

FOCUS

Review Judgement in Halima Khatun Case

by Abdul Matin Khushru

In their judgement pronounced on 4 January 1978 their Lordships stated, "the Constitution of Bangladesh, 1972, stands subordinate to the Proclamations, Regulations or Orders as may be made by the President by virtue of assumption of power and as such the Constitution is no longer the supreme law of the country." This judicial pronouncement of the apex court made the Constitution subordinate to the proclamation. So, if this judgement is not overruled by review, it will continue to stand as an obstacle towards the independence of the judiciary and democratic development.

THE Constitution of Bangladesh came into operation in December 1972. It not only embodied the principles of constitutionalism, rule of law and human rights. It made specific provisions in articles 44 and 102 for realization and enforcement of those as well. It is undeniable that a strong judiciary is the best safeguard against violation of, and best protection for preservation of, human rights. Article 7 of the Constitution provides for the supremacy of the Constitution i.e. for constitutional governance of the state and the guardianship of the Constitution was given to the Supreme Court. It is a matter of historical fact that judiciary can flourish only in a truly democratic system of government which can succeed in an environment of civility and respect. Compromise, not confrontation; accommodation, not acrimony must be the words we should use to describe democracy which guarantees human rights and transparency in all spheres of administration.

Bangladesh as a member of the United Nations is committed to All Human Rights for All. So, it has become an imperative to effectively implement the Vienna Declaration and Plan of Action adopted at the world

conference of human rights held in June 1993. However, proper and effective mechanisms are yet to be evolved in this country. But due to lack of awareness, economic poverty and effective mechanisms in the legal field the conditions of enjoyment for human rights could not be achieved and in many cases stand as an impediment in the way of proper protection and upholding human rights. For achieving sustainable human development in Bangladesh and realization of a truly democratic society that the diverse forms of deprivation affecting people from all walks of life should be eliminated. The eradication of human rights violations can be possible through the strengthening of the democratic institutions in the country.

Modern civilization is, to a great extent, founded on law and justice. Access to justice is the birth right of every human being without any discrimination like other fundamental rights codified in chapter III of the Constitution.

Since the adoption of the Universal Declaration of Human Rights in December 1948, the international community has made considerable progress towards the promotion and development of transnational jurisprudence of substantive hu-

man rights embodied in a good number of international conventions, global and regional, general and specialized. Effective mechanisms for the enforcement of human rights in the national, regional and international systems of justice are a fundamental requisite as without such mechanisms human rights will remain unfulfilled injunctions in the constitutions or in the regional and international conventions. An impartial judiciary composed of competent judges is the best guarantee of proper administration of justice, and in the final analysis, of defence of human rights.

Judicial activism plays a vital role in bringing in the social transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation. Thus, where the legislature falters, the judiciary corrects. Having been armed

with this power of review, the judiciary comes to acquire the status of a catalyst on change. In the field of *locus standi* also, it is again the judiciary which has enlivened the dead law by sharply deviating from the traditional rule of private interest to public interest litigation.

The question of *locus standi* is now much more liberal than before. In a recent case *Mohiuddin Farooque vs Government of Bangladesh* (July '96), the Appellate Division of the Supreme Court extended the meaning of 'person aggrieved'. The petitioner filed a petition challenging the Flood Action Plan (FAP-20) of the government, which was primarily rejected by the High Court Division on two grounds i.e. (a) non-maintainability and (b) that the petitioner is not a person aggrieved and therefore, had no legal right to file petition for the enforcement of his fundamental right. Finally, the Ap-

pellate Division entertained an appeal against the High Court's decision and held that the petitioner is an aggrieved person and therefore he has *locus standi*. This revolutionary decision upset the long fastened legal knot of standing to a great extent.

In the case of *State vs Deputy Commissioner, Satkhira* (Reported 1993), judicial activism of the High Court Division has been introduced in our jurisdiction for the first time, where, based on a newspaper report, a Bench of the High Court Division issued a *suo moto* rule questioning the legality of the detention of a young boy Nazrul Islam, who was detained in jail for twelve years.

The judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order to settling legal disputes and thus promotes a harmo-

nious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgements.

What matters most, therefore, is the extent to which people have confidence in judicial impartiality. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution". This point has eloquently been expressed by a distinguished Justice of the US Supreme Court:

"The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgements and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are independent

and courageous."

In *Anwar Hossain Chowdhury vs Bangladesh and others 1989 BLD (Special Issue)* the Supreme Court (A.D.) did not hesitate to declare amendment of Article 100 along with its consequential amendment of Article 107 of the Constitution to be *ultra vires* and invalid.

Judiciary is the guardian of law, protector of individual rights and media for balancing the social equilibrium. Unfortunately in Bangladesh, the judiciary came under pressure from the extra-judicial powers at different times. Although Article 7 of the Constitution provides for the supremacy of the Constitution and the guardianship of the Constitution was given to the Supreme Court, in the judgement of *Halima Khatun* (30 DLR (SC) 207) the Appellate Division of the Supreme Court categorically said that the Constitution shall not compete with the proclamation of Marital Law. In their judgement pronounced on 4 January 1978 their Lordships stated, "the Constitution of Bangladesh, 1972, stands subordinate to the Proclamations, Regulations or Orders as may be made by the President by virtue of assumption of power and as such the Constitution is no longer the supreme law of the country".

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ouncement of the apex court made the Constitution subordinate to the proclamation. So, if this judgement is not overruled by review, it will continue to stand as an obstacle towards the independence of the judiciary and democratic development.

Interestingly, I may refer and quote Article 136 of 1917 Mexican Constitution: "This Constitution shall not lose its force or effect, even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein, should become established, through any public disturbance, as soon as the people recover their liberty its observance shall be reestablished and those that have taken part in the government emanating from the rebellion shall be judged in accordance with this Constitution."

Our Parliament may consider amendment of the Constitution in the line of the Mexican Constitution.

I would most humbly like to urge upon our most respected judges of our apex court to kindly see whether the judgement given in the *Halima Khatun* case can be reviewed.

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PN Haksar — That Man of the Moment

PN Haksar is no more. He played an important role as Prime Minister Indira Gandhi's Secretary and Adviser during the crucial years for Bangladesh — 1970-72. Here are some relevant extracts from the writings of Dwarka Nath Chatterjee and Subimal Dutt, both diplomats at that time — which appeared in the collection of articles titled 'PN Haksar: Our Times and the Man' brought out on the occasion of his 75th birthday in 1989 by Allied Publishers Private Limited, New Delhi.

"AFTER the liberation of Bangladesh in 1971, one of the pressing problems for the Pakistanis was to secure without delay the release of about 90,000 Pakistani prisoners of war in Indian custody. Prime Minister Indira Gandhi and PNH, her close adviser in those days, displayed statesmanship of high order. India was careful not to humiliate a vanquished Pakistan in the Simla Agreement. Subsequently PNH negotiated, as the special representative of the Prime Minister, with the Pakistani minister of state for defence and foreign affairs, Mr Aziz Ahmed, the repatriation of the prisoners of war. I happened to know of the hard and proud character of the Pakistani minister, who must have been particularly bitter and touchy after the Pakistani debacle. To my pleasant surprise PNH concluded the talks in Rawalpindi and Delhi with a satisfactory accord, without offending Aziz Ahmed and his team in any way. I have seen some photographs in this connection, showing both Aziz Ahmed and PNH in a highly jubilant and fraternal mood.

Discretion is one of the indispensable qualities a diplomat must have. PNH was a professional diplomat in the Foreign Service, and though later he rose virtually to cabinet rank with other responsibilities, some particularly delicate diplomatic tasks continued to be entrusted to him. Negotiations with Aziz Ahmed had required a certain style which was employed with success. However, in the autumn of 1973 PNH was called upon to undertake a very important mission abroad, in which discretion, credibility, integrity, and diplomatic finesse of the highest order were needed. PNH successfully fulfilled his mission. Discretion forbids me to add anything more....

It is interesting to contrast this indulgent attitude of Prime Minister Indira Gandhi and PNH to a defeated Pakistan with their grim, resolute mood, once they had realized that the extent and rigour of West Pakistani repression in what now is Bangladesh, was not only barbaric *per se*, but that it also posed a grave threat to the security and stability of India. The Revolutionary China of Mao Tse-tung and Chou En-lai remained unmoved by the atrocities the military dictatorship of Pakistan committed against the Bengalis. The Great Capitalist Democracy of America, guided by President Nixon and the future Nobel laureate for Peace, Kissinger, remained an understanding patron of the Pakistani dictator. Other major

countries were interested observers, but they found no reason to intervene. Some Muslim countries had more sympathy for the marauding West Pakistanis than for their Muslim Bengali victims. Meanwhile millions of refugees streamed into Calcutta in an endless flow. After the partition of India in 1947, countless thousands of refugees had been coming from East Pakistan and Calcutta has never recovered from the strain they imposed on an overpopulated, volatile city. This new massive exodus from East Pakistan in 1971 generated great anxiety and also anger. India had to do something. There was clamour for immediate military action. I remember that even Jayaprakash Narayan, who was my guest in Paris in that tense summer of 1971, was in favour of invasion. Unofficial reports from Delhi indicated that even some of our generals — with the notable exception of General (later Field Marshal) Manekshaw — wanted to march into East Pakistan without delay. The political pressure on the Prime Minister for a muscular intervention was mounting dangerously.

However, our Prime Minister had a tight little circle of cool-headed advisers in which, to the best of my knowledge, Haksar was particularly influential. They appraised the situation realistically. At the superpower level, China was imminent: America under Nixon was equally so, even though Kissinger did his best to mislead our Foreign Office. In July 1971 I had learnt, for instance, that Kissinger had assured Foreign Secretary T N Kaul that he would "talk Nixon out of supporting Yahya Khan" adding that Pakistan was of "marginal interest" to the USA. He had also stated that not only was India a stable democracy, but it was also a power capable of "taking on single-handed not only Pakistan but also China." All these remarkable statements, made to beguile India as a prelude to Nixon's diplomatic coup *vis-a-vis* China, damaged Kissinger's credibility, without deceiving PNH and his colleagues.

China and America were in the hostile camp and the European powers were non-committal, even if they deplored the massacres in East Pakistan. On 14 July 1971 President Pompidou had said to me: "France is for peace", while talking about the situation in East Pakistan. I had responded with disarming candour: "France is also for justice". He did not disagree. It was obvious that Pakistan was sheltered by legality and that an Indian invasion of East Pak-

istan would invite international condemnation. Besides, military operations in East Pakistan were likely to bog down unless undertaken in the dry season. As it became increasingly clear that eventually India would have to resort to force, PNH took the lead in helping the Prime Minister to resist pressure for premature military action, while fortifying the diplomatic position of India in the event of war. The first act was to reinforce our links with the Soviet Union (the 20-year Friendship Treaty of August 1971) — and then followed the visits of Prime Minister Indira Gandhi, accompanied by PNH and Foreign Secretary T N Kaul, to the major European countries and Washington. Nixon was not won over, but the international climate was not hostile when India marched into East Pakistan in December of 1971, to make it the independent State of Bangladesh. One may say that in this case PNH had evoked both Clausewitz and Rousseau!

Haksar and India's Foreign Policy by Dwarka Nath Chatterjee

"THEN came the liberation war in East Pakistan in 1971. It was no secret that during those troubled days Haksar and D P Dhar were two of Mrs Gandhi's close advisers, but I had no personal knowledge of their activities. When the war ended in December 1971, those of us whose original homes were in Bangladesh most had collaborated with the Pakistan army during the liberation war. These issues were discussed by the Indian and Pakistani representatives at many sittings held alternately in New Delhi and Islamabad. Haksar represented India at all these discussions. He did not have convinced the other side on all points but they recognised his sincerity. And his sense of humour would often relieve the tension that occasionally developed during discussions.

The two issues which were of intimate concern to Bangladesh were the future of the Pakistani prisoners of war and the Bihar refugees numbering several lakhs: most had collaborated with the Pakistan army during the liberation war. These issues were discussed by the Indian and Pakistani representatives at many sittings held alternately in New Delhi and Islamabad. Haksar represented India at all these discussions. He did not have convinced the other side on all points but they recognised his sincerity. And his sense of humour would often relieve the tension that occasionally developed during discussions.

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