

Review of Martial Law: Thank You Mr Minister

by Ahmed Ziauddin

It is now the turn of the believers of the Constitution, constitutional rule, rule of law, democracy to speak out. Analyse the role of the judiciary *vis-à-vis* Martial Law, contribute find ways to finally rid the Constitution off the ghosts of Martial Law. The Supreme Court can initiate in its own self-cleansing procedure, concerned citizens could start appropriate proceedings and perhaps though difficult, the petitioners of the cases referred to could come forward to introduce review applications. The issues involved are enormously important, as each individual in Bangladesh has stake in working of country's Constitution.

BANGLADESHI Law Minister deserves congratulation for his recent remarks. During the inaugural session of British-Bangla Law Week, organised by Dhaka's British Council to mark the 50th anniversary of Universal Declaration of Human Rights, the Minister urged upon the judges of the Supreme Court to "see whether the judgement given in the Halima Khatun case can be reviewed." This is for the first time minister of a government has made such an appeal since the decision of the case in 1978.

The Appellate Division of the Supreme Court of Bangladesh in the case, *Mrs. Halima Khatun vs. Bangladesh and others 30 DLR (SC) (1978) 207*, declared the "Constitution has lost its character as the supreme law of the country". The Court, composed of Chief Justice Syed A. B. Mahmud Hossain, Justice Kemaluddin Hossain and Justice Fazle Munim, after analysing Martial Law Proclamations, first imposed in August 1995, reached to this conclusion. The Minister has pointed out that "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 call of the Minister will remain indelible outcome of British-Bangla Law Week, which brought together creme de la creme of Bangladesh's legal luminaries. The Minister made his statement in presence of country's Chief Justice.

Halima Khatun case, although it is the jewel in the crown of the cases on Martial Law, a voluminous jurisprudence on Martial Law has developed in Bangladesh. The purpose of this essay is to highlight few more cases on Martial Law decided by the judges in Bangladesh to show that if and when, the Supreme Court conducts any such review, other principles of Martial Law propounded by them must be overthrown as

Background

Since its birth, Bangladesh has undergone turbulent and often tortured periods. The Constitution, adopted within a year of liberation, embodied aspirations of the people, whose hopes were dashed in 1947 with the creation of Pakistan and India and who suffered systematic discrimination over the years of Pakistani rule, culminating in the genocide in 1971. It reflected the long struggle of the people of Bangladesh. It contained principles of democracy, secularism, non-communal politics and guaranteed most of the political rights mentioned in international instruments.

The Constitution introduced parliamentary form of government and economic well-being of the people was secured. It contained provisions to re-organise civil bureaucracy and empowered people by decentralisation of administration with local bodies by persons elected by people to plan, implement and maintain public order. It set-up appropriate mechanism to secure individual rights, with the Supreme Court with authority to control and discipline judicial service and magistrates exercising judicial power. All necessary ingredients, thus, was put in place for a truly free, democratic, liberal and prosperous society.

However, the ideals and novelties of the Constitution

withered away fast, and the process started soon after its coming into force. In first four years of existence, the Constitution was amended as many as four times, and the last, the Constitution's fourth amendment in 1975, essentially took it's heart out. The Constitution became unrecognisable.

Dark Hours of Law

Why legality of the Fourth Amendment of the Constitution was not challenged in a court of law for violating the Constitution, still remains a mystery. The Amendment radically altered the Constitution and produced, what can only be described as an authoritative constitution. It removed much sought after check and balance between the organs of the State and created an all powerful President.

The declaration of Martial Law in the same year put the last nail on democracy's coffin in Bangladesh. The leaders of coup d'état who assassinated the President and carried out a massacre, imposed Martial Law in the country but did not abrogate the Constitution. Most of the provisions of the Constitution was suspended including Supreme Court's power to enforce fundamental rights.

The Minister said: "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... the Appellate Division of the Supreme Court categorically said that the Constitution shall not compete with the proclamation of Martial Law."

As a matter of fact, much before 1978, High Court Judges had begun laying down foundations of Martial Law jurisprudence.

Justice Badrul Haider Chowdhury in *Abdus Shukur Dado vs. The State 28 DLR (1976) 441* made revealing statements about Martial Law. In the case where the petitioner was arrested under Penal Code and Martial Law Regulation, the Judge said: "Martial Law is now known concept of jurisprudence. We have had series of Martial Law in this sub-continent since 1958. Martial Law is proclaimed when normal machinery breaks down and for taking certain corrective measures which are beyond the reach of normal laws. Of necessity certain corrective steps are to be taken and one of it being is the refusal of bail in cases where allegation is made of contravention of Martial Law Regulation."

It should be noted here that the Judge in this case, did not investigate nor took judicial notice or even mentioned any fact to indicate that "normal machinery" of the country had indeed broken down which went "beyond the reach of nor-

mal laws" to correct. In other words, the Judge laid out, timing, circumstances and causes of imposition of Martial Law without taking trouble to check whether in the instant case, the imposition of Martial Law was indeed because of the very reasons enumerated by him.

Next block on the principle of Martial Law was laid in 1977. In a case challenging assessment of income tax pursuant to Martial Law proclaimed by General Yahya Khan of Pakistan in 1969, Justice Shahabuddin Ahmed said in *Mullik Brothers vs. Income Tax Officers 29 DLR (1977) 234*:

"...the very concept of Martial Law is based on the absence or non-existence of the Ordinary legislative machinery because of certain circumstances on which the Constitution of the country has failed to function. The Martial Law is nothing but the expression of the will of the person who holds the supreme power because of his command over the entire armed forces and so long a country is governed by the Martial Law Authorities the wish of the Martial Law Authorities expressed through Orders, Regulations or Notifications is the law of the land simply because there is no other person in the country to oppose or disobey it."

Hence, the Judge ruled: "no Constitutional provision can claim to be sacrosanct and immutable. The present Constitutional provision may, however, claim superiority to any other law other than a Regulation or Order made under the Proclamation."

Regarding Court's authority to question Martial Law actions, the Judge said: "no Court including the Supreme Court has any power to call in question in any manner whatsoever or declared illegal or void the Proclamation or any Regulation or order". He confirmed: "there is no vagueness or ambiguity... as regards the total ouster of jurisdiction of the Court Division."

The Judge was making the decision at a time when in Pakistan already the court declared Yahya Khan's regime illegal (*PLD 1972 SC 139*), though Bangladesh was under Martial Law. Equally, to suggest that there was "no other person in the country to oppose or disobey it" (Martial Law), also contradicts with the facts on the ground. Even before 1969, when Yahya Khan declared Martial Law, the people of both wings of Pakistan waged mass upsurge against the government and since, his military writings were regularly flouted in Bangladesh. If Yahya Khan had his way through Martial Law, there would have been no Bangladesh.

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By then, Appellate Division of the Supreme Court was approached in the case pointed out by the Minister. In *Halima Khatun vs. Bangladesh 30 DLR (1978) 207*, Justice Fazle Munim made definitive interpretation of Martial Law, its scope, application and legal status in Bangladesh. The case raised questions of the Abandoned Property Order of 1972 and the Court had to determine question of conflict between the Constitution and Martial Law.

The Judge declared, Martial Law "Proclamation made the Constitution of Bangladesh, which was allowed to remain in

force, sub-ordinate to Proclamation and any Regulation or Order as may be made by the President in pursuance thereof."

Referring Martial Law decrees, the Judge said: "It may be true that whenever there would be any conflict between the Constitution and the Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not seem to concede, such superiority of the Constitution. Under the Proclamation..., the Constitution has lost its character as the supreme law of the country."

He then made most far reaching statement on Martial Law. He said: "There is, no doubt, an express declaration in Article 7(2) of the Constitution to the following effect: "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of inconsistency be void." Ironically enough, this Article though still exists, must be taken to have lost some of its importance and efficacy."

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In the same year in 1978, the Appellate Division of the Supreme Court of Bangladesh further expanded import of Martial Law. In an appeal by special leave, in *Haji Joynal Abedin 32 (AD) 110*, the Appellate Division set aside the judgement and order of the High Court Division.

The Judge here singularly failed to explain how sovereignty passed on from the people of Bangladesh to the Chief Martial Law Administrator.

In the same year in 1978, the Appellate Division declared the conviction and sentence passed by the Special Martial Law Court no. II without lawful authority and of no legal effect. The High Court Division Judges found that the offences were committed before the Proclamation of Martial Law, and that the trial held by the Martial Law Court was without jurisdiction.

The High Court Division accepted that death penalty passed by the Martial Law Court was wholly illegal and a nullity in the eye of law since being violative of the fundamental right guaranteed under Article 32 of the Constitution, which was, the High Court Division declared, subject to judicial review under Article 102 of the Constitution.

Justice Ruhul Islam, along with Chief Justice Kemaluddin Hossain and Justice Fazle Munim said, the High Court Division Judges failed to appreciate the correct import of Martial Law and Proclamation of August 20, 1975 "(of) ousting the jurisdiction of all courts including the Supreme Court from calling in question the Proclamation or Regulation or Order or other Orders or anything done or any action taken thereunder."

He then considered at length background of Martial Law imposed in 1975 and concluded that, "it leaves for no room for doubt that the Constitution though not abrogated, was reduced to a position subordinate to the Proclamation, inasmuch as, the unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial law Regulation or orders and other

orders; and the Constitution was amended from time to time by issuing Proclamation." He went on: "In the face of the fact stated above I find it difficult to accept arguments advanced in support of the view that the Constitution as such is still in force as the supreme law of the country, untrammelled by the Proclamation and Martial Law Regulation."

Outlining the position of Martial Law, Justice Islam said: "So long the Constitution is in force as the supreme law of the country, any act done or proceeding taken by a person purporting to function in connection with the affairs of the Republic or of a local authority may be made subject matter of review by High Court in exercise of its writ jurisdiction. The moment the country is put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position."

Justice Islam then ruled that the Chief Martial Law Administrator had the power to legislate with retrospective effect as he assumed supreme power of legislation. In view of position of Martial Law, he held, "that the High Court Division was not justified in interfering with the proceedings before the Special Martial Law Court in the manner it has been done; and this order cannot be sustained."

The people will only have confidence in the judiciary, judges and the court, if as the US Judge has observed and quoted by the minister, the judges are independent. The judiciary must therefore be independent. And this is where the problem is in Bangladesh which is at the hand of the Minister himself.

In the same venue, at British-Bangla Law Week, a senior and respected lawyer has regretted that the judiciary remained shackled with the administration belying the constitutional commitment. He echoed the nations sentiment when he said, "It is a great shame for us that the judiciary is still not independent." He lamented, "Separation of the judiciary from the administration seems a distant goal although it is now a pertinent issue."

Separation of the judiciary from the executive is the first and integral step to make the judiciary independent. The Minister and his government is pledged bound to separate the judiciary, give its due independence. There are no shortage of ideas or models of how to achieve this goal, but government seems to lack necessary commitment and will to take or criminal cases.

Bangladesh, as said earlier, has undergone turbulent periods and it is imperative that society at large reconciles with the past. The process of reconciliation can only resume if open and frank discussion takes place of the past, however unpalatable the exercise might be.

But First Think First

The Minister of Law in his presentation has made other pertinent remarks. He said: "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." He went on: "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 harmonious 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, the Minister said: "is the extent to which people have confidence in judicial impartiality." He quoted an US Judge and said: "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 their problems are independent and courageous."

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The Minister has to do his bit first, otherwise, such statements will be considered merely rhetorics. He has recommended of the Law Commission, of the Supreme Court and host of other suggestions. He has only to act now.

Way Forward

In his speech, the Minister has suggested a way forward for the future. He has quoted provision of Mexican Constitution of protection of the constitution. He proposed that "Our Parliament may consider amendment of the Constitution in the

line of the Mexican Constitution."

Article 136 of 1917 Mexican Constitution states: "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 re-established and those that have taken part in the government emanating from the rebellion shall be judged in accordance with this Constitution."

In fact, Attorney General of Bangladesh, late Mr. Aminul Huq, made similar suggestion, few years back, at a presentation at Co-ordinating Council for Human Rights in Bangladesh-CCHRB. He was inspired by an article of a noted Belgian jurist.

Again, it is the Minister of Law, who has to take a lead in formulating such a defensive mechanism, but before that he can take similar actions even when Bangladesh Constitution has got no such provision. Recently, a Court in Bangladesh has convicted a number of people involved in the killing of the President and others in August 1975. The killers also staged a coup d'état and overthrew the government, imposed Martial Law and suspended the Constitution. The people involved were accused under Sections 120 B/ 302/ 34/ 189/ 324/ 307/ 201/ 380 of Penal Code and convicted under Section 302/ 34 and Section 120 A, for murder, common intention and criminal conspiracy.

They were neither accused nor convicted for overthrowing the government.

Similarly, Ershad spent five years in prison and rightly so. He was accused in all kinds of criminal cases, of possession of arms, corruption, abuse of power etc. But he was not accused for his first and principal crime, overthrowing a government for exactly these crimes had by now, gathered enough dust at Ramna police station to bury it.

The Law Minister should seriously explore ways to put the leaders of the Coup d'état of 1975 and 1982 on trial for crimes against the Constitution, for illegally taking over of power and overthrowing the government, which tantamount to waging war against the people. Meanwhile, he should formulate appropriate law, taking into account international law and usurers.

Finally, it is now the turn of the believers of the Constitution, constitutional rule, rule of law, democracy to speak out. Analyse the role of the judiciary *vis-à-vis* Martial Law, contribute find ways to finally rid the Constitution off the ghosts of Martial Law. The Supreme Court can initiate in its own self-cleansing procedure, concerned citizens could start appropriate proceedings and perhaps though difficult, the petitioners of the cases referred to could come forward to introduce review applications. The issues involved are enormously important, as each individual in Bangladesh has stake in working of country's Constitution.

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The Breach of Our Discontent

by Ekram Kabir

US-UK may be held responsible and pay reparations for the damage they inflicted on Iraq. In case US and UK default on this requirement, a united world community should freeze assets belonging to US-UK within UN member-countries. If UN does not have the muscle to implement restitution on behalf of Iraq, UN would, de facto, be a toothless tiger.

Now that the bombers started to hit Iraq, what could the White House do, apart from bomb again and again? The rest of the world, with the exception of the loyal Tony Blair, presumed that the only exit strategy involved in the air-raids was the one that stops impeachment.

According to critics, the bombing in Iraq was a cynical ploy by Clinton to "upend his impeachment process. It was an act of war that is not sanctioned by international law or by the US Constitution. It is not solving the problem of Saddam Hussein's weapons programmes. But it was killing and maiming innocent Iraqis.

This illegal war-making pockets at the heart of constitutional system of America. The US Congress has been given the sole — and express — power to declare war. Bombing Iraq was clearly an act of war, but Congress did not make such a declaration.

According to international law and the UN charter, a country can take unilateral action against another country only for the purpose of self-defense. But this attack was not in self-defense. Whether Iraq's cooperation with the UN inspectors was full or partial was up to the UN Security Council to decide, not the America and Britain.

And it was up to the Security Council, not member-states, to decide on what action to take. As Secretary of State Madeleine Albright just said in August: "It is a UN issue, not a US issue." Magically, four months later, it has become a US issue.

By pursuing the bombing of Iraq against their wishes, and

regard for the long-term security of the US itself. The biggest threat to the US is not Iraq but a renewed Cold War, either with Russia or China.

The reason for the hurry-up strike is obvious but its effectiveness was minimal. Neither Saddam nor his weapons of mass destruction have disappeared. The attacks achieved little, accept a 24 hour delay in the Clinton impeachment vote. But the failure of the US to consult with the Russians has had a permanent effect. A process that has been under way for several years has been crystallised. Russia has been retreating from both its liberal economic reforms and its pro-western foreign policy slowly for several years. The trend has accelerated since Primakov, the former head of foreign intelligence for the KGB, became Prime Minister. The lower house of the Duma passed a resolution that resolutely condemned "the barbaric bombing of the Republic of Iraq," and said that it was an act of international terrorism that posed a direct threat to international peace and security.

Clinton's action produced a galvanic revelation. It drove home American contempt for Russia's views and brought together the entire Russian political party around a single issue: the return of Russian greatness. Economic dislocation does not block this. [Remember that Germany revitalised its economy with a rear-mannament programme?]

The Iraq issue is a good place to start.