds constitutional limits.

Even international legal principles have some safeguards. The Latimer House Principles, affirmed by Commonwealth countries, state that the executive must remain accountable to Parliament and that Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament (Commonwealth Parliamentary Association, 2023). As per this, any ordinance must ultimately face legislative oversight (Brewer & Slinn, 2018). Similarly, a fundamental aspect of constitutionalism is an independent judiciary, as the Supreme Court itself cited: an independent, impartial, honest, and competent judiciary is integral to upholding the rule of law (Civil Appeal No. 6 of 2017). These structural prohibitions—time limits, legislative review, and judicial independence—form part of the charter that restricts any interim measure and guards against unchecked executive rule.

6.4. Normative Balance

Beyond formal legality, a normative assessment of legitimacy shows how interim ordinances align with the spirit of the constitution (Barnett, 2003). As mentioned earlier, Article 7 of the Constitution ensures that all power derives from the people of Bangladesh. Thus, any change from the ordinary democratic process requires a compelling justification. The interim regime's mandate to hold free elections and purge authoritarian abuses aligns with the will of the people and the Constitution's underlying principles (Human Rights Watch, 2025). Therefore, the interim government is essentially a collective expression of the mass movement's will, focused on returning the country to popular rule (Shain, Linz, & Berat, 1995). In this sense, a purposive reading of the Constitution might view the interim measures as consistent with constitutional morality, a concept meaning that officials shall act in a manner that is consistent with the principles and values that the spirit of the Constitution demands (Beteille, 2008).

International experience reinforces the need for balance. Transitional justice

theory emphasizes that legitimacy in crises depends on fair procedures and accountability (Buckley-Zistel, Beck, Braun, & Mieth, 2014). This means that the interim government's ordinance making must remain transparent, narrow in scope, and aimed solely at restoring constitutional order rather than entrenching new power structures (Beermann, 2003). Bangladesh's prior caretaker system was expressly designed to be non-partisan and accountable; it was meant as a temporary fourth branch to secure elections. The constitutional guarantee of basic structure adds a normative floor. Article 7B of the Constitution clearly declares that certain core features of the Constitution are unamendable. This reinforces that even a transitional government cannot override democracy's foundations. The interim ordinances must be justified not just by emergency, but by fidelity to democratic norms; they may be legitimate if and only if they advance a return to representative rule, respect fundamental rights, and remain subject to the constitutional checks outlined above.

6.5. Reviewing Interim Ordinances

Under the Constitution of Bangladesh, all power originates from the people of the state, and the Constitution is the supreme law of the State. This supremacy implicitly becomes judicial supremacy, where courts are empowered to interpret the Constitution's meaning and enforce its limits (Phillips, 1962). An independent and impartial judiciary is primarily responsible for ensuring the rule of law (Idrisur Rahman v. Secretary, Ministry of Law, 2009). The judiciary serves as the guardian of the Constitution and the people's rights, empowered to check the executive and protect citizens from arbitrary excesses (Government of Bangladesh v. Asaduzzaman Siddiqui, 2017). Also, the Constitution of Bangladesh is treated as a living document, subject to purposive interpretation in the public interest (Rahim & Islam, 2019).

Therefore, it may apply the following three-part test for reviewing interim ordinances:

- a) The ordinance must address an urgent public welfare need. The court should assess whether the measure genuinely responds to an acute crisis or emergency (Fraser Jr., 1951).
- b) The ordinance must respect the Constitution's core basic structure. It should not undermine essential democratic principles or unamendable features. It should be ensured that the ordinance fits within the Constitution's basic values and structure (Adler & Dorf, 2003).
- c) The ordinance must preserve checks and balances and legal accountability. It should be temporary, transparent, and narrow in scope, aimed at restoring constitutional order. The executive remains answerable and does not accumulate arbitrary power (Idrisur Rahman v. Secretary, Ministry of Law, 2009).

7. Conclusion

The constitutional legitimacy of interim governance in Bangladesh lies in inter-

preting textual rigidity with functional necessity. The analysis has shown that constitutional silence does not equate to institutional paralysis. It calls for purposive interpretation to preserve state continuity. Comparative jurisprudence shows that constitutional continuity is a universal principle where governments must not collapse even when regular leadership is absent (Chen, 2023). The power to promulgate ordinances during interim governance is neither an exception nor a usurpation but an instrument conditioned by temporariness and accountability. It is true that extraordinary powers cannot be exercised arbitrarily; they must remain consistent with the basic structure of the constitution and be subject to eventual parliamentary ratification (Supreme Court of India, 1973, Kesavananda Bharati). International law supports this position, where recognition of de facto authority rests upon effectiveness and the capacity to uphold obligations until representative institutions resume (Talmon, 1998). Legitimacy demands faithfulness to constitutional morality. Governance cannot merely claim legality through textual loopholes but must be based on the trust of the people (Frohnen & Carey, 2010). The interim regime bears a duty not only to administer but also to ensure that every measure taken under ordinance power is temporary, transparent, and directed toward elections. The legitimacy of ordinances made by the executive in Bangladesh by the interim government is neither absolute nor illusory. It is conditional, sustained only when necessity, continuity, and constitutional morality converge to guarantee that exceptional authority ultimately serves the return to democratic governance.

Conflicts of Interest

I hereby declare there are no conflicts of interest regarding the publication of this paper.

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