



Doctrine of Condonation : An Emerging Principle in the Constitutional Jurisprudence of Bangladesh

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Court, if any party fails to institute his case or plea within the prescribed statutory period, upon having been satisfied with the explanation about that delay, condones the same so that the concerned party has access to justice. Condonation is, thus, a forgiveness by the court of the inability to comply with the limitation period. People in the legal arena are familiar with this type of condonation. However, in constitutional law this principle has gained a new dimension of condoning 'acts done by those actually in control without lawful validity- *a defacto* government. The principle has been applied recently by the Supreme Court of Bangladesh at least in two historic decisions' . In those decisions the Supreme Court after declaring the assumption of powers by declaring martial law and validating those through constitutional amendments as illegal and *ultra vires*, condoned, amongst others, some actions and even legislative measures that were taken place in those illegal periods. This condonation gives rise to a question in the minds of many that under what jurisprudential basis this condonation is made by the courts and what the extent of this condonation is. This article would try to search a jurisprudential answer of those questions in a brief manner in order to generate a debate on the issue which would ultimately lead to a justified conclusion in future.

Development of the Doctrine : Doctrine of Necessity & Doctrine of Condonation

Usually when an act or a regime is declared illegal or *ultra vires*, the logical question comes out as to what the legal consequence would be for actions done under that void law or laws and actions taken by the void regime. Since before the declaration by the court many actions and legislative measures must have been taken and by which rights and obligations of the people had been determined, to avoid any chaos and confusion that might create aftermath of the judicial pronouncement and to keep continuity of the sovereignty and legal norm of the Republic, the court developed this doctrine of condonation in order to condone those illegal actions meaning that those actions cannot be reopened under the changed circumstances on the basis of the principle of state necessity. As those actions are void thus they cannot be given validity but are condoned for the greater public interest especially to avoid chaos in the legal order. Lawful continuity of sovereignty does not signify that all illegalities are to be validated by invoking the principle of necessity and their perpetrators are to be given impunity in the garb of that principle.

The morale is that what is illegal and wrong must always be condemned as illegal and wrong till eternity. The doctrine of state necessity does not and cannot make an illegal act a legal one but the court in exceptional circumstances, in order to avert the resultant evil of illegal legislations may condone such illegality on the greater interest of the community in general but on the condition that those acts would have been

legally done at least by the proper authority.

The doctrine of state necessity has been imported for the [first time in this Sub-Continent in Pakistan in the field of constitutional jurisprudence by Chief Justice Mohammed Munir in *Special Reference no.1 of 1955*⁴. This Reference was made by Governor General of Pakistan, Ghulam Mohammad, under section 213 of the Government of India Act, 193. Doctrine of necessity has the origin in 13th century Bracton and in the early Middle Ages of Kings prerogatives and maxims. such as, *Id Quod Alias Non Est Licitum, Necessitas Licitum Facit* (that which otherwise is not lawful, necessity makes lawful). *salus populi est suprema lex* (Safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the state is the supreme law).

His Lordship, Munir, J. in tracing back the history of the principle referred to the summing up of Lord Mansfield, to the Jury in the proceedings against George Stratton and held.

“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 bonafide under the stress of necessity, the necessity being referable to an intension 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 unlawful.”

Principle of Implied Mandate and Public Policy

There are two other principles that are called principle of implied mandate from the lawful Sovereign and public policy, which recognize the need to preserve law and order in a territory controlled by a usurper. Under these principles also acts done by those actually in control without lawful validity or usurpers might be recognized as valid subject to certain conditions. It follows that all the three principles i.e., state necessity, implied mandate and public policy can be applied interchangeably in a wider perspective especially in the case where the question of validity of acts done by illegal regime comes to light.

Application of the Principle in different Jurisdictions

USA

The principle has been adopted by the American Courts in various cases` which came up after suppression of the rebellion of the Southern States and the Court held that where the acts done by usurper were "necessary to peace and good order among citizens and had affected property and contractual rights they should not be invalidated" not because they are legal but because they would cause inconvenience to innocent persons and lead to further difficulties but not that all acts can be validated.

The Supreme Court in *Texas v. White* laid down the principle to be applied in these terms

“ It is not necessary to attempt any exact definitions, within which the acts done by such a State government must be treated as valid or invalid. It may

be said, perhaps with sufficient accuracy, that the acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real or personal, and providing remedies for injuries to person or estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general valid when proceeding from an actual, though unlawful government; and the acts in furtherance or support of rebellion against the United States. Or intended to defeat the just rights of citizens, and other acts like nature, must in general, be regarded as invalid and void."

Uganda, Nigeria, Cyprus

In Uganda in the case of *Uganda v. Commissioner of Prisons, ExParte Matovu*, in Nigeria in *Lakamani and Ola v. Attorney General (West Nigeria)* and in Cyprus in the Case of *Attorney General of the Republic v. Mustafa Ibrahim and Others* the principle has been adopted. In Cyprus the Supreme Constitutional Court had gone a bit further and applied the doctrine of necessity to validate a certain legislation which was otherwise inconsistent with certain Articles of the Cyprus Constitution.

Rhodesia

This principle has been very comprehensively propounded by Lord Pearce in *Madzimbamuto v. Lardner-Burke*¹⁰ in his dissenting judgment that

'I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted on by the courts, with certain limitations, namely; (a) so far as they are directed to and reasonably required for ordinary orderly running of the State and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution and (c) 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. This is tantamount to test of public policy.'

Pakistan

As stated earlier the principle of doctrine of necessity has been applied for the first time in the history of subcontinent in Pakistan by Mohammed Munir, CJ in *Special Reference No.1 of 1955* and subsequently followed in various cases including *The State v Dossu*" . However the important case of Pakistan is *Asma Gilani v. Govt. of Punjab*' which overruled *The State v, Dossu* and developed a new doctrine of condonation for the first time in the history of constitutional jurisprudence.

Doctrine of Condonation

In Asma Gilani v, Govt. of Punjab^{5"} Hamoodur Rahman C.J, also accepted the doctrine of necessity after declaring the martial law illegal and terming its rulers usurpers to deal with the acts done by the unlawful government and held that-

"I too am of the opinion that recourse has to be taken to the doctrine of necessity Where the ignoring of it would result in disastrous consequence to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers in my humble 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".

But his Lordship not only accepted the formulation of Lord Pearce but rather, extended it further, held at page-207:

"Applying this test I would condone(1) all transactions which are past and closed, for, no useful purpose can be served by re-opening them, (2)all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order,(3) all acts which tend to advance or promote the good of the people, (4) 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."

Yaqub Ali J., in the same case, in considering the question of State necessity held¹⁵:

"The next question which arises, for determination is whether these illegal legislative acts are protected by the doctrine of State necessity. The laws saved by this rule do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions that the recognition given by the Court is proportionate to the evil to be averted, it is transitory and temporary in character does not imply abdication of judicial review. In the Southern Rhodesian case Madzimbamuto V. Lardner Burke only those legislative acts of the de facto Government of Smith were recognized which were necessary for the ordinary, orderly running of the Courts and which did not defeat their rights of the citizens and in its operation did not directly or indirectly entrench the usurpation (Fieldsend, A. J.A). Acts which are beneficial to the Society and provide their welfare, such as, appointment of judges and other public functionaries by Yahya Khan will also be covered by the doctrine. It has been noticed that both President's Order 3 of 1969 and Martial Law Regulation 78 of 1971 were intended only to deny to the Courts the performance of their judicial functions, No chaos or anarchy would have taken place in the Society if these 'laws' were not promulgated. Both Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regulation 78 are, therefore, not protected by the doctrine of State necessity."

It is to be noted that in the case of *Asma Gilani*, instead of validation of the acts of the usurpers, a new term, the principle of condonation has been adopted and which sounds very logical and appropriate. Since, illegal acts and things cannot ethically and morally be validated or legitimized but as of the necessity or for public policy, they may only be condoned in a very rare circumstance. However in this case their lordships especially Hamoodur Rahman, CJ extended the domain of condonation from the principle propounded by Lord Pearce. In the present case the legislative

measures have also been included in list of condonation which raised the question among the jurists on the ground that it is indirectly an act of legislation (the function of the legislature) by the courts which they are not allowed to do under a Constitution where separation of powers has been adopted as one of the basic features.

Application in Bangladesh:

5th Amendment Case

In the Constitution 5th Amendment Case. for the first time in the legal history of Bangladesh, his Lordship, Mr. Justice ABM Khairul Haque (Subsequently Chief Justice of Bangladesh) declared. amongst others, all the martial law provisions (made during the period from August 15, 1975 to April 9, 1979) illegal, void and *non est* and assumption of state power during martial law by General Ziaur Rahman and Mr. Justice Abu Sadat Mohammad Sayem, amongst others, are also illegal. However, His Lordship took recourse to the doctrine of necessity to condone certain acts done or taken during that period rather than validating/legitimizing the same. His Lordship held:

"At this stage, we would observe that the doctrine of necessity is not a normal rule but it is an exception to the normal, as such, can be called upon only in an exceptional circumstances, in order to remedy a lapse or illegality which could not be settled in any other way but such a lapse or illegality must be remedied in the greater interest of the State and its citizens but not to bestow benefit upon the usurpers and the dictators if the said doctrine is not invoked the interest of the State as well as its citizens could be seriously prejudiced harmed only in such circumstances it can be invoked. In other words, this doctrine can only be invoked, when there is no other way out and most certainly, not in a matter of course".

His Lordship further held:

" Violation of the Constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate for ever, however, on the necessity of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims, Id quod Alias Non Est Licitum, Necessitas Licitum Facit, salus populi est suprema lex and salus republicae est suprema lex."

Applying this principle of necessity his Lordship held (in the summery):

'20. As such, all acts and things done and actions and proceedings taken during the period from August 15,1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever

21. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble, Article 6,8,,9,10,12,25,38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as the Second Proclamation Order No. IV of 1976,

is declared valid and retained.”

It appears that Mr. Justice ABM Khairul Haque accepted the principle of condonation as prescribed by Mamoodur Rahman, CJ since he condoned the actions and also provisionally condoned all provisions of the Constitution that have changed by martial law provisions except those contained in para 21 of the summary of the Judgment. His Lordship, however, did not clarify the term `provisionally condoned' that used in the judgment. It may be that as the condonation of provisions may amount to legislation, thus it is the domain of the legislature to deal with it but to avoid chaos and confusion and for the greater interest of the public for the time being until Parliament takes up the matter, those provisions are provisionally condoned. This interpretation is safe and sound considering the doctrine of separation of powers. However, no illustrations have been provided as to what are to be treated as condoned and what are not. Catalogue of condonation has not been provided in the Judgment either. It appears from the judgment that the High Court Division in making condonations applied a yardstick that the provisions of the 5th amendment which altered or infringed the basis fabrics and scheme of the original constitution. for example, secularism, cannot be condoned.

Appellate Division"

The Appellate *Division* (Judgment delivered by His Lordships, Md. Tafazzul Islam, CJ,) upheld the judgment of the High Court and also accepted the doctrine of condonation to acts done and legislative measures taken by the illegal regime. The Appellate *Division* upheld the judgment with some modifications. The Appellate Division held in its summary

' We, therefore, sum up as under:

.....
.....

3. *In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:*

(a) *all executive acts, things and deeds done and actions taken during the period from 15 August 1975 to 9th April, 1979 which are past and closed,*

(b) *the actions not derogatory to the rights of the citizens;*

(c) *all acts during that period which tend to advance or promote the welfare of the people;*

(d) *all routine works done during the above period which even the lawful government could have done.*

(e) (i) *the Proclamation dated 8 November, 1975 so far it relates to omitting part VIA of the Constitution;*

(ii) *the Proclamations (Amendment) Order 1977 (Proclamations Order No. I of 1977) relating to Article 6 of the Constitution.*

(iii) *the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. TV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1) of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;*

(iv) *the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it relates to substituting Bengali text Article 44;*

(v) *The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and*

(vi) *All acts and legislative measures which are in accordance with, or could have been made under the original Constitution.”*

The Appellate Division in paragraphs 3(a) to 3(d) condoned certain actions taken or done by the illegal regime, in paragraph 3(a) above "*all executive acts, things and deeds done and actions taken during the period from 15 August 1975 to 9th April, 1979 which are past and closed*" have been condoned. However, this paragraph needs to be explored further to specify the limit and extent of the term 'past and closed'. Does it include if someone has been convicted or suffered his fundamental or legal right by the martial law provisions that were declared *ultra vires*? However, it is argued, if paragraphs 3(a) and 3(b) are read together, the correct interpretation would be that only "those past and closed actions" which are not *derogatory to the rights of the citizens* are condoned but not all. In that circumstances answer of the posed question is in the negative i.e., the action taken against that person does not fall under the category of past and closed transaction. Hamoodur Rahman, C.J. thus, put it as *all transactions which are past and closed, for, no useful purpose can be served by re-opening them.* in paragraph no. 3(e), the Appellate Division condoned certain provisions of the Constitution leaving those provisions that were provisionally condoned by the High Court Division. The Appellate Division did not also specify- the basis upon which the condonations were made only for those particular provisions leaving others. Further, paragraph 3(e) and (f) above also seem overlapping. No explanation is apparent as to why the other provisions of the proclamation stated in paragraph 3 (e) are not condoned and why portion of a particular proclamation is condoned. Are not all of them falling under the principle enunciated in paragraph no. 3(f)? Paragraph 3(f) also raised a pertinent question that whether the provisions of the 5th Amendment of the Constitution which are not condoned, have not they been made *in accordance with the Original Constitution or could not have been made under the Original Constitution?* It is humbly submitted, the answer to that question has not been manifested in the Appellate Division Judgment. In light of the Appellate Division Judgment. the Constitution was printed by the Ministry of Law and Parliamentary Affairs. A great deal of confusion arose from the printed Constitution. The Appellate Division did not even clearly indicate that whether the condonations are provisional or otherwise.

However, the Appellate Division for the first time in the 5th Amendment Judgment upheld the supremacy of the Constitution by declaring both usurpation of sovereign power of State through martial law and constitutional amendment by the usurper as void and unconstitutional, The Appellate Division in unequivocal terms held that the Constitution is the supreme law of land. This is a landmark and historic contribution of the Appellate Division in the development of our constitutional jurisprudence. The Appellate Division turned down its earlier findings that the constitution was made Subservient and subordinate to martial law e.g., in *Halima Khtun vs. Bangladesh* the Appellate Division held, in case of conflict between the provisions of martial law and

those of the Constitution ‘the Constitution lost its character as the supreme law of the Country’ and ‘the moment the country is put under Martial Law.....the constitutional provision loses its superior position. The Appellate Division in 5th Amendment Judgment²⁰ held:

"351. We are of the view that in spirit of the Preamble and also Article 7 of the Constitution the Military Rule direct or indirect, is to be shunned once for all. Let it be made clear that Military Rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever as the same is against the dignity, honour and glory of the nation that it achieved after great sacrifice; it is against the dignity and honour of the people of Bangladesh"

In the last paragraph²¹ of the Judgment the Appellate Division recorded its 'total disapproval of martial law and suspension of the Constitution or any part thereof in any form and desired suitable punishment of perpetrators and usurpers. The Appellate Division bit 'farewell for all kinds of extra constitutional adventure forever'. The nation should be indebted to the Appellate Division for upholding the constitutional supremacy and rectifying the errors of the past.

Appellate Division Review:

Subsequently a review petition was filed for modification of its earlier Judgment in particular about the part of the observation made by the Appellate Division in relation to Article 150 of Constitution (transitory period). On 11 May 2011. the Appellate Division delivered its Order endorsing the findings of the High Court Division about Article 150 of the constitution but still many provisions were not condoned which, it is submitted, should have been condoned especially Article 99 and Article 42(2), amongst others. However, a principle has been adopted for the first time that all condonations are provisional and short lived until 31 December 2012.

On 21.06 2011 again a modification of the review order was made condoning only a single provision i.e. Article 99 of the Constitution. However, Parliament by the 15th Amendment of the Constitution retained Article 42 (2) which was inserted in the Constitution by the contentious 5th Amendment.

15th Amendment of the Constitution

The Constitution 15th Amendment Act was passed by the Parliament in which many provisions that were included by the 5th Amendment were retained including those which were not condoned by the Appellate Division'. The judgment of the Amendment was dealt with by this Amendment amongst others. However, it is argued the amendment did not address the spirit of the 5th Amendment Judgment rather, to some point, went against it by retaining the provision of state religion. And many contentious provisions were incorporated by this Amendment like Article 7 Kha etc. and abolition of Non Party Caretaker Government.

7th -Amendment Case²⁴

The Constitution 7th Amendment Case (Judgment delivered by His Lordship Mr. Justice AHM Shamsuddin Chowdhury) also accepted the principle of condonation as it was accepted by the Appellate Division in the Constitution 5th Amendment Case. By this case the takeover of power by General Ershad was declared illegal and the martial law imposed by him was also declared illegal following the *ratio* of 5th Amendment Case,

The constitutional jurisprudence is an organic one. It develops through the change of time to cope with the emerging situations of a changing society. The principle of condonation rather than legitimization of the acts of the unlawful government is definitely a progressive development of the jurisprudence which is also supported by morality and ethics. The provisional condonation of provisions of law for a specific period is another beautiful development which ensures the Separation of Powers, the basic structure, and thus will help build the trusts and confidence among the organs of the state. However, one thing that our judiciary needs to determine the precise scope of the condonation and principles upon which that is to be invoked. At present no clear cut indications are apparent from the Judgments of 5th Amendment case. We hope in the 7th Amendment Case (Judgment yet to be published) the Appellate Division has the opportunity to explore these issues for proper guidance. It also appears from the jurisprudence of different jurisdictions that whatever term one can use be it either doctrine of necessity or implied mandate or public policy, the courts are to condone some of the actions including legislative [acts, in](#) particular past and closed transactions, of the unlawful government or usurpers. Here the courts have to be cautious and more vigilant in determining the circumstances that really warrant the invocation of doctrine of necessity and whether its application is for the benefit of people at large or for that of the usurper or for someone else as applied by Munir, C.J, in the case of *the Special Reference No.1 of 1955*.

Case Reference:

Bangladesh Italian Marble Works Ltd & Ors v. Government of Bangladesh & Ors. (High Court Division, Judgment on 29 August 2005); *Khondker De/war Hossain v. Bangladesh Italian Marble Works Ltd:(Appellate Division)*, commonly known as The Constitution (5th Amendment) Act's Case, 2010 BLD (Special), (judgment on 01 February 2010) and *Siddique Ahmed v. Bangladesh* (High Court Division, Judgment on 26 August 2010), commonly known as The Constitution (7th Amendment) Case, 1 TLR Special Issue 2011

³ The Constitution (5th Amendment) Case, (High Court Division); 2010 BAD (Special). 224.

⁴ PLD 1955 FC 435,

⁵ *Madzimbamuto v. Lardner-Burke* [1968] 3 All ER 361,

⁶ *Texas V. White* (1868) 7 Wallace 733; *Horn v. Lochurt* (1873) 17 Wallace 850; *Baldy v. Hunter* (1897) 171 U S 388,

⁷ (1868) 7 Wallace 733

⁸ 1966 EALR 514

⁹ 1964 CLR 195

¹⁰ [1968] 3 All ER 561, 579

¹¹ [1955] 1 FCR 439

¹² [1958] 2 PSCR 180, Where Munir, C.J, declared that Martial Law and its rulers

¹³ PLD 1972 Sc 139

¹⁴ PAD 1972 Sc 139C 206

¹⁵ PLD 1 97? Sc 139C 239

¹⁶ The Constitution (5th Amendment) Case, (High Court Division): 2010 BAD (Special), 224. 5

¹⁷ The Constitution (5th Amendment) Act's Case, 2010 BLD (Special) 1 .

¹⁸ 30 DLR (SC)207 by Fazle Munim, J

¹⁹ Ruhul Islam, J in *the State vs. Haji Joynal Abed/n*, 32 DAR (AD)110

²⁰ The Constitution (5th Amendment) Act's Case, 2010 BAD (Special) 1C138

²¹ The Constitution (5th Amendment) Act's Case, 2010 BAD (Special) 1 G 140, Paragraph 354

²² The gazette published on 3 July 201 1.

²³ For example, Articles 42 (2), 102 etc

²⁴ The Constitution (7th Amendment) Case, 1 TLR Special Issue 2011,