

# THE RECENT EMERGENCY AND THE POLITICS OF THE JUDICIARY IN BANGLADESH

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*The recent state of Emergency in Bangladesh (2007-08) put the country's judiciary under certain challenges with a far-reaching bearing on judicial statesmanship, resurfacing the old but difficult question of the proper judicial role in Emergency. The 2007 Emergency regime initiated an array of reforms in politics, and legal and judicial spheres, but at the same time clipped the rights of the people and the judiciary's protective authority. The proper role of the judiciary in such a context should be defined by reference to its ability to maintain the 'rule of law'. Recent Bangladeshi judicial decisions show that while the Supreme Court's High Court Division by and large asserted self-confidence vis-à-vis the overweening Emergency government, its Appellate Division either remained silent or paid undue deference to the executive. By examining the new politics of the senior judiciary in Bangladesh and the potential reasons that may explain this, and having been based on the premises that the law is a site of political contestation while the judiciary is a political institution constantly negotiating the law with politics, this article will examine whether the Bangladeshi judges during the 2007 Emergency employed their statesmanship in protecting the citizens. This paper argues that the judiciary throughout the Emergency regime suffered a crisis of public confidence, with negative impacts for its constitutional agency in upholding justice and constitutionalism. While contextualizing the need for judicial activism during Emergency, the paper will question the efficacy of dominant legal-constitutional theories of the judicial role.*

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## I. INTRODUCTION

“The Supreme Court had to function under ‘severe stresses’ arising from the profound crisis in the public life created by the absence of democracy and the curtailment of people’s fundamental rights during the last two years of unelected government [Emergency].”<sup>1</sup> [Translated by the author]

On January 11, 2007 the then interim government in Bangladesh declared a state of Emergency in the face of escalating political clashes that ensued ahead of scheduled general elections in early 2007. The prolonged state of Emergency in Bangladesh, which was withdrawn only on December 17, 2008, effectively, but off-constitutionally, deferred general elections by 2 years. Further, it put the country’s judiciary under certain challenges and left a far-reaching bearing on judicial statesmanship. The Emergency regime initiated an array of reforms involving politics, law and the judiciary. But there was a simultaneous curtailment of the rights of the people as well as the protective role of the courts through the Emergency Powers Ordinance, 2007 (*hereinafter* EPO) and the Emergency Powers Rules, 2007 (*hereinafter* EPR).<sup>2</sup> Hence, there was a resurrection of the old, but complex, questions of the proper role of the judge during an Emergency: will the judge take refuge to legal positivism as a convenient technique and abdicate his/her constitutional duty, or will s/he help the ‘law’ ‘speak the same language’<sup>3</sup> during an ‘emergency’ as in peace? In other words, the perennial but perplexing question is, what does the judge do? Does he merely apply rules to a dispute properly brought before him, or, does he seek to dispense justice through the judicial process of which he is in charge?

Recent Bangladeshi judicial decisions show that while the High Court Division (*hereinafter* HCD) of the Supreme Court (*hereinafter* SC) seems to be asserting self-confidence *vis-à-vis* the overweening Emergency government, the Appellate Division (*hereinafter* AD) of the SC has arguably paid undue deference to the executive. By reflecting on some selected recent decisions in the SC of Bangladesh, this paper examines how the judiciary, during the recent Emergency, has dealt with executive interventions with the liberty of the people and principles of constitutionalism and how it has reacted, if at all, to Emergency itself.

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<sup>1</sup> M. A. Rashid, J., Judge, High Court Division (*hereinafter* HCD), Supreme Court (*hereinafter* SC) of Bangladesh, Farewell speech while retiring from the Court (January 26, 2009).

<sup>2</sup> For accounts of political anecdotes to the 2007 emergency and its impacts on rights of the citizens and democratic culture, see, SARA HOSSAIN & DINA M SIDDIQI, HUMAN RIGHTS IN BANGLADESH 2007 (2008); ODHIKAR, HUMAN RIGHTS CONCERNS 2007: ODHIKAR REPORT ON BANGLADESH (2007).

<sup>3</sup> Lord Atkin in dissent his in *Liversidge v. Anderson* [1942] A.C. 206. See further, David Dyzenhaus, *Intimations of Legality amid the Clash of Arms*, 2 (2) INT. J. CONSTITUTIONAL LAW 244-71(2004).

It is argued here that the Bangladeshi judiciary's (in particular that of the AD) largely ambivalent and almost escapist position during Emergency has led it to suffer a severe crisis of public confidence which is likely to generate negative implications for its constitutional agency in achieving and improving justice and constitutionalism.<sup>4</sup> While emphasising and contextualising the need for judicial activism during an emergency, the present paper questions the efficacy of dominant legal-constitutional theories about the judicial role. A limitation of this paper is that it does not reflect on the Bangladeshi judges' performance during the past undemocratic regimes, which is, however acknowledged to have had some spill-over effects on later judicial decisions concerning emergency.

## II. EMERGENCY AND THE CONSTITUTION OF BANGLADESH

It is interesting to note here that the Constitution of Bangladesh as adopted in 1972 did not stipulate provisions for a state of emergency. It was through a constitutional amendment in 1973<sup>5</sup> that the constitutional provisions granting the executive emergency powers were first introduced.<sup>6</sup> According to the newly inserted Article 141A of the Constitution, the President may proclaim a state of emergency if he is "satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance". Such a state "shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament".<sup>7</sup> Importantly, however, in order for it to be valid, the Presidential Proclamation of Emergency needs to be countersigned by the Prime Minister<sup>8</sup> except when a care-taker government is in charge of the country.<sup>9</sup>

The Constitution provides for two legal consequences of the invocation of emergency. First, during the period of operation of emergency, the State may make any law or take any executive actions in derogation of the six Fundamental

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<sup>4</sup> In this paper I use the term 'constitutionalism', which has many connotations, in the sense of complete political accountability of those charged with public governance in meeting constitutional commitments and mandates such as the protection of fundamental rights, widening of public sphere in the governance system, and the realisation of ideals of equality, justice and human dignity.

<sup>5</sup> The Constitution (Second Amendment) Act, 1973 (Bangladesh).

<sup>6</sup> The Constitution of the People's Republic of Bangladesh, 1972, Part IXA, Articles 141A, 141B, & 141C.

<sup>7</sup> *Id.*, Article 141A (2) (C).

<sup>8</sup> *Id.*, Article 141A, inserted by The Constitution (Twelfth Amendment) Act, 1991 (Bangladesh), § 17.

<sup>9</sup> *Id.*, Article 58E, inserted by The Constitution (Thirteenth Amendment) Act, 1996 (Bangladesh), § 3.

Rights (*hereinafter* FRs) enshrined in Articles 36-40, and 42<sup>10</sup>, meaning, by implication, that the laws and executive actions can not derogate from other constitutional FRs.<sup>11</sup> Second, the President may declare that the right to judicially enforce such FRs as he may specify be suspended<sup>12</sup>. On a closer look at the above emergency provisions, it appears that the Constitution is silent about (i) the justiciability of the President's satisfaction as to the existence of reasons warranting imposition of emergency, and (ii) whether he can suspend the judicial enforcement of all constitutional rights on a wholesale basis. The latter issue concerns the question of the extent of derogation from FRs during a state of emergency. Also, the Constitution remained reticent as to how long, particularly when Parliament for long stands dissolved as was the case with the recent Emergency, the state of emergency can continue. During the waning hours of the recent Emergency, these questions made their way up to the Court.

Bangladesh has so far experienced four states of Emergency, including the latest 2007 Emergency.<sup>13</sup> Not too long after the introduction of constitutional provisions for emergency, the first state of Emergency was declared on the ground of internal disturbances on December 28, 1974 and it lasted till November 27, 1979.<sup>14</sup> The next Emergency was invoked on May 30, 1981 following the assassination of the President, while the third state of Emergency was invoked on November 27, 1987 obviously to suppress political upsurge against the then unelected autocratic regime.<sup>15</sup> As noted earlier, the latest and the fourth state of Emergency was declared in early 2007, which being proclaimed by a non-party, care-taker government, is a class by itself, putting novel challenges for the Court in particular.

Interestingly, it is only during the first (1974) and fourth (2007) emergencies that the constitutional provision permitting the suspension of the right to judicially enforce certain FRs has been invoked. The first Emergency, however, coexisted with a graver situation of martial law, thereby occasioning little judicial engagement with constitutionality of Emergency legislative and executive actions, which is in contradistinction with the scope for judicial activity during the recent Emergency. As I shall discuss in passing below, the Court during the first Emergency nevertheless played a laudatory role by checking political and

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<sup>10</sup> *Id.*, Article 141B.

<sup>11</sup> These rights are, respectively, the rights of freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, freedom of profession, and the right to property.

<sup>12</sup> *Id.*, Article 141C.

<sup>13</sup> Another state of emergency was invoked by the then military-turned-civilian President in 1990 just days before his resignation on December 6, 1990. This emergency declared on November 27, 1990 was, however, not put into effect.

<sup>14</sup> *See*, the Presidential Proclamation of December 28, 1974.

<sup>15</sup> *See*, THE BANGLADESH GAZETTE, July 10, 1981 & November 27, 1987. *See further*, IMTIAZ OMAR, RIGHTS, EMERGENCIES, AND JUDICIAL REVIEW (1996).

bureaucratic arbitrariness in curtailing the citizens' liberty and their property right.<sup>16</sup> Also, during the past emergencies the fundamental question of constitutional validity of one or the other proclamation of emergency was not posed for judicial determination. Unlike the 1974 emergency, thus, the 2007 emergency brought this constitutional question into sharp focus, albeit lately.

### III. EMERGENCY AND THE ROLE OF COURTS

Before entering the area of central focus of this paper, it is pertinent to have a quick conceptual picture of the judicial discourse of the 'emergency and courts phenomenon'. What should be, and what actually is the role of the judiciary in a democracy is a subject matter of a continuing debate and discourse.<sup>17</sup> On the other hand, the traditional constitutional-legal theories, particularly those loaded with formalistic ideals, doubt and sometimes refute a role for the Court in helping the troubled nations restore democracy.<sup>18</sup>

Traditionally, the courts facing emergencies or omnipotent executives across the world have often tended to defer to the executive, holding that, for 'separation of powers' it is for the executive, and not the courts, to decide what is in the best interest of the country or what constitutes the interests of national security.<sup>19</sup> For example, in the oft-quoted case of *A.D.M. Jabalpur v. Shivakant Shukla*,<sup>20</sup> the Indian Supreme Court interpreted emergency as having excluded judicial review power even to examine whether the State was lawfully depriving its citizens of their unconditional constitutional right to life during the emergency. In this celebrated case, wrote a Bangladeshi scholar recently, "the majority adjudicated only legalistically, effectively giving unqualified sanctity to the Presidential Order of 1975 [emergency], and thus depriving the right of any person to move a court for the enforcement of the rights conferred by [the Constitution]".<sup>21</sup> The majority

<sup>16</sup> See, e.g., *M/S A. T. J. Industries v. Government of Bangladesh* (1976) 28 DLR (HCD) 27.

<sup>17</sup> For a recent analysis, see, David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?* 27 CARDOZO L. REV. 2005-39 (2006).

<sup>18</sup> For a discussion of the place of state of emergency in legal theory, see David Dyzenhaus, *The State of Emergency in Legal Theory* in GLOBAL ANTI-TERRORISM LAW 65 (Victor Ramraj, Michael Hor & Kent Roach, eds., 2005).

<sup>19</sup> Secretary of State for the Home Department v. Rehman [2003] 1 AC 153, at paras. 53-55, per Lord Hoffman. Lord Hoffman, however, changed this deferential position in *A v. Secretary of State for the Home Department* [2005] 2 WLR 87. For a critique of Hoffman, see David Dyzenhaus, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, 68 MODERN L. REV. 672-76 (2005).

<sup>20</sup> AIR 1976 SC 11207.

<sup>21</sup> Salimullah Khan, *Lawless Laws and Roads To Emergency: Reflections on India 1975 and Bangladesh 2007*, 1(1) J. LAW AND DEVELOPMENT 41-49 (2009). On Indian courts' role during emergencies see *inter alia*, D. J. Derrett, *Emergency and Preventive Detention in India: A Question of the Court's Proper Role*, in RULE, PROTEST AND IDENTITY: ASPECTS OF MODERN SOUTH ASIA (Peter Robb & David Taylor eds., 1978); Anil B. Divan, *Courts and the emergency under the Indian Constitution* in PUBLIC LAW IN INDIA (A.G. Noorani ed., 1982); IMTIAZ OMAR, EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN (2002). See further, C. N. Tate, *Courts and Crisis Regimes – A Theory Sketch with Asian Case Studies*, 46(2) POLITICAL RESEARCH QUARTERLY 311-38 (1993).

judges “overlooked the fact that sometimes a law can be formally legal but at the same time substantially, completely illegitimate”.<sup>22</sup>

Similarly, in an early Pakistani case, *Pakistan v. Moulvi Tamizuddin Khan*,<sup>23</sup> the highest court of Pakistan in effect refused to decide on issues concerning emergency. Before Pakistan could adopt its first Constitution, the then Governor-General of the country, Ghulam Muhammad, unleashed his paternalistic dominance over the Constituent Assembly by issuing on October 24, 1954 a proclamation effectively to dissolve the Assembly. In *Moulvi Tamizuddin Khan*, the legality of this proclamation “was controversially upheld by the country’s highest court through a purely technical and unpersuasive interpretation of the [relevant] laws”<sup>24</sup> and even without entering into merits. In this case and other subsequent legal proceedings which additionally concerned the legality of state of emergency that followed,<sup>25</sup> the Federal Court indeed engaged in politicization of legal interpretations so as to legitimise unconstitutional actions of the omnipotent executive. The court invoked the doctrine of civil/State necessity to establish the so called ‘legal bridge’ in order to close the legal gaps in the creation of which the Court significantly contributed itself.<sup>26</sup>

As opposed to the traditional view of the Court in situations of emergency, some judges, imbued with dynamic judicial job perceptions, preferred the path of upholding high legal values through the judicial process. In the Sindh Chief Court case of *Tamizuddin Khan v. Pakistan*<sup>27</sup> for example, the judges employed a dynamic interpretation of the legal text holding unlawful the proclamation dissolving the Constituent Assembly, thereby respecting the representative institution rather than the Governor General.<sup>28</sup> Interestingly, the liberal jurisprudence of reviewing conditions leading to state of emergency dates back to the colonial British Indian era. In a lawsuit concerning the Governor General of India’s declaration of the state of emergency in 1930, the Lahore High Court held that the Court could inquire as to

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<sup>22</sup> Khan, *id.*, 48. See, however, the powerful dissenting opinion of Khanna, J., who later had to pay price for his dissent as he was superseded by another judge for the position of Chief Justice. Khanna, J. remarked that without the sanctity of life and liberty, the distinction between a lawless society and one governed by laws ceases to have any meaning.

<sup>23</sup> 7 PLD 240, 240-45 (Fed. App. 1955), Cornelius J. dissenting.

<sup>24</sup> Osama Siddique, *The jurisprudence of dissolutions: Presidential power to dissolve Assemblies under the Pakistani Constitution and its discontents*, 23(3) ARIZ. J. INT’L & COMP. L. 615-715 (2006).

<sup>25</sup> A state of emergency was declared on March 27, 1955, which the Court declared *ultra vires* in the case of Usif Patel, PLD 1955 FC 385. As fallout of Patel a second proclamation of emergency was made on April 16, 1955, which was controversially endorsed by the Federal Court.

<sup>26</sup> The Governor General’s Reference No. 1 of 1955, PLD 1955 FC 435.

<sup>27</sup> PLD 1955 Sind 96. See also, Sardar Farooq Ahmed Khan Leghari & Ors. v. Federation of Pakistan, PLD 1999 SC 57 (The Pakistani SC held unconstitutional the blanket suspension of constitutional rights pursuant to the 1998 Emergency).

<sup>28</sup> See M. FAROGH NASEEM, CONSTITUTIONAL BREAKDOWN AND THE JUDICIARY IN PAKISTAN (1997).

whether there existed valid reasons for declaring a state of emergency, while a Bombay Court further advanced this dictum by saying that the legality of actions taken during emergency is justiciable when the normalcy is restored.<sup>29</sup>

While for an assertive judiciary a guarantee of judicial independence or the existence of democracy is a prerequisite, a self-confident and willing judiciary even in an adverse political regime can help achieve democratic values. In contemporary times, it is being increasingly recognised that that constitutional courts, charged with the duty of enforcing the Constitution, have a duty towards the “establishment and maintenance of democratic systems of government”,<sup>30</sup> although it is a different question, altogether, whether a particular judiciary has stood up to its democratizing obligation.

Doubtless, under extra-constitutional regimes or in difficult political situations like the state of emergency, the judiciary has to act in a force-based or authoritative political system and often has to face moral dilemmas of standing against the regime or legalizing it. There are accusations that judges often end up in legitimising such oppressive regimes or applying harsh and unjust laws, and thus breach their oaths to protect the Constitution. Against these accusations, arguments are often made that the judiciary then is deprived of the political guarantee of enforceability of its decisions, and is put at the risk of being retaliated and humiliated at the hands of an all-powerful executive. To avoid their judgments being defied and ignored, judges usually take strategic decisions fitted into political contexts.<sup>31</sup> As Alexander rightly puts it, the judicial protection of human rights during periods of emergencies may thus remain illusory,<sup>32</sup> among other things, because of these factors of executive non-cooperation and the threat perception among the judges.<sup>33</sup> The level of pressure which any extra-constitutional situations may bring to a judge can be gauged from the following apologetic words of Justice Munir of the Pakistani

<sup>29</sup> AIR 1930 Lahore 781; AIR 1931 Bombay 57. For this piece of information, I am indebted to Justice Gholam Rabbani's newspaper article in *The Prothom Alo*, Dhaka, November 9, 2008, 11.

<sup>30</sup> For details, see Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117-64 (2001).

<sup>31</sup> SHYLASHRI SHANKAR, SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS AND SOCIAL RIGHTS 20 (2008) (by referring to Jeffrey Rosen).

<sup>32</sup> G. J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 1 HUMAN RIGHTS L. J. 1 (1984); see further, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029 (2004) (Ackerman argues for new constitutional concepts to better protect civil rights against repressive laws during crises or emergencies, but does not think that judges can do better than they have done in the past during an emergency).

<sup>33</sup> For example, Baxi thinks that Chandrachud, J.'s “belief that ... when enforcement of rights threatens the survival of the Supreme Court as an institution, the Supreme Court should not intervene against the Supreme executive even if fundamental rights are thereby jeopardized” influenced his role in the ADM Jabhalpur Case. Upendra Baxi, *In the Fair Name of Justice: The Memorable Voyage of Chief Justice Chandrachud*, in A CHANDRACHUD READER: COLLECTION OF JUDGMENTS WITH ANNOTATIONS 81 (V. S. Deshpande ed., 1985).

Supreme Court who had been the architect of submissive judicial role during Emergency or extra-legal regimes: “The mental anguish caused to the Judges by these cases is beyond description and I repeat that no judiciary anywhere in the world had to pass through what may be described as a judicial torture.”<sup>34</sup>

The judge’s dilemma during difficult situations of emergency or martial law, and the above common apologies were vividly described in a 1989 case by one of Bangladesh’s greatest legal minds, M. H. Rahman, J. in the SC of Bangladesh:

“The court carries the burden without holding the sword of the community held by the executive or the purse of the nation commanded by the legislature. [...] 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>35</sup>

To these two options, Oyhanarte J, an Argentine judge, added the third, which is to ‘simply accept the fact’, i.e., total surrender to autocracy.<sup>36</sup> Earlier in 1988, Rahman, J., speaking extra-judicially, hinted that his preferable ‘temporary’ surrender of judicial freedom was not meant to be a complete surrender, but rather an engagement in ‘the worthwhile job’<sup>37</sup> of doing justice between citizens so as to lay the foundation for the days when the judge would be able to enforce justice against the mighty and the overbearing as well.<sup>38</sup> Rahman, J. arguably preferred a strategic judicial silence for the grater cause of justice, preferring patience for a ripe time for judicial activism to leaving the administration of justice at the hands of submissive judges.<sup>39</sup> It is,

<sup>34</sup> Siddique, *supra* note 24, 627.

<sup>35</sup> Anwar Hossain Chowdhury v. Bangladesh, (1989) 9 BLD (Spl.) 1, 180.

<sup>36</sup> As cited in MUSTAFA KAMAL, BANGLADESH CONSTITUTION: TRENDS AND ISSUES 60 (1994).

<sup>37</sup> It remains but a question to what extent the Bangladeshi judiciary during the past undemocratic regimes played its ‘worthwhile’ role of doing justice even in privative disputes. This is beyond the scope of this paper to detail on this. Suffice it to say that except for few judges, and despite the protective judicial role as is recorded in this paper, the judges generally failed to ensure justice as they became overly subjugated to the military executive. For example, in Halima Khatun v. Bangladesh, (1978) 30 DLR (AD) 207, 211, Munim, J. in the SC considered it his ‘duty [...] to administer [...] even an unjust law’, while in Sultan Ahmed v. Chief Election Commissioner, (1978) 30 DLR (HCD) 291, 296, S. Ahmed, J. called the martial law ‘the Supreme law of the land’.

<sup>38</sup> M. H. Rahman, *The role of the judiciary in the developing societies: Maintaining a balance* 11 (1-2) LAW AND INTERNATIONAL AFFAIRS 1-10.

<sup>39</sup> This strategic position resembles Naseem’s consideration of the Pakistani judiciary’s silence during martial law regimes as a central necessity. See, Naseem, *supra* note 28. See further, Tayyab Mahmud, *Praetorianism and common Law in Post-colonial Settings: Judicial responses to constitutional breakdowns in Pakistan*, UTAH L. REV. 225(1993).

however, crucial that judges uphold the high values of justice even during the intermittent time, and exercise principled activism vis-à-vis injustices of the regime.

Essentially, judicial responses to the breach or twisting of principles of constitutionalism have been society-specific and are positively co-related with practices of constitutionalism by the other two organs of the State.<sup>40</sup> Additionally, background factors of the judge including his view of the judicial role and approaches to legal theories significantly contribute to the resultant jurisprudence of emergency. It is in the background of this postulate that the role of any judiciary during Emergency needs to be assessed. Before analysing the judicial role under the recent emergency in Bangladesh, however, a brief assessment of judicial responses to its first emergency can profitably be made.

During the first emergency, the Court had often to engage in scrutiny of preventive detention orders, legal challenges to which were barred by Emergency rules.<sup>41</sup> In personal liberty cases which nevertheless came before them, the Court offered a mixed response of evasion and creativity, travelling from mechanistic application of the law<sup>42</sup> to a relatively broader course of legal interpretation.<sup>43</sup> Thus, when the FR to invoke constitutional judicial review in order to enforce constitutional rights remained suspended, the HCD gave remedies on sub-constitutional grounds by, e.g., widening the scope of Section 491(1) of the Criminal Procedure Code, 1898 (*hereinafter* Cr.P.C.) that provided for *habeas corpus*-type remedies to secure release of any person detained “illegally or improperly”.<sup>44</sup> This the Court attained by creatively dislodging the statutory bar that made this remedy inapplicable *vis-à-vis* preventive detentions.<sup>45</sup>

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<sup>40</sup> In transitional democracies or in the so-called third world countries the onus on the judiciary *vis-à-vis* constitutionalism is thought to be relatively more vigorous than elsewhere. See generally, WE Conklin, *The Role of Third World Courts during Alleged Emergencies*, in *ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE* 81 (M. L. Marasinghe & William E. Conklin eds., 1984).

<sup>41</sup> This paragraph and some other observations made elsewhere in this paper draw on findings made in my doctoral thesis: Ridwanul Hoque, *Judicial Activism as a Golden Mean: A Critical Study of Evolving Activist Jurisprudence with Particular Reference to Bangladesh*, (2007), (unpublished Ph.D. Thesis, School of Oriental and African Studies, London) (on file with the author).

<sup>42</sup> In *Ahmed Nazir v. Bangladesh* (1975) 27 DLR (HCD) 199, 211, for e.g., Munim, J. was quick to find a ‘valid order’ of detention, even without indulging in legal questions involved.

<sup>43</sup> In an important non-fundamental rights case, *Karnaphuli Rayon and Chemicals Ltd v. Bangladesh*, (1976) 28 DLR (AD) 116, the AD held that it had power even to modify the language used in a statute if the literal interpretation thereof leads to injustice.

<sup>44</sup> See Criminal Procedure Code, 1898 (Bangladesh) (*hereinafter* Cr.P.C.), § 491 (1)(a)(b). See e.g. *Nurunnahar Begum v. Govt. of Bangladesh* (1977) 29 DLR 372; *Amaresh Chakravarty v. Bangladesh* (1979) 31 DLR (AD) 240.

<sup>45</sup> Cr.P.C., § 491(3) (inserted by Act VIII of 1973).

Similarly, when in emergency preventive detention challenges the government pleaded the Court's lack of jurisdiction to review statute-compliant detention orders by virtue of statutory ouster of judicial review,<sup>46</sup> the Court took a pro-active but strategic stance in holding that the ouster of judicial power is ineffective when an improper, colourable, unlawful or 'arbitrary action' is challenged.<sup>47</sup> In arriving at these conclusions, the Court exercised sort of strategic activism in that they avoided being engaged in scrutiny of constitutionality of laws/actions during emergency, but rather acknowledged, although not uncontroversially, their legal inability to enforce constitutional rights. The following remarks by Justice B.H. Chowdhury in the now famous case of *Kripa Shindu Hazra v. The State*, are self-explaining: "[D]uring Emergency, when the fundamental rights are suspended and the right to move the court for the enforcement of the same has been taken away, neither Article 102 [of the Constitution], nor [section 491 of the Cr.P.C.] is available to seek [to enforce fundamental rights]".<sup>48</sup>

In the above case, however, Chowdhury, J. granted relief to the detainee by extending to him the remedial protection of Section 491, if not by "enforcing" his right to liberty. Short of placing a serious pressure on executive transgression under the shadow of emergency powers, the Court in Bangladesh by and large 'endeavoured to uphold basic notions of legality during Emergency rule.'<sup>49</sup>

#### IV. THE 2007 EMERGENCY IN BANGLADESH: JUDICIAL PASSIVITY OR SUBMISSIVISM?

During the recent emergency regime, citizens as well as legal actors have resorted to the instrumentality of legal actions in order to protect the FRs and ensure constitutionalism. The use of the Court and legal actions has been through the channels both of traditional concrete-injury lawsuits and public interest litigations (*hereinafter* PIL).

Notably, the SC's public interest jurisprudence, beginning in the mid-1990s, has played a major role in changing the way the people and civil society see the judiciary.<sup>50</sup> Although PILs on constitutional rights grounds have now become stalled due to the operation of emergency law, public-spirited citizens or 'interested'

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<sup>46</sup> By referring to Special Powers Act, 1974 (Bangladesh), § 34 that precluded 'any court' from questioning orders/actions (such as preventive detention orders) made thereunder.

<sup>47</sup> *Md. Humayun Kabir v. The State*, (1976) 28 DLR (HCD) 259, 262.

<sup>48</sup> (1978) 30 DLR 103, 114. (Here, a comparative reference may be made to a powerful dissent by Subba Rao, J. in *Makhan Singh Tarasikka v. Punjab*, AIR 1964 SC 381, who held that access to the court for *habeas corpus* under § 491 of the Cr.P.C. 1898 survived the suspension of the constitutional right to move any court.)

<sup>49</sup> Omar, *supra* note 15, 200.

<sup>50</sup> See, Ridwanul Hoque, *Problems of Judicial Affairs in Bangladesh*, 11 D+C DEVELOPMENT AND COOPERATION 426-27 (2007).

politicians have been repeatedly accessing the Court under the operative part of the constitutional remedial clause to secure justice or to challenge the legality of several activities of the government.<sup>51</sup> For example, in an early challenge during the recent regime, a petitioner was partially successful in challenging the alleged internment of the immediate-past Prime Minister Begum Khaleda Zia. At the preliminary hearing of this petition, the HCD seriously questioned the petitioner's legal standing to sue, but ultimately agreed to call an explanation from the government whether or not Begum Zia's liberty was curtailed, and also directed, by order of May 7, 2007, the concerned Ministry to re-connect Begum Zia's telephone lines within three days.

There have been some other instances of public interest court actions, including the ones challenging the lawfulness of Emergency provisions in the Constitution, that have been instituted to challenge un-constitutionalism, in which the 'law' has been used as a tool of governance and also as a legal pressure on the government to make it remain stick to its post-Emergency commitments of restoring democracy. To make a special note of *Masood R. Sobhan v. The Election Commission*,<sup>52</sup> for example, the HCD in this case employed a purposive interpretation of the Constitution's time-frame of 90 days for holding general elections following the dissolution of Parliament.<sup>53</sup> The Court dismissed a constitutional challenge to Election Commission's (EC) deferral of general elections beyond this time-limit, leaving the issue of EC's non-compliance with the Constitution for elected Parliament to settle while observing that the EC's promise of holding elections by December 2008 was not unreasonable.<sup>54</sup> In this case, the Court insisted that the EC submitted an affidavit of its pledge of holding elections within the declared time, a strategy that acted as a check on the emergency government. Below, I analyse certain other high-profile cases implicating 'emergency' to fathom the judicial responses to the current Emergency regime.

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<sup>51</sup> Although the right to enforce FRs as envisaged by Article 102(1) of the Constitution had been suspended, judicial review power concerning other issues of legality as provided under Article 102(2) remained unaffected.

<sup>52</sup> W.P. No. 709 of 2008 (HCD, SC of Bangladesh) (unreported). (I thank Dr. Shahdeen Malik for making a copy of the judgment available to me).

<sup>53</sup> See, Constitution, *supra* note 6, Article 123 (3) (provides that Parliamentary elections shall be held within 90 days of the dissolution of Parliament).

<sup>54</sup> *Supra* note 52, *per* M. A. Rashid, J.

### A. *MOYEZUDDIN SIKDER V. STATE*

In a significant, early emergency-period decision, the HCD in *Moyezuddin Sikder v. State*<sup>55</sup> effectively held that its inherent power and wider judicial authority to grant bail to the accused can not be foreclosed by law even during the state of national emergency.<sup>56</sup> The EPR, Rule 19Gha, provided that notwithstanding the general legal provisions concerning bail,<sup>57</sup> no application for bail can be made to ‘any court or tribunal’ by a person against whom an inquiry, investigation, or trial is pending concerning an offence under the EPR or certain EPR-covered statutes.<sup>58</sup> Mr. Sikder, charged under a law covered by the EPR, sought bail from the HCD where the government unconvincingly argued that, in the face of the term ‘any court’ in the above-mentioned restrictive law, the Court lacked jurisdiction to entertain the petition. Employing a historical-contextual and liberal interpretation to the law in question and by relying on arguments made by *amici curiae* who referred to a series of comparative constitutional decisions, the Court held that the term ‘any court or tribunal’ in Rule 19Gha of the EPR was not meant to include the SC, reasoning that in the absence of a clear ‘ouster’, the SC’s supervisory jurisdiction cannot be interpreted to be curtailed or limited by implication. In this bold, liberty-focused decision, the principle of rule of law was thus upheld against the prerogatives of a powerful, emergency-government.

Unfortunately, however, the AD in *Moyezuddin Sikder v. State*<sup>59</sup> overruled the HCD’s decision. By narrowly interpreting the term ‘any court’ and the *non-obstante* clause in Rule 19D of the EPR, it argued that there was a ‘manifest’ legislative intention to oust the HCD’s jurisdiction to grant bail in EPR-cases.<sup>60</sup> The Court read this legislative ‘intention’ readily from a laboured, textual interpretation of Section 498 of the Cr.P.C. that empowers the HCD to grant bail. In its view, since the EPR reserved the effect of Section 498, the term ‘any court’ should be meant to include the HCD. It is submitted that this legal-formalism inspired reasoning,<sup>61</sup> which avoided constitutional arguments altogether, is open to question in terms of compatibility with wider constitutional norms. The following comment of the Court reveals its jurisprudential attachment to excessive legalism: “The question whether the lawmakers have disregarded justice ... in framing [rule] 19Gha is not for the Court to decide”.<sup>62</sup> It seems that the AD in *Moyezuddin Sikder* skillfully abdicated its judicial duty of ensuring justice under the shadow of

<sup>55</sup> (2007) 59 DLR (HCD) 287 (judgment handed down on April 22, 2007).

<sup>56</sup> *Id.*, 297, per Nozrul I. Chowdhury & S. M. Emdadul Hoque, JJ.

<sup>57</sup> See, Cr.P.C., §§ 497 & 498.

<sup>58</sup> See, EPR, 2007 (Bangladesh), Rules 14 & 15.

<sup>59</sup> (2008) 60 DLR (AD) 82.

<sup>60</sup> *Id.*, 88.

<sup>61</sup> On ‘legal formalism’, see *inter alia*, F. Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988): “At the heart of the word formalism ..., lies the concept of decision-making according to rule” [Emphasis supplied].

<sup>62</sup> (2008) 60 DLR (AD) 82, ¶ 54.

positivistic legal interpretations.<sup>63</sup> The decision also stands at odd with earlier liberal constitutional decisions of the SC.<sup>64</sup> Appreciably, however, the AD in *Moyezuddin Sikder* opened a small space for judicial justice by holding that bails in EPR-cases can nonetheless be granted if the concerned charge is in bad faith, or if it shows a case of ‘no jurisdiction’ and *coram non judge*.<sup>65</sup> It appears that the AD created a high threshold for the accused to overcome, requiring him to prove a case of *malafide* or *ultra vires*, and thus narrowed the access to justice.<sup>66</sup>

Despite the AD-endorsed jurisdictional bar to grant bail under ordinary legal provisions, however, the HCD innovatively granted bails in a number of EPR-cases invoking its inherent power under Section 561A of the Cr.P.C. to ‘secure the ends of justice’ in any case. In a well-reasoned decision in *AKM Reazul Islam v. State*,<sup>67</sup> the HCD held that the Court ‘should not put its hands off’ when no remedy in law is available to the accused, but rather intervene so as to serve ‘the cause of justice’.<sup>68</sup> This decision indicates that a justice-conscious and willing Court may discover appropriate legal technology to secure citizens’ liberty even in the face of restrictive legal provisions.

## B. BANGLADESH V. SHEIKH HASINA

The next important case that brings in the issues of proper judicial role and judges’ dilemma during Emergency is *Bangladesh v. Sheikh Hasina*<sup>69</sup> in which the AD has, not un-controversially, held that the retrospective operation of the EPR concerning trial of certain criminal offences is not unconstitutional.

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<sup>63</sup> In a statement reacting to this judgment, the Asian Human Rights Commission critiqued that the Court abdicated its ‘power’ regarding bails. See, Asian Human Rights Commission, *Bangladesh: Supreme Court Abdicates its Powers Relating to Bail on Emergency Law Matters*, April 24, 2008 available at <http://www.ahrchk.net/statements/mainfile.php/2008statements/1485/> (Last visited on January 31, 2009).

<sup>64</sup> Here, reference can be made to a decision by the HCD in *Afzalul Abedin & Ors. v. Government of Bangladesh & Ors.* (2003) 8 BLC (HCD) 601 striking down the Public Safety (Special Provision) Act, 2000 (Bangladesh) (hereinafter PSA). In this case the Court considered a complete ouster of judicial power to grant bail (PSA, § 16) a breach of constitutional due process (*per Aziz, J.*, 643) and of the principle of judicial independence (*per Huda, J.*, 671).

<sup>65</sup> (2008) 60 DLR (AD) 82, 89, ¶ 55.

<sup>66</sup> That this threshold had negative implications soon became clear in *Ali Ahsan Mujahid v. State* (2008) 60 DLR (HCD) 60, where the accused unsuccessfully sought bail on the ground of ‘malice’ in prosecuting him. The Court refused to grant him bail reasoning that “allegation of *malafides* [...] can not be readily accepted” and “is a matter of proof at the trial”.

<sup>67</sup> (2008) 13 BLC (HCD) 111.

<sup>68</sup> *Id.*, 119, ¶ 44. (In invoking its inherent jurisdiction, the Court was prompted by the fact that the authorities failed to finish investigation against the accused within the EPR-prescribed time, a failure which, the Court held (*id.*, at ¶ 45), gives rise to an implicit right to seek bail.)

<sup>69</sup> (2008) 60 DLR (AD) 90.

The case arose from a judicial review at the HCD, *Sheikh Hasina v. Bangladesh*,<sup>70</sup> in which the petitioner, a then former Prime Minister, challenged the legality of a governmental order putting within the purview of the EPR the trial of a criminal charge against her involving allegations that precede the promulgation of emergency. The effect of this governmental action was that Ms. Hasina was effectively deprived of the right to seek bail. The EPO authorised the government to initiate special measures to conduct effectively and speedily any investigation, trial, and appeal regarding *any offence* [emphasis added] during the continuance of Emergency,<sup>71</sup> and provided that any byelaws (in this case the Rules) made in this regard may be given retrospective operation<sup>72</sup>. Accordingly, Rule 19Neo (19E) of the EPR provided that the government may sanction the placement within ambit of the EPR any case concerning offences under certain laws. The HCD found the language of these provisions ‘clear and unambiguous’ and concluded that they contemplated only retrospective operation of the byelaws (in this case, the Rules) and did not clearly authorize trial of offences committed before the promulgation of Emergency.<sup>73</sup> Moreover, the HCD further embarked upon a number of constitutional issues including the prohibition of *ex post facto* laws in Article 35(1) of the Constitution and the question of whether curtailment of judicial power by administrative legislations is constitutional, and finally concluded that the retrospective operation of the EPR to conduct trial of pre-Emergency offences was unlawful, and that the criminal proceeding against the petitioner stood as quashed.<sup>74</sup>

Further, the HCD declared that the restrictive provisions of the EPR (Rules 10(2), 11, 19Gha) ousting its power to grant bails were unconstitutional for breaching the constitutional right to life and the guarantee of equal legal protection.<sup>75</sup> Here, the Court qualified the extent of the constitutional emergency provisions, by holding that the constitutional prohibition in Article 26 against law-making in breach of FRs renders unlawful any Emergency-law breaching inviolable FRs.<sup>76</sup> The Court in *Sheikh Hasina* thus concluded with a forceful observation that “Emergency has not curtailed the power and authority of ... the Court ... to deal with the bail and other matters in accordance with existing laws in force”.<sup>77</sup>

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<sup>70</sup> (2008) 13 BLC (HCD) 121 (judgment delivered on 5 February 2008).

<sup>71</sup> EPO, § 3(3a).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, 123.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, 144-45.

<sup>76</sup> *Id.*, 142, ¶ 42.

<sup>77</sup> *Id.*, 148. (This reasoning resembles the Pakistani SC’s view in *Sardar Farooq Ahmed Khan Leghari & Ors. v. Federation of Pakistan*, PLD 1999 SC 57, 76, that despite the ousting of the Court’s jurisdiction by the Emergency law, the Court has jurisdiction to examine the compatibility of any exercise of state power with the Constitution/statute).

The reasoning that the HCD advanced in its judgment was logically attractive and was premised on constitutional values and the Constitution-inspired judicial role perception. The Court remarked that they took oath both to 'preserve, protect, and defend' the Constitution, and hence their ('extra') duty was to examine the Constitution-compatibility of executive actions when citizens' rights are at stake even during emergency.<sup>78</sup> On appeal, however, the AD followed quite a different path. Based on the mere text of Article 35 (1) of the Constitution, it found that the prohibition as to operation of *ex post facto* laws concerned only 'conviction' or 'sentence', and not the trial of the offence concerned.<sup>79</sup> It argued that since the government applied the EPR only for the purpose of trial of an offence and since the EPR did not create any new offence in retrospect, there has been no violation of the rule against *ex post facto* criminal laws as provided for in the Constitution.<sup>80</sup> The AD also blasted the HCD for not following the principle of judicial minimalism, i.e., for embarking on constitutional issues which it thought were not necessary for resolving the issue before the Court and also for giving *ex gratia* relief. It is submitted that the AD's objection to the HCD's decision on these technical grounds is of doubtful justification. For example, it was nearly impossible for the HCD to determine the legality of the governmental order in question without determining the constitutionality or otherwise of retrospectively applying the EPR to try pre-Emergency offences.<sup>81</sup>

On a plain reading of the Constitution, disassociated with concerns for justice and fairness, the AD's interpretation that the constitutional prohibition of *ex post facto* laws applies, not to a procedural law, but only to a substantive law, may appear blameless. The interpretation is, however, fraught with logical unsophistication, and is open to question on a number of counts. First, the AD ought to have noticed that the law did not in express words provided for retrospective operation of the EPR even for mere trial of offences. Second, the AD ignored a strong and sophisticated argument of the HCD that EPR's retrospective

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<sup>78</sup> Interestingly, the Court distinguished their duty to 'protect and defend' the Constitution from their Indian and Pakistani counterparts' duty to 'uphold' the Constitution. This distinction reflects the Court's readiness to exercise judicial vigilantism in times of extraordinary political situations like Emergency. In the Court's words (*id.*, ¶ 48), the duty to 'defend' the Constitution, in addition to protecting it, cast upon the Bangladeshi judges an additional duty to "read and apply the provision of the Constitution strictly" when a citizen's rights are infringed. See also, Achintya Sen, *A landmark verdict*, THE NEW AGE (Dhaka) February 12, 2008.

<sup>79</sup> (2008) 60 DLR (AD) 90, 100, ¶ 56.

<sup>80</sup> Notably, the Court boosted its reasoning by relying on identical comparative constitutional decisions. The AD particularly relied upon *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 SC 394 in which the Indian SC interpreted Article 20 (1) of the Indian Constitution, the words of which correspond to those in Article 35 (1) of the Bangladeshi Constitution, as having prohibited only 'conviction' through *ex post facto* laws.

<sup>81</sup> As a further example, the AD bruised the HCD for quashing the criminal proceeding traveling beyond its powers, although quashing a criminal proceeding appears to be within the ambit of its judicial review power.

operation effectively deprived the accused of her/his right to seek bail under existing statutes, which cannot be taken away by a subordinate legislation like the EPR. The AD's response was that the accused does not have a right to 'bail'; bail is a mere privilege. This reasoning appears to have missed the distinction between the right to obtain a bail and the right to access the court seeking bail, and to have sidelined constitutional implications of the wholesale statutory prohibition of bails. Denial of the latter doubtless runs contrary to such constitutional values as equal protection of law and human dignity and worth. Thirdly, the AD's endorsement of retrospective operation of the EPR could be avoided in light of the possibility of violence to the norm of fair trial, as the accused may consider himself deprived of 'justice' and legal security and the administration may have misused their power of transferring cases to the EPR-regime.

The AD failed itself in understanding the constitutional objection concerning the underlying political objectives behind the selective or individuals-based enforcement of the emergency laws. It will not be out of place, here, to quote Justice Jackson in the Supreme Court of the United States who famously observed in a 1949 case that "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation".<sup>82</sup> The AD in the above case has failed apparently to require the law to be applied equally. Just and equal application of the law is a basic pillar of the rule of law itself,<sup>83</sup> and this altruistic principle of constitutionalism was missing in the AD decision in *Sheikh Hasina*.

### C. ADVOCATE SULTANA KAMAL AND OTHERS V. BANGLADESH

In this PIL,<sup>84</sup> three eminent citizens of the country challenged the constitutionality of certain provisions of the EPO and the EPR. It is interesting that these public interest litigators did not challenge the state of emergency as such, nor the constitutionality of the EPO as a whole. Presumably, these and other legal activists had, for their further actions, been waiting for a more appropriate time to come. In late 2008, thus, full-fledged challenges to the constitutionality of Emergency provisions made their way up to the Court, which we discuss below.

In its judgment delivered on December 4, 2008, the Court invalidated Section 5 of the EPO that precluded judicial review of any executive order issued under any emergency laws. The Court also declared unlawful Rules 11(3), 19Gha and 19Uma of the EPR that either limited or pulled off the judicial power to grant

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<sup>82</sup> *Railway Express Agency Inc v. New York* 336 US 106, 112–113 (1949).

<sup>83</sup> Lord Bingham, *The Rule of Law* 66(1) CAMBRIDGE L. J. 67–85, 75 (2007).

<sup>84</sup> *Advocate Sultana Kamal & Ors. v. Bangladesh*, W.P. No. 4216 of 2008 (SC of Bangladesh) (unreported), *per* ABM Khairul Haque and Md Abdul Hye, JJ.

bails, to hear appeals from interim lower court orders, and to suspend sentences.<sup>85</sup> Although the Court stopped short of striking down the current Emergency as unconstitutional, it observed that under the Constitution of Bangladesh, emergency can not continue for an indefinite period.<sup>86</sup> In essence, the Court here addressed the question whether the President's 'satisfaction' about the existence of reasons for imposing emergency is subject to judicial review, and seems to answer the question in the affirmative.<sup>87</sup> Notably, there already is in place a series of decisions holding that President's satisfaction as to the need for promulgating an Ordinance when Parliament is not in session is justiciable. However, a more fine-grained argument in favour of judicial reviewability of President's satisfaction as to the existent/emergent conditions for emergency remains due. It is worth noting here that according to a leading Bangladeshi constitutional authority, the validity of the proclamation of emergency can be challenged on the ground that there was no satisfaction at all or that it was wholly in bad faith or based on totally irrelevant or extraneous grounds.<sup>88</sup>

Further, in striking down the emergency law, provisions denying the accused the right of bail, the Court observed that right to petition the court for bail is a FR, which can not be infringed 'even during war'.<sup>89</sup> Its reasoning appears to be informed of the principle of constitutionalism, *i.e.*, constitutional limits of each State organ, and of the overriding values of constitutional FRs. As the Court observed, although the proclamation of emergency enables the State to enact laws affecting certain but not all FRs, the SC has the legitimate power to review the constitutionality or otherwise of the laws and actions taken during emergency.<sup>90</sup> This reasoning has thus further advanced the HCD's reasoning in *Sheikh Hasina* that the State bears a continuous, paramount obligation not to breach FRs while making laws.<sup>91</sup> It needs to be mentioned that the government has appealed to the AD against the above decision of the HCD, and has obtained a stay.

<sup>85</sup> EPR, Rule 11(3) bars any appellate court from staying any sentence given in any corruption case and granting bail to anyone accused in a case lodged under the emergency rules; Rule 19Gha bars any person, accused in any case under the emergency rules, from seeking bail in any court during the inquiry, investigation and trial of the case. Rule 19Uma stipulates that no appeal can be made to any appellate court against orders of any court or tribunal and any action taken by the authorities during the inquiry/investigation of any case under the rules.

<sup>86</sup> For the Court's observations, see *HC Declares 4 Emergency Provisions Void*, THE NEW AGE (Dhaka) December 5, 2008.

<sup>87</sup> *Cf Abdul Baqui Baluch v. Pakistan* (1968) 20 DLR (SC) 249 (The Pakistani SC held that once a proclamation of emergency had been validly issued the question whether conditions for emergency ceased and the emergency needed to be withdrawn was not for the Court to decide).

<sup>88</sup> MAHMUDUL ISLAM, CONSTITUTIONAL LAWS OF BANGLADESH 320 (2002). (The observation drew on comparative constitutional decisions).

<sup>89</sup> This echoes Lord Atkin's dissent in *Liversidge*, *supra* note 3, in which his Lordships held that law should speak the same language amidst the clash of arms.

<sup>90</sup> By resorting to the principles of constitutional supremacy and separation of powers amongst the three state organs, which the Court held are basic features of the Bangladeshi Constitution, the Court observed: "None in the state can go beyond the Constitution [...] even during war".

<sup>91</sup> *Supra* note 69.

*D. M. SALEEM ULLAH AND OTHERS V. BANGLADESH AND M ASAFUDDOWLA AND OTHERS V. BANGLADESH*

In *M. Saleem Ullah and Others v. Bangladesh*,<sup>92</sup> a PIL, a well-known PIL-initiator challenged the constitutionality of the EPO and the EPR 2007. Upon a four-day preliminary hearing, a division bench of the HCD<sup>93</sup> issued a *rule nisi* on July 14, 2008 asking the government to explain why the proclamation of emergency and the suspension of FRs should not be declared unconstitutional. The Court also directed the government to provide information as to how and when it was planning to hand over powers to elected representatives, and observed that the promised handing over of power must be transparent. While *M. Saleem Ullah* was awaiting final determination, in *M Asafuddowla and Others v. Bangladesh*, the latest PIL concerning Emergency,<sup>94</sup> three public spirited litigants challenged the constitutionality of the constitutional provisions enabling the President to declare a state of emergency, apart from specifically challenging the Emergency Proclamation Orders 1 & 2 of 2007 that respectively stayed the constitutional right to enforce FRs guaranteed by the Constitution, and stripped the SC of its authority to decide upon pending petitions involving FRs.<sup>95</sup>

In effect, in this constitutional petition based upon arguments of constitutionalism and democracy as particularly enshrined in the Preamble to the Bangladeshi Constitution, the litigants challenged the *vires* of The Constitution (2<sup>nd</sup> Amendment) Act, 1973 that inserted to the Constitution provisions concerning the state of emergency. Having been primarily convinced by these arguments, the Court issued a *rule nisi* against the government asking it to explain why the imposition of the 2007 emergency suspending the enforcement of constitutional rights, and why the implicated constitutional provisions *vis-à-vis* Emergency would not be declared unconstitutional. It now remains to be seen how the Court responds to this fundamental constitutional issue brought before it 35 years after the provisions for Emergency have been declared constitutional. Given that the state of emergency has in the meantime been withdrawn, the challenge for the Court will be to choose between refusing to decide the question on the ground that it has been rendered 'academic' by change of circumstances and deciding the issue as a fundamental public law question.<sup>96</sup> The question whether even constitutional

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<sup>92</sup> W.P. No. 5033 of 2008 (SC of Bangladesh) (unreported).

<sup>93</sup> The Bench comprised of Khademul Islam Chowdhury and Mashuq Hossain Ahmed, JJ.

<sup>94</sup> W.P. of 24 November 2008.

<sup>95</sup> These Proclamation Orders, promulgated respectively on 11 and 13 January 2007, simply invoked Article 141C of the Constitution. See *supra* note 6 and the accompanying text.

<sup>96</sup> See *Bangladesh Italian Marble Works Ltd v. Bangladesh*, Special Issue BANGLADESH LAW TIMES (HCD) 1 (2006). (The Court embarked on the issue of legality of a past martial law regime. Constitutional courts elsewhere are increasingly building up a jurisprudence that supports judicial determination of issues which concern public law questions, even if they are rendered 'academic' for the concerned immediate parties before the Court.) See e.g., *Secretary of State v. Sakthevel Prabakar*, Civil Misc. Proceeding No. 18 of 2003 (Hong Kong Court of Final Appeal) (unreported).

enabling provisions concerning the state of emergency is constitutionally legitimate can never become a moot question, since these constitutional provisions are provisions to suspend the Constitution itself.<sup>97</sup>

## V. CONCLUSIONS

The above shows that judicial responses to the 2007 Emergency regime in Bangladesh in terms of protecting fundamental constitutional values, including individuals' autonomy, are a mixed bag of assertion and passivity or submissivism. While the HCD of the SC has resorted to a dynamic interpretation of the Constitution in most if not all cases concerning the Emergency laws, the AD in Emergency cases, including cases concerning preventive detentions, has followed a formalistic and conservative method of constitutional construction and has sometimes overly interfered in judicial freedom of the HCD. The AD's approach stands at odds even with its previous style of legal interpretation involving issues of fundamental rights and constitutionalism. In almost every single decision, until at the very last hours of the Emergency regime, the AD unraveled its policy preference for not interfering with the executive. Surprisingly, there was not even any dissenting opinion in the discussed cases of doubtful logical correctness. This is, however, not to discredit the AD's recent opening of a little space for liberal interpretations particularly in granting bails of the accused facing prolonged detention pending trial of criminal cases. It is unclear whether the AD of the Bangladeshi SC sought to extend, in a legal way, some amount of legitimacy to the allegedly extra-constitutional emergency government so as to support its purportedly noble mission of institutionalizing democracy, or it became subjugated to the external pressure coming from the military-baked government that imposed Emergency.

One might wonder whether the political and constitutional contexts which gave birth to the 2007 emergency have not influenced judicial responses coming from the SC. Taking account of local social specificities is what the theory of judicial constitutional activism requires of judges willing to improve constitutional justice, but this needs to be distinguished from subverting the Constitution itself by unduly deferring to the executive operating under Emergency.<sup>98</sup> The AD of the

<sup>97</sup> It is tempting to quote Khan's forceful argument that an Emergency by suspending the right to life indeed suspends the Constitution: "The state as a legitimate association ceases to exist when the law or laws, which found it, cease to exist. 'No person shall be deprived of life or personal liberty save in accordance with law,' (Article 32) and 'All citizens are equal before law and are entitled to equal protection of law (Article 27) are two such laws. It is important to realize that they do not stand on an ostensibly adopted Constitution that founds a State. On the contrary, it is the state itself that rises or falls with them." See Khan, *supra* note 21, 49.

<sup>98</sup> It is tempting to quote Kentridge here: "Sometimes there will be pressure on the judiciary to pay special heed to the difficulties of government. [...] [A]ny yielding to such pressures, whether on the plea of avoiding chaos, preserving peace or some lesser ground, may be the first step on a slippery slope. Such pressures whether from government or the press or sections of the public must be valiantly resisted." Sir Sydney Kentridge Q.C., *A judge's Duty in a Revolution – The Case of Madzimbamuto v. Lardner-Burke*, 15(2) COMMONWEALTH JUDICIAL JOURNAL 32, 42.

SC probably under-read the colonial pattern of the recent Emergency,<sup>99</sup> while over-emphasising the government's declared objective of restoring democracy. Judges in an emergency-laden country must strike the delicate balance between respecting internal security concerns and protecting the rights of citizens and constitutional values. There has always been some impact of any regime or political change upon law, courts and judicial elites.<sup>100</sup> The developmental history of judicial activism or the record of judges' democratising role in South Asia, prominently in India and Pakistan, testifies to this.<sup>101</sup> While for the effective protection of rights and principles of constitutional justice the existence of judicial independence is an imperative, judges charged to dispense justice and with oaths to uphold and defend the constitution cannot afford to avoid their obligation pleading the doctrine of limited judicial power and the absence of enough judicial freedom.

Why is it that the AD throughout the 2007 Emergency regime played an executive-minded role? There are allegations that the current regime created an atmosphere of fear and humiliation for the top judges which allegedly compelled them not to 'speak'.<sup>102</sup> The question, then, is how one should evaluate the legal reasoning that underlies the Appellate Division's excessive deference and reprehensible decisional silence. On the other hand, a deeper analysis of the decisions of the HCD in which the Court asserted its constitutional authority against the misuses of Emergency laws and actions suggests that a willing and able court, informed of the limitations of legal formalism and traditional conceptions of mechanical judicial role, can protect values of constitutionalism even during hostile environment in the polity. How does one explain the differences in adjudicative approach of two Divisions of the one and same SC? Any investigative mind must also ask if there are threat perceptions amongst Bangladesh's AD Judges, then how the judges in the HCD could overcome the threat factor. To be cynical, the HCD judges probably took the advantage of the fact that their assertion or otherwise would be subject to appellate scrutiny, thereby shifting the risk of executive retaliation. Here, analyses of a leading constitutionalist may be drawn

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<sup>99</sup> See Salimullah Khan, *supra* note 18. See further Eric A. Posner & Adraion Vermeule, *Emergencies and Democratic Failure*, 92(6) VA. L. REV. 1091-1146 (2006).

<sup>100</sup> Schmidhauser, J. *The Impact of Political Change upon Law, Courts and Judicial Elites*, 13(3) INTERNATIONAL POLITICAL SCIENCE REVIEW 223-33 (1992).

<sup>101</sup> As a convenient short reference, mention can be made of two decisions of the Bangladesh SC, one delivered during an undemocratic regime and the other during a democratic era. In *Abdus Shukoor Dada v. The State*, (1976) 28 DLR 441, the Court extended *ex gratia* glorification to martial law by calling it a 'known concept' of jurisprudence, while in *Bangladesh Italian Marble Works Ltd v. Bangladesh* *supra* note 96, it adjudged martial as 'no law'. On the influence of the nature of political regimes on judicial behaviour in India, see a recent work, Shankar, *supra* note 31, Ch. 1 & 2.

<sup>102</sup> There has been some rumour in the air that government posed threats of bringing corruption charges against some AD judges.

upon. In seeking to address the question why top judges across the world take differing approach to constitutional interpretations and judicial role, Goldsworthy put forward as an explanation. Such factors as the legal culture in which judges receive their legal education, social backgrounds which are reflected in judicial appointments, political culture with which judges are imbibed, the nature and age of the constitution, and the fact that judges manage to adjust their constitutions to 'the felt necessities of the time'.<sup>103</sup>

The above factors can also be used as a tool to explain the judicial behavior in Bangladesh during the Emergency period under review here. As the above analysis shows, however, in addition to the atmosphere of judicial subjugation and other background factors that often influence the judge's mind, it is the AD's embracement of legal formalism, whether ignorantly or deliberately, that may count for its judicial failing during an Emergency. This preference can partially be explicated by a reference to the spill-over effects of the judiciary's pro-establishment role during the past undemocratic regimes (1974 to 1990).

There is no denying that particularly the senior judiciary in Bangladesh incurred a crisis of public confidence during the recent emergency, which in the coming days is more likely to have serious implications for the reputation and ability of the court. It will remain to be seen whether the court would be able to overcome this confidence-crisis and regain their reputation by becoming a much stronger institution acting for the people as was the case with the Indian judiciary in the post-Emergency period. For this to happen, the judges must now reflect on the importance of judicial vigilantism in protecting the rule of law, and not the rule by law, during Emergencies or constitutional crises.

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<sup>103</sup> Goldsworthy, J., *Conclusions*, in INTERPRETING CONSTITUTIONS 321-45, 343.

