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Historical Background of Constitutional Law in Bangladesh

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Abstract

In a democratic country based on constitutional supremacy, the Constitution is of paramount importance in guiding the nation in upholding the law and ensuring the proper governance of its affairs. However, in the newly created State of Pakistan, the Constitution-making process stumbled due to a palace clique and many other issues, particularly the dubious role of the erstwhile top Court of Pakistan. As a constituent part of Pakistan, Bangladesh also became a victim of such barriers towards the constitution-making process. Against this background, this article examines the role of various historical incidents, primarily the impact of colonial acts and the highest Court of the then Pakistan, in the process of adopting the Constitution of the State of Pakistan, which was subsequently followed by Bangladesh. By employing the doctrinal method, this study finds that the colonial Acts offered a limited scope to the path of constitutionalism, but the Pakistan Federal Court (subsequently the Pakistan Supreme Court) played a hostile role in the making of the Constitution of Pakistan, which also negatively impacted the Constitution-making process of Bangladesh. However, Bangladesh could adopt and enforce its own Constitution only after gaining independence in 1971.

Keywords: Constitutional Law, Constitutionalism, Dominion, Full Powers, Constituent Assembly, Essential Requisite, Authoritarian Rule and Provincial Autonomy

1.0 Introduction

The present stands on the remnants of the past. The present status of constitutional law in Bangladesh is not the creation of a day. It has a long journey which dates back to some hundred years, even before the advent of the Muslims in the political arena of this sub-continent. Since then, it has witnessed many vicissitudes on its way at the hands of the British before India achieved independence from the British colonial regime in 1947. The development of constitutional law takes a new shape in independent India. However, in newly created Pakistan, it stumbled on its way on several occasions at the hands of the Pakistani regime. After a long struggle for independence, Bangladesh emerged as an independent State on 16 December 1971, wherefrom the constitutional law of Bangladesh started its journey anew. Given this background, the Article provides a brief overview of the historical development of the constitutional law of Bangladesh. At the end, it reveals that the constitutional journey of Bangladesh started long before, particularly with the advent of the British in the soil of India. However, Bangladesh has had to struggle for a long time to see its constitution adopted and enforced until 16 December 1972.

2.0 Development under the Law Commissions during the British Regime

The British entered the territory of India for the purpose of carrying out business in the name of the Governor and Company of Merchants of London Trading into the East Indies (East India Company) (Jain, 1996). However, in the course of time, the East India Company turned into a political organisation having political control over a

significant part of the Mughal Empire. The expansion of the power of the East India Company started with its win over Nawab Siraj Ud Daulah in the Battle of Plassey in 1757 and the grant of *Diwani* in 1765 after the Battle of Buxar in 1764 (Kulshreshtha, 2000). With the downfall of the Mughal dynasty in 1858, the British took full control of the administrative affairs of the then India (Kulshreshtha, 2000). Presently, being split, British India, with hundreds of princely states, formed the independent India, Pakistan and Bangladesh. During the British rule, there was no significant development of constitutional law. However, they established four law commissions, which made some proposals based on which some landmark *Acts* were passed for the governance of the affairs of British India in the absence of a constitution in the strict sense of the term.

The first Law Commission of British India was appointed by the Government of India in 1835 under the *Charter Act* 1833. This commission consisted of Lord TB Macaulay, as chairman and 4 members, namely, CH Cameron, JM MacLeod, GW Anderson and F Millet (Jain, 1996). This Commission is notable for drafting the *Indian Penal Code* 1860, which is still in force in India, Pakistan and Bangladesh with some modifications (Jain, 1996). The Indian *Penal Code* is the result of the 'untiring efforts' made by Lord Macaulay, and it was considered to be the 'most outstanding work' of 'a genius' (Jain, 1996). Besides, this Commission, after appreciating the complaints of the Anglo-Indians in regard to the difficulties of the enforcement of their civil rights, presented the *Lex Loci Report* in 1837 (Jain, 1996). This Commission also recommended various changes in the procedure of civil suits and drafted a *Code of Civil Procedure* and the *Law of Limitation* (Jain, 1996).

The Second Law commission was appointed on 29 November 1853 under the Charter of 1853 (Jain, 1996). This Law Commission was composed of Sir John Romilly as the president of the Commission, while Sir John Jervis, Sir Edward Rayan, Robert Lowe, Lord Sherbook, CH Cameron, JM MacLeod and TF Ellis were its members (Jain, 1996). This Commission passed the *Indian Penal Code* 1860, drafted by the First Law Commission and drafted two codes on civil procedure and criminal procedure in the years 1859 and 1861, respectively (Jain, 1996). Based on these drafts, the Indian Legislature enacted the *Code of Civil Procedure* 1859 and the *Code of Criminal Procedure* 1861 (Jain, 1996). The *Limitation Act* 1859 was also passed under the aegis of the Second Law Commission (Jain, 1996). This Law Commission is commended for presenting the basis of the procedural laws, though they were 'doubtless rough', yet they constituted an 'enormous advance over the law of procedure' in the course of time (Jain, 1996).

The Third Law Commission of British India, appointed on 02 December 1861, consisted, at the first instance, of Lord Romilly as the chair and Sir W Erle, Sir Edward Rayan, Lord Sherbook, Robert Lowe, JM MacLeod and Justice Wills as Members (Jain, 1996). Later, on the retirement of Sir W Erle and Justice Wills, their places were taken up by WM James and John Henderson and on the death of Henderson, he was succeeded by Lord Lush (Jain, 1996).

Under this Commission, many important *Acts* were passed, of which the *Indian Succession Act* 1865, the *Indian Contract Act* 1872, the *Negotiable Instruments Act* 1881, the *Indian Evidence Act* 1872, the *Specific Relief Act* 1877 and the *Transfer of Property Act* 1882 are mentionable (Jain, 1996). The tenure of the Third Law Commission also witnessed a host of other *Acts* for the governance of the Indian affairs (VD Kulshreshtha, 2000). Therefore, the Third Law Commission is termed the *Golden Age of Codification* in British India (Kulshreshtha, 2000).

The Fourth Law Commission of British India was appointed by the Government of India on 11 February 1879 (Kulshreshtha, 2000). The Commission constituted of Dr. Whitely Strokes as the chairman and Sir Charles Turner and Raymond West as the members (Jain, 1996). The Legislative Council of India, on the recommendation of the Fourth Law Commission, passed 'codes relating to *Negotiable Instruments* in 1881, and those relating to Trusts, Transfer of Property and Easements 1882 in 1882' (Kulshreshtha, 2000). The contribution of the Law Commissions of British India on Indian Law was applauded as 'powerful instruments which injected English Common and statute law and equitable principles into the expanding structure of Indian Jurisprudence' (MC Setalvad in the Hamlyn Lectures, *The Common Law in India,* cited in Kulshreshtha, 2000).

3.0 Development under Different Colonial Acts

After arrival in India, the British gradually gained control over the Indian political affairs. With this position in

politics, they 'built a new constitutional structure on their experience in England to suit their political ends in India' (Kulshreshtha, 2000). To secure these ends, the British Parliament passed the *Regulating Act* 1773, which, *inter alia*, brought the 'Presidencies of Bombay and Madras … under the control of the Governor-General of Bengal' and entrusted the 'supervision of the Company' to the Ministry in England (Kulshreshtha, 2000). This *Act* empowered the Crown to establish by Charter or Letters Patent a Supreme Court at Fort William, and in the exercise of this power, the Crown established the Supreme Court at Calcutta (Kulshreshtha, 2000). After this *Act*, there came the *Act of Settlement* 1781 with the object of defining the powers of the Supreme Court and settling some conflicting issues which arose due to the 'defective provisions' of the *Regulating Act* 1773 (Kulshreshtha, 2000). The *Act of Settlement* 1781 introduced some reforms in the existing system, which included granting of immunity to the Governor General, the Councillors, the *Zemindars* and the landlords from the jurisdiction of the Supreme Court and authorising the Governor General and Council to frame 'independently regulations for the Provincial Councils and Courts' (Kulshreshtha, 2000). The *Pitt's India Act* 1784 and the *Act of* 1786 also contained some provisions of constitutional importance. Under the *Pitt's India Act* 1784, the strength of the Councils was reduced to three from four, and the Governments of Bombay and Madras were made subordinate to the Governor General-in-Council of Bengal (Kulshreshtha, 2000). The *Act of* 1786 provided that the Governor General would be the Commander-in-Chief and would have the power to override his Council whenever considered necessary (Kulshreshtha, 2000). The *Charter Act* 1793 empowered the Governor General of Bengal and his Council to 'superintend, direct and control the Governments of Bombay and Madras' (Kulshreshtha, 2000). The *Charter Act* 1813 asserted the sovereignty of the British Crown over the Indian territories and thus removed the 'doubts created by constitutional controversy' (Kulshreshtha, 2000). The *Charter Act* 1833 granted the East India Company another term of twenty years to retain its 'political and administrative power', and it ceased the trading character of the East India Company (Kulshreshtha, 2000). The *Charter Act* 1833 was followed by the *Charter Act* 1853, which introduced 'far-reaching changes in the machinery for legislation in India' (Kulshreshtha, 2000). The Law Member of the Governor General's Council was granted equal status to the other three members of the Council, and for legislative purposes, the Council was to consist of twelve members, of which seven were required to make the quorum (Kulshreshtha, 2000). Besides, the *Act* of 1854 empowered the Governor General to appoint administrative officers in some areas like Assam, Central Provinces, Burma, etc., with necessary powers (Kulshreshtha, 2000).

After the *Sepoy Mutiny,* followed by the downfall of the Mughal dynasty, the British Parliament passed the *Government of India Act* 1858 with a view to introducing ministerial responsibility into the affairs of British India (Kulshreshtha, 2000). With this end in view, this *Act* vested the territories of the East India Company in the Crown, empowered the Crown to appoint the Governor General of India and the Governors of the Presidencies (Kulshreshtha, 2000). Besides, this *Act* transferred all the property of the East India Company to the Crown, including its contractual liabilities (Kulshreshtha, 2000). Thereafter, there came the *Indian Councils Act* 1861, which opened the door for the Indians to be inducted into the legislative functions of India (Kulshreshtha, 2000). Under this *Act*, the Governor General was empowered to enlarge the size of the Council by 'adding not less than six and not more than twelve members' with at least half of them non-officials, including the Indians (Kulshreshtha, 2000). Other notable features of this *Act* were that it made 'compulsory to secure the assent of the Governor-General on every enactment passed by the Legislative Council' and conferred on him the power to 'issue ordinances independently which were to remain in force for six months unless disallowed by the Crown' (Kulshreshtha, 2000). The *Indian High Courts Act* 1861 reorganised the judicial organisation by uniting the Company's Courts and King's Courts and established three Presidency High Courts of Calcutta, Bombay and Madras, abolishing the Supreme Court at Calcutta and *Sadar Diwani and Sadar Nizamat Adalats* (Kulshreshtha, 2000).

The *Government of India Act* 1870 empowered the Governor General to make laws for the less developed areas (Kulshreshtha, 2000). The *Indian Councils Act* 1892 contributed to the growth of representative institutions in the constitutional history of India by increasing the number of its members by not less than ten and not more than sixteen (Kulshreshtha, 2000). This number was further increased by the *Indian Councils Act* 1909, which also recognised the principle of election in 'explicit and direct terms' (Kulshreshtha, 2000).

Standing on the constitutional platform thus orchestrated by different *Acts* described above, the *Government of India Act* 1919 made its emergence, introducing vital changes, among others, in the Government of India and the Provincial Government (Kulshreshtha, 2000). It is seen that it reduced the size of the Council from not less than eight and not more than twelve in number, with a fixed term of office for five years at a fixed salary (Kulshreshtha, 2000). Moreover, this *Act* enlarged and strengthened the representative character of the Central Legislature, increased the power of the Governor General over the Executive Council by conferring the 'power of certification', including the ordinance-making power (Kulshreshtha, 2000). In respect of the Central Legislature, this *Act* replaced the 'old Imperial Council of one House only' with a bicameral legislature to consist of the 'Council of State (Upper House) and the Central Legislative Assembly (Lower House) (Kulshreshtha, 2000). Both the Houses' composition was to be governed by the principle of 'separate communal representation' (Kulshreshtha, 2000).

The *Government of India Act* 1919 was followed by the *Government of India Act* 1935, which was constructed on the basis of the report submitted by the *Simon Commission* in 1930 (Jain, 1996). This *Act* of 1935 conferred a 'substantial measure of autonomy on the Provinces of British India and established responsible government for the first time' in India (Jain, 1996). This *Act* declared India to be a Federation. All the Provinces were to join the All India Federation automatically, though it was optional for the Indian native States to join the Federation by an Accession of Instrument (*Government of India Act* 1935, sections 5 & 6). It replaced the unitary system of government with federalism, which was to comprise the 'Provinces and the Indian States' (Jain, 1996). Under the *Government of India Act* 1935, the Federal Legislature was to consist of two Chambers to be known as the Council of States and the House of Assembly (*Government of India Act* 1935, section 18(1)). The Council of States was to comprise of one hundred and fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States, while the Federal Assembly was to consist of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States (*Government of India Act* 1935, section 18(2)). The Council of States was made a permanent body not subject to dissolution, but as near as may be, one-third of the members thereof was to retire in every third year (*Government of India Act* 1935, section 18(4)). On the other hand, the Federal Assembly was given a year's tenure unless dissolved earlier (*Government of India Act* 1935, section 18(5)).

The Governor General was equipped with the power of promulgating an ordinance whenever he felt it necessary during the recess of the Federal Legislature (*Government of India Act* 1935, section 42(1)). Such an Ordinance would carry the 'same force and effect as an *Act* of the Federal Legislature' (*Government of India Act* 1935, section 42(2)). However, under section 43 of this *Act*, the Governor General could promulgate an ordinance to take 'immediate action' for 'satisfactory discharge of function' (*Government of India Act* 1935, section 42(1)).

The *Government of India Act* 1935 provided for the establishment of a Federal Court in India to be composed of 'a Chief Justice of India and such number of other judges' as the Crown might deem necessary (*Government of India Act* 1935, section 200(1)). Perhaps, it was the most striking feature of this *Act* that resulted from the 'growing trend of the Indian public opinion in favour of stopping appeals to the Privy Council from Indian High Courts and partly due to the emerging federal-structure of the British Empire in India' (Kulshreshtha, 2000). The necessity for the establishment of the Federal Court was also partly for the reason that a federal constitution would involve a 'distribution of powers between the Centre and the constituent units' (Report of the Joint Committee on Indian Constitutional Reform, p 193, (1934)). Another compelling reason for the establishment of the Federal Court was that it was considered the 'interpreter and guardian' of the Constitution as well as a tribunal for the 'determination of disputes' between the 'constituent units and the Federation' or 'amongst the constituent units *inter se*' (Jain, 1996).

Then the British Parliament passed the *Indian Independence Act* 1947 in order, *inter alia*, to 'make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the *Government of India Act* 1935' (*Indian Independence Act* 1947, Preamble). This *Act* established two new Dominions, namely the Dominion of Pakistan and the Dominion of India, by partitioning British India (*Indian Independence Act* 1947, section 1). Under this *Act*, the territories of British India, excepting those comprised of the newly created Dominion of Pakistan, constituted

the Dominion of India (*Indian Independence Act* 1947, section 2(1). By the authority of this *Act*, the Dominion of Pakistan was curbed out of the territories from British India and comprised of the territories included in the Provinces of East Bengal and West Punjab, the territories included in the Province of Sind, the Chief Commissioner's Province of British Baluchistan and the North West Frontier Province which by majority of valid votes cast in the referendum included in that Province (*Indian Independence Act* 1947, section 2(2) (a) (b) (c)).

The Legislatures of the newly created Dominions attained 'full power' to make laws for their respective Dominion, including laws having 'extra-territorial operation' (*Indian Independence Act* 1947, section 6(1)). At the same time, the Governor General of each of the new Dominions had 'full power to assent in His Majesty's name' to any law of his respective Legislature (*Indian Independence Act* 1947, section 6(3)). This *Act* conferred the constitution-making power of each of the Dominions upon their respective Constituent Assembly and provided that each of the new Dominions would be governed 'as nearly as might be' in accordance with the *Government of India Act* 1935 (*Indian Independence Act* 1947, section 8(1) & (2)).

4.0 Development under Constituent Assemblies

As stated above, the Constituent Assembly of India and that of Pakistan got the power to adopt a constitution for their respective countries under the *Indian Independence Act* 1947. The Constituent Assembly of India, formed with some 300 members, took the onerous task of framing the Constitution of India (*Indian Independence Act* 1947, section 8(1) & (2)). After the rough draft of the Constitution was prepared, it was placed before the Drafting Committee, which scrutinised the same 'word to word', approved in February 1948, thoroughly discussed from 15th November 1948 to 17th October 1949 in the Constituent Assembly and came into force on 26th January 1950 (Kulshreshtha, 2000). Since then, under the guardianship of the Supreme Court of India, the constitutional law of India has been developed, covering all aspects of State affairs.

4.1 Making and Adopting the Constitution of Bangladesh

Adoption of the Constitution of Bangladesh was not an easy job. Bangladesh had to wait for twenty-four years to have a constitution of its own from 1947 to 1972. This is because Bangladesh had to share the legacy of the constitutional history of Pakistan. After partition, Bangladesh joined the Dominion of Pakistan to achieve its 'legitimate expectation for its autonomy and self-determination' (Ridwanul Hoque and Rokeya Chowdhury, 2025). After creation, the Constituent Assembly of Pakistan was formed for the august purpose of framing a Constitution for Pakistan, but it could not happen due to the palace clique, deception and disappointment manipulated by the then power mongers in the political circle of Pakistan (*Khondker Delwar v Bangladesh Italian Marble Works*, (2010) 62 DLR (AD) 298). The Constitution-making process of Pakistan was marred by various incidents that took place at the behest of the power grabbers and, of course, with the dubious role played by the Federal Court of Pakistan under the Chief Justiceship of Justice Muhammad Munir.

With the demise of Muhammad Ali Jinnah, the founder and first Governor General of Pakistan, Khawaja Nazimuddin became the second Governor General of Pakistan on 14th September 1948 and continued until he took the office of Prime Minister of Pakistan on 17th September 1951 by relinquishing the office of Governor General to Malik Ghulam Muhammad, a civil servant under the British colonial regime. Before that, General Ayub Khan was appointed as the first-ever Muslim Commander-in-Chief of Pakistan on 17th January 1951 (Khan, 2008). The constitution-making efforts of Pakistan were faltered at the hands of this trio formed by Justice Muhammad Munir, Malik Ghulam Muhammad and General Ayub Khan, and thereby the constitutional law of Pakistan received several setbacks.

4.1.1. Dismissal of the Cabinet of Khawaja Nazimuddin

The turbulent events that heavily shook the constitutional path of Pakistan had perhaps started with the dismissal of the Cabinet of Prime Minister Khawaja Nazimuddin by Governor General Malik Ghulam Muhammad in April 1953. Muhammad Ali Bogra, Pakistan's Ambassador to the United States of America, was appointed as the Prime Minister while General Muhammad Ayub Khan became his Defence Minister (*Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). Despite his being the constitutional head under the *Indian Independence Act 1947* and the *Government of India Act* 1935, Governor

General Malik Ghulam Muhammad, without any 'legal authority', dismissed the Prime Minister and assigned to himself the role of a sovereign authority. This act of dismissal of the Prime Minister Khawaja Nazimuddin and his Cabinet was termed as the first mishap in the constitutional history of Pakistan in *Asma Jilani's case (Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139).

4.1.2 Dissolution of the Constituent Assembly

The *Tamizuddin Khan's case (Federation of Pakistan v Tamizuddin Khan* (1955) 7 DLR (FC) 291) was propelled by the same facts which were purported to have been taken by the Constituent Assembly for the flourishing of the constitutional path of Pakistan. One of these glorious facts was the adoption of the *Rules of Procedure* of the Constituent Assembly of Pakistan (*Rules of Procedure*). Rule 62 of the *Rules of Procedure* provided that to attain the validity of law, a Bill would not need to be assented to by the Governor General if the same was published in the official Gazette of Pakistan after being authenticated by the President of the Constituent Assembly (*Federation of Pakistan v Tamizuddin Khan* (1955) 7 DLR (FC) 291).

The other fact related to the conferment of the power of issuing different writs on the High Courts of Pakistan by inserting section 223A in the *Government of India Act* 1935 by the *Government of India (Amendment) Act* 1935, which came into force on 16 July 1954 (*Federation of Pakistan v Tamizuddin Khan* (1955) 7 DLR (FC) 291). The remaining fact was connected with the conferment of the power of appointment of the Prime Minister of Pakistan by the Governor General from a member of the Constituent Assembly who would command the support of the majority members of the Assembly by the *Government of India (Fifth Amendment) Act* 1954 (*Federation of Pakistan v Tamizuddin Khan* (1955) 7 DLR (FC) 291).

Both these *Acts* were passed by the Constituent Assembly and signed by the President of the Assembly by way of authentication and in the belief that they would become law without the assent of the Governor General by force of Rule 62 of the *Rules of Procedure* (*Federation of Pakistan v Tamizuddin Khan* (1955) 7 DLR (FC) 291). Meanwhile, the Constitution-making process of Pakistan was in progress, and it was ready to be tabled before the Constituent Assembly for approval. At this time, all of a sudden, Malik Ghulam Muhammad, the Governor General of Pakistan, exercising his power under section 45(1) of the *Government of India Act* 1935 (Section 45(1) of the *Government of India Act* 1935), dissolved the Constituent Assembly on 24 October 1954. Another reason that guided him to dissolve the Constituent Assembly was motivated by the fact of inclusion of a clause in the draft Constitution restricting the power of the Governor General to dismiss a ministry as long as it commanded a majority in the House (Khan, 2006).

Being aggrieved with the order of the Governor General, Tamizuddin Khan, the President of the Constituent Assembly, moved a petition before the Chief Court of Sindh seeking writs of *mandamus* and *quo warranto* on 07 November 1954 *(Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). He sought a writ of *mandamus* to be issued against the government officials, restraining them from implementing the proclamation of the Governor General of the 24th October 1954 and from interfering directly or indirectly with the exercise of the functions and duties of the President of the Constituent Assembly (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). Besides, he also prayed for the writ of *quo warranto* for the cancellation of the appointments of some Ministers to the Council despite their not being the Members of the Constituent Assembly (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). The Chief Court of Sindh, after examining the facts of the case, observed that the *Acts* of the Constituent Assembly, when it did not function as the Federal Legislature, did not require the assent of the Governor General for their validity as law and as such the dissolution of the Constituent Assembly by the Governor General by his proclamation made on 24 October 1954 was illegal (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). With this observation, the Court declared the dismissal order of the Governor General as illegal (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291).

The Federation of Pakistan appealed against the verdict of the Chief Court of Sindh before the Federal Court of Pakistan. The Federal Court examined the legality of Rule 62 of the *Rules of Procedure,* which withdrew the requirement of the assent of the Governor General to a Bill passed and authenticated by the President of the Constituent Assembly for its validity. Standing

on the same ground, the Federal Court examined the constitutionality of the conferment of writ jurisdictions upon the High Courts across the country under section 223A of the *Government of India (Amendment) Act* 1954 which did not attain the assent of the Governor General under section 6(3) of the *Indian Independence Act* 1947 read with section 32(1) of the *Government of India Act* 1935.

After a careful perusal of the law points raised by both sides, the Federal Court believed that assent of the Governor General was mandatory for a Bill to attain the validity of a law though it was published in the official Gazette after being passed by the Constituent Assembly and authenticated by the President of the Assembly (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). The majority judgment authored by Justice Muhammad Munir, the Chief Justice of Pakistan, ruled:

> So long as Pakistan remains a Dominion, assent to its legislation is necessary both under the common law doctrine and the statutory provision in sub-section (3) of section 6 … But if it intended to proceed constitutionally such secession would itself require the assent of the Queen or her representative, or legislation by the Parliament of the United Kingdom (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291).

On the question of constitutionality of Rule 62 of the *Rules of Procedure*, the Federal Court observed that a mere Rule of Procedure could not amend the *Constitution Act* even if the Rule be assumed to be a constitutional provision, it itself required the Governor General's assent and in the absence of such assent, was wholly invalid (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). With these findings, the Federal Court declared the very assumption of writ jurisdictions by the Chief Court of Sindh under section 223A of the *Government of India (Amendment) Act 1954* illegal since the very enabling *Act* did not attain the assent of the Governor General under section 6(3) of the *Indian Independence Act* 1947 (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). Therefore, the Federal Court set aside the judgment of the Chief Court of Sindh (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291).

However, Justice AR Cornelius, in his dissenting judgment, made it clear that the Governor General acting under the *Indian Independence Act* 1947 could not be compared with the Governor General appointed and acting under the *Government of India Act* 1935 during the British regime. In his view, though the Governor General of Pakistan would swear in to maintain 'true faith and allegiance to British Sovereign', it could not be construed to accept any 'inferiority of position, much less of servitude in the feudal sense appropriate to the conception of royalty' (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). To him, it was simply an 'undertaking of loyalty on equal terms' to the British Sovereign (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). To quote him:

> It could hardly appear more clearly that the Governor General owes nothing to the British Sovereign except his warrant of appointment issued upon the recommendation of the Government of Pakistan … The appointment by its terms affirms and emphasises that the Governor General's duty … is to the Constitution (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291).

Further, Justice AR Cornelius held that the Constituent Assembly of Pakistan was created by 'supra-legal power to discharge the supra-legal function of preparing a Constitution of Pakistan' (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). Thus, the power of the Constituent Assembly, he argued, 'inherently belonged to itself by virtue of its being a body the representative of the will of the people in relation to their future mode of Government' (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). Therefore, to Justice AR Cornelius, the British Parliament did not stipulate the provision of assent as a mandatory requirement to a Bill to become a law (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291). His argument found place in the following part of his dissenting opinion:

> I do not agree that the words can mean that the British Parliament intended to or assumed that assent was an essential requisite … the absence of such provision, in the Indian Independence Act … strongly inclines me to the view that such prescription was liberately avoided by the British Parliament … at the time when Pakistan came into being (*Federation of Pakistan v Tamizuddin Khan*, (1955) 7 DLR (FC) 291).

To sum up, the majority view expressed in the voice of Justice Muhammad Munir relied on the literal meaning

of the text of the *Indian Independence Act* 1947 as regards the requirement of assent of the Governor General to a Bill to attain the validity of law. The Federal Court voted in favour of strict adherence to the textual meaning of the provisions governing the passage of a Bill in the Constituent Assembly as viewed through section 6(3) of the *Indian Independence Act* 1947. This stance of the Pakistan Federal Court was found *ex facie* erroneous and described as the 'second great mishap' in the constitutional history of Pakistan in the Judgment of the case of *Asma Jilani's case*.

The Federal Court of Pakistan reaffirmed its position regarding the requirement of the Governor General's assent in legislation in the judgment of *Usif Patel's case, Usif Patel v The Crown* (1955) 7 DLR (FC) 385. As the facts of the case revealed, the Governor General of Pakistan was given powers to make 'orders' under section 9 of the *Indian Independence Act* 1947, and this power was time-limited to 31st March 1948 *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). However, the Constituent Assembly altered this date to 31st March 1949 by section 2 of the *Indian Independence (Amendment) Act* 1948, which was never presented to the Governor General for his assent and consequently did not become law for want of the Governor General's assent *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). Yet, in exercise of this power, on 19 July 1948, section 92A was added to the *Government of India Act* 1935 by the Governor General after the expiry of this time limit on 31st March 1948 in exercise of powers under section 9 of the *Indian Independence Act* 1947 *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). In exercise of the power derived under section 92A of the *Government of India Act* 1935, the Governor of Sindh issued some orders based on which some persons were arrested under the *Sindh Control of Goondas (Governor's) Act* 1952. They were tried before the District Magistrate of Larkana, where they were directed to furnish heavy security and for failure of which they were confined to prison *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). They challenged their detention before the Chief Court of Sindh, which upheld the imprisonment *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). Being aggrieved, they appealed before the Federal Court of Pakistan on the ground, *inter alia*, that since the newly inserted section 92A in the *Government of India Act* 1935 empowering the Governor General to issue Proclamations did not become law for want of the assent of the Governor General, the very power which the Governor of Sindh derived from such Proclamations to act under the *Sindh Control of Goondas (Governor's) Act* 1952 was without lawful authority and void *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385).

The Federal Court under the leadership of Justice Muhammad Munir upheld the contention of the appellants declaring the alteration of time from 31 March 1948 to 31 March 1949 through the *Indian Independence (Amendment) Act* 1948 as invalid as it did not achieve the assent of the Governor General of Pakistan *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). Consequently, inclusion of section 92A to the *Government of India Act* 1935 with the exercise of the power so derived under the *Indian Independence (Amendment) Act* 1948 by the Governor General was invalid and did not confer any power upon the Governor General to issue Proclamations empowering the Governor of Sindh to act under the *Sindh Control of Goondas (Governor's) Act* 1952 *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). In the result, the Federal Court declared the detention of the appellants as illegal *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385).

4.1.2 Application of the Doctrine of State Necessity

The *Reference No. 1* of 1955 *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395) is another example that perverted the constitutional path of Pakistan. This Reference had a direct link with the opinion formulated by the Federal Court of Pakistan in *Tamizuddin Khan's case* and *Usif Patel's case* concerning the legal requirement of the assent of the Governor General to validate a law to be passed by the Constituent Assembly of Pakistan. In both cases, the Federal Court opined that a law passed by the Constituent Assembly could not become a law unless it was accompanied by the assent of the Governor General. In *Usif Patel's* case the Federal Court of Pakistan in respect of the extent of legislative power of the Governor General observed the effect of the dissolution could certainly not be the transfer of its powers to the Governor-General who might give or withhold his assent to the legislation of the Constituent Assembly *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385). The Governor General himself was not the Constituent Assembly, and on its disappearance, he could neither claim powers which he never possessed nor claim to succeed to the powers of that Assembly *(Usif Patel v The Crown* (1955) 7 DLR (FC) 385).

With this observation, the Federal Court unanimously concluded that the Constituent Assembly of Pakistan was

not a sovereign body, and in the same line of argument, the Governor General of Pakistan was also not a sovereign law-making body *(Usif Patel v The Crown*, (1955) 7 DLR (FC) 385).

However, the Federal Court of Pakistan diametrically altered this position in the answers crafted by it in response to the *Governor General's Reference No.1* of 1955. The facts leading to the *Governor General's Reference No. 1* of 1955 unveiled that on 27 March 1955, the Governor General, in exercise of his power under section 42 of the *Government of India Act* 1935 promulgated the *Emergency Powers Ordinance* 1955 by which he sought to validate and to give effect to 35 *Constitutional Acts* which had been passed by the Constituent Assembly in exercise of its power under 8(1) of the *Indian Independence Act* 1947*(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395). These *Acts* became invalid following the judgment of the *Tamizuddin Khan's* case. Moreover, in *Usif Patel's* case, the Federal Court ruled that the legislature could not validate what it could not legislate, as it was found saying:

> The Rule hardly requires any explanation, much less emphasis that a legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates, the principle governing validation being that validation itself being legislation you cannot validate what you cannot legislate upon *Usif Patel v The Crown* (1955) 7 DLR (FC) 385.

Therefore, the Court opined that the legislative power of the Governor General was subject to the checks and limits envisioned in section 42 of the *Government of India Act* 1935 and in the exercise of which he could not validate these 35 *Constitutional Acts (Usif Patel v The Crown* (1955) 7 DLR (FC) 385).

The legal position thus appeared was that it was only the Constituent Assembly which could re-legislate on the subjects covered by those *Constitutional Acts*. But the noteworthy fact was that the Constituent Assembly had ceased to function, as it was dissolved by the Governor-General by a Proclamation on 24 October 1954and no legislature competent to validate these *Acts* was in existence. Thus, it created a vacuum in the legal arena as regards the extent of legislative power of the Governor General in the absence of the Legislature. In such a dire situation, the Governor General sought the legal opinion of the Federal Court under section 213 of the *Government of India Act* 1935. The *Governor General's Reference No. 1 of 1955* predominantly concentrated on the question whether after *Usif Patel's case* the laws listed in the Schedule of the *Emergency Powers Ordinance* 1955 could be validated under section 42 of the *Government of India Act* 1935, or could be given retrospective operation in the absence of the Legislature *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395). This question was supplemented by the asking that whether in such situation the Governor General could, by order or otherwise, declare that all orders made, decisions taken and other acts done under these laws would be valid until the question of their validation was determined by the new Constituent Convention *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395).

So to rescue the Governor General from the legal vacuum, the Federal Court, speaking through its Chief Justice Muhammad Munir, invoked the doctrine of state necessity as a part of the statute law of Pakistan *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395). In constructing his opinion, the Chief Justice heavily relied on the maxims, such as *Id Quod Alias Non Est Licitum, Necessitas Licitum Facit* (that which otherwise is not lawful, necessity makes lawful), *salus populi Suprema lex* (safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the State is the supreme law) *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395). Thus, the answer that ensued to the *Reference No. 1*question was that the Governor General had such power to validate the laws until the new legislature decided their fate *(Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395). As the Court propounds:

> [I]n 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 of which they purported to come into force (*Governor General's Reference No. 1* of 1955, (1955) 7 DLR (FC) 395).

So what came out of the surface is that the Federal Court even did not hesitate to take shelter on the 13th

century maxims to pull the Governor General out of danger created by himself by dissolving the Constituent Assembly at his whims and caprices. The Federal Court became generous to legitimise the invalid actions which were declared not to be validated by any manner by the Court itself in its earlier judgment in *Usif Patel's* case. Moreover, this very Court was found very strict in *Tamizuddin Khan's case* in adhering to the constitutional requirement of the Governor General's assent to confer validity to any law passed by the Constituent Assembly. Moreover, it would be seen how the development of the constitutional law of Pakistan was endangered by adopting the doctrine of state necessity, which was applied for the first time by the highest constitutional court, in the subsequent events in the case of *Dosso's case (State v Dosso* (1959) 11 DLR (SC) 1).

4.1.3 Legitimisation of Martial Law

The event subsequent to this that divulged the constitutional path of Pakistan was the dismissal of the Prime Minister Malik Feroz Khan Noon and his Cabinet by President Iskander Mirza on 07th October 1958, by abrogating the Constitution of 1956 and imposing Martial Law throughout Pakistan without any provocation of doing so from any quarter. This event was further intensified with the appointment of General Ayub Khan as the Chief Martial Law Administrator (CMLA) on the same day. The imposition of Martial Law brought all over Pakistan, a total disaster in the political system, including the civil administration throughout Pakistan:

> The Martial Law of 1958 brought in authoritarian rule and, in the end, accentuated the sense of alienation amongst the Bengalis. The Constitution of 1956 was abrogated, political parties were banned, politicians were indiscriminately put behind bars, and virtually all public leaders of any importance were disqualified from holding effective office (Hossain, 2016).

Justice Yaqub Ali in *Asma Jilani v Government of Pakistan (Asma Jilani v Government of Pakistan*, 1972 PLD SC 139) described this event as the 'third great mishap which hit Pakistan like a bolt from the blue' in her way of constitutionalism *(Asma Jilani v Government of Pakistan*, 1972 PLD SC 139).

The role played by the Supreme Court of Pakistan through the judgment of *Dosso's case* can be characterised as the blackest event in the history of constitutional law of Pakistan. The Supreme Court of Pakistan legitimised military takeover by General Ayub Khan and offered a seal of legitimacy to all his actions, decisions taken and orders made as a military dictator of Pakistan.

As the facts of the case revealed, under the Constitution of 1956, the general elections were scheduled to be held in the spring of 1959 (Khan, 2006). Iskander Mirza, who during his thirty months' tenure as President of Pakistan, 'manipulated party positions' by trying every 'permutation and combination' to create such a situation that compelled 'four ministries' to fall one after the other (Khan, 2006). He apprehended that there was no chance for him to be re-elected in that election (Khan, 2006). As M Asghar Khan noted:

> He was conscious of the fact that he had annoyed the political forces of the day … He knew that in the event of general elections … party positions in the next parliament would change in such a manner that he could not hope to be re-elected as President. He, therefore, decided to abrogate the Constitution, dissolve the ministries and assemblies, abolish the political parties and impose martial law (Khan, 2006).

Three days later, the President promulgated the *Laws (Continuance in Force) Order* 1958, which validated all laws which were in force before the Proclamation and restored the jurisdiction of all courts, including the Supreme Court and High Courts (*State v Dosso*, (1959) 11 DLR (SC) 1). By this Proclamation, it was declared that the country would be governed as 'nearly as may be in accordance with the late Constitution' *(Laws (Continuance in Force) Order* 1958 [cited in *State v Dosso*, (1959) 11 DLR (SC) 1). Simultaneously, by the force of article 2(7) of the *Order,* all the pending applications for writs or writs already issued but were *sub judice* before the Supreme Court stood abated unless they were provided for by this *Order (Laws (Continuance in Force) Order* 1958 cited in *State v Dosso*, (1959) 11 DLR (SC) 1).

Therefore, an interpretation of articles 2(1) and 2(7) of the *Laws (Continuance in Force) Order* 1958 made it clear that all the laws as they stood before the Proclamation would continue to be in force, excepting the Constitution, which would be followed as nearly as possible in the governance of the country. At the same time, all the proceedings, before the Supreme Court and High Courts,

including all other Courts across Pakistan, were given the seal of legal validity except those which were not saved by Article 2(7) of the *Laws (Continuance in Force) Order* 1958.

Given this background, Constitutional Criminal Appeal No. I of 1957, Criminal Appeal No. 24 of 1957 and Criminal Appeals Nos. 60 and 67 of 1958 came up for determination before the Supreme Court of Pakistan *(State v Dosso*, (1959) 11 DLR (SC) 1). The question involved in each of them was whether the writ issued by the High Court was abated under article 2(7) of the *Laws (Continuance in Force) Order* 1958 *(State v Dosso*, (1959) 11 DLR (SC) 1).

The factual matrix leading to Criminal Appeal No. 1 of 1957 was that Dosso and Muhammad Khan filed a petition for appropriate writ before the High Court of West Pakistan seeking for their release against the detention order passed by a *Jirga* (Council of Elders) under section 12(2) of the *Frontier Crimes Regulation Act* 1901 *(State v Dosso*, (1959) 11 DLR (SC) 1). The High Court found the relevant provisions of the *Frontier Crimes Regulation Act* 1901 void, being repugnant to article 5 of the late Constitution *(State v Dosso*, (1959) 11 DLR (SC) 1). Consequently, the Court ordered their release *(State v Dosso*, (1959) 11 DLR (SC) 1). The State appealed against such a release order *(State v Dosso*, (1959) 11 DLR (SC) 1). The High Court also issued a similar order in the other two cases on the same ground *(State v Dosso*, (1959) 11 DLR (SC) 1).

While dealing with these appeals, the Supreme Court of Pakistan, by majority, set aside the release order of the High Court and upheld the contention agitated by the State. The Court speaking through Chief Justice Muhammad Munir held that in the absence of the very article 5 of the late Constitution, all the proceedings not saved by the *Laws (Continuance in Force) Order* 1958 abated and hence the convictions recorded and the references made to the Council of Elders were good *(State v Dosso*, (1959) 11 DLR (SC) 1). On the question of enforceability of the fundamental rights listed in the late Constitution, Justice Muhammad Munir observed:

> The so-called fundamental rights which were described in Part II of the late Constitution were, therefore, no longer a part of the national legal order and neither the Supreme Court nor the High Court had, under the new Order, the authority to issue any writ on the ground of the violation of any of the fundamental rights *(State v Dosso*, (1959) 11 DLR (SC) 1).

In reaching this conclusion, Chief Muhammad Munir, at first, validated the promulgation of Martial Law all over Pakistan as a successful *coup d'etat* by invoking the pure theory of law propounded by Hans Kelsen (Kelsen was a professor at Vienna, Cologne, Geneva, and the German University in Prague). Justice Munir relied upon the Kelsenian theory to the effect that a new legal order established by a revolution overthrowing the old legal order was good in law if the new legal order commanded the support of the community *(State v Dosso*, (1959) 11 DLR (SC) 1).

Then Justice Muhammad Munir fashioned a concept of revolution in line with his own thinking, matching the Kelsenian theory of positive law. To him, a change is, in law, a revolution, if it annuls the Constitution and the annulment is effective irrespective of whatever may be the motive for such a change and whoever brought this change *(State v Dosso*, (1959) 11 DLR (SC) 1). In the opinion of Justice Munir, for a revolution, 'bloodshed' and 'motive for a revolution' are irrelevant, and a destruction of the constitutional structure might be prompted by a highly patriotic impulse or by the most sordid ends *(State v Dosso*, (1959) 11 DLR (SC) 1). To him, a change was, in law, a revolution, if it could annul the Constitution and the annulment was effective *(State v Dosso*, (1959) 11 DLR (SC) 1).

With this mindset, Justice Muhammad Munir proceeded to lay down the possible consequences of a revolution. He opined that in the event the revolution became victorious to successfully required the inhabitants of the country to conform to the new regime, the revolution itself became a law-creating fact which was to be judged not by reference to the annulled Constitution but by reference to its own success *State v Dosso*, (1959) 11 DLR (SC) 1.

Therefore, as the revolution was successful in satisfying the test of efficacy, it became a law-creating fact. As a consequence, the *Laws (Continuance in Force) Order* 1958, being a new legal order, had to be taken into consideration to determine the validity of the laws and the correctness of judicial decisions irrespective of their being transitory or imperfect in nature *(State v Dosso*, (1959) 11 DLR (SC) 1). Thus, judgment in *Dosso's case* set the seal of legitimacy on the Government of Iskander Mirza, who was deposed from office by Muhammad Ayub Khan,

a day after the judgment was delivered on 23rd October 1958, when he assumed the office of the President.

The legal position of the Supreme Court, as expressed in *Dosso's case,* was challenged in *Asma Jilani's case.* In this case, the Supreme Court of Pakistan differed from its earlier view as expressed in *Dosso's case* concerning the acceptability of the doctrine of legal positivism as expounded by Hans Kelsen. Chief Justice Hamoodur Rahman, elaborating the doctrine at length, opined that Kelsen himself did not lay down the proposition that the command of the person in authority was a law *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139).

Chief Justice Hamoodur Rahman in *Asma Jilani's case* examined the legality of the assumptions based on the theory of legal positivism that guided Chief Justice Muhammad Munir in *Dosso's case* and found the assumptions so viewed as unjustified *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). Therefore, to Justice Hamoodur Rahman, 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'. The Chief Justice further observed that even Kelsen never did 'attempt to formulate any theory which favoured totalitarianism' *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). Munir's reliance on the Kelsenian doctrine was also subject to criticism on the ground that a revolution was a valid law-creating fact from the standpoint of international law if the 'territory and the people remain substantially the same' after the revolution *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139).

Moreover, Justice Muhammad Munir was criticised to be 'erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him' *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). With these observations, Justice Hamoodur Rahman overruled the decision of the *Dosso's case* as he found the principle of law enunciated by Muhammad Munir 'wholly unsustainable' and which could not be treated as 'good law either on the principle of *stare decisis* even otherwise' *Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139.

The legal position adopted in *Dosso's case* was put to the crossroads of legal validity by Justice Yaqub Ali in *Asma Jilani's case*. Upon an extensive analysis of the doctrine of Hans Kelsen, Justice Yaqub Ali concluded that this theory could not be taken as a rule by any municipal Court to form a 'part of the national legal order of any State' *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). In his view, instead of upholding the validity of the *Laws (Continuance in Force) Order* 1958, the Supreme Court should have directed the President to call the National Parliament to adopt a new Constitution, failure of which neither Iskander Mirza nor Muhammad Ayub Khan became a valid source of law-making *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139). Justice Yaqub Ali's reasoning found place in his following expression:

> How could the Court accept one or the other as a law-making fact? No valid law can come into being from the foul breath or smeared pen of a person guilty of treason against the national order *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139).

Finally, Justice Yaqub Ali declined to accept an illegitimate usurper of State power as a 'valid source of law-making' and advocated that such a usurper 'should be tried for high treason and suitably punished' to deter the 'would-be adventurer' *(Asma Jilani v Government of Pakistan*, 1972 PLD (SC) 139).

4.1.4 Emergence of Bangladesh as an Independent State and Adoption of the Constitution of Bangladesh 1972

With the seal of legitimacy in *Dosso's case,* Ayub Khan continued to hold the reins of State power until he had to abdicate to another Chief of Army Staff, General Aga Muhammad Yahya Khan, on 25 March 1969. The judgment in *Dosso's case* created for Ayub Khan, an environment to impose 'authoritarian rule' which 'accentuated the sense of alienation amongst the Bengalis' (Hossain, 2016). General Ayub Khan introduced Basic Democracy in 1959, promulgated a new Constitution in 1962 and introduced indirect elections with a presidential form of government and a strong centre (Hossain, 2016). All these measures effectively excluded' the Bengalis from 'decision-making process' (Hossain, 2016). Besides, the policy of 'divide and rule' was adopted particularly to dominate the people of East Pakistan (Hossain, 2016). The tricks could best be picturised in the words of Dr. Kamal Hossain:

> The powerful minority which controlled the Centre could only continue its domination through

> military rule. Over the next twelve years, between 1958 and 1970, different schemes were devised to create divisions amongst different sections of people in East Bengal. Religious sentiments were exploited, and patronage was distributed through basic democracies and the allotment of generous credit facilities and industrial licenses, which were aimed at procuring support for the Centre-dominated political structure (Hossain, 2016).

Moreover, during the mid-fifties and mid-sixties, a 'massive transfer of resources took place from East Pakistan to West Pakistan for the sheer development of the western wing of the country. This 'diversion of foreign exchange, earned from the export of jute and jute goods, accounted for nearly 70 per cent of the country's total export earnings' of the country (Hossain, 2016).

Amid this situation of deprivation from the legitimate power of the Bengalis at the hands of West Pakistani rulers, the political movement for provincial autonomy gained momentum under the great leadership of Sheikh Mujibur Rahman in 1964 (Hossain, 2016). In the process, Sheikh Mujibur Rahman tabled his famous Six Points Programme at the conference of opposition parties convened in Lahore on 03rd February 1966 (Hossain, 2016). At the conference, Sheikh Mujibur Rahman was denied the opportunity to present the Six Points Programme (Hossain, 2016). Consequently, he walked out of the conference and released the texts of the Six Points Programme to the Press, which made a 'prominent coverage' of it (Hossain, 2016).

General Ayub Khan made a sharp reaction to the Six Points Programme, which he labelled as a 'scheme for secession and declared to respond to it with the language of weapons (Hossain, 2016). On the other hand, the Awami League made a wide propagation of the Six Points Programme to the length and width of the country, explaining the points in detail, which inspired a 'mass movement to grow in its support' (Hossain, 2016). This was responded to by the Government by arresting Sheikh Mujibur Rahman on 09 May 1966 under the *Defence of Pakistan Rules* (Hossain, 2016).

The *Agartala Conspiracy case (*Agartala Conspiracy Case a case framed by the Pakistan Government in 1968 during the Ayub regime against Awami League chief Sheikh Mujibur Rahman, some in-service and ex-service army personnel and high government officials)., which added fuel to the fire on the agonies in the minds of the Bengali populace, is marked as another landmark in the constitutional history of Bangladesh. A good number of notable senior Bengali members of the Pakistan Civil Service and Bengali armed forces personnel were arrested by the Government during the last week of December 1967 on the allegation of their being involved in a secession plot alleged to have taken place at Agartala in Assam province of India, designed to overthrow the Ayub Government and occupy state power (Hossain, 2016). The prosecution began with the release of a government press report in early January 1968 (Hossain, 2016). However, though at the beginning of the trial, Sheikh Mujibur Rahman was not named as an accused, with utter surprise, the Government mentioned his name as the principal accused for the first time in the official press release made on 18 January 1968 (Hossain, 2016). Ayub Khan promulgated an ordinance in April 1968 for a special tribunal to conduct the trial (Hossain, 2016). The Government included the name of Sheikh Mujibur Rahman in the case to 'discredit' him, but on the contrary, it had 'exactly the opposite effect' (Hossain, 2016).

The movement for withdrawal of the *Agartala Conspiracy case* gained momentum with the death of Asad, a student of Dhaka University and the death of Professor Shamsuzzoha, a Professor of Rajshahi University (Hossain, 2016). These events take the shape of 'political protest' at every nook and corner of East Pakistan (Hossain, 2016). Side by side, there was mounting pressure upon the Government to withdraw the *Agartala Conspiracy case,* to be followed by the release of all the political prisoners charged therewith (Hossain, 2016). Against this backdrop, Ayub Khan convened a meeting on 17 February 1969 known as the Round Table Conference and invited the opposition leaders for talks (Hossain, 2016). But, a standoff was created on the question of the participation of Sheikh Mujibur Rahman as the Awami League leaders declined to join the Round Table Conference, keeping him behind bar (Hossain, 2016).

In addition to political efforts, legal efforts were also underway toward releasing Sheikh Mujibur Rahman, including other political leaders arrested in the *Agartala Conspiracy Case*. A legal notice was served upon the Government for their release on the grounds that the Special Tribunal, with its procedures, violated the fundamental right guaranteeing equality before the law and equal protection of law (Hossain, 2016). In response

to this notice, the Government at first agreed to release Sheikh Mujibur Rahman on bail just to ensure his participation in the Round Table Conference, which he denied outright (Hossain, 2016). On the contrary, Sheikh Mujibur Rahman demanded 'unconditional withdrawal of the case and the release of all the accused persons' (Hossain, 2016). At last, finding no other alternative, the Government yielded to the demand of the mass populace and released him on 22 February 1969 by withdrawing the *Agartala Conspiracy case* as it was found 'constitutionally invalid' (Rahman, 2012 and Hossain, 2016).

Thereafter, Sheikh Mujibur Rahman joined the Round Table Conference on 10 March 1969 and presented the famous Six Points Programme, including the Eleven Points Charter of demands of the Students' Action Committee (Rahman, 2012). But he walked out of the Round Table Conference on 13 March since these demands were not accepted by the Government (Rahman, 2012). Therewith, the Round Table Conference met an abrupt ending.

With the breakdown of the Round Table Conference, Ayub Khan met Sheikh Mujibur Rahman and primarily agreed to accept the Six Points Programme (Hossain, 2016). Sheikh Mujibur Rahman, on the plea of Ayub Khan insisting that acceptance of the Six Points Programme would require a great deal of time to work out, assured him that the 'draft amendments could be delivered within three weeks' (Hossain, 2016). Accordingly, the draft of the amendments to the Constitution of 1962 was prepared within the appointed time, and an advance copy was delivered to Ayub Khan on 22 March 1969 (Hossain, 2016). However, the country's situation deteriorated quickly, and there was a 'complete breakdown of the government machinery', turning the country's condition to a 'semi-archaic' one (Chowdhury, 2014). Amid this chaotic situation, after about eleven years of 'almost absolute rule', Ayub Khan confessed that the country was on the 'verge of total collapse' (Chowdhury, 2014), where 'all civil administration and constitutional authority in the country had become ineffective' *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). Failing to tackle the situation, on 24 March 1969, he decided to step down, calling upon the Commander-in-Chief of Pakistan, General Aga Muhammad Yahya Khan, to do the needful in the following words:

> It is your legal and constitutional responsibility to defend the country not only against external aggression but also to save it from internal disorder and chaos. The nation expects you to discharge this responsibility to preserve the security and integrity of the country and to restore normal, social, economic and administrative life *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139).

On the following day, Ayub Khan requested the countrymen to 'appreciate the delicate situation' and assist their 'brethren in the defence forces in every conceivable manner to maintain law and order' *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). Yahya Khan premised his position on this declaration of Ayub Khan made on 24 March 1969, and proclaimed Martial Law throughout the length and breadth of the country and assumed the powers of the Chief Martial Law Administrator (CMLA) *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). Thereupon, he abrogated the Constitution, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers ceased to hold office with immediate effect *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). Existing laws and Courts were, however, preserved with the proviso that no writ or other order could be issued against the Chief Martial Law Administrator (CMLA) or any person exercising powers or jurisdiction under the authority of the CMLA *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139).

A grotesque event took place. On 31 March 1969, General Yahya Khan, in addition to his being the CMLA, assumed to himself the office of the President of Pakistan, though the same ceased to exist with the proclamation of Martial Law *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). This was stipulated in article 3(2) of the *Provisional Constitutional Order* issued on 04 April 1969 *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). Under this *Provisional Constitutional Order*, the Constitution of 1962, was by and large restored, and it was provided that the country would be governed 'as nearly as may be' in accordance with the Constitution of 1962 subject to the Proclamation of Martial Law and any Regulation or Order that would be made from time to time by the Chief Martial Law Administrator *(Provisional Constitution Order 1969 and Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). After assuming the total powers of the country, General Yahya Khan committed himself to the transfer of power to the

elected representatives of the people' (Hossain, 2016). To this end, he held a series of bilateral talks with the political leaders in which Sheikh Mujibur Rahman proposed the setting up of a constituent assembly to be formed with the representatives who would be elected on the quantum of population following the principle of universal adult franchise (Hossain, 2016). Yahya Khan conceded to this proposal (Hossain, 2016).

Accordingly, the *Legal Framework Order* was announced on 31 March 1970, which contained five principles regarded as the 'minimum requirements for a united Pakistan' (Chowdhury, 2014). Among these principles, principle No. 5 outlined that the distribution of power between the centre and the province would be designed in a way which 'must' yield 'maximum degree of autonomy' to the province, consistent with giving the central Government adequate power to discharge its federal responsibilities' (Chowdhury, 2014). The *Legal Framework Order* allocated 169 seats for East Pakistan in the National Assembly, which was to be comprised of 313 members and 310 seats for the East Pakistan Provincial Assembly (Chowdhury, 2014). The 'first and last genuine' general elections took place in united Pakistan on 07th December 1970, in which Awami League secured 167 seats in the elections of the National Assembly, a clear majority to form the Government and 288 seats in the Provincial Assembly to form a provincial government(Chowdhury, 2014 and Rahman, 2012).

On 03rd January 1971, Sheikh Mujibur administered the oath to the representatives on the Race Course Maidan (Suhrawardy Udyan) with a mindset that the Constitution would be framed based on the Six Points Programme (Rahman, 2012). In the meantime, Sheikh Mujibur Rahman was elected the Leader of the majority Party in the House (Rahman, 2012). On 05 January, Zulfiqur Ali Bhutto agreed to form a coalition government at the Centre with the Awami League. To implement it, he came to Dhaka on 28 January 1971 for a discussion with Sheikh Mujibur Rahman, but the three-day discussion ended with no result (Rahman, 2012). On 13 February, Yahya Khan declared that the meeting of the National Assembly would be held on 03 March at Dhaka, but to the utter frustration of all, Zulfiqur Ali Bhutto proposed for transfer of power to the majority Party of each Wing of Pakistan (Rahman, 2012). Sheikh Mujibur Rahman criticised this demand as unreasonable and therefore unacceptable. He emphasised that the power should be transferred to the Awami League, which was the largest elected party in Pakistan (Rahman, 2012). Under this situation, Yahya Khan postponed the meeting of the National Assembly *sine die*. This was responded to by a sharp reaction on the part of the people of East Pakistan by calling a hartal on 03rd March 1971(Rahman, 2012).

So, apparently, the country came under the grip of tension. On 07th March 1971 made a historic speech in the Suhrawardy Udyan, which included a full narrative of the historical background of Pakistan, emphasising the torture, killing, and discrimination at the hands of the Pakistani Military Junta, who occupied power for most of the time since the creation of Pakistan *(Constitution of Bangladesh*, Fifth Schedule). He very delicately and emotionally expressed the constitutional position of the people of East Pakistan, expressed through their votes cast in the general elections of 07th December 1970 *(Constitution of Bangladesh*, Fifth Schedule). At the end of his speech, he declared with this powerful voice that the struggle at that time was a 'struggle for emancipation' and 'struggle for independence' *(Constitution of Bangladesh*, Fifth Schedule).

Against this backdrop, Yahya came to Dhaka. To hammer out a suitable solution to the question of transfer of power, the Mujib-Yahya dialogue started on 16th March 1971 and continued to 24th March 1971, reaching no solution (Rahman, 2012). On the eve of leaving Dhaka for West Pakistan, Yahya signed the blueprint of the notorious Operation Search Light, signalling an army crackdown on the unarmed and innocent civilians of East Pakistan (Rahman, 2012). Following this, the Pakistan Army started killing the unarmed civilians from that night to create one of the worst genocides in human history. As a result, Sheikh Mujibur Rahman declared the independence of Bangladesh on that very night at 12.20 am (Rahman, 2012).

The Government of Pakistan responded to this declaration by arresting Sheikh Mujibur Rahman from Dhanmondi residence at around 1.30 AM on that very night and took him to West Pakistan, where he was released after Bangladesh became independent through a 'historic struggle for national liberation' on 16th December 1971 (Rahman, 2012).

An all-out war continued against the Pakistani Army of occupation for a long period of nine months, which caused the deaths of nearly 30 lacs martyrs, violated millions of women and destroyed wealth and properties

of uncountable worth. During the continuance of the war, the elected representatives of the general elections of 1970 issued *Proclamation of Independence* on 10th April 1971 and formed the provisional government for Bangladesh on 17th April 1971 electing Sheikh Mujibur Rahman as the President of Bangladesh, Syed Nazrul Islam as the Acting President, the President being imprisoned in West Pakistan while Tajuddin Ahmad as the Prime Minister (Hossain, 2016). It adopted the declaration of independence issued by Sheikh Mujibur Rahman before his arrest between the night of 25th and 26th March 1971 (Hossain, 2016). On the same day, the Constituent Assembly was formed with the Bengali Members elected to the National Assembly and the Provincial Assembly (Hossain, 2016). After independence, on his being released from the Mianwali jail in West Pakistan on 08 January 1972, Sheikh Mujib returned to Bangladesh on 10th January 1972 (Hossain, 2016). On this afternoon, Sheikh Mujibur Rahman was given a huge public reception at the Suhrawardy Udyan, where he was welcomed 'with respect and affection' as the 'Father of the Nation' (Hossain, 2016). Thereafter, on the following day, Sheikh Mujibur Rahman issued the *Provisional Constitution of Bangladesh Order* 1972, which, *inter alia*, provided for a parliamentary form of government and establishment of a High Court for the newly constituted country *(Provisional Constitution of Bangladesh Order* 1972, articles 5, 6, 9 & 10). Then the process of making a constitutional framework started with the passing of the *Constituent Assembly of Bangladesh Order* by fixing the date for its meeting on 10th April 1972 (Hossain, 2016). A thirty-four-member Constitution Drafting Committee was formed with Dr Kamal Hossain as the Chair (Hossain, 2016). Within seven months, drafting the Constitution was completed and was adopted by the Constituent Assembly on 04 November 1972 (*Constitution of Bangladesh*, Preamble and Hossain, 2016). Finally, the *Constitution of Bangladesh* comes into effect from 16th December 1972 *(Constitution of Bangladesh*, article 150(1). However, it was provided that the executive and legislative power of the Republic would be governed by the provisions of the *Provisional Constitution of Bangladesh Order* 1972 until the day upon which the Parliament would first meet pursuant to the provisions of the Constitution *(Constitution of Bangladesh*, article 150(1). Since then, the *Constitution of Bangladesh* has been in force, though it was abrogated during the Martial Law regimes imposed by General Ziaur Rahman and General HM Ershad. Notably, the period of 2007 to 2009, when an extra-constitutional force backed by the Army, governed the country under the banner of the Caretaker Government headed by Fakhruddin Ahmed.

The salient features of the *Constitution of Bangladesh* include the Fundamental Principles of State Policy without judicial protection, a bunch of fundamental rights under the heading of Fundamental Rights with judicial protection, the parliamentary and unitary form of government and independence of the judiciary, the Supreme Court being at the head with the power of judicial review, including the power to do complete justice.

5.0 Findings and Conclusion

The foregoing discussion on the historical development of the constitutional law of Bangladesh has been overwhelmingly influenced by its respective constitutional assemblies. It finds that the Constituent Assembly for the Dominion of India was very successful in presenting a well-written Constitution for India in a very short span of time. On the other hand, the constitution-making process in the Dominion of Pakistan was put to an impasse due to the palace clique orchestrated by the power mongers spearheaded by Justice M Munir, the Chief Justice of erstwhile Pakistan and his clung. These events perverted the constitutional law journey of the Dominion of Pakistan and made it a 'laughing stock' *(Asma Jilani v Government of Punjab*, 1972 PLD (SC) 139). The State power grabbers occupied State powers for a long time until it was 1971, when Bangladesh liberated itself from the shackles of the Pakistani army of occupation through a bloody war of independence. However, thereafter, the Constituent Assembly formed for the adoption of the *Constitution of Bangladesh* successfully offered the countrymen a fine written constitution. This chapter also brings to light that different *Acts* of constitutional importance passed during the British regime also contributed a lot to the development of the constitutional law of these countries, whilst they had been under the British colonial regime.

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