

## MARTIAL LAW, JUDICIARY AND JUDGES: TOWARDS AN ASSESSMENT OF JUDICIAL INTERPRETATIONS

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### INTRODUCTION

In countries of written constitutions the courts are regarded as temples of justice, the judges its oracles. Constitutional supremacy presupposes the existence of a strong neutral organ which would be able to prevent unconstitutional onslaught by the executive and legislature. In course of time judiciary has been developed and recognised as the guardian of the constitution. If executive or legislature desires to do something which is inconsistent with the provisions of the constitution, the judiciary has been empowered to undo the ill-design orchestrated by the executive or legislature. When an usurper unconstitutionally captures state apparatus, the judiciary is expected to act in the way as the constitution, supreme law of the land, directs. The judges are subject only to the constitution as they are oath bound to preserve, protect and defend it. They submit their allegiance and make themselves subservient to the constitution and (valid) law.

Judiciary is expected to be the ultimate custodian of the constitution, but when an unconstitutional martial law regime captured power in a country the judiciary has seldom been able to stand by its oath. In most of cases, the judiciary became a passive spectator or a partner with the usurper's regime rather than a protector of the constitution and rule of law.

Once upon a time the highest court of country treated *de facto* government as valid source of law which has been established by successful usurpation of power. A *de jure* status has been conferred on a usurper by the highest court sometimes by invoking the doctrine of efficacy or revolutionary legality and sometimes by the doctrine of state necessity. The

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judiciary actively participated in the process by which the usurper captured state power or acted as an organ conducive to the continuation of the unconstitutional regime of the usurper.

The purpose of this article is to examine the role of judiciary, specially the role of the highest courts of Pakistan and Bangladesh before and during martial law regimes. The paper, from a legalist standpoint, analyses the incumbent responsibility of the judges, the limitations of the judges, few prudent and courageous decisions by the judiciary and an overall appraisal of the judiciary and the judges during martial law regimes.

### **THE ROLE OF JUDICIARY IN PAKISTAN**

The Federal Court and later Supreme Court of Pakistan played a role which can not be said to have been conducive for constitutionalism in Pakistan, rather it strengthened the hands of Governor Generals and military rulers.

#### ***Maulovi Tamizuddin Khan vs Federation of Pakistan*<sup>1</sup>**

After its independence, Pakistan began to be governed by the Government of India Act, 1935 and the Indian Independence Act, 1947. The Constituent Assembly of Pakistan acted as the federal legislature, in addition to the task of framing the constitution. The draft constitution was scheduled to be signed by the Draft Committee on October 25 and thereafter to be placed before the Assembly on October 27, 1955 for its adoption. However, on October 24, 1955 the then Governor General Gulam Muhammad dissolved the Constituent Assembly, leading to a total breakdown of the constitutional process. By a writ petition under section 223A of the Government of India Act, 1935, the President of the Constituent Assembly Maulovi Tamizuddin Khan challenged the act of the Governor General before the Chief Court of Sind. The writ jurisdiction was conferred in July 1954 by inserting section 223A by way of an amendment to the Government of India Act of 1935.

A strange plea was put forward by the Attorney General on behalf of the Federation of Pakistan, claiming that section 223A of the Government of India Act, 1935, under which a writ petition was filed was, not a valid piece of legislation for want of assent by the Governor General.

The Chief Court of Sind held that the Constituent Assembly was supreme in all matters and it was not subject to any instrument other than itself. The court unequivocally held that there was no ambiguity in the

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<sup>1</sup> PLD 1955 Sind 96.

amendment and that the Constituent Assembly had full legislative power to amend the Government of India Act, 1935 in order to confer writ jurisdiction to the respective high courts of the provinces which the Assembly did by inserting section 223A through an amendment. So the power to issue writ by the Chief Court of Sind was valid by which the honourable court ordered to restore the President of the Constituent Assembly to his office.

The Chief Court after considering all the matters held that the dissolution of the Constituent Assembly a nullity in law, on the ground that Governor General had no jurisdiction to dissolve the Constituent Assembly under the constitution. Being a sovereign body the Assembly was “subject to no agency or instrument outside itself to effect its dissolution or to give effect its laws validity, except such as it itself chose to create.”<sup>2</sup>

The Federation of Pakistan preferred an appeal in the Pakistan Federal Court which by a majority judgement turned down the decision of Sind Chief Court. The Federal Court held that the power of issuing writs of mandamus by the Sind Chief Court was not valid as it was incorporated in the Government of India Act, 1935 by inserting section 223A by a resolution of the Constituent Assembly itself to which the assent of the Governor General was not obtained. So, the petition of Maulovi Tamizuddin Khan for a prayer to declare the proclamation of Gulam Muhammad dissolving the Constituent Assembly illegal was not maintainable. It is pertinent to mention here that, no such assent of the Governor General was taken from any of the Governor Generals including Golam Muhammad himself for validity of any Act passed by the Constituent Assembly. The Federal Court by 4 to 1 majority delivered its verdict on March 21, 1955 without, however, actually elaborating on the main issue, i.e., whether the Governor General had the power under the Indian Independence Act, 1947 to dissolve the Constituent Assembly.<sup>3</sup> The Federal Court ignored the fact that Pakistan was then an independent State for all practical purposes and Pakistan would be completely under her own sovereign authority to be exercised by the Constituent Assembly. It became an established practice of Pakistan that no assent of the Governor General was necessary for any law to become operative and all institutions

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<sup>2</sup> Mushtaq Ahmad, Government and Politics in Pakistan, 3<sup>rd</sup> edition, Karachi, 1970, at p.31; see also, PLD 1955 Sind 96.

<sup>3</sup> Moudud Ahmed, Bangladesh: Constitutional Quest for Autonomy, 2<sup>nd</sup> edition, Dhaka, 1991, at p.33.

— legislative, executive and judiciary — had accepted this position including the sitting Governor General. But this point was ignored by the Federal Court. It also ignored that the Governor General had no jurisdiction to dissolve the Constituent Assembly under the Indian Independence Act, 1947.<sup>4</sup>

This judgement of the Federal Court had far reaching consequences on the future course of events in Pakistan. Implications of this judgement were not limited to the validity of writ jurisdiction alone, created by section 223A of the Govt. of India Act, 1935. Instead of reconstituting a new Constituent Assembly, the Governor General assumed all the legislative powers. He repealed and amended provisions relating to Federal Legislature and requirement for Annual Financial Statement by the Emergency Powers Ordinance No. 9 of 1955 which also purported to oust court's jurisdiction to challenge Acts and Orders passed by the Governor General. The consequence, thus, of assertion of the writ jurisdiction by the judiciary, through fiat of interpretation, was the usurpation of all power by the Governor General. Chief Justice Munir, author of the Supreme Court judgement, later admitted that, "it is a mistake to suppose that we were not aware of the far reaching consequences of the decision in the *Tamizuddin Khan* case."<sup>5</sup>

The consequences of the Federal Court's judgement was more severe than the judges probably contemplated. In its constitutional development, the people witnessed one disaster after another. In course of time, a situation arose that the whole country was probably functioning under invalidated laws and the entire constitutional edifice was on the verge of collapse.<sup>6</sup>

Amir-ul Islam has commented on the judgement in the following words:

With all due respect to Mr. Justice Munir, his refusal to save the law which was lawfully enacted by a sovereign Constituent Assembly and to deny its validity merely for lack of assent despite the fact that the law was obeyed, practised and acted upon and even their validity tested and recognised before the Federal Court itself, knowing as he did that the requirement of an assent in a constitutional legislation is of technical nature and it is doubtful and debatable whether the assent is a sine qua non for its

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<sup>4</sup> Ibid., at p.34.

<sup>5</sup> Report on this Special Reference made by the Governor General of Pakistan being Special Reference No. 1, PLD 1955(1) FC 435, at p. 447.

<sup>6</sup> Supra note 3, at p.34.

validity, creates a grave doubt as to the logic or consistency or judicial integrity and responsibility behind his judgement.<sup>7</sup>

### ***Special Reference No.1 of 1955***

After the judgement in the *Tamizuddin Khan* case there was no machinery which could act as constitution and law making body. In that situation the Governor General proclaimed an emergency by Emergency Powers Ordinance No. 9 of 1955 in order to establish some constitutional machinery and to validate past laws. He assumed the power to make provisions for the framing of the constitution and validating the past laws which became invalid without the assent of the Governor General. But the Ordinance was challenged as the Governor General had no jurisdiction to enact constitutional provisions which authority was only conferred to the Constituent Assembly by the Indian Independence Act, 1947. The Federal Court had earlier created a questionable precedent in the *Tamizuddin Khan* case and it was caught in its own trap and this created a severe constitutional impasse in Pakistan. To overcome the situation the then Governor General invoked the advisory jurisdiction of the Federal Court by the Reference No 1 of 1955. In order to solve the impasse created by itself the Federal Court of Pakistan recommended the Governor General to constitute a new Constituent Assembly. As there was no law under the Act of 1935 or 1947 by applying which Governor General could create a Constituent Assembly, the Federal Court invoked the doctrine of state necessity to give a seal of validity to such an act of the Governor General.

The evil effect of the judgement in the *Tamizuddin Khan* case continued to pose the question whether an assent of the Governor General would be required to get validity of any law. It clearly meant that any future constitution of Pakistan would require the assent of the Governor General. The formula given by the Federal Court strengthened the hands of the Governor General more than ever before. The new Constituent Assembly was established with a clear authority of the Governor General to dissolve the same along with many other prerogatives reserved to him. The Federal Court of Pakistan created a Constituent Assembly without any authority of law.

It is submitted that the first Constituent Assembly was dissolved unconstitutionally by the Governor General and the decision was upheld by the Federal Court in the *Tamizuddin Khan* case. Subsequently the second

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<sup>7</sup>. Amir-ul-Islam, "Status of an Usurper: A Challenge to the Constitutional Supremacy and Constitutional Continuity in Bangladesh", 2 (1997) The Chittagong University Journal of Law, 1, at pp. 9-10.

Constituent Assembly was constituted unconstitutionally by the order of the Federal Court in *Special Reference No. 1* of 1955. By this process the Governor General became the most powerful power in Pakistan with the approval of the Federal Court. The political and constitutional effect of the said acts of the Federal Court was disastrous. From then onwards the validity of all constitutional development in Pakistan had been questioned.<sup>8</sup> There is no ambiguity in holding that by questionable interpretations of constitutional acts and the power of the chief executive, the Pakistan Federal Court may have paved the foundation for future usurpation of power by military rulers. Thus, the role of the highest court became one of facilitating organs which promoted, encouraged and established unconstitutional regime of Governor General and military rulers, rather than defending constitutional supremacy and rule of law. In this connection it would be worthwhile to quote Chief Justice Hamoodor. In *Asma Jilani vs Government of Punjab* he observed

The disaster, which was apprehended in the case of Moulvi Tamizuddin Khan had occurred. The Governor General had unconstitutionally dissolved the Constituent Assembly. Proceedings taken to question the validity of the Governor General's action by invoking the jurisdiction of the High Court under Section 223A of the Government of India Act were held to be incompetent, because, that section itself had been incorporated in the Government of India Act by a resolution of the Constituent Assembly which had not, according to the practice up to that time prevailing, been formally put up for assent. Thereafter, when the Governor General attempted to validate a vast body of such constitutional legislation, which had been passed between 1947 and 1954, retrospectively by an Ordinance itself was struck down. In desperation the Governor General in his turn invoked the advisory jurisdiction of the Federal Court under section 213 of the Government of India Act *vide* Governor General's reference No. 1 of 1955 and asked the Court to find a solution for the constitutional impasse created by the judgements of the Court itself. The Federal Court again came to his rescue and although no 'law' of any kind could be found to meet the situation, invoked in aid 'the supreme principle of necessity' embodied in the maxim *salus populi est suprema lex* and on the basis thereof evolved a new political formula for the setting up of a new Constituent Assembly, even though this very maxim when used in support of the contention of Moulvi Tamizuddin Khan that the invalidation of a large number of constitutional laws merely on the ground of want of formal assent of the Governor General

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<sup>8</sup> Supra note 3, at p.36.

would cause 'disaster' and create a 'Constitutional impasse,' had not found favour with the Court.

The object of the learned counsel in referring to these decisions is presumably to suggest that from this day onwards whatever constitutional developments took place were not strictly legal. The 1956 Constitution, under which the principle of Parity was accepted and the country was divided into two provinces of East and west Pakistan, was, it is alleged, a constitution framed by an illegally Constituted body which was, under the threat of refusal of assent, also coerced into electing General Iskander Mirza as the first President of Pakistan under the Constitution. The process of illegality thus set in motion led in its turn to the illegal usurpation of power by the President so elected under the said Constitution abrogating the Constitution and declaring Martial Law on the 7<sup>th</sup> of October, 1958. This was followed three days later by the promulgation of the Law (Continuance in Force) Order on the 10<sup>th</sup> of October, 1958.<sup>9</sup>

### *State vs Dosso*

Pakistan got its first constitution in 1956. Thereafter Governor General Iskander Mirza was elected as the first President under the new constitution. However, he declared martial law on October 7, 1958 throughout the Pakistan when the country was preparing for the general election, scheduled in February, 1959. Governor General Mirza dismissed the Central and Provincial governments, dissolved the Central and Provincial Legislatures, and appointed the Commander-in-Chief of the Pakistan Army as the Chief Martial Law Administrator. Following the proclamation of martial law, the Law (Continuance in Force) Order was promulgated. Pakistan Supreme Court examined the legality of Mirza's proclamation of martial law and the taking over of power by military government in *State vs Dosso*.<sup>10</sup> In its judgement the highest court of Pakistan invoked the doctrine of revolutionary legality based on the positivist theory of efficacy expounded by Hans Kelsen. By applying this doctrine, Pakistan Supreme Court declared the martial law and military government valid and lawful. As the previous legal order was overthrown and a new legal order captured the power by imposing martial law, and there was no protest from the people, and the 1956 Constitution was abrogated, the *coup d'etat* was deemed a successful one and martial law and military government were legally valid — or so expounded the court.

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<sup>9</sup> PLD 1972 SC 139.

<sup>10</sup> PLD 1958 SC 533.

The judgement delivered by Chief Justice Munir was severely criticised. On the other hand, judges of different Commonwealth countries invoked this judgement for giving a seal of validity to usurpers in their own countries. Chief Justice Munir in *State vs Dosso* expressed his understanding of successful revolution in the following language:

Victorious revolution or a successful *coup d'etat* was an internationally recognised legal method of changing a constitution, and the revolution having become successful in Pakistan it satisfied the efficacy of the change and became a basic law-creating fact .... It sometimes happens that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order ... from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial .... Equally irrelevant is the motive for a revolution .... If the revolution is victorious in the sense that persons assuming power under the change can successfully require inhabitants of the country to conform to the new regime, the revolution itself becomes a law-creating fact.<sup>11</sup>

The basis of this judgement was the interpretation of Kelsen's pure theory of law. Hans Kelsen in his General theory of Law and State systematically presented the legal effects of a revolution. In the language of Kelsen, a revolution means a successful revolution. To be successful, the old order must have ceased and replaced by a new order which is efficacious in its governance. The new order begins to be efficacious when individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order. This order, then, is considered as a valid one. It is now according to this new order that the actual behaviour of individual is interpreted as legal or illegal.

However, the revolution, i.e., proclamation of martial law in Pakistan in 1958 did not come about with mass participation of the people of Pakistan. The term 'martial law' was used in Article 196 of the 1956 constitution of Pakistan which recognised the possibility that martial law might be imposed under the common law doctrine of necessity for the purpose of "the maintenance or restoration of order in any area in Pakistan." There was no situation which could justify the declaration of martial law by President Mirza. If the President was satisfied that a grave emergency existed in which the security or economic life of Pakistan, or any part thereof, was threatened by war or external aggression, or by

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<sup>11</sup> Ibid.



internal disturbance beyond the power of a Provincial Government to control, he might issue a Proclamation of Emergency.<sup>12</sup> Instead of proclaiming emergency, he declared martial law which was a clear violation of Article 196 of the constitution.

The usurpation of power by Generals was considered 'successful revolution' by Chief Justice Munir. This 'successful revolution' unseated civilian interim government based on national consensus. This government was making arrangements for holding a general election in Pakistan with the assistance of other political parties when this 'successful revolution' took place.<sup>13</sup>

Under the Kelsenian doctrine of successful revolution the old order must cease to exist. In the case of Pakistan, President Mirza, however, remained the President and very important part of the new order. Hence, it is not clear how the old order ceased, keeping Mirza in the position of President, though Mirza dismissed the Central and Provincial governments and legislatures. It is well known that President Mirza was deeply and inextricably involved in machinations and intrigues in an attempt to make himself the centre of power of the whole Pakistan. "The constitution to which he had sworn allegiance was subverted by him long before it was overthrown lock, stock and barrel."<sup>14</sup> Finally, he, in collusion with the Chief of Army Staff, declared martial law and put the country in an unconstitutional condition. Unfortunately, doings of Mirza, by which he established the so called new order, was considered by Munir, C.J. as revolution. In the guise of the doctrine of efficacy, Chief Justice Munir legalised usurpation of power by President Mirza and made grounds for the Armed Forces to over power in Pakistan. It is the irony of history that:

After judgement was delivered approving the new legal order imposed by President Mirza, and before the judgement could even be typed and printed, Iskander Mirza was forced to abdicate in favour of General Ayub Khan. Next morning Supreme Court's judgement and Chief of Army's assumption of power both shared the front page headlines in the newspaper side by side.<sup>15</sup>

In his judgement Munir C.J. said, "... from a juristic point of view the method by which and the persons by whom a revolution is brought about

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<sup>12</sup> Article 191(1) of the Constitution of the Islamic Republic of Pakistan, 1956.

<sup>13</sup> Abdul Gaffar Chowdhury, "*Ekush Satoker Bat Talay*" titled column, Daily Pratham Alo (Bengali), October 22, 1999, p.6.

<sup>14</sup> Supra note 2, at p.177.

<sup>15</sup> Supra note 7, at p.12.

is wholly immaterial .... Equally irrelevant is the motive for the revolution ....” Munir C.J. did not explain why the method and by whom a revolution is brought about. He also did not make his proposition clear about valid motives for a revolution. In evaluating any change of power or popular uprising, three elements, namely the method, the persons behind the movement and the motive are crucial and significant.

The principle enunciated by Chief Justice Munir provided a precedence for giving validity to usurpation of power in a number of countries of Asia, Africa and some Caribbean Islands. It is very interesting that the judgement delivered by Munir C.J. in *State vs Dosso* was overruled in *Asma Jilani vs Government of Punjab* by the Supreme Court of Pakistan. After thorough scrutiny, Pakistan Supreme Court unequivocally said that, Munir C.J. misapplied the doctrine enunciated by Hans Kelsen and it was not a generally accepted rule of jurisprudence. Chief Justice Hamoodor Rahman of Pakistan Supreme Court observed:

with the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice (Muhammad Munir) not only misapplied the doctrine of Hans Kelsen but also fell into error that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone .... I am unable to resist the conclusion that he erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is wholly unsustainable and I am duty bound to say that it cannot be a good law either on the principle of *stare decisis* or even otherwise.<sup>16</sup>

Munir C.J. in his judgement had said that if the revolution was victorious in the sense that persons assuming power could successfully require inhabitants of the country to conform to the new regime, the revolution becomes a law-creating fact. From the judgement it is clear that if the new regime is able to manage the inhabitants to conform to the new regime by applying force or any other means that is all right. Spontaneous allegiance on the part of the inhabitants is not necessary.

There is, beneath the surface of the doctrine, a common understanding that if a forcible seizure of power is successful and the regime is effective enough to command the allegiance of the inhabitants of the country to conform to the new regime, such a revolution itself becomes a law creating source. The doctrine appears to impart that nothing succeeds like success and that might determines right. Effectiveness is measured in terms of the presence of popular approval of the regime, or of the

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<sup>16</sup> PLD 1972 SC 139.

absence of popular opposition or resistance to the regime. This effectiveness may be brought about by any means -- persuasion, coercion or oppression. Therefore, there is no need to validate by any act of parliament or by reference to the constitution and revolutionary seizure of power which itself is valid and protected by dint of its own success and effectiveness under Kelsenian doctrine.<sup>17</sup>

### *Asma Jilani vs Govt. of Punjab*

Against the backdrop of mass uprising President of Pakistan Ayub Khan handed over power to Yahya Khan, the Commander-in-Chief of the Army. On March 25, 1969 Yahya Khan declared martial law throughout the whole of Pakistan and abrogated the 1962 Constitution of Pakistan. The legality of Ayub's proclamation of martial law and abrogation of constitution came up for consideration in *Asma Jilani vs Government of Punjab*. Pakistan Supreme Court found Yahya Khan to an usurper, overruled the judgement of the *Dosso* case and observed:

We must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under authority of the civil government and it can displace the civil government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil government. The maxim *inter armes leges silent* applies in the municipal field only where a situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well established principle that where the civil Courts are sitting and the civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed.<sup>18</sup>

From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil

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<sup>17</sup>. M. Rafiqul Islam, "The Seventh Amendment to the Constitution of Bangladesh : A Constitutional Appraisal", 58:3 (1987) The Political Quarterly, at pp.314-315.

<sup>18</sup> PLD 1972 SC 187.

authorities. Also, it certainly does not vest the commander and the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of an agency set up and maintained by the State itself for its own protection from the external invasion and internal disorder. If the argument is valid that the Proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the Armed Forces do not assist the State in suppressing disorder but actually creates disorder by disrupting the entire legal order of the State. It is, therefore, not correct to say that the Proclamation of Martial Law by itself must necessarily give the commander of the Armed Forces the power to abrogate the Constitution, which he is bound by his oath to defend.<sup>19</sup>

In the *Asma Jilani* case the Pakistan Supreme Court examined the nature and scope of martial law and came to the conclusion that:

- (1) Martial law as a machinery for the enforcement of internal order is normally brought in by a proclamation of the civil government and it can displace the civil government only where it is impossible for the civil courts and other civil authorities to function.
- (2) The imposition of martial law does not of its own force require the closing of the civil courts or the abrogation of the authority of the civil government.
- (3) The promulgation of martial law does not by itself involve the revocation of the constitution, supreme law of the country.
- (4) The proclamation of martial law did not by itself give Yahya Khan the power to abrogate the constitution, which he was bound by his oath to defend. Pakistan Supreme Court made a thorough survey of different legal systems of the world and then without any ambiguity opined that, there was no legal system which conferred the Commander-in Chief the right to proclaim martial law. Accordingly the highest court held that, the proclamation of martial law by Yahya Khan was illegal and his assumption of state power was totally unconstitutional and without lawful authority.

### ***Begum Nusrat Bhutto vs Chief of Army Staff***

The People's Party of Pakistan won in the general election held in March, 1977. Allegations of massive rigging and manipulation were raised by opposition parties. Continuous street agitation and politics of ransack led

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<sup>19</sup> Ibid., at p. 190.

to turmoil and caused a number of deaths. Inter-party negotiations failed on the issue of an interim authority with adequate powers to supervise fresh election. The opposition Parties did not trust the new government formed by Mr. Zulfikar Ali Bhutto and the government was suffering a crisis of confidence. In this milieu, the Commander-in-Chief of the Army General Ziaul Haque led a military coup, ousted Bhutto and his government, suspended the 1973 constitution, dissolved the parliament and promulgated martial law.

Begum Nusrat Bhutto filed a case<sup>20</sup> by which she challenged the usurpation of power by General Ziaul Haque and declaration of martial law. In the case the respondents took the stand that the constitution was not abrogated and the elected president continued in office. The sole purpose of taking over power was to arrange a free and fair general election, the respondents argued. The Pakistan Supreme Court considered the situation as a constitutional deadlock and found the government of Bhutto had lost its constitutional authority to govern the country. The court held that the situation was different from the situation obtaining in the *Dosso* and *Asma Jilani* where the constitutions were abrogated. The court further held that the Chief of Army Staff took over temporarily to organise a free and fair election and it was a constitutional deviation rather than usurpation.

This time the Pakistan Supreme Court invoked the doctrine of necessity to declare the taking over of power by General Ziaul Haque valid and lawful. To save Pakistan from further chaos and bloodshed, General Ziaul Haque took over state power temporarily. The Supreme Court, thus, gave a seal of validity to usurpation of power by Ziaul Haque in the guise of the doctrine of state necessity. The court held:

It was in this circumstances that the Armed Forces of Pakistan ... intervened to save the country from further chaos and bloodshed to disaster. It was undoubtedly an extra constitutional step, but obviously dictated by the highest consideration of state necessity and welfare of the people.

The imposition of martial law was impelled by high considerations of state necessity and welfare of the people, the extra-constitutional step taken by the Chief of Army Staff to overthrow the government of Mr. Bhutto, as well as the provincial government and to dissolve the Federal

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<sup>20</sup> *Begum Nusrat Bhutto vs Chief of Army Staff*, PLD 1977 SC 657.

and Provincial legislature stand validated in accordance with the doctrine of necessity.<sup>21</sup>

The highest court of Pakistan confessed in its judgement that the step taken by General Ziaul Haque was extra-constitutional, but obviously dictated by the highest consideration of state necessity and welfare of the people, which the court deemed as the motive of the usurpation.

Earlier, during the previous martial law, President General Iskander Mirza, in his proclamation on October 7, 1958, had declared that the country would be run under martial law until alternative arrangements are made. The promised alternative arrangements did not come about until June 8, 1962 when martial law administration gave way to the 1962 constitution. On June 8, 1962 General Ayub Khan proclaimed, "I do hereby enact this constitution" and thereby became the lawgiver. On the same day General Ayub was sworn in as the new President under the new constitution and martial law was withdrawn, though cantonment remained his real power base till collapse of his regime.

General election in Pakistan was held in 1970. Awami League secured majority seats in the Parliament, but the military junta with Yahya Khan at its head was determined not to allow this Assembly to adopt a constitution by the free choice of the majority people. They were also determined not to accept full autonomy of East Pakistan. Proclamation of another emergency in March, 1971 to thwart the election results lead to the war of liberation by the people of the then East Pakistan, culminating in the creation of independent Bangladesh in December, 1971.

Eric A. Nordlinger evaluated and analysed different data on martial law of 74 non-western and non-communist countries in 1970. His conclusion was that there existed an inverse relationship between political power of Armed Forces and social and economic modernisation of a country. Similarly, R. D. Makinlay and A.S. Kohan in 1975 undertook a survey in which they established that military ruler cannot make any considerable contribution to economic development. Robert W. Jackman collected data from 77 countries of the Third World and on the basis of that he wrote, "military intervention in the countries of the Third World had no impact on social change of these countries."

In fact the military rulers contribute nothing to socio-economic development of a country though they claimed opposite thing of this proposition. In the field of political development their role is more frustrating. Civil political leaders first face difficulties in political

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<sup>21</sup> PLD 1977 SC 657.

development. Military rulers make those problems more acute and critical. Military ruler deprived civil political leaders from achieving those political strategies which are required for smooth functioning of the country. In this way the military rulers linger the circle of political underdevelopment. At last due to the participation in politics Armed Forces become unable to maintain internal and external security of the country.<sup>22</sup>

In *Asma Jilani vs Punjab* Justice Hamoodor Rahman correctly said that,

If the argument is valid that the Proclamation of Martial Law by itself leads to the complete destruction of the legal order, then the Armed Forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State.

In *Begum Nusrat Bhutto vs Chief of Army Staff* the Pakistan Supreme Court legalised martial law declared by General Ziaul Haque under the guise of doctrine of state necessity and on the plea that declaration of martial law and usurpation of power was dictated by the highest consideration of state necessity and wellbeing of people. The court neither considered previous history of Pakistan Armed Forces nor paid heed to the words pronounced by Justice Hamoodor Rahman.

Military rulers were in state power when Pakistan Supreme Court delivered its judgements in the *State vs Dosso* and *Begum Nusrat Bhutto vs Chief of Army Staff* cases. In the first case the highest court invoked the doctrine of efficacy and in the second case the doctrine of state necessity to legalise usurpation of power by the Armed Forces. The decision in *Asma Jilani vs Government of Punjab* was delivered one day before martial law was withdrawn and Zulfiker Ali Bhutto, who was holding the rein, was interested in having Yahya Khan declared as an usurper.

Notwithstanding the political overtone of the decision, it must be said that the usurper not being in control, jurisprudentially, the decision in *Asma Jilani* is correct.<sup>23</sup>

## **ROLE OF JUDICIARY IN BANGLADESH**

In times of military take-overs, the courts in Bangladesh have also faltered.

### ***Halima Khatun vs Bangladesh***

The provisions of the President Order No. 16 of 1972 relating to abandoned property were made more stringent by Martial Law Regulation

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<sup>22</sup> Talukder Muniruzzaman, Military Withdrawal from Politics: A Comparative Study, Dhaka, 19

<sup>23</sup> Mahmudul Islam, Constitutional Law of Bangladesh, Dhaka, 1994, at p.64.

No. VII of 1977. The Supreme Court was restrained from determining any question relating to the legality of government action under the above mentioned President Order. All the judgements, decrees and orders of the courts were annulled which were passed for the restoration of any abandoned property.

Halima Khatun filed a writ petition by which she challenged the taking over of her property as an abandoned property but the High Court (now High Court Division<sup>24</sup>) discharged the Rule on the ground that it required determination of disputed questions of fact. In this case a preliminary question arose whether due to the Martial Law Regulation No VII of 1977 the writ petitions pending before the High Court had abated. The appellants argued that whatever may be the law making authority of martial law regime it could not nullify the constitutional jurisdiction of the High Court under the proclamation. At the hearing of her petition for leave to appeal before the then Supreme Court (now Appellate Division) it was further argued that neither the constitution nor the proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and the power of law making authority is circumscribed by the limitation inherent in the Proclamation itself.

But the Supreme Court negated the contentions. The Supreme Court decided that under the Proclamation the constitution had lost its character as the supreme law of the country.<sup>25</sup>

The learned judge (judgement by Fazle Munim J.) observed:

What appears from the Proclamation of August 20, 1975, is that, with the declaration of Martial Law on August 15, 1975, Mr. Khandaker Moshtaque Ahmed who became the President of Bangladesh assumed full powers of Government and by clauses (d) and (e) of the Proclamation made Constitution of Bangladesh, which was allowed to remain in force, subordinate to the Proclamation and any Regulation or Order as may be made by the President in pursuance thereof. It may be true that whenever there would be any conflict between the Constitution and the Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not seem to concede such

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<sup>24</sup> A Supreme Court and a (separate) High Court was established for Bangladesh by the Second Proclamation Order No. IV of 1976 on May 28 of the same year. On April 23, 1977 by the Proclamation Order No. 1 of 1977 the judiciary was reverted back to its original structure, i.e., from then onwards there shall be a Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division.

<sup>25</sup> Supra note 7, at p.17.



superiority to the Constitution. Under the Proclamation which contains the aforesaid clauses the Constitution has lost its character as supreme law of the country. There is no doubt an express declaration in Article 7(2) of the Constitution to the following effect: This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void.- Ironically enough this Article, though still exists, must be taken to have lost some of its importance and efficacy. In view of clause (d), (e) and (g) of the Proclamation the supremacy of the Constitution as declared in that Article is no longer unqualified. In spite of this Article, no constitutional provisions can claim to be sacrosanct and immutable. The present constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation.<sup>26</sup>

Clause (g) of the Proclamation of August 20, 1975 provided that no court including the Supreme Court had any power to call in question in any manner whatsoever or declare illegal or void the proclamation or any regulation or order. The Supreme Court noticed this clause and held that, “there is no vagueness or ambiguity in the meaning of the words used in the clause as regards the total ouster of jurisdiction of this court. .... It was the duty of the judges to administer a 'harsh' or even an unjust law.”<sup>27</sup>

The argument that neither the constitution nor the proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and that the power of the law-making authority was circumscribed by the limitation inherent in the proclamation was put forward to achieve a situation of co-existence between the constitution and the proclamation. But the Supreme Court denigrated the constitution in no uncertain terms as subservient to the martial law proclamation. There was no saving of judicial power at all.<sup>28</sup>

It is pertinent to mention here that touching upon the same questions Sahabuddin Ahmed J., later Chief Justice and now President of Bangladesh, in *Sultan Ahmed vs Chief Election Commissioner*<sup>29</sup> observed:

On plain reading of these provisions of the Proclamation it is as clear as anything that the Martial Law is the Supreme law of the land and that though the Constitution has not been abrogated it has been made

<sup>26</sup> *Halima Khatun vs Bangladesh*, 30 (1978) DLR (SC) 207.

<sup>27</sup> Justice Musataf Kamal, *Bangladesh Constitution: Trends and Issues*, 2<sup>nd</sup> edition, Dhaka, 1994, at p.68.

<sup>28</sup> Id.

<sup>29</sup> 30 (1978) DLR (HCD) 291.

subordinate to the Martial Law and that the Constitution will continue in force subject to the Martial Law, that is to say, it will have effect so long it does not come in conflict with the Martial Law.<sup>30</sup>

The constitution cannot be made subservient to any law as Article 7(2) of Bangladesh Constitution unequivocally declared the constitution as the supreme law of the Republic and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.

***Haji Joynal Abedin vs State and State vs Haji Joynal Abedin***

The Special Martial Law Court convicted five persons and imposed death sentence on them. They preferred an appeal in the High Court Division by which they challenged their conviction as it was passed without jurisdiction. The Proclamation of August 20, 1975 and Martial Law Regulation No. 1 did not provide for trial for offences committed before the Proclamation. So, the trial and conviction of the prisoners by the Special Martial Law Court was without jurisdiction, the appellants argued.

The High Court Division held that it could exercise all powers and jurisdictions of the High Court Division as exercised under the constitution, even though the country was then under martial law. The court further held that the powers and jurisdictions conferred by the constitution were not disturbed even by the martial law proclamation notwithstanding clause (g) of the proclamation ousting the jurisdiction of all the courts. The High Court Division took the view that the martial law courts and the ordinary courts existed side by side and it expressed its reluctance to accept the argument that the jurisdiction of the superior courts had been ousted so far as martial law courts are concerned. After thorough examination, the High Court Division came to the decision that the transfer of the case from Special Tribunal to Special Martial Law Court No 11 was a nullity. As the offences were committed before the proclamation of martial law, the Martial Law Court had no jurisdiction to try those offences with retrospective effect. The learned judge (Judgement by Badrul Haidar Chowdhury J.) observed:

We have already found that present Martial Law is completely different from that of 1958 or 1969. The Constitution has not been abrogated; only certain part of it has been circumscribed by the Martial Law Proclamation out of necessity. This Martial Law is a mere constitutional deviation and not one of Wellingtonian style.<sup>31</sup>

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<sup>30</sup> Ibid., at p.

<sup>31</sup> *Haji Joynal Abedin vs State*, 30 (1978) DLR (HCD) 371.

The State preferred an appeal in the Appellate Division of the Supreme Court which by a majority view allowed appeal of the state and set aside the judgement of the High Court Division. The Appellate Division (Judgement by Ruhul Islam J.) observed :

From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a position subordinate to the Proclamation, inasmuch as the unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial Law Regulation or Orders and other orders; and the Constitution was amended from time to time by issuing Proclamation. In the face of the facts stated above I find it difficult to accept the arguments advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammelled by the Proclamation and Martial Law Regulations .... The moment the country is put under Martial Law, the above mentioned constitutional provision along with other civil laws of the country loses its superior position. Martial Law courts being creatures either of the Proclamation or Martial Law Regulation, have the authority to try any offence made triable by such Courts.<sup>32</sup>

The Appellate Division set aside the judgement of the High Court Division on the ground that

the writ jurisdiction of High Court Division as conferred under Article 102 of the Constitution is to be exercised subject to the bar put under the Proclamation and Martial Law Regulation. .... the High Court Division was not justified in interfering with the proceedings of Martial Law Courts.

However, the minority-dissenting judgement by K.M. Sobhan, J. upheld the view taken by the High Court Division and clearly declared that the constitution and the martial law were co-extensive and that the constitution was not subordinate to the martial law. Justice Sobhan held that the President still takes oath to “preserve, protect and defend the Constitution” and he has not determined, through express legislation, if the Martial Law Regulations or Orders shall have precedence over constitutional legislation. The writ jurisdiction of the High Court Division having neither been abrogated nor suspended and not being in conflict with Martial Law Regulations and Orders, the Martial Law Courts are amenable to the writ jurisdiction of the High Court Division whose jurisdiction shall be ousted only when it is shown that (I) the Martial Law Court has been properly constituted in accordance with the statute forming

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<sup>32</sup> *State vs Haji Joynal Abedin*, 32 (1980) DLR (AD) 110.

the Martial Law Court, (II) accused are subject to the jurisdiction of the Martial Law Court, (III) the offence must be one triable by the Martial Law Court, and (IV) the jurisdiction. He relied upon the case of *Zafar-ul-Asban vs Republic of Pakistan*.<sup>33</sup>

It is very interesting to notice that the Appellate Division came round to the views of Justice K.M. Sobhan, the learned dissenting Judge, in subsequent cases.<sup>34</sup> It reminds one of the dissenting judgement of Lord Atkin in *Liversidge vs Anderson*<sup>35</sup> which, forty years later, came to be accepted as the correct interpretation by the House of Lords.

### ***Ehteshumuddin vs Bangladesh***

This case came up before the Appellate Division after the end of first martial law by the Proclamation of April 7, 1979. After trial one Special Martial Law Court convicted Ehteshumuddin @ Iqbal under section 302 of the Penal Code and sentenced him to death which was later on confirmed by the reviewing authority and Chief Martial Law Administrator. Ehteshumuddin challenged the trial, conviction and sentence of death passed by the court, order of the reviewing authority and the confirmation by the Chief Martial Law Administrator. The grounds put forward by the appellant were rejected by the High Court Division. The issue subsequently, agitated before the Appellate Division was as to whether the High Court Division could examine the proceedings of the Special Martial Law Court in exercising its constitutional jurisdiction after enactment of the Fifth Amendment to the Constitution. Regarding this question the Appellate Division noticed Paragraph 18 added to the Fourth Schedule to the Constitution by the Constitution (Fifth Amendment) Act, 1979. Paragraph 18 confirmed and ratified all proclamations, proclamation orders, martial law regulations, martial law orders or any other laws made during the period between August 15, 1975 and April 9, 1979. It also confirmed, ratified and declared any order made or sentence passed by any court, tribunal or authority in the exercise or purported exercise of the powers, derived from proclamation etc. have been validly made, done or taken and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever.

The Appellate Division held that the High Court Division cannot examine the proceedings of the Special Martial Law Court, the order of

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<sup>33</sup> 12 (1960) DLR (SC) 9.

<sup>34</sup> Supra note 28, at p.72.

<sup>35</sup> *Liversidge vs Anderson*.

the reviewing authority and the confirming authority in its writ jurisdiction due to the aforesaid Paragraph 18 of the Fourth Schedule. This case therefore reiterated prior utterance of the highest court that the constitution is subservient to martial law proclamation. By this interpretation the Appellate Division also foreclosed the possibility of re-examining proceedings of Martial Law Courts after the constitution was revived following the end of martial law.

In this case question was raised as to the legality of the transfer of the case from the Court of Sub Divisional Magistrate to the Special Martial Law Court. The appellant contended that as the constitution is allowed to be continued under the proclamation, so it retains its supremacy. On the other hand, the Attorney General contended that the constitution was allowed to be continued subject to the proclamation and martial law regulations and he relied upon the decisions of the Supreme Court decided earlier. The appellant's counsel cited the principle decided in the *Asma Jilani* case. But Bangladesh Supreme Court bypassed the principle and majority judges admitted martial law as supreme law of the country. But by this case the Appellate Division gave some power to the superior courts to examine jurisdiction of Martial Law Court when it is found to be *coram non judice*. In this regard the Appellate Division observed:

The moment any Martial Law Court is found to have acted without jurisdiction, more precisely, has taken cognisance of an offence not triable by such Courts under the Martial Law Regulation, or the Martial Law Court is not properly constituted, the superior Court's power to declare the proceedings wholly illegal and without any lawful authority in exercise of its power under Article 102 of the Constitution cannot be denied. The power of the Superior Courts can be extended to examine jurisdiction of Martial Law Court when it is found that it is *coram non judice*.<sup>36</sup>

The Appellate Division in the *Halima Khatun* and *Joynal Abedin* cases stopped all the avenues to exercise judicial power under Article 102 of the constitution for so long as martial law existed. In the *Ehteshumuddin* case the Appellate Division came round to the view that the proceedings of Martial Law Courts are not immune from examination by the superior courts if these are without jurisdiction, *coram non judice* or malafide. It is very interesting to notice that the Supreme Court was barred by clause (g) of the Proclamation to question in any manner whatsoever any proclamation etc., which bar was continued by paragraph 18 to the Fourth

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<sup>36</sup> *Khandker Ehteshumuddin Ahamed @ Iqbal vs Bangladesh*, 33 (1981) DLR (AD) 154.

Schedule of the constitution. There exist no reason to treat the bar under the Proclamation to be superior to the bar imposed by Paragraph 18.<sup>37</sup> So, Justice Mustafa Kamal, very correctly raised the question: “if judicial power is available inspite of the bar under paragraph 18, why should it not be available during a bar under the Proclamation?”<sup>38</sup>

In a brief appraisal it can be said that, during the first martial law regime only in the *Joynal Abedin* case the honourable Judge of the High Court Division and honourable dissenting Judge of the Appellate Division subscribed to the proposition that that the Constitution was not subordinate to Martial Law and the Constitution and the Martial Law were co-extensive. The argument in the *Halima Khatun* case that neither the Constitution nor the Proclamation aimed at interfering with the exercise of judicial power by the Supreme Court and that the power of law-making authority was circumscribed by the limitation inherent in the Proclamation itself was not accepted by the Appellate Division. In the *Joynal Abedin* case it did not accept the concept propounded by the High Court Division that Martial Law Courts existed side by side with the ordinary Courts and the jurisdiction of superior courts had not been ousted in so far as Martial Law Courts were concerned.

In the *Jamil Huq* case<sup>39</sup> the jurisdiction to examine was further extended to a Court or Tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies. But the highest court did not deviate from its position as it declared in the *Halima Khatun* case that the Constitution is subservient to Martial Law Proclamation and it has lost its character as supreme law of the country.

#### **JUDICIARY DURING THE SECOND MARTIAL LAW REGIME**

Bangladesh witnessed promulgation of Martial Law for the second time on March 24, 1982 by the then Chief of Army Staff Lieutenant General Hussain Muhammad Ershad. By his Proclamation he suspended the Constitution and later on inserted a Schedule to the Proclamation which provided that subject to the Proclamation and Martial Law Regulations, etc., the country would be governed according to the provisions of the said Schedule. He preserved all the powers to revive the Constitution. His

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<sup>37</sup> Supra note 28, at p75.

<sup>38</sup> Ibid.,at p. 75.

<sup>39</sup> *Jamil Haque vs Bangladesh*, 34 (1982) DLR (AD) 125.

Proclamation foreclosed the exercise of judicial power by the High Court Division under Article 102 of the suspended Constitution. He also put an embargo on the jurisdiction of the Supreme Court to question or declare illegal or void his Proclamation, Regulations, Orders, etc. The second martial law in its dispensation successfully debarred the Supreme Court from exercising its jurisdiction. The only exception was *Bangladesh vs Md. Salimullah*<sup>40</sup> where learned Judge (Judgement by Ruhul Islam J.) observed:

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

By referring to the Schedule of the Chief Martial Law Administrator the learned Judge observed:

The language of sub-clause (1) and (2) of clause (4) clearly shows that the High Court Division shall have such jurisdiction as is or may be conferred on it by law. The expression 'by law' does not include the suspended Constitution, whereas, the Appellate Division of the Supreme Court shall have such jurisdiction as it had immediately before the Proclamation. The expression 'such jurisdiction' includes jurisdiction conferred under Article 103 of the suspended Constitution. Notwithstanding the suspension of the Constitution by the Proclamation the Appellate Division continues to exercise all the jurisdiction exercised by it immediately before the Proclamation. The Appellate Division shall have jurisdiction to hear and determine appeals from the judgements, decrees, orders or sentences of the High Court Division. The respective jurisdiction as being now exercised by the High Court Division and the Appellate Division shows the difference, because the High Court Division has completely ceased to exercise any jurisdiction conferred upon it under Articles 44 and 102 of the suspended Constitution, but the Appellate Division continues to exercise the jurisdiction conferred under Article 103 of the suspended Constitution.<sup>41</sup>

In the above judgement the learned Judge did not make it clear why "law" does not include suspended Constitution.

### **THE JUDGE'S DILEMMA**

There are occasions, as Mustafa Kamal, J. said, when either the established constitutional machinery breaks down or an extra-constitutional force takes

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<sup>40</sup> 35 DLR (AD) 1.

<sup>41</sup> Ibid., at p. ...

over the reins of administration, posing a dilemma for the judges. Nearly all Constitutions require the Judges to take an oath to "preserve, protect and defend the Constitution and the laws." But when the Constitution is either abrogated or suspended and made subservient to the will of an extra-constitutional force, the judges have to make a choice. An Argentinian Judge (Oyhanarte, J.) has aptly described the dilemma of the Judges in the following language :

The Supreme Court cannot modify the course of history. It lacks the power necessary to do this. When it is faced with the overthrow of constitutional authorities and the installation of a Government of force by what have come to be called 'revolutionary' means, the judges of the court can do three things:

resign, thus transferring the responsibility of the decision to others;

simply accept the fact;

try to save those institutional values which can still be saved.<sup>42</sup>

Why are options given to the judges, why will they not be amenable to their oath? If options are given to the judges it amounts to serve them a technique to evade their constitutional obligation. Chief Justice Marshall of U.S. Supreme Court in *Marbury vs Madison*<sup>43</sup> asked judges to strictly comply with their oath. He did not allow any other option than oath. It is the acid test for the judges whether they would be able to remain sincere, honest and determined to stand by their oath when the established constitutional machinery breaks down or an extra-constitutional force takes over the reins of administration.

Let us hark back to the options offered by the learned Judge Oyhanarte. Regarding the first option it can be said that resignation is no solution, rather it can be termed as a retreating attitude. The judges should be sincere to their constitutional obligation whatever consequence might ensue. By keeping pace with their oath if they declare the usurper illegal and uphold constitutional supremacy and later on removed by the usurper, then it can be considered a very good effort on the part of the judges to make constitutional edifice stronger. One may set forth arguments that judgements declaring military ruler illegal will not deter governance of military ruler and continuance of martial law as in that situation military administration will not sit idle, but it will certainly take initiative to frustrate

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<sup>42</sup> Snow, Judges and Generals : The Role of the Argentine Supreme Court during periods of Military Government, 1975, p. 617, quoted in Kamal, supra note 28, at p.60.

<sup>43</sup> *Marbury vs Madison*, (1803), 1 Cranch, 137.



the judgements or restrict jurisdiction of superior courts by issuing Proclamation, Regulation etc. Instances can be cited in support of the said proposition. In *Malik Mir Hassan vs State*, the Lahore High Court of Pakistan declared the proclamation of martial law by Yahya Khan illegal. To frustrate the judgement the President's Jurisdiction of Courts (Removal of Doubts) Order, 1969 was issued by which the courts were debarred from questioning the exercise of power by the military authority and the decision in contravention of this would be deemed to be of no effect. The Supreme Court of Nigeria in *Lakanmi and Ola vs Attorney General, Western State and Others*<sup>44</sup> declared the military coup and martial law illegal and without lawful authority. The judgement was undone and made ineffective by the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970, issued by the then military ruler.

The above instances are two exceptions, it is not the general trend of the judiciary in Third World countries where judiciary simply bow down to the usurper and made the passage to be used as an effective machinery to legalise new regime in the guise of the doctrine of revolutionary legality or doctrine of state necessity. This was done by the Pakistan Supreme Court in *State vs Dosso* and *Begum Nusrat Bhutto vs Chief of Army Staff and Federation of Pakistan*, by the High Court of Uganda in *Uganda vs Commissioner of Prisons*.<sup>45</sup> Our Supreme Court made the Constitution subservient to the martial law proclamation, though occasion to determine the legality of martial law regime did not come before it.

“Resignation of Judges in revolutionary situations” as Mustafa Kamal, J. said, “has not been uncommon, but except for the ripple that it causes in the body politic neither the Judges by resignation *en masse* or in ones or twos have been able to deflect the revolutionary regime from following the course of action it chose to pursue nor have the people at large carried the mantle from the Judges to overthrow the extra-constitutional force. On the other hand when Judges resigned in protest against an unconstitutional take-over or when Judges were removed because of their obstruction to the wishes of the new authority, their successors on the Bench merely conformed to the wishes of the new regime and often they were also of so low a calibre that justice was no longer administered properly.”<sup>46</sup>

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<sup>44</sup> Unreported, SC 58/1969, Judgement was delivered on April 24, 1970, see 4(1970) *Annual Survey of African Law*, pp. 28-29.

<sup>45</sup> *Ex Parte Matovu* [1966] E.A. 514.

<sup>46</sup> *Supra* note 28, at p.61.

If Judges are of high calibre, but restriction is imposed on the exercise of their judicial power or due to the pressure of usurper or out of free will they conform to the wishes of the new regime, how will justice be administered then? This question has not been answered by the honourable Judge Mustafa Kamal, though he very correctly observed that, “ .... it may perhaps be rightly argued that the continuance in office of the Judges gives the new regime a semblance of legitimacy.”<sup>47</sup>

Regarding the second option, if the judges do not resign and do not accept the fact simply and unanimously stand by their oath to uphold constitutional supremacy no usurper, however mighty and strong might be, will impair the integrity of judiciary and take prejudicial actions to judges. But if maximum judges accept the fact simply and one or two judges sincerely try to stick to their constitutional obligation then the usurper will get advantage of the disunity of judges and situation will be the same as it happened in Pakistan and Nigeria mentioned above.

Third option is more reasonable to concede. But by keeping the usurper in power how it would be possible for a judge to save those institutional values which can still be saved? If judges do not try to save institutional values unanimously how it can be preserved? In the *Joynal Abedin* case Justice Badrul Haider Chowdhury of the High Court Division and Justice K.M. Sobhan of the Appellate Division tried to save the institutional values which could still then be saved.

F. Reyntjens and L. Wolf-Phillips, discussing the role of judiciary under an usurper's regime, observed:

When the judiciary is asked to 'stand up' against usurper it is too often forgotten that Judges may not have the means to do so. ... Why should the Courts be able to resist the unconstitutional action if the deposed Executive, the dissolved Parliament, (a part of) the Army and the Police, the Trade Unions .... cannot? The Courts can never really be the 'last bastion' against illegality because in terms of power to enforce obedience (Physical, if need be) they constitute the weakest link.

In rationalising the role of the Judges under an unconstitutional regime, the concern is not due to physical inability of a judge to 'stand up' against an usurper's regime, but the real concern is the ability of the Judiciary to give the regime a *de jure* status and in the process undermine the entire constitutional edifice on which the Judiciary itself is founded.<sup>48</sup>

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<sup>47</sup> Ibid., at p.61.

<sup>48</sup> Supra note 7, at p.26.

In evaluating the role of judges in an unenviable condition Muhammad Habibur Rahman, J., said, “For the time being the worthwhile role for him (a judge) will be to do justice between a citizen and a citizen, so that a foundation may be laid down for the future when a citizen will be able to expect justice against the mighty and the overbearing as well.”<sup>49</sup>

Regarding the oath taken by the judges to defend the constitution and the role of judges under an unconstitutional regime, Md. Habibur Rahman, J. expressed his opinion in the Eighth Amendment case in the following language:

The Court's attention has repeatedly drawn to the oath the Chief Justice or a Judge of the Supreme Court takes under Article 148 of the Constitution on his appointment. .... the Court carries the burden without holding the swords of the community held by the executive or the purse of the nation commanded by the legislature. The Court could do so because all the authorities of the Republic act, as enjoined by the Constitution under Art. 112 in aid of the Court for securing obedience to its judgements and orders. When the Constitution is suspended or made subject to a non law the Court is deprived of the aid of the relevant authorities of the Republic. When such an abnormal situation occurs a Judge has got two alternatives: either he would resign or he would hold on to his post. One who has not lost faith in the rallying power of law may prefer a temporary deprivation of freedom to desertion.<sup>50</sup>

Justice Muhammad Habibur Rahman provided justifications for judges' temporary deprivation in defending the Constitution to maintain their oath and asked the judges to wait for the rallying power of law to be mobilised. But what happens if the judges during the interim period undermines the foundation on the basis of which the rallying power of law will be mobilised. The learned judge does not elaborate as to how the judges would perform their duties during this temporary period. Would the judiciary under such circumstances be expected to act as the Pakistan Federal Court did by denying the Sind High Court's power to exercise its writ jurisdiction for restoring the sovereign Constituent Assembly? Would the justification extend to the situation as was in case of the *Haji Joynal Abedin* in which the Appellate Division set aside the judgement of the High

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<sup>49</sup> Muhammad Habibur Rahman, “The Role of Judiciary in Developing Societies” in Muhammad Habibur Rahman, Rallying Power of Law, Dhaka, 1997, at p. 62.

<sup>50</sup> 1989 BLD (Spl) 1, per Habibur Rahman, J., para 488.

Court Division trying to uphold the Constitution in a limited manner only in order to coexist with Martial Law?<sup>51</sup>

### JUDICIAL REVIEW AND JUDICIARY

There is no direct authority in the Constitution of United States of America to empower the Supreme Court to examine the constitutionality of State or Federal Acts. Some writers strongly argued that the framers of the Constitution did not intend to confer such right upon the Supreme Court of the U.S.A. The exercise of authority to examine the constitutionality of Federal Acts and Orders is the usurpation of power by the Supreme Court, they said. President Jefferson had unequivocally declared that, the framers of the Constitution desired to set up three independent departments of Government. He said, giving jurisdiction to the judiciary to review the acts of Congress and the President was not only the violation of the doctrines of Separation of Powers and Limited Government, but it was also in violation of the intentions of the makers of the Constitution.<sup>52</sup>

There are others who stood strongly on behalf of judicial review. They consider judicial review is inherent in the nature of a written Constitution. There are two important provisions of the Constitution which are indicative of the intentions of its framers, it has been maintained by them. One is Article VI, Section 2 and another is Article III, Section 2. Both these provisions are sufficient to fill in the gap which the Constitution failed to expressly provide for. Finally Chief Justice Marshall made the issue clear. Whatever might be the intention of the framers of the Constitution, it was settled by Chief Justice Marshall in *Marbury vs Madison* in 1803. Since then the doctrine of judicial review has become an inevitable part of constitutional law and followed in countries of written constitution. Briefly the proposition of Chief Justice Marshall was that the Constitution is the supreme law of the land and judges are bound to give effect to it. Marshall argued that judges were bound by oath to support the Constitution, when they found that one of its provisions was in conflict with the law they must hold the latter repugnant and void.<sup>53</sup>

Although the powers of the courts to interpret the constitution and the laws and to review executive and legislative acts in the light of the constitution is not recognised in the U.S. Constitution, it is well known

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<sup>51</sup> Supra note 6, at pp. 27-28.

<sup>52</sup> Anup Chand Kapur, Selected Constitutions, 14<sup>th</sup> edition, Delhi, 1997, at pp. 220-221.

<sup>53</sup> Ibid., pp.221-222.

that the concept of judicial control of the executive and the legislative organs of the state through judicial review of their acts was in fact born in the United States when Chief Justice Marshall as back as in 1803 made his historic pronouncement, 'It is emphatically the province and duty of the judicial department to say what law is.' Since then, despite absence of a specific constitutional provision to this effect, the U.S. Supreme Court has been exercising the enormous power of judicial review without interruption.<sup>54</sup>

Though the power of judicial review is not explicitly provided in the Constitution of U.S. but the Supreme Court of U.S. assumed the power to develop a sound governmental and political system. This power of judicial review has very clearly given to our highest court under Articles 7, 26 and 102 of the Constitution, but during the unconstitutional martial law regime unfortunately our supreme court failed to exercise the power of judicial review and judges failed to stand by their oath. Badrul Haider Chowdhury, C.J. very correctly observed that:

What was said in 1803, was re-echoed in Article 7 of the Constitution of the People's Republic of Bangladesh. In *Halima Khatun*, unfortunately this well settled constitutional doctrine was missed. .... Chief Justice Marshall often reminded his countrymen that 'we must never forget that it is constitution we are expounding'. When *Halima Khatun* was decided the Constitution was very much in existence notwithstanding the proclamation of Martial Law which was termed merely as 'constitutional deviation' in 30 DLR 375 where it was said 'Present Martial Law is completely different from that of 1958 or 1969. The Constitution has not been abrogated; only certain part of has been circumscribed by the Martial Law Proclamation out of necessity. This Martial Law is a mere constitutional deviation.' This decision was however overruled in 30 DLR (SC) 207.<sup>55</sup>

The Appellate Division of Bangladesh Supreme Court in the *Halima Khatun* and *Joyal Abedin* cases foreclosed any exercise of judicial power as long as Martial Law existed. In the *Ehteshumuddin* case it held that the judicial power of the superior courts extends to an examination of the proceedings of a Martial Law Court when it is without jurisdiction. During the second martial law regime the Appellate Division was allowed to exercise all the jurisdiction under the suspended Constitution, but High

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<sup>54</sup> Justice Naimuddin Ahmed, "Independence of Judiciary, Transparency and Accountability of Judges", Key Note Paper presented in the Annual meeting of *Ain Samity*, Dhaka, 1999.

<sup>55</sup> Badrul Haider Chowdhury, J., Evolution of the Supreme Court of Bangladesh, Dhaka, 1990, at p. 81.

Court Division was not allowed and it did not try to exercise the power of judicial review which in the judgement of the Eighth Amendment case was viewed in the following language:

... the Supreme Court with plenary judicial power over the Republic is a basic structure of the Constitution which cannot be altered or damaged. After the revival of the Constitution as soon as the Eighth Amendment was passed, it was challenged and declared to be *ultra vires* by the Appellate Division so long the amendment was concerned with Article 100.

For the first time in the history of Bangladesh the Appellate Division applied the doctrine of judicial review once propounded by U.S. Supreme Court and well entrenched in some provisions of our Constitution. The Supreme Court acquired a lot of praise and honour by nullifying one ill design of the then usurper Ershad.

## CONCLUSION

In the dawn of the civilisation need for a judicial organ was strongly felt and in course of time it has become an inevitable part of society and subsequently of state. An independent judiciary is regarded as the *sine qua non* of any form of democratic constitution. The judges are put on a high pedestal. When democracy is in danger or the executive tramples rule of law, then judiciary, people expects, will stand with vigorous effort to save democracy and rule of law though the deposed executive or the dissolved legislature do not come forward. In the preamble of our Constitution it was unequivocally proclaimed that : "it shall be fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation — a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens." To secure this ends if any organ of the state becomes destructive it is within the ambit of the judiciary to supervise and if necessary it has been empowered to act as the guardian of the Constitution as judges are oath bound to preserve, protect and defend the Constitution. If rule of law, fundamental human rights and freedom, equality and justice are in peril, judiciary should come forward to ensure rule of law and justice as people consider judiciary as temple of justice.

In our country the supreme court failed to maintain its role as envisaged by law and democracy conscious people. The then Pakistan Federal Court started this practice in the *Tamizuddin Khan* case. The consequences of the judgement delivered by the Federal Court was more severe than the judges could contemplate. In constitutional arena the

country witnessed one disaster after another. The aftermath of the judgement created a situation when the country was standing on invalidated laws and the entire constitutional edifice was on the verge of collapse. The situation was to some extent overcome by the Federal Court through its advisory opinion in Reference No.1 of 1955. Nevertheless the evil effect of the *Tamizuddin* judgement continued. Moreover, the formula given by the Federal Court in the Special Reference No.1 of 1955 strengthened the hands of the Governor General more than ever before. The Supreme Court of Pakistan legalised martial law regime in the guise of the doctrine of revolutionary legality in *State vs Dosso* and in the guise of the doctrine of necessity in *Begum Nusrat Bhutto vs Federation of Pakistan*. In the *Asma Jilani* case Pakistan Supreme Court very courageously and correctly declared martial law regime illegal which was in tune with the provisions of the Constitution and the expectation of democracy searching people.

In Bangladesh the Supreme Court in the *Halima Khatun* case made the Constitution subservient to martial law proclamation which was clear violation of the oath of the judges to preserve, protect and defend the Constitution. In only the *Joynal Abedin* case Justice Badrul Haider Chowdhury and Justice K.M. Sobhan tried to save the institutional values in a limited manner. But the Appellate Division turned down their proposition that, Constitution was not subservient to martial law and Constitution and martial law were co-extensive. The Appellate Division during the whole first martial law regime stuck to its view that, the Constitution is subservient to martial law. During the second martial law regime the Appellate Division was allowed to exercise its jurisdiction under the suspended Constitution, but the High Court Division was not allowed to exercise its power of judicial review and the Supreme Court admitted the situation without any effort of protest. In only Eighth Amendment case the Appellate Division successfully accomplished its incumbent constitutional obligation.

After considering the role of judiciary in Bangladesh during two martial law regimes one can easily come to the conclusion that, the supreme court as an institution and the judges collectively failed to maintain their obligation conferred upon them by the Constitution and the supreme court and the judges also failed to fulfill the expectation of the citizens who believe in civil society and democracy.