

## The Role of Judiciary in Protecting Citizens' Rights and Upholding Constitutionalism during Emergency: Bangladesh Perspective

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**Abstract:** The Constitution of Bangladesh has entrenched the code of constitutional supremacy and attributed the state goal of social justice by ensuring rule of law, fundamental human rights, and the standards of equality, justice, and human dignity. But the executive has breached these constitutional commitments by declaring state emergency in four situations; the most recent of which was in 2007. This emergency regime was an extraordinary situation in the politics of Bangladesh. It suspended people's fundamental rights and curtailed the judiciary's protective role by enacting the Emergency Power Ordinance 2007 (*hereinafter* EPO) and the Emergency Power Rules 2007 (*hereinafter* EPR). Against this backdrop, this paper will examine to what extent the judiciary has performed its rightful duty of protecting citizens' rights and upholding constitutionalism. To this end, some leading cases will be analyzed to examine the role of the judiciary to protect the rights of the citizens and to uphold constitutionalism. This study finds that the High Court Division (*hereinafter* HCD) often expressed self-confidence through progressive interpretation of the constitution of Bangladesh to protect the rights of the citizens and to uphold constitutionalism while the Appellate Division (*hereinafter* AD) played a conservative role and often negotiates the law with the executive during the extra-constitutional regime.

**Keywords:** Emergency, EPO, EPR, Citizens' Rights, Constitutionalism, Judicial Activism.

### 1. Introduction

The Constitution of Bangladesh has been an unconventional manuscript based on the utmost sacrifices of the people who paved the way for the independence of Bangladesh.<sup>1</sup> The very birth of Bangladesh in 1971, following a nine-month historic struggle for national liberation, conveys its people's deep commitment to the value of

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<sup>1</sup> The Constitution of the People's Republic of Bangladesh was adopted on 4 December and entered into force on 16 December 1972. See for details, Abul Fazl Huq, 'Constitution-making in Bangladesh' (1973) 46(1) Pacific Affairs 59-76.

fundamental human rights and constitutionalism, who had long suffered the evils of social injustice and military rule. This Constitution has adopted the code of constitutional supremacy and attributed the state goal of social justice by ensuring rule of law, fundamental human rights, and the standards of equality, justice, and human dignity. This document not only provides for fundamental rights<sup>2</sup> but also includes the principles of social justice<sup>3</sup> which provides the normative framework of the government policy and affects the lawmaking procedure. It's worth noting that the 1972 Constitution of Bangladesh did not include any provisions for declaring a state of emergency. This notable exclusion was presumably the result of misuse of emergency provisions in our predecessor Pakistan's Constitution. The constitutional provisions allowing the state of emergency were initially adopted through a constitutional amendment in 1973.<sup>4</sup> The President is given the power in Article 141A to proclaim a state of emergency for one hundred and twenty days if he is 'satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war, external aggression, or internal disturbance'.<sup>5</sup> However, the proclamation of the state of emergency shall require for its validity the prior counter signature of the Prime Minister.<sup>6</sup> A proclamation of emergency shall expire after one hundred and twenty days if it has not been approved by the Parliament before the end of that period.<sup>7</sup> The invocation of emergency has two legal effects. First, the state may enact any law or take any executive action in violation of the fundamental rights guaranteed in Articles 36, 37, 38, 39, 40, and 42.<sup>8</sup> Second, the President may announce that the right to have certain fundamental rights enforced in court is suspended.<sup>9</sup> Surprisingly, the constitutional clause allowing the suspension of specific fundamental rights has only been applied during the first (1974) and fourth (2007) emergencies.<sup>10</sup>

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<sup>2</sup> The Constitution of the People's Republic of Bangladesh, 1972, Part II: Fundamental Rights

<sup>3</sup> Ibid, Part II: Fundamental Principles of State Policy

<sup>4</sup> The Constitution (Second Amendment) Act, 1973 (Act No XXIV of 1973)

<sup>5</sup> The Constitution of the People's Republic of Bangladesh, 1972, Clause 1 of Article 141A

<sup>6</sup> Ibid, proviso to clause 1 of Article 141A

<sup>7</sup> Ibid, Clause 2(C) of Article 141A

<sup>8</sup> Ibid, Article 141B

<sup>9</sup> Ibid, Article 141C

<sup>10</sup> Ridwanul Hoque, 'The Recent Emergency and The Politics of The Judiciary in Bangladesh' (2009) 2 NUJS Law Review 183-203

Bangladesh has been in four situations of emergency. The most recent of which was proclaimed on 11 January 2007 by the then interim government.<sup>11</sup> The government proclaimed the emergency because of existing political conflicts ahead of scheduled general election. Unfortunately for the reason of the emergency, the general election was postponed for two years. Following the proclamation of the state of emergency, the EPO and the EPR were enacted. Many fundamental rights have been suspended by both the EPO and the EPR.<sup>12</sup> During the emergency, the judiciary of our country had to face some stress as the protective function of the judiciary has also been curtailed under the EPO and the EPR. However, the judiciary tried to protect the fundamental rights of the citizens and to uphold constitutionalism. Without any doubt, the judiciary was not as successful as the expectation from it.<sup>13</sup> In this backdrop, this paper will examine to what extent the judiciary has performed its rightful duty of protecting citizens' rights and upholding constitutionalism. This paper will also focus on how the judiciary dealt with government interference with people's liberty and constitutional principles during the emergency, as well as how it reacted, if at all, to the emergency itself, by commenting on some decisions of the Supreme Court of Bangladesh. Analysis of some leading cases will express that the HCD of the Supreme Court of Bangladesh often appears self-confident through progressive interpretation of the provisions of the constitution of Bangladesh to protect citizens right and to uphold constitutionalism while the AD played a conservative role and often negotiates the law with the executive during the extra-constitutional regime.

## 2. Research Methodology

This study follows the qualitative method of research and the descriptive method is used to explain and analyze the information to accomplice the aim of the study. As a primary source, the study refers to different provisions of the EPO, the EPR, the Constitution of Bangladesh and the judgments of the Supreme Court of Bangladesh relating to the subject matter of the study. At the same time, the study collects secondary information from scholarly articles, international instruments, newspapers, and websites.

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<sup>11</sup> Ibid

<sup>12</sup> *Moyezuddin Sikder v State* [2008] 60 DLR AD 82.

<sup>13</sup> Md. Milan Hossain, 'The Role of Subordinate Judiciary in Enforcing Citizens' Rights: Bangladesh Perspective'(2020) 7 (2) International Journal of Human Rights and Constitutional Studies 84-99.

### 3. Emergency Provisions in Bangladesh

Emergency means one kind of unexpected occurrence when immediate action becomes necessary because the security of a state is more important than the liberty of any individual. In the words of the Black Law Dictionary, an emergency can be understood as a ‘situation which requires quick action and immediate notice as such a situation causes a threat to the life and property in the nation’. According to it, a situation of emergency arises due to the failure of the government machinery which demands immediate action from the authority. The 1972 Constitution of Bangladesh did not include any provisions for declaring a state of emergency. This notable exclusion was presumably the result of misuse of emergency provisions in our predecessor Pakistan’s constitution. The constitutional provisions allowing the state of emergency were initially adopted through a constitutional amendment in 1973.<sup>14</sup> The President is given the power in Article 141A to proclaim a state of emergency for one hundred and twenty days if he is ‘satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war, external aggression, or internal disturbance’.<sup>15</sup> However, the proclamation of the state of emergency shall require for its validity the prior counter signature of the Prime Minister.<sup>16</sup> A proclamation of emergency shall expire after one hundred and twenty days if it has not been approved by the Parliament before the end of that period.<sup>17</sup> During emergency the state may enact any law or take any executive action in violation of six fundamental rights namely freedom of movement<sup>18</sup>, freedom of assembly<sup>19</sup>, freedom of association<sup>20</sup>, freedom of thought and conscience<sup>21</sup>, freedom of profession or occupation<sup>22</sup> and rights to property<sup>23</sup> as guaranteed in the constitution.<sup>24</sup> At the same time the President may also announce that the right to have certain fundamental rights enforced in court is suspended.<sup>25</sup> Surprisingly, the constitutional clause allowing the suspension of specific

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<sup>14</sup> The Constitution (Second Amendment) Act, 1973 (Act No XXIV of 1973)

<sup>15</sup> The Constitution of the People’s Republic of Bangladesh, 1972, Clause 1 of Article 141A

<sup>16</sup> Ibid, proviso to clause 1 of Article 141A

<sup>17</sup> Ibid, Clause 2(C) of Article 141A

<sup>18</sup> Ibid, Article 36

<sup>19</sup> Ibid, Article 37

<sup>20</sup> Ibid, Article 38

<sup>21</sup> Ibid, Article 39

<sup>22</sup> Ibid, Article 40

<sup>23</sup> Ibid, Article 42

<sup>24</sup> Ibid, Article 141B

<sup>25</sup> Ibid, Article 141C

fundamental rights has only been applied during the first (1974) and fourth (2007) emergencies.<sup>26</sup> However, the Constitution is silent on whether the President's satisfaction as to the existence of reasons warranting imposition of emergency is justifiable.<sup>27</sup> Furthermore, the Constitution remained evasive as to how long the state of emergency can last, particularly when Parliament is dissolved for an extended period, as was the case with the 2007 Emergency.

#### **4. Incompatibility of the EPO and the EPR with Constitutional Principles**

Following the proclamation of the state of emergency on 11 January 2007, the interim government enacted the EPO and the EPR. Many fundamental rights such as freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, freedom of expression, freedom of profession and occupation, rights to property, and protection of home and correspondence have been suspended by the EPO and the EPR.<sup>28</sup> EPR, in section 3, makes it illegal to form any kind of organization, procession, demonstration, or rally without specific permission from the government, and anyone found guilty of conducting a meeting or demonstration receives a sentence of two to five years in prison. Furthermore, the publication of any criticism of the government's operations that the authorities perceive to be 'provocative' in media is prohibited by section 5 of the same rule.<sup>29</sup> Thus all political activities were banned. Political parties were forced to close their offices. The EPR has also empowered the member of the law and order maintenance force to arrest any person on suspicion without a warrant.<sup>30</sup> It also authorizes the 'law and order maintaining forces' to use force to carry out any order given under the Rules giving the government protection from prosecution.<sup>31</sup> Above all the EPR asserts that any accused person shall not ask for bail from any court or tribunal, if any inquiry, criminal investigation, or trial is ongoing against him under sections 14 and 15 of the Rules.<sup>32</sup> Thus, by abolishing the protection against arrest and imprisonment, these laws effectively legalize arbitrary arrests and indefinite incarceration.

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<sup>26</sup> Hoque, (n 10)

<sup>27</sup> Ibid

<sup>28</sup> *Moyezuddin Sikder v State* (n 12)

<sup>29</sup> Mahfuz Anam, 'Gagging the Media is Not the Answer', Daily Star, (Dhaka) 12 January 2007.

<sup>30</sup> The Emergency Power Rules 2007, Section 16(2)

<sup>31</sup> Ibid, Section 20

<sup>32</sup> Ibid, Section 19d

The government, later on, changed the EPR and inserted section 18A which states that the government or the Anti-Corruption Commission may, in the public interest, withdraw any case from any Court of Session Judge, or Court of Magistrate, or Court of Special Judges, or Tribunal in any part of the country and transfer the same to a Court of Special Judges for trial, regardless of the provisions of other laws or the rules in question.<sup>33</sup> In addition, section 18A sub section 2 specifies that any such transferred matter must be tried under the EPR and the Criminal Law Amendment Act, 1958. According to section 18B sub section 2, the Special Judge has the authority to try any case involving any offences covered by the EPR. The territorial jurisdiction of a Court of Special Judges has been extended to include the entire country of Bangladesh. Section 21A sub section 1 gives the government the authority to enact any administrative measures necessary to help with inquiries, investigations, trials, and other proceedings relating to offenses under the EPR. This is effectively a blank check for the police, armed forces, and paramilitary forces like the Rapid Action Battalion (RAB) and the Bangladesh Rifles to conduct arbitrary arrests and then accuse them of false accusations while they are detained. The police have now included section 16(2) to any complaints as a default; imply that the alleged offender has broken the provisions of the EPR. The accused is subject to a summary inquiry and trial under these Rules. Courts must complete all legal actions, including trial and sentencing, within 45 days of the start of the trial, unless ‘unavoidable circumstances’ necessitate a 30-day extension. In the context of Bangladesh, the completion of the inquiry and subsequent trial in 45 days raises several concerns about the proceedings’ legitimacy as police investigations, prosecutions, and trials typically take 5 to 7 years due to slowness, political meddling, and corruption.

The EPO and the EPR contain provisions that violate many national, municipal, and international human rights norms and standards. Article 35(5) of the Bangladesh Constitution, for example, forbids torture. It's worth noting that arbitrary detention is illegal under international law. The right to liberty and security a person is guaranteed in Article 9 of the International Covenant on Civil and Political Rights, to which Bangladesh is a signatory. Article 9(4), in particular, states that people arrested or detained have the right to bring a case before a court as soon as possible to have the lawfulness of their custody reviewed and their release ordered if the imprisonment is unlawful.

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<sup>33</sup> Ibid, Section 18A (1)

## 5. Role of Judiciary in Protecting Citizens' Rights and Upholding Constitutionalism during Emergency

Through both traditional injury lawsuits and public interest litigations, citizens, as well as legal actors, have resorted to the instrumentality of legal actions to protect fundamental rights and to ensure constitutionalism. Public interest jurisprudence has played an important role in changing the impression of the judiciary to the people and civil society.<sup>34</sup> In an early case of *Moyezuddin Sikder v. State*<sup>35</sup>, Sikder was charged under a law covered by the EPR. He made an application for bail to the HCD. The government argued that the HCD had no jurisdiction to deal with the petition due to Rule 19 Gha of the EPR. The HCD held that to grant bail to the accused is its inherent power and this judicial authority cannot be abolished by law even during a national emergency. HCD reasoned that the supervisory authority of the Supreme Court cannot be foreclosed by implication. There is no necessity to say that it was a bold decision by the HCD against the emergency government where the principle of rule of law was upheld. However, the AD overruled the decision of the HCD. The AD interpreted the term 'any court' as mentioned in Rule 19 Gha of the EPR in a narrow sense and argued that there was a legislative intention to oust the power of the HCD to grant bail concerning the offenses covered by EPR. There is no necessity to say that the AD avoided its judicial duty of ensuring justice under the head of positivistic legal interpretations in this case.

Though the AD set a jurisdictional barrier in granting bail in offences covered by the EPR, the HCD innovatively granted bail in a few EPR cases through its inherent power provided under section 561A of the Code of Criminal Procedure, 1898 to ensure the ends of justice. In the case of *AKM Reazul Islam and others v. State*<sup>36</sup>, the HCD held that the Court should intervene to serve the cause of justice when no remedy in law is available to the accused. This decision shows that a court can find a way to ensure citizens' liberty even in restrictive situations. In this case, the HCD was liberal in its decision whereas the AD was restrictive in securing the liberty of the citizens of the country. The AD was not progressive to uphold constitutional values.

<sup>34</sup> Abbott E, 'Law, Emergencies, And The Constitution: A Review of Outside The Law: Emergency And Executive Power' (2010) 7 Journal of Homeland Security and Emergency Management

<sup>35</sup> *Moyezuddin Sikder v State* [2008] 60 DLR AD 82.

<sup>36</sup> *AKM Reazul Islam and others v State* [2008] 13 BLC HCD1

Another important case, *Bangladesh v. Sheikh Hasina*,<sup>37</sup> expressed the judges' dilemma during a state of emergency. In this case, the AD allowed the retrospective operation of the provisions of EPR concerning the trial of some offenses. Undoubtedly, this decision held by the AD was controversial too. In this case, the government initiated the trial of a criminal charge against the petitioner involving allegations that precede the promulgation of emergency. The petitioner challenged the legality of a governmental order under the EPR. Due to that governmental order, Hasina was deprived of the right to seek bail. The EPO authorized the government to take measures to conduct effectively any investigation, trial, and appeal relating to any offense during the Emergency.<sup>38</sup> The EPO also stated that any by-laws made in this regard may be given retrospective operation. However, according to Rule 19 E of the EPR, the government may sanction the placement within the ambit of the EPR in any case relating to offenses under certain laws. The HCD observed that the language of these provisions was clear and unambiguous and concluded that the retrospective operation of the by-laws did not authorize the trial of offenses committed before the Emergency. The HCD took Article 35(1) of the Constitution into consideration which prohibits the ex-post facto laws and stated that the curtailment of judicial power by administrative legislation was unlawful. The HCD concluded that the retrospective operation of the EPR to conduct the trial of pre-emergency offenses was unlawful. Further, the HCD stated that the Rules 10(2), 11, and 19 Gha of the EPR are restrictive in nature and these provisions which oust its power to grant bails were unconstitutional as these provisions were violating the constitutional right to life and the guarantee of equal protection of the law.<sup>39</sup> Therefore, the court stated that the emergency has not curtailed the power and authority of the Court to deal with the bail and other matters following existing laws in force.<sup>40</sup>

In this case, the HCD took the right-based approach and the reasoning was attractive. The HCD was willing to uphold the constitutional values in this case. Undoubtedly, in this case, the court played its judicial role as to its oath to preserve, protect, and defend the Constitution. But it was unfortunate that the AD followed completely a different

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<sup>37</sup> *Bangladesh v Sheikh Hasina* [2008] 60 DLR AD 90

<sup>38</sup> Hoque, (n 10)

<sup>39</sup> *Bangladesh v. Sheikh Hasina* (2008) 60 DLR (AD) 90

<sup>40</sup> Hoque, (n 10)

path. The AD observed that the prohibition referred under Article 35(1) as to the operation of ex-post-facto laws did not apply to procedural law, but only to substantive law. The AD stated that as the government applied the EPR only for the trial of an offense and did not introduce any new offense in retrospect, there has been no violation of ex-post facto criminal laws as stated in the constitution.<sup>41</sup> But the interpretation is open to several points of view. First, the law did not clearly express the retrospective operation of the EPR even for the mere trial of offenses. Second, the AD ignored an emphasized argument given by the HCD that the retrospective operation of the EPR effectively deprived the accused to seek bail under existing statutes. The HCD argued that this right to seek bail cannot be denied by legislation that is subordinate to the existing laws. The interpretation given by the AD says that the accused does not have a right to seek bail. According to its interpretation, it is just a privilege. Without any doubt, this interpretation given by the AD does not uphold the constitutional values relating to equal protection of the law and human dignity. It is quite clear that the interpretation of the HCD in this regard was liberal enough to uphold the constitutional values whereas the interpretation of the AD was conservative. There is no necessity to say that the principle of constitutionalism was ignored by the AD in this case.

One of the most important cases regarding constitutionalism during the emergency was Advocate Sultana Kamal and others v. Bangladesh.<sup>42</sup> The constitutionality of certain provisions of the EPO and the EPR was challenged by three citizens of the country in this case. The state of emergency as such was not challenged in this case. A point to be noted is that the constitutionality of the EPO as a whole was not challenged in this case. Probably the litigators were waiting for the right time to do such. State of emergency as such and the constitutionality of the EPO as a whole were challenged in late 2008.

The judgment was delivered on December 4, 2008. Section 5 of the EPO which precluded judicial review of any executive order issued under any emergency laws was invalidated by the court. At the same time, Rules 11(3), 19Gha, and 19Uma of the EPR that either limited or pulled off the judicial power to grant bails, hear appeals from interim lower court orders, and suspend sentences were declared unlawful by the court. Undoubtedly it was a bold decision by the court. There is no necessity to say that the political situation encouraged the court to stand against the emergency government at

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<sup>41</sup> Ibid.

<sup>42</sup> *Advocate Sultana Kamal & Others v Bangladesh* [2008] W.P. No. 4216 SC (unreported)

that moment. The court observed that an emergency cannot continue for an indefinite period under the constitutional provisions of Bangladesh. The question of whether the President's satisfaction with the existence of reasons for imposing an emergency is subject to judicial review was also addressed by the court. Fortunately, it seems to answer the question in the affirmative. There are a series of decisions stating the President's satisfaction as to the need for promulgating an Ordinance when Parliament is not in session is justifiable. The validity of the proclamation of emergency can be challenged on some grounds. If there is no satisfaction for the proclamation of emergency at all or that it was wholly in bad faith or based on totally irrelevant or extraneous grounds the validity of the proclamation of emergency can be challenged by judicial review.

Further, the court stated that the right to petition for bail is a fundamental right, which cannot be violated even during the war. The court observed that the proclamation of emergency enables the state to promulgate laws affecting some fundamental rights but the Supreme Court has the legal power to review the constitutionality of those laws or actions taken by the government even in a time of emergency. This observation has thus further advanced the observation of the HCD in Sheikh Hasina that the State bears a continuous, paramount responsibility not to violate fundamental rights while making laws. It should be mentioned that the government appealed to the AD against the above decision of the HCD.

In the case of *M. Saleem Ullah and Others v. Bangladesh*<sup>43</sup>, the constitutionality of the EPO and the EPR was challenged by some public spirited litigators. In this case the HCD issued a rule nisi on 14 July 2008, asking the government to explain why the proclamation of the state of emergency and the suspension of fundamental rights should not be declared unconstitutional. In this case, the HCD also directed the government to provide information as to how and when it was planning to hand over powers to elected representatives. The HCD also observed that the promised handing over of power must be transparent.

In the case of *Md. Idrisur Rahman v. Bangladesh (2008)*<sup>44</sup>, the High Court Division adjudged unconstitutional the Supreme Judicial Commission Ordinance 2008. The

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<sup>43</sup> *M. Saleem Ullah and Others v Bangladesh* [2008] W.P. No. 5033 SC (unreported)

<sup>44</sup> WP No. 3228 of 2008

HCD observed that Supreme Judicial Commission Ordinance 2008 breached the principle of judicial independence by providing for a Commission with majority members from outside of the judiciary. In this case, the HCD stated that the principle of judicial independence is the basic structure. So, the ordinance violated constitutional values.

In the decision of the case of *Md. Shamsul Hoque and Another v. Bangladesh*<sup>45</sup>, the Court declared the Contempt of Court Ordinance, 2008 unconstitutional. The reasoning behind the decision of the case was not only for violating the principle of judicial independence but also for not being within the President's power provided under the constitution to make such a constitutive ordinance during the tenure of the caretaker government.

## 6. Concluding Remarks

The 2007 emergency regime, like past emergency regimes, was an extraordinary situation in the politics of Bangladesh. This state of emergency has a negative impact on Bangladesh's courts. Citizens' rights were curtailed, and the judiciary's protecting function was reduced, under the 2007 Emergency regime. In such a circumstance, the judiciary's proper role should be to protect the rights of the citizens and to uphold the constitutionalism. The finding of this paper regarding the success of the judiciary to protect the citizens' rights and to uphold constitutionalism is a complex result. It will not be convenient to say that the judiciary failed to protect citizens' rights and to uphold constitutionalism. Rather it will be convenient to say that the judiciary was not as successful as to the expectation of the people of the country. While the HCD of the Supreme Court has used a dynamic interpretation of the Constitution in most, if not all, cases involving emergency laws, the AD has used a formalistic and conservative method of constitutional construction in emergency cases, including cases involving preventive detentions, and has occasionally overstepped its bounds in the HCD judicial freedom. Even when it comes to matters of fundamental rights and constitutionalism, the stance of AD is at variance with its past style of legal interpretation.<sup>46</sup> The AD unraveled its policy preference for not intervening with the administration in practically

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<sup>45</sup> *Md. Shamsul Hoque and Another v. Bangladesh*, WP of 2008 (judgment of 24 July 2008)

<sup>46</sup> Ridwanul Hoque, 'Problems of Judicial Affairs in Bangladesh' 11 *Development and Cooperation* 426-27 (2007).

every decision until the very last hours of the emergency period. It's unclear whether the AD of the Supreme Court of Bangladesh sought to give the allegedly extra-constitutional emergency government some legal legitimacy to support its ostensibly noble mission of institutionalizing democracy, or whether it succumbed to external pressure from the military-backed government that imposed the Emergency.