



Martial law when legal or illegal

JUSTICE MOHAMMAD GHOLAM RABBANI

Though this note is the reaction to the judgement of the High Court Division delivered on 29 August declaring in effect the rules of Mushtaque, Sayem and Zia from 15 August to 9 April as illegal, but this is not the discussion on that judgement at all. This judgement reminds me of a judgement delivered by a full bench of the Pakistan Supreme Court headed by the Chief Justice Hamoodur Rahman in the early part of 1975.

Earlier in 1958 Pakistan Supreme Court gave legal recognition to the then martial law regime in Pakistan in a case... State vs Dosso, reported in 1958 PID 533.

The Full bench headed by Chief Justice Rahman framed these issues for consideration: (i) Whether the doctrine in the case of State vs Dosso was correct? (ii) Whether the source of power assumed by Ayub Khan was legal and constitutional? and (iii) Whether power transferred to Yahya Khan by Ayub Khan was legal and constitutional?

Chief Justice Rahman in the judgement held, "Looked at, therefore, either from the constitutional view or the martial law point of view whatever was done by Ayub Khan or Yahya Khan was entirely without legal foundation. It was not even a revolution or a military coup d'etat in any sense of its term. On the stepping aside of the constitutional President the constitutional machinery should have automatically come into effect and the speaker should have taken over as acting president until fresh election was held for the choice of a successor. The National and Provincial Assemblies should have taken steps to resolve the political disputes, if any, if the Military Commander had not by illegal order dissolved them. The Military Commander did not allow the constitutional machinery to come into effect, but usurped the functions of the government and started issuing all kinds of Martial law regulations, Presidential Orders and even Ordinances."

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RIGHTS column



Afghanistan's accession to the 1951 Convention

Afghanistan has signed the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, a significant sign of recovery for a country that used to be one of the world's largest producers of refugees and asylum seekers.

In a press statement on September 2, 2005, UN High Commissioner for Refugees Antonio Guterres welcomed Afghanistan's accession to the Convention and Protocol, which takes effect this week after several months of close collaboration between UNHCR and Afghan authorities.

"It is possible at times to forget the true meaning of the refugee Convention, but if anyone can understand its significance, it is the people of Afghanistan," said Guterres. "During the long, dark years of fighting and extremism, millions of Afghans had to flee their homeland to seek refuge elsewhere. It is testimony to the remarkable progress Afghanistan has made on the road to recovery that it is now able to join the Convention."

With the accession, Afghanistan enshrines in international law its long-standing tradition of asylum. Despite being embroiled in decades of war and civil conflict, Afghanistan kept its doors open to refugees, notably those from Central Asia, like the tens of thousands who fled Tajikistan's civil war in the early 1990s.

Since the fall of the Taliban in late 2001, more than 3.5 million Afghans have repatriated from neighbouring Iran and Pakistan in one of the largest refugee repatriation operations in UNHCR's 54-year history. The UN refugee agency has also been working in Afghanistan to support the authorities' efforts to reintegrate the millions of newly returned people.

"The accession to the international refugee Convention and Protocol is a very significant step for Afghanistan," the Afghan Minister for Refugees and Repatriation, Dr. Azam Dadfar, said in Kabul. "So many Afghans have experienced exile and know how important it is to be treated with respect and dignity as refugees. We are, therefore, particularly pleased to be joining the community of signatory states, to strengthen our cooperation with the Office of the United Nations High Commissioner for Refugees and to add our voice to those committed to provide protection to refugees. Afghanistan will be proud to respect its obligations under these important international instruments."

Afghanistan is the 146th country to ratify either the 1951 Convention or its 1967 Protocol. Iran, which has hosted millions of Afghan refugees over the years, has also signed the Convention. UNHCR hopes that Pakistan, which has also generously hosted millions of Afghans, will soon join as well.

There are now just under 1 million Afghan refugees in Iran. A recent census showed that more than 3 million Afghans live in Pakistan, though not all of them are "of concern" to UNHCR. A significant number are expected to choose to repatriate, but it is also likely that some Afghans will want to remain in their countries of asylum, where some have been living for decades as well-integrated, productive members of society.

Recognising a return to more normal conditions in the region, consultations have been underway between Afghanistan, Iran, Pakistan and the international community on the development of a broader management framework that would provide not only for refugees, but also for other forms of population movement. In this context, Afghanistan's accession to the Convention marks yet another step towards greater regional stability and cooperation.

Source: UNHCR

The Fifth Amendment

SHEIKH HAFIZUR RAHMAN KARZON

An unenviable feature of the 'constitutional development' of Bangladesh is that it had to withstand two extra-constitutional, i.e., Martial Law, regimes. Later on the Fifth and the Seventh Amendments to the Constitution validated the Martial Law regimes, which raise a series of questions concerning their legality, both substantive and procedural. Were the two Martial Law regimes legal under the constitutional dispensation of Bangladesh? Were they justified under the Kelsenian doctrine of efficacy or the doctrine of state necessity? If the Martial Law Proclamations and all activities of Martial Law regimes were legal then why did they require validation at the time of their termination? Can Parliament validate anything which is otherwise invalid from its very beginning? Can a Martial Law Proclamation amend any provision of the Constitution and can the Parliament give legal coverage to that amendment? Can Parliament amend any provision of the Constitution which is considered as a basic structure of the Constitution? All these questions have been in the discussion for long 30 years, lastly to be decided by a division bench of the High Court Division of Supreme Court. The High Court in its historic judgement declared the Fifth Amendment illegal and unconstitutional.

It legality of first martial law regime

A group of unruly army officers, breaking chain of command assassinated the President of the country, Bangabandhu Sheikh Mujibur Rahman, along with his family members, on August 15, 1975 and Martial Law was proclaimed. Major (Retd.) Shariful Hossain Dalim, one of the coup leaders, announced the Martial Law. Subsequently Khandoker Moshtaque Ahmed, by a Proclamation, placed the whole of Bangladesh under Martial Law.

Khandoker Moshtaque Ahmed's swearing in as the President of Bangladesh was clear violation of the Constitution. Article 55 of the Constitution provided that the Vice-President would succeed the President if there is a vacancy until a new President was elected. Khandoker Moshtaque Ahmed was not the Vice-President. Moreover, he was sworn in as the President of Bangladesh by the acting Chief Justice Syed A.B. Mahmud Hossain, though Form I of the Third Schedule of the Constitution required the President to be sworn in by the Speaker of the House.

Khandoker Moshtaque Ahmed handed over power to Justice Abu Sadat



The Fifth Amendment brought the following changes in the Constitution:

1. In the Preamble the words "a historic war for national independence" were substituted for the words "a historic struggle for national liberation."
2. In the original Constitution it was provided in article 6 that the citizens of Bangladesh would be known as "Bangalees". This was changed to provide that citizens would be known as "Bangladeshis".
3. One of the four major fundamental principles of state policy "secularism" was omitted.
4. Another fundamental principle of state policy, "socialism", was given a new explanation to the effect that "socialism would mean economic and social justice."

Mohammad Syem, who finally left the office in favour of Major General Ziaur Rahman. The first Martial Law regime, installed on August 15, 1975, continued till April 6, 1979.

The declaration of Martial Law in Bangladesh in 1975 cannot be considered legal as the 1972 Constitution, supreme law of the country, does not recognise Martial Law, and no reference has been made to Martial Law throughout the text of the Constitution. The Constitution does not permit Martial Law even for the sake of restoring law and order. Thus, it is submitted that the declaration of Martial Law in Bangladesh in 1975 was illegal. Moreover, Martial law was proclaimed in Bangladesh in peace time and there was no question of suppressing riot, rebellion or insurrection. So, the Proclamation of Martial Law on August 15, 1975 did not fulfil the requirements of the doctrine of state necessity and

as such, was unjustified.

In fact, Martial Law was proclaimed in Bangladesh as a means to implement a coup d'état and to obviate any public opposition to extra constitutional acts of the coup leaders. Being an upshot of that Proclamation the whole first Martial Law regime lacked validity.

The Constitution (Fifth Amendment) Act

The Constitution was amended several times during the Martial Law regime of about four years (1975 to 1979) through four major Martial Law Proclamations and various Proclamation Orders were made thereunder. It may be noted that the Constitution (Fifth Amendment) Act was passed when the Constitution was not fully revived.

The second parliamentary election was held in 1979 through which the Martial Law Administrator General Ziaur Rahman's

newly created political party secured two-thirds majority. The first session of the new Parliament was convened on April 1, 1979 and on April 6, the Constitution (Fifth Amendment) Act, 1979 was passed to legally validate the actions taken by the Martial Law Government during the period between August 15, 1975 and April 9, 1979. The Act amended the Fourth Schedule to the Constitution by an addition of new paragraph 18 thereto which provided, that "all Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders, and other laws made during the period between August 15, 1975 and April 9, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in the Constitution during the said period by any such Proclamation, all orders made, acts and things done, and actions and proceedings taken, ...are hereby ratified and confirmed and are declared to be validly made, done or taken and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever."

The changes made by the Fifth Amendment cannot be held valid in the light of basic structure principle of Constitution. The judgement in the Eighth Amendment case [Anwar Hossain Chowdhury v. Bangladesh, 1989 BLD (Spl) 1.] reaffirmed the doctrine of basic structure, as old as the making of the Constitution as expounded by Chief Justice Marshall in *Marbury v. Madison* [2 L.Ed. 60.] case. In written Constitutions there are certain provisions, written or implied, which are basic and constitute foundation and structure of the Constitution.

The negation of these provisions would negate the Constitution itself and hence cannot be amended. So, any amendment by way of addition, alteration, substitution or repeal which aim to destroy the basic structure of the Constitution is void. The Fifth Amendment changed some of the basic principles of the original Constitution which cannot be made by a constitutional amendment.

Concluding remarks

Martial Law of 1975 was declared in peace time; the then civil government and civil courts were functioning smoothly and there was no question of suppressing riot, rebellion or insurrection. Hence, the Martial Law of 1975 cannot be justified under the Common Law doctrine of state necessity. During the first Martial Law regime the Constitution was amended several times by Martial Law Proclamations which are clearly unconstitutional as the Constitution cannot be amended by any process other than that which is provided in Article 142 of the Constitution.

Constitutionality of the fifth amendment

Moreover, a seal of legality had been put on the first Martial Law regime and its actions by the Fifth Amendment. This Amendment undermined the supremacy of the Constitution, destroyed the secular character of the Constitution, changed the Preamble and some of the fundamental principles of the Constitution which are beyond the domains of any amendment. Hence, the Fifth Amendment cannot be considered valid.

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LAW opinion

Adoption laws in Islam: Some issues

MOHAMMAD ZAHIDUL ISLAM

THIS is basically in response to the write-up by K M Rasheduzzaman Raja, a Joint District Judge at Sirajgonj, published in the Daily Star on 3 September 2005 entitled 'Adoption law is need of the hour'. Mentioning two examples, the honourable judge has tried to advocate for the provision of adoption in Muslim personal law. His first example tells the story that a wealthy elderly woman without any children was killed by her nephew who was her only heir. To expedite his inheritance he hired a professional killer to commit the grisly crime. It could have been otherwise if she had a child who should have taken care of her in her last days as the other children do in our society in the case of their parents. The other example is that an expatriate woman who was cherishing for motherhood for long time expressed her desire to adopt a baby, left in a clinic by its poor mother after delivery, and accordingly she filed a petition before the Family Court. Not surprisingly, the court frustrated her saying that the law can only provide her with guardianship of the child on consideration of her legal capacity, but cannot let it be adopted on consideration of her parental affection.

With these two examples followed by a short discussion on problems for not having provision of adoption in Muslim personal law, he concludes that at a certain age the wealthy industrialists, business tycoons or financially solvent persons having no issues become tired and cast a vacant look upon their hard-work-earned huge property and cast a deep sigh thinking that who would maintain their empire of wealth in their absence in the world. To let them come out of such despairing condition the adoption law can play a magic and keep them active till their last day to flourish the economy of the country.

He seems that the honourable judge has given a tremendous thought for a class of wealthy people of the country. However, with due respect to his views, I

want to express the insights into the prohibition of adoption in Islam. This write-up is, simultaneously, expected to state whether adoption law is a solution to the problem.

The central notion of justice in the Shari'ah is based on mutual respect of one human being by another. The just society in Islam means the society that secures and maintains respect for persons and their rights through various social arrangements that are in the common interest and welfare of all members. Islam views adoption as a falsification of the natural order of society and of reality. And the prohibition of legal adoption in Islam has been, in fact, ordained to protect the rights, not of a single class, but of the adopted, adopter, natural parents, other individuals affected by the adoption, and society as a whole. This proposition will be made clear in the following.

The child is an extension of his father and the bearer of his characteristics. During his lifetime he is the joy of his father's eyes. While after his father's death the child represents a continuation of his existence and an embodiment of his immortality. The child inherits his features and stature as well as his mental qualities and traits, both the good and the bad, the beautiful as well as the ugly. The child is a part of the father's heart and a piece of his body. These facts cannot be altered by adoption of that child by anyone and Islam has provided the inalienable right of the child to his lineage as well as that of the natural father to lineage.

The child in Islam also has the equally inalienable right to legitimacy. The principle of legitimacy holds that every child shall have a father and one father only. This is why Allah has ordained marriage and has forbidden adultery so that paternity may be established without doubt or ambiguity and that the child may be referred to his father and the father to his sons and daughters. Hence, adoption cannot be used in Islam to hide the illegitimacy or the paternity of the child.

By adopting someone's child, as one's own, the rightful and deserving heirs to the property of a man are deprived of their

shares. Hence Islam has made it haram (forbidden) for a father to deprive his natural children of inheritance. Allah has established the distribution of inheritance in order to give each eligible person his or her share. In matters of inheritance, the Qur'an does not recognise any claim except those based on relationship through blood and marriage (Qur'an 8:75).

Taking a stranger, by adoption, into the family as one of its members and allowing him the privacy to be with women who are not close relatives (non-mahrem), is a deception, for the adopter's wife is not the adopted son's mother, nor is his daughter the boy's sister, nor is his sister the boy's aunt since all of them are non-mahrem to him and vice-versa for an adopted daughter. Also when the adopted child's lineal identity or paternity is changed, it is quite possible that the adopted child may, unknowingly, enter into incestuous relationships by marrying close relatives of the natural parents (mahrem) or otherwise his marital chances may in general become subject to rejection.

When the adopted child receives a claim on the inheritance of the adopter, the anger and wrath of the real relatives may be aroused against the adopted who the relatives feel forces himself or herself upon them and usurps their rights, depriving them of their full inheritance. Often such anger leads to quarrels, fights, and even killings, as we see nowadays, and to the breaking of relations among relatives. Therefore, it is not conducive to family solidarity and overall harmony and peace, which are necessary for social stability.

However, "adoption" is also used in another sense. This use of adoption is not prohibited by Islam -- that is, when a man brings home an orphan (including a foundling or abandoned child) and wants to raise, to educate, and to treat as his own child. In this case, he protects, feeds, clothes, teaches, and loves the child as his own without attributing the child to himself, nor does he give him or her the rights which the Shari'ah reserves for natural children.



However, if a man is childless and has no children of his own, and he wishes to benefit such a child (orphan or foundling) from his wealth, he may give him whatever he wants during his lifetime. This is a meritorious and noteworthy act in Islam, and the man who does it will be rewarded by Allah.

Muslims believe that Allah is the Wise, All-Knowing and Merciful. He makes things halal (permitted) and haram (forbidden) for a reason, with the people's well-being in mind. Thus, a Muslim is not required to know exactly what is harmful in what Allah has prohibited; it may be hidden or not clear to him but could be apparent or clear to someone else, or its harm may not have been discovered during his lifetime but may be understood at a later time period or era. A great example of this is the prohibition of the eating of pork in Islam. Scientific research,



after centuries of this prohibition, has now shown the presence of parasites and deadly bacteria in its flesh. True believers have to accept Allah's Wisdom and Knowledge in the forbidding of any act since He sees and knows things on a universal and timeless basis for all mankind unlike the ability of human beings to focus mainly on individual and present needs. Thus the acceptance of the prohibition of legal adoption, as it is personal affairs of Muslims and affecting no person of other religions, should also be regarded as the acceptance of the timeless power and knowledge of Allah.

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