Doctrine of Necessity: Stumbling Against the Same Stone in Pakistan
- A Mistake Not to be Emulated in Sri Lanka

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'To stumble twice against the same stone is a proverbial disgrace.'- Cicero

This paper is about how the doctrine of necessity paved the way for the destruction of democracy in Pakistan, from whose experience Sri Lanka has much to learn and why it should not be applied in Sri Lanka in matters of constitutional law. The immediate reason for writing this is the call from pro-government lawyers to emulate what happened in Pakistan. What is worse is the attempt at eulogizing Chief Justice Munir who introduced the doctrine to Pakistan.

Part I – The Pakistani Experience

Origins and essence of the doctrine

The doctrine of necessity was first expounded by the 13th century English jurist Henry de Bracton, who stated 'that which is otherwise not lawful is made lawful by necessity'. In the English case of *Manby v Scott*, I Lev. 4 (1672), it was stated that "the law for necessity dispenses with things which otherwise are not lawful to be done. . .."

Glanville Williams described the defence of necessity as involving a choice of the lesser evil. 'It requires a judgment of value, an adjudication between competing 'goods' and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.' Glanville Williams, 'Defence of Necessity' [1953] *Current Legal Problems* 216 at p. 224.

The doctrine is recognized in criminal law. Section 74 of the Sri Lankan Penal Code provides: 'Nothing is an offence merely by reason of its being done with the knowledge criminal intent, that it is likely to cause harm if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property.' The following illustration is given: 'A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of an offence.' Similar provisions are found in penal laws all over the world.

Because of its express recognition, with illustrations, chances of the doctrine being abused in matters of criminal law are far less, also because there is at least one appeal available to a higher court. The danger is with its application in constitutional law when the matter is decided almost always in the highest court of a land as happened in Pakistan.

In *Re the Reference by the Governor General* (PLD 1955 FC 435), the Pakistani Federal Court quoted Cromwell as saying: 'If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make the law.' But Cromwell was aware of the danger of abuse of the doctrine. He stated in Parliament on 12 September 1654: "Necessity hath no law. Feigned necessities, imaginary necessities...are the greatest cozenage men can put upon the providence of God . . .."

S. A. De Smith is familiar to the Sri Lankan legal community. Having seen the doctrine been prostituted in Pakistan, De Smith stated in his *Constitutional and Administrative Law* (3d ed. 1977, p.502) that the necessity must be proportionate to the evil that is to be averted and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order.

On Munir CJ

Writing an introduction to Sri Lankan legal academic Dr. Reeza Hameed 's article 'Constitution Changes- Points to Ponder' in *Pakistan Horizon*, the blog of the Pakistan Institute of International Affairs, its editor and senior lawyer Asad Khan said: 'Originating in the works of Henry de Bracton and William Blackstone**,** the doctrine of necessity has plagued Pakistan's history and M Munir CJ has rightly been labelled "the destroyer of democracy in Pakistan". From that perspective, the doctrine of necessity will never get stale in Pakistan's history. To be sure, our country has, through its law courts, which ought to have protected democratic virtue but opted to fall into despotic vice, set unparalleled standards for venality by being the first free nation to apply "the doctrine" to murder democracy in its nascency.'

Munir joined the judiciary in 1942 and was appointed Chief Justice of the Lahore High Court in 1949. At the time, the highest court in Pakistan was the five-member Federal Court, headed by the respected Chief Justice Abdul Rashid. When Rashid retired in 1954, A.S.M. Akram, a Bengali, was the next senior-most judge. But the West Pakistani establishment was prejudiced against him and Governor General Ghulam Muhammad appointed Munir as Chief Justice vaulting him over the other four sitting judges of the Federal Court.

Munir CJ's capability is beyond doubt, as evidenced from his judgements. Hamid Khan quotes Justice Cornelius, a Pakistani Christian and a liberal, progressive and erudite jurist who later became Chief Justice, as telling him that Munir would boast of his ability to write two judgements in a criminal case — one for conviction and one for acquittal— both equally convincing and legally correct. Munir was also fond of saying that the law is an instrument to be used by the judge to reach his desired result. (Hamid Khan, *A History of the Judiciary in Pakistan,* Oxford University Press, 2017, pp. 79-80) Hamid Khan is a senior lawyer who has been described thus in a review of his book: '[A]t one point or another, every little bird fluttering in the Aiwan-i-Adl [Hall of

Justice] has whispered in his ear. Moreover, on an individual level, he has enjoyed personal relations with Chief Justices as far apart as A.R. Cornelius (1960-1968) and Jawwad Khawaja (2014).' (Salahuddin Ahmed, 'Shakers and Shapers of Pakistani Law' *Dawn* 18 September 2018, Karachi).

First use in Pakistan

At independence, the Government of India Act, 1935 was the basic law of both India and Pakistan. Their respective Constitutional Assemblies (CA) were also the legislatures. The Indian CA produced a constitution by November 1949 but not so the Pakistani CA. The latter was headed by Ali Jinnah himself who was also the first Governor-General. After the untimely death of Jinnah in 1948, Prime Minister Liaquat Ali Khan headed it for three years when he was assassinated. The two events no doubt contributed the slow pace of the Assembly's work, not to speak of the impasse between members. The deadlock was however resolved in October 1953. On 21 September 1954, the revised report of the Basic Principles Committee was approved by the CA. Pakistan was at last close to adopting a new Constitution. The draft of the constitution was ready to be announced on December 25, 1954, Ali Jinnah's birthday, but Governor General Ghulam Muhammad dismissed the CA on 24 October 1954 claiming that the CA had lost the confidence of the people and that the constitutional machinery had broken down. The real reason, though, was that the draft proposed the curtailment of the Governor-General's powers, including, importantly, the power of dismissing the Government of the elected Prime Minister.

Moulvi Tamizuddin Khan, who was Deputy to Ali Jinnah and Liaquat Ali Khan and became President of the CA after the latter was assassinated, invoked the writ jurisdiction of the Sindh High Court against the dissolution of the CA. The High Court (*Moulvi Tamizuddin Khan v Federation of Pakistan,* 1954 SHC 81) granted the writs prayed for, holding that a Governor-General had no special privilege like that of the Crown. The Court cited with approval, the leading Privy Council case of *Musgrave v. Pulido* (1879) 5 AC 102) in which the Governor of Jamaica sought to escape responsibility in an action based on his seizure and detention of the vessel 'Florence' by the plea that he had acted as Governor in the reasonable exercise of his discretion and that the action taken was an act of state. The Judicial Committee rejected, as did the Court below, the contention that this was any answer, emphatically asserting that a Governor cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power.

It may also be noted that the Indian Independence Act set up India and Pakistan was 'independent dominions'. Also, unlike in Sri Lanka (then Ceylon) where Parliament consisted of the King, Senate and the House of Representatives, in India and Pakistan by contrast, the King, and therefore the Governor-General, was not a part of the legislature.

The writ jurisdiction of the High Court had been granted by section 223-A introduced to the Government of India Act by the CA in July 1954. This was one of the forty-six pieces of legislation passed by the CA since independence. The laws were not assented to by the Governor General but were signed into law by the President of the Assembly as provided by Rule 62 of the CA Rules. The Government claimed that section 233-A was invalid as it had not received the Governor-General's assent. The High Court rejected this argument, stating that the provisions of Independence Act left no room for any manner of doubt that the CA was a sovereign body and not subject to any checks and balances, restraints and restrictions. The Government appealed to the Federal Court headed by Munir CJ.

That the Sindh High Court would hold with Moulvi Tamizuddin Khan had been expected. Hamid Khan, in his *A History of the Judiciary in Pakistan* (pp. 34-35) relates how Munir manipulated the constitution of the bench in advance of the *Maulvi Tamizuddin case* to bring about Ghulam Muhammad's desired outcome. Apparently, Munir foresaw that it would be difficult to bring about even a majority decision with Justices Cornelius and Shahabuddin very likely to dissent in which case Justice Akram might join them. That would turn Munir's majority into a minority. To forestall this possibility, Munir asked Ghulam Muhammad to remove Justice Shahabuddin from the bench by appointing him Governor of East Pakistan and fill the vacancy with a more pliable ad-hoc judge. With Justice Shahabuddin out of the way, Munir was confident that he would be able to persuade Justice Akram to join him. Ghulam Muhammad accordingly asked Justice Shahabuddin to temporarily accept the position of Governor of East Pakistan 'in the national interest' as a non-political person was needed there because the Muslim League had been badly defeated by a coalition of parties, giving rise to a difficult situation. The unsuspecting and well-intentioned Justice Shahabuddin accepted the offer. Justice Rahman, Chief Justice of the Lahore High Court, was appointed as an ad hoc judge in his place.

In the Federal Court (*Federation of Pakistan v Moulvi Tamizuddin Khan*, PLD 1955 FC 240) allowed the appeal, with Cornelius J dissenting. Munir CJ did not consider the issue of the legality of the dissolution but decided that it was imperative that a law enacted by the CA should be assented to by the Governor-General. Thus, section 223-A was null and void and the Sindh High Court had no writ jurisdiction.

The judgement meant that not only section 233-A but also the other forty-five laws enacted by the CA were void. These included the Privy Council (Abolition of Jurisdiction) Act and the Indian Independence (Amendment) Act under which the authority of the Governor-General under section 9 of the Indian Independence Act was extended for one year from 31 March 1948. The Governor-General had himself acted under those Acts and passed several orders under them. Also several people have been convicted and acquitted under the Acts. In fact, this was

something that the Sindh High Court considered, observing that '[i]f every one of these Acts were held invalid for want of assent, the consequences are bound to be disastrous.'

The Governor-General then sought to validate the Acts, except section 233-A, by indicating his assent with retrospective operation by means of the Emergency Powers Ordinance, No. IX of 1955 issued under section 42 of the Government of India Act. The Federal Court, in *Usif Patel v The Crown* (PLD 1955 FC 387), declared that the Acts could not be validated under that section nor could retrospective effect be given to them.

The Governor-General then made a Reference to the Federal Court seeking its opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws should be valid and enforceable and those laws which could not without danger to the State be removed from the existing legal system should be treated as part of the law of the land until the question of their validation was determined by a new Constituent Convention.

In *Re the Reference by the Governor General*, the Federal Court, divided three-two, with Cornelius and Muhammad Sharif JJ in the minority, held: 'In the situation presented by the Reference, the Governor-General has during the interim period the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly, are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.'

Munir CJ invoked the doctrine of necessity in support of the decision of the majority. He referred to the address to the jury (thus, in a criminal case) by Lord Mansfield in *Proceedings against George Stratton and others* (21 Howard's St. Tr. 1046) where the accused were charged for a misdemeanour in arresting, imprisoning and deposing Lord Pigot, Commander-in-Chief of the Forces in Fort St. George and President and Governor of the Settlement of Madras in East Indies. The defence was that Lord Pigot had violated the constitution of the government of Madras with regard to the Governor and Council in whom the whole power was vested by the East India Company and that the defendants had acted under necessity in order to preserve the constitution. In this address to the Jury, Lord Mansfield dealt with the law of civil necessity, as distinguished from the law of natural necessity and told the jury: 'But the only question for you to consider is this. Whether there was that necessity for the preservation of the society and the inhabitants of the place as authorises private men (for when they are out of the Council till a Council is called they are private men) to take possession of the government; and to take possession of the government to be sure it was necessary to do it immediately. … If you can find

that there was that imminent necessity for the preservation of' the whole, you will acquit the defendants.'

The Chief Justice stated: 'The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful. Since the address expressly refers to the right of a 'private person to act in necessity, in the case of Head of the State justification to act must a fortiori be clearer and more imperative.'

In the result, what Munir CJ did was to validate the dissolution of the CA and let all the other laws enacted by the CA continue. But this was to be just the beginning of Munir's contribution to the destruction of Pakistani democracy.

***State v. Dosso*, Munir CJ invokes Kelsen**

In 1955 itself, Ghulam Muhammad fell badly ill and went off to the United Kingdom for treatment, having appointed Interior Minister Major General Isakander Mirza as acting Governor General. Soon, Mirza deposed him with the support of members of the new CA. The CA promulgated a new Constitution for Pakistan on 23 March 1956. It provided for a unicameral legislature, the National Assembly, which would have 150 members each from West and East Pakistan. The Federal Court became the Supreme Court. Mirza became the first President of Pakistan.

State v. Dosso (PLD 1958 SC 533) concerned four appeals from the High Court of West Pakistan. They were listed for argument before the Supreme Court on 13 and 14 October 1958. The main issue before the Court was the legality of the Councils of Elders in the tribal areas of the North Western Frontier Province which were given criminal jurisdiction under the Frontier Crimes Regulation, 1901. The respondents had succeeded in the High Court which held that the relevant provisions of the Regulation offended fundamental rights guaranteed by Article 5 of the Constitution of 1956.

Six days before the hearing, on 07 October 1958, President Mirza annulled the Constitution by Proclamation, dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies. Martial Law was declared and General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army, was appointed as the Chief Martial Law Administrator. Three days later, the President promulgated the Laws Continuance in Force Order, the general effect of which was the validation of laws, other than the late

Constitution, that were in force before the Proclamation. The Order contained the further direction that the country shall be governed 'as nearly as may be' in accordance with the late Constitution.

The main issue before the Supreme Court now turned out to be the legal validity of the new regime. With the 1956 Constitution abrogated by the usurper, would Article 5 of the Constitution still apply? In other words, was the abrogation of the Constitution valid?

On the day the judgment in *Dosso* was due, in the early hours of 27 October, Ayub Khan struck, forcing Mirza out. On 27 November, he was exiled to London, where he lived until his death in 1969.

Munir CJ placed the stamp of legality on the military regime, as he did for Ghulam Muhammad's dismissal of the CA. He now clung to Kelsen, citing the following passage from the jurist's 'General Theory of Law & State':

'From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase `remains valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution, which is not the result of a constitutional alteration of the former. If laws, which, are introduced under the old constitution continue to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution.'

Munir CJ held that the revolution having been successful, it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption, the Laws Continuance in Force Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined.

It is hard to see how, in a case that was heard within six days of the promulgation of Martial Law and within three days of the promulgation of the Laws (Continuance in Force) Order, Munir could hold that the new regime satisfied the test of efficacy. Indeed, as counsel in the 1972 *Asma Jilani case* would point out: 'It was too early yet to hazard even a guess as to its efficacy. Indeed, had the learned Chief Justice waited a few more days he would have seen that the efficacy was

non-existent. This was more than amply demonstrated by the removal of the so-called successful law-creator himself the very next day after the publication of the judgment of the Court. Where then, it is said, was "the essential condition" for the recognition of the change?'

***Asma Jllani* – 'necessity' not followed**

Ayub Khan promulgated a new Constitution on 01 March 1962, which came into effect on 08 June 1962. Unable to deal with the growing unrest in East Pakistan, Ayub handed over power to the Army's Commander-in-Chief, General Yahya Khan on 24 March 1969. Yahya Khan imposed Martial Law two days later and abrogated the 1962 Constitution. He appointed himself President and Chief Martial Law Administrator. On 04 April 1969, a Provisional Constitution Order was enacted whereby the Constitution of 1962 was by and large restored, and it was provided that the country was to be governed as nearly as may be in accordance with its terms subject to the Proclamation of Martial Law and subject to any Regulation or Order that may be made from time to time by the Chief Martial Law Administrator.

After the defeat of Pakistan in the Bangladeshi war, Yahya Khan resigned on 20 December 1971 and Zulfikar Ali Bhutto, the leader of the Pakistani People's Party took over both positions.

The validity of the Yahya Khan regime came up for decision in *Asma Jllani v Government of Punjab* (PLD 1972 SC 139). The petitioner's father had been arrested in Karachi under an order dated 22 December 1971 issued in exercise of powers under Rule 32 (1) (b) read with Rule 213 of the Defence of Pakistan Rules, 1971. On the 30 December 1971 the order was rescinded and substituted by another order issued by the Martial Law Administrator, Zone C under Martial Law Regulation No. 78. The Government raised a preliminary objection that the High Court could not assume jurisdiction in the matter because of a bar contained in the jurisdiction of Courts (Removal of Doubts) Order, 1969, promulgated by the Martial Law regime. The High Court, relying on *State v. Dosso*, held that the Order of 1969 was a valid and binding law and that it had no jurisdiction in the matter.

The Supreme Court granted leave on (1) as to whether the doctrine enunciated in the case of *State v. Dosso* was correct, (2) even if correct, whether the doctrine applied to the facts and circumstances in which Ayub Khan transferred power to Yahya Khan, and (3) if the source of power assumed by Yahya Khan was illegal and unconstitutional then whether all legislative and executive acts done by him including the imposition of Martial Law and the promulgation of Martial Law Regulations and Orders were illegal.

The Court declined to follow *Dosso*. Hamoodur Rahman CJ, saying that he had high esteem for the profound legal learning and sound judgment Munir CJ, disagreed with the latter's three basic assumptions in *Dosso*: (i) 'that the basic doctrines of legal positivism, expounded by Kelsen, which

he was accepting, were such firmly and universally accepted doctrines that ‘the whole science of modern jurisprudence rested upon them; (ii) that any ‘abrupt political change not within the contemplation of the Constitution’ constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it; and (iii) that the rule of international law with regard to the recognition of States can also determine the validity of the state’s internal sovereignty. The Chief Justice stated that ‘Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which "favours totalitarianism".’

The Chief Justice opined that Kelsen's theory is only a descriptive theory of law and not a normative principle of adjudication. Kelsen was only trying to lay down a pure theory of law as a rule of normative science consisting of ‘an aggregate or system of norms.’ He was propounding a theory of law as a ‘mere jurists' proposition about law.’ He was not attempting to lay down any legal norm or legal norms which are ‘the daily concerns of Judges, legal practitioners or administrators. It was, by no means, his purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become a law creating agency. His purpose was to recognize that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous ‘grundnorm’ until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity

Kelsen's attempt to justify the principle of effectiveness from the standpoint of International Law cannot also be justified, the Chief Justice stated, for, it assumes ‘the primacy of international law over national law.’ In doing so, Kelsen has overlooked that for the purposes of international law the legal person is the State and not the community and that in international law there is no ‘legal order’ as such. The recognition of a State under international law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State.

The Chief Justice agreed with the criticism that Munir CJ not only misapplied Kelsen’s doctrine but also fell into error in thinking 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.’ *Dosso's case* does not lay down good law, and must be overruled.

The military rule sought to be imposed upon country Yahya Khan was declared not only invalid and illegitimate but also incapable of being sustained even on ground of necessity.

The question remained whether everything (legislative measures and other acts) done during the illegal regime, whether good or bad, can be treated in the same manner and branded as illegal and of no effect. The attention of the Court was drawn to the Privy Council case of

Madzimbamuto v. Lardner-Burke and another ((1968) 3 AER 561) where Lord Pearce in a very elaborate dissenting judgment accepted that acts done by those actually in control without lawful authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles either of necessity or implied mandate, particularly where the enquiry is being made ex post facto, because, common sense dictates that everything done during the intervening period, whether good or bad, cannot be treated in the same manner. In support for this proposition, Lord Pearce referred to a passage from Grotius' *De Jure Belli et Pacis* (Book 1, Ch. 4): 'Now while such a usurper is in possession, the acts of Government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the Courts.'

Lord Pearce did not give a *carte blanche* for the use of the doctrine and indicated three limitations for the validation! of such acts, namely: '(1) So far as they are directed to and reasonably required for ordinary orderly running of the State; (2) so far as they do not impair the rights of citizens under the lawful Constitution; and (3) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign.'

Chief Justice Hamoodur Rahman stated that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself strongly disagreed with the view that the doctrine can be the basis for validating the illegal acts of usurpers. In his opinion, this doctrine can be invoked in aid only *after* the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. 'I would call this a principle of condonation and not legitimization' he stated.

Applying the test. the Chief Justice condoned (i) all transactions which are past and closed, for, no useful purpose can be served by reopening them; (ii) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (iii) all acts which tend to advance or promote the good of the people; and (iv) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of. in our case, the objectives mentioned in the Objectives Resolution of 1954. 'I would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously impairs the rights of the

citizens except in so far as they may be designed to advance the social welfare and national solidarity', the Chief Justice concluded.

Muhammad Yaqub Ali J, in a concurring opinion, said that '[n]o valid law can come into being from the foul breath or smeared pen of a person guilty of treason against the national order.' The Martial Law Regulations and Orders and President's Orders and Ordinances imposed by Yahya Khan were tainted with illegality and would not be recognized by Courts.

The impugned orders of detention were declared to be void and of no legal effect.

The *Asma JIlani* judgement was followed by the removal of Martial Law, the Interim Constitution of 1972 and then by the new Constitution of 1973 under which Pakistan reverted to a Parliamentary form of government. Bhutto became Prime Minister.

Back to 'necessity' in *Begum Nusrat Bhutto*

In July 1977, General Zia-ul-Haq intervened, imposed Martial Law and abrogated the 1973 Constitution. Bhutto had just won the Parliamentary elections but the Opposition alleged massive vote-rigging. The country witnessed massive violent demonstrations, civil disobedience and confrontations with the Police. Zia claimed that he had no option but to do what he did after negotiations between Bhutto and the Opposition had broken down. Bhutto was arrested but released later. He was arrested again in September 1977 for allegedly authorizing the murder of a political opponent. He was convicted and eventually hanged in in April 1979.

During Bhutto's incarceration, his wife Begum Nusrat Bhutto challenged the detention of Bhutto and ten other party leaders as well as the validity of the promulgation of Martial Law. The case, *Begum Nusrat Bhutto v. Chief of Army Staff* was heard by a seven-member Bench of the Supreme Court (PLD 1977 SC 657).

The Court held that Kelsen's theory of revolution legality can have no application to a situation where the breach of legal continuity is admitted to be of purely temporary nature and for a specified limited purpose. It would be inappropriate to seek to apply Kelsen's theory to such transient and limited change in legal continuity of the country thus giving rise to unwarranted consequences of far reaching character not intended by those responsible for the temporary change.

Having held that Kelsen's theory was not applicable, one would have expected the Supreme Court to decide on the legality of the change. Instead, the Court went to consider whether the change was necessary! It held that the Proclamation of Martial Law appeared to be an extra-constitutional step necessitated by the complete break-down and erosion of the constitutional and moral authority of the Bhutto Government as a result of the unprecedented protest movement launched by the Opposition against the alleged massive rigging of elections.

It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. Were there no election laws that provided for courts to invalidate the elections on the basis of electoral fraud? one is tempted to ask.

The Court went on to hold that the imposition of Martial Law therefore stands validated on the doctrine of necessity and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity.

The Court stated that it was clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remained the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan as well as the superior Courts continue to function under this Constitution. 'In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution.'

The Court went on to validate the suspension of the right to enforce fundamental rights for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by clause (1) of Article 232 of the Constitution, and the right to enforce fundamental rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution. The Court was clearly wrong. Under Article 232, a Proclamation of Emergency could have been made only by the President. The Laws (Continuance in Force) Order, 1977 was issued by the Chief Martial Law Administrator. For the pliant Court, the Order was 'of the kind which could have been made' under Article 233 (2).

The breach of legal continuity of 'purely temporary nature for a specified limited purpose' envisaged by the Supreme Court endured for almost a decade. Martial law continued until March 1985 when the 1973 Constitution was restored. At a Parliamentary election held that year, political parties were not permitted to contest. The notorious Eighth Amendment to the Constitution granted the President discretionary powers to dismiss Parliament and call for fresh

elections. All acts of General Zia between the suspension and restoration of the Constitution were validated.

Zia, like the dictators before him, ruled with an iron fist until August 1988, when he died in a plane crash. His death paved the way for the restoration of democracy and elections in December that year.

In April 1997, the government of Nawaz Sharif restored some powers of the Prime Minister by the Eighth Amendment which also took away the power of the President to dissolve the National Assembly in his discretion.

There was relative peace for about a decade until the Army struck again in October 1999, this time under the leadership of General Musharraf. He suspended the Constitution, dismissed the federal and provincial governments and declared himself the Chief Executive. He also declared a state of emergency and promulgated the Provincial Constitutional Order, 1999. In January 2000, when his regime was challenged, the judges of the superior courts were asked to take a new oath of office pledging to serve under the Provincial Constitutional Order. Six out of the thirteen judges of the Supreme Court, including Chief Justice Saeduzzaman Siddiqui refused. The Court was then reconstituted.

'Necessity' yet again to validate Musharraf's coup

In *Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869) a twelve-member Bench validated the coup on the ground of state necessity. As in *Begum Nusrat Bhutto*, the Court justified the military overthrow: 'After perusing the voluminous record and after considering the submissions made by the parties, we are of the view that the machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people. The impugned action was spontaneously welcomed by all sections of the society.'

The Court held that the 1973 Constitution remained the supreme law of the land, subject to the condition that certain parts thereof have been held to abeyance on account of State necessity. Sweeping powers were given to Musharraf, who was described as 'the Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people'. He was empowered to amend the 1973 Constitution, except that 'no amendment shall be made in the salient features of the Constitution i.e. independence of

Judiciary, federalism, parliamentary form of Government blended with Islamic provisions.' He was required to hold election to the National Assembly, Senate and Provincial Assemblies within three years from the date of the coup.

Musharraf became President through a referendum held in April 2002, not an election where there would be other candidates. At the general elections held in October 2002, the Muttahida Majlis-e-Amal (MMA), an alliance of religious parties and the pro-Musharraf Pakistan Muslim League (Q) won comfortably. In 2003, the Seventeenth Amendment to the Constitution validated the various acts done by Musharraf, including the revival of the President's power to dissolve Parliament. The President to Hold Another Office Act, 2004 (PHAA) permitted Musharraf to be both President and Chief of Army Staff.

In *Pakistan Lawyers' Forum v. Federation of Pakistan* (PLD 2005 SC 719) both the Seventeenth Amendment and the PHAA were challenged. The petitioners relied on *Zafar Ali Shah'e case* where the Court had held that the Constitution had certain 'salient features'. The Supreme Court validated both the Seventeenth Amendment and the PHAA. Having referred to the mandate that Musharraf received at the referendum, the Court stated that it was no longer correct to think of the Constitution of Pakistan as providing for a purely parliamentary system according to the Westminster model. 'Instead, what can be seen is that over time, Pakistan has evolved its own political system so as to suit the political conditions found here. No objection can now be taken to the said system on the bass that it provides for a balance of powers (as opposed to concentrating all powers in the hands of the Prime Minster). As such, the vehement protects of the petitioners that the impugned provisions have destroyed the basic structure of the Constitution appear to be considerably overwrought and no weight can be placed on those arguments.'

The Court observed that even though there were certain salient features of the Constitution, it has been the consistent position of the court ever since it first enunciated the point in *Zia-ur-Rehman's case* (PLD 1973 SC 49) that the debate with respect to the substantive vires of an amendment to the Constitution is a political question to be determined by the appropriate political forum and not by the judiciary. The position adopted by the Indian Supreme Court in *Kesvavananda Bharati case* (AIR 1973 SC 1461) is not necessarily a doctrine which can be applied unthinkingly to Pakistan. Pakistan has its own unique political history and its own unique judicial history. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments.

Clearly, the Court was now extending the doctrine of state necessity. The basic features doctrine enunciated in *Zafar Ali Shah's case* that stood in its way was not followed. 'In legitimizing the power of the military and executive over the Parliament, this case further strengthened the popular perception of the subservience of the Supreme Court to the military regime.'[1] Pakistan being a jurisdiction with post-enactment judicial review, it is difficult to see how the power of review would not extend to the review, in the absence of a specific constitutional provision to that effect.

On 09 March 2007, Musharraf suspended the Chief Justice of Pakistan, Justice Iftikhar Mohammad Chaudhry, giving rise to lawyers' protests all over the country. On 20 July 2007, a 13-member Bench of the Supreme Court of Pakistan unanimously reinstated the Chief Justice.

On 03 November 2007, Musharraf declared a state of emergency and again suspended the Constitution and Parliament. Supreme Court judges were locked up. A Provisional Constitutional Order was issued prescribing a special oath for judges of the Superior Courts as a requirement for continuing to hold office. 13 out of the 18 judges of the Supreme Court and 61 out of 93 Judges of the various High Court did not take the oath.

'Necessity' buried

After the general elections in February 2008 at which Musharraf's party was badly defeated, the Constitution was restored and an elected Government revived. General Musharraf resigned in August 2008. In September 2008, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, Justice Chaudhry was re-instated as Chief Justice.

In *Syed Yusuf Raza Gilani, Prime Minister's case* (19 June 2012), the Supreme Court refused to resurrect 'the malignant doctrine of necessity which has already been buried, because of the valiant struggle of the people of Pakistan.' When Musharraf was tried for high treason (*Federation of Pakistan v. General (R) Pervez Musharraf,* 17 December 2019), the issue of the legality of his actions came up before the Special High Court which refused to invoke the doctrine of necessity to validate his actions. Referring to Munir CJ's original invocation of the doctrine, the Special High Court stated: 'Had the hon'ble Superior Judiciary, at that time, not invoked the Doctrine of Necessity, and had proceeded against usurpers, abrogaters, subvertors, the Nation would not have seen this day at-least, where an officer in uniform repeats this offence'.

[1] <http://pgil.pk/wp-content/uploads/2014/12/CONSTITTIONAL-HISTORY11.pdf> 11 May 2020.

Addressing a judge's conference on 02 February 2019, the then Chief Justice of Pakistan, Mian Saqib Nisar said that the infamous doctrine of necessity that had given the judicial nod to successive martial laws in the country now lay buried. *(Dawn*, 04 February 2019).

On 22 April 1960, speaking to the Lahore Bar Association on his retirement, Munir referred to the controversial cases he dealt with and stated that holding against the Governor General would have entailed enforceability issues and caused bloodshed. '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', he added. In 1962, Munir accepted a Cabinet position in Ayub Khan's regime under a Constitution which did not have fundamental rights. In his book '*From Jinnah to Zia'* published in 1979, Munir does not utter a word about his infamous judgements or about the doctrine, probably out of remorse.

Mark M. Stavsky in his paper on '*The Doctrine of State Necessity in Pakistan'* warned against the dangers of the doctrine's application in constitutional law: 'Doctrinally, courts should be reluctant to permit deviations from constitutional norms. Approval must be reluctant because courts, in reviewing a state necessity claim, must consider the legitimacy of readjusting fundamental political, social, and legal values. This consideration must be made in cases where the challenged state action affects individual rights as well as in cases involving changes in the governmental structure.' (*Cornell International Law Journal*, Summer 1983, 341 at p. 344).

Part II - Lessons for Sri Lanka

The doctrine has come up for discussion in Sri Lanka due to the postponement of Parliamentary elections due to the Covid-19 pandemic.

Constitutional provisions

The Nineteenth Amendment to the Constitution of 2015 reduced the term of Parliament from six years to five. Also, Parliament can be dissolved by the President during the first four and a half years only if Parliament so requests by a two-thirds majority. The last Parliament met for the first time on 01 September 2015, which meant that its term would end on 01 September 2020 and that the President could dissolve Parliament on his own only after 01 March 2020. When President Sirisena purported to dissolve Parliament in 2018, the Supreme Court, in

Rajavarothiam Sampanthan and others v Attorney General,[2] declared the dissolution unconstitutional.

Gotabhya Rajapakse, who became President in November 2019, dissolved Parliament on 02 March 2020. The general election was fixed for 25 April and the new Parliament summoned to meet on 14 May. After nominations for the election were received on 19 March, the Election Commission postponed the election without a date being fixed. Later, the election was fixed for 20 June but it is very likely that it would be postponed again. Thus, Parliament will not be able to meet on 02 June as scheduled.

One of the issues arising from this is that Sri Lanka would be without a Parliament for more than three months, the maximum period that the Constitution permits the country to function without Parliament. Parliament is not only a legislative body; it is the institution to which the President is accountable. Under Article 33A, inserted by the Nineteenth Amendment, reads: 'The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.' It is Parliament that can initiate impeachment proceedings but it is highly unlikely that the Opposition would want to embarrass the President by doing that in the present circumstances; a severe backlash at the general election is certain if that happens.

Parliament also has an important oversight function. The Finance Committee, the Committee on Public Accounts (COPA), the Committee on Public Enterprises (COPE) and the various Parliamentary Oversight Committees discharge important functions in that regard.

Under Article 148, Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.

A question has arisen as to how the President can withdraw money from the Consolidated Fund. The Vote on Account passed earlier in the year is only for the period up to 30 April 2020. Under Article 150 (3), '[w]here the President dissolves Parliament before the Appropriation Bill for the financial year has passed into law, he may, unless Parliament shall have already made provision, authorize the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new Parliament is summoned to meet.' While it has been argued that only funds needed for 'public services' can be drawn under this provision, it appears that the

[2] *Rajavarothiam Sampanthan and others v Attorney General*, SC FR 351-356/2018, and 358-361/2018, SCM 13.12.2018.

Government has been advised that the power to withdraw from the Consolidated Fund is unlimited. How the Government can continue to raise loans without the debt ceiling being raised by Parliament is another issue that has been raised.

The most serious issue that arises from the present situation is that the Sri Lanka would be governed without one of the three pillars of government, on which the State rests and which are indispensable for democratic governance, would not function over and above the three-month period permitted by the Constitution. The second is the Executive.

The third pillar, the judiciary, has been described as the weakest branch of government and that is no affront to that great institution. The judiciary's role is limited; it cannot act on its own; its jurisdiction has to be invoked; decisions take time. Its advisory jurisdiction can be invoked only by the President and the Secretary to the President has made it clear that no advice will be sought. Even if sought, the Court can only answer the questions referred to it. The Court would not wish to give unsolicited advice.

The country being governed without Parliament means in effect that it would be governed only by the President, without the institution to which the he is constitutionally accountable functioning.

Invoking the doctrine in constitutional law

Pro-government lawyers have been heard to say that the doctrine of necessity permits governance without Parliament. Elections have been postponed for reasons beyond anyone's control and it is because of that, that Parliament cannot meet within three months of dissolution. So, it is argued, we can go on without Parliament on the basis of the doctrine of necessity.

It would be useful, at the cost of repetition, to refer to Lord Pearce's dissenting judgement in *Madzimbamuto v. Lardner-Burke and another* referred to earlier. Lord Pearce did not give a *carte blanche* for the use of the doctrine, but imposed three limitations for the validation of the impugned acts: '(1) so far as they are directed to and reasonably required, for ordinary orderly running of the State; (2) so far as they do not impair the rights of citizens under the lawful Constitution; and (3) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign.'

'Necessity' envisages a situation in which there is a clear and present danger that requires immediate action and there is no alternative but to prevent the danger by doing an act which is otherwise illegal. The illustration in section 74 of the Penal Code cited earlier is apt: in a great

fire, pulling down houses in order to prevent the conflagration from spreading. However, the act done must not cause more mischief than the damage sought to be avoided.

Availability of alternatives

One sure way of avoiding governance without Parliament is to withdraw the Proclamation of dissolution made on 02 March. This would allow Parliament to resume and go on till 01 September 2020 and the general election to be held in late November. It can be dissolved earlier if the situation improves. The Government appears determined not to do that. One reason is that nominations accepted would be annulled. The Government fears that the two factions of the UNP would then get together for the elections. However, nominations received can be still be validated for the election through a constitutional amendment that is applicable to the forthcoming general election only. This would be the best course of action but getting the parties to agree on this would be difficult. However, it is not impossible.

The other way out is to summon the dissolved Parliament. This can be done in one of two ways. If a Proclamation is made under the Public Security Ordinance ('declaration of emergency') when Parliament has been dissolved, Article 155 (4) (1) triggers off the summoning of Parliament. The Proclamation would have to be approved by Parliament. If the President does not wish to use the Public Security Ordinance, he can use Article 70 (7) under which the President can summon Parliament in an emergency. That there is an emergency situation today cannot be denied.

'Why should Parliament be summoned?', the question has been asked. The simple answer from a constitutional law perspective is that to govern for more than three months without Parliament violates the sovereignty of the People. Some may have a very negative view about the quality of Parliamentarians that they themselves elect. But, as has been pointed out, over 200 of the 225 members of the last Parliament have been nominated again and at least 150 of them are likely to be in the next Parliament. What is important is the institution of Parliament, not the quality of its members who the People elect in the exercise of their franchise.

The doctrine of necessity is invoked when an illegal act is condoned to prevent a greater mischief. Applying the doctrine to the present, the illegality sought to be cured is governance without Parliament over the constitutionally permissible period. Then, what is the greater mischief? Is recalling Parliament a greater harm as far as the Constitution is concerned? Is the argument that 'the former Parliament is a dead Parliament' or 'none of the 225 MPs do not deserve to be in Parliament' a constitutionally acceptable argument?

It has been argued that to summon Parliament is a matter for the President to be done in his discretion. That 'there is no unfettered discretion in public law' is an accepted constitutional

principle. I wish to quote from a recent case, in a long line of similar cases, *Nethsinghe v Ratnasiri Wickremanayake* (SC FR 770/1999), where Justice Eva Wanasundera, with Justices Aluwihare and Chitrasiri agreeing, stated that our Supreme Court has 'specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that discretions are conferred on public functionaries in trust for the public, to be used for the good of the public, and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.' It follows that as much as it is unconstitutional to exercise a discretion unfairly, it is unconstitutional for an authority to refuse to exercise a discretion when the necessity has arisen to do so.

The basis of the argument in favour of the use of the doctrine of necessity is that an extraordinary situation not envisaged has arisen. It is in such extraordinary circumstances that Article 70 (7) must necessarily be used. One cannot say that there is an unforeseen emergency for the doctrine to be invoked and, in the same breath, argue that there is no emergency for the purpose of Article 70 (7).

It will thus be seen that there is a clear and perfectly constitutional way out of the crisis, namely the summoning of Parliament. When the Constitution allows Parliament to be summoned, the doctrine of necessity cannot be invoked to govern the country without Parliament. As Sherlock Holmes would have asked Dr. Watson, isn't this elementary?

Cicero said: 'To stumble twice against the same stone is a proverbial disgrace.' Unfortunately, Pakistan stumbled against the same stone several times. Hopefully, it will not happen again in Pakistan. What we need to ensure is that Sri Lanka does not stumble against the same rock.

The doctrine of necessity is not a panacea for all ills. After disastrous consequences of its use, the doctrine has been buried in Pakistan. Let us not bring the corpse and resuscitate it in Sri Lanka.

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