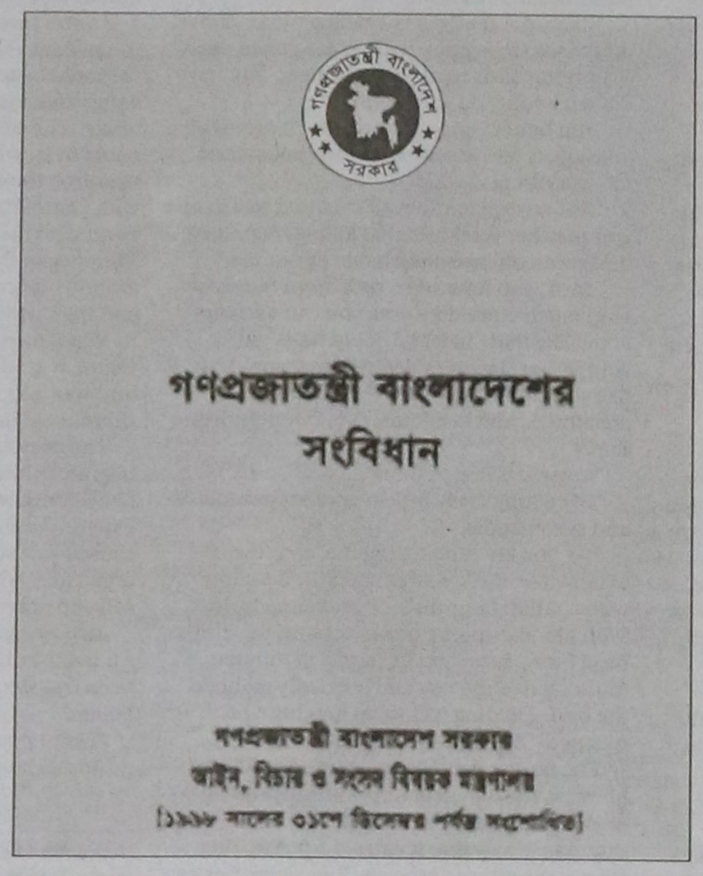
LAW *judgement review*

5th Amendment: A critical analysis

M. JASHIM ALI CHOWDHURY

CONSTITUTION has a body as well as a psyche. Physically it is the accumulation of fundamental rules but psychologically it is the harbor of aspirations core to the nationhood. This is a sacred charter requiring sacred allegiance and defence to the last breath. Unfortunately ours was invaded and tormented erratically for selfish ends 'both during the time when it was functioning and during the time when it was not allowed to function' (Rahman MH, Our experience with Constitutionalism, BJL 2:2, 1998, p 118). Like others, our judiciary also remained cold to those hot political issues, of course until recently a Division Bench of the High Court Division thought it 'best for the country that we put our records correct, once and for all'. This was in the Bangladesh Italian Marble Works Ltd v. Government of Bangladesh and Others 2006 (Spl) BLT (HCD) 1, the famous Moon Cinema case. Mentioning the page numbers in brackets the present write-up tries to dig out the key principles laid down by the Court in that 242-page judgment.



The moon cinema controversy

After 1971, the Holding No 11 and 12, Waisghat was declared to be abandoned property. Though the Holding No 12 was released later, Holding No 11 housing the Moon Cinema House was not released. The petitioner challenged the order declaring the said property as abandoned. The High Court Division in Writ Petition No 67 of 1976 directed the respondents to hand over the possession in favor of the petitioners. In due course the Ministry of Industries deleted the 11, Waisghat from the list of abandoned property and released that in favour of the petitioner with a direction to the Freedom Fighters' Welfare Association to handover the possession. But the Association filed the petition for Special Leave to Appeal No 291 of 1977 which was dismissed on 20.1.1978. Even then the Association declined to release the property on a new excuse. It was the Martial Law Regulation VII of 1977. Section 6(1) of the MLR VII declared that if any property was taken over as an abandoned property, any judgment of any court in that regard would stand annulled and be of no effect notwithstanding any defect in such taking over. That MLR VII of 1977 was given constitutional protection through the Fifth Amendment.

Since in the face of MLR VII even the orders of the High Court Division could not be executed to the prejudice of the petitioners, they filed three writ petitions in 1994, 1997 and 2000 consecutively. The first two were summarily dismissed for not challenging the Fifth Amendment itself and the last one was dismissed for default. So the petitioner filed the present one and challenged the vires of the Fifth Amendment.

The Fifth Amendment: a historical account

On the dark night of August 15, 1975 Bangabandhu was brutally killed along with almost all of his family members, perhaps with democracy also. On August 20, Khandker Mushtaq Ahmed declared Martial Law with effect from August 15 and thereby, in the words of the Court 'committed the offence of sedition against the Republic of Bangladesh' (p 75). During the turmoiling 1st week of November, Mushtaq nominated Justice Sayem as the President. Ziaur Rahman came to the scene as the Deputy Martial Law Administrator on November 7, 1975. On November 29, 1976 Justice Sayem was to declare Zia as the Chief Martial Law Administrator to sustain himself as a figure head President (Ahmed Moudud, Democracy and Challenge of Development: A study of Politics and Military Interventions in Bangladesh, p 51). Zia took oath as President on April 20, 1977 due to the 'deteriorating health' condition of Sayem. While even 'a Chairman of a Union Council had to be elected and couldn't be nominated, nomination could be made to the highest office of the Republic' (p 93). Zia arranged a referendum 'unknown to the constitution or any other law of the land' (p 86) to obtain 'confidence' of the people. He hammered a 99 percent of the total vote cast. The Presidential Poll was scheduled in June 1978 and Zia put his candidature. That time he got 76.73 percent to become a 'democratic' President. After forming BNP in August 1978, he arranged the Parliamentary Election on February 18, 1979. BNP got 207 parliamentary seats and 41 percent of the total vote cast. The newly formed rubber stamp parliament was called in session on April 5 1979. In the very first session it passed the Fifth Amendment Act which ratified and confirmed all the Proclamations, Martial Law Regulations and Orders made during the period from August 15, 1975 to April 9, 1979 and judged them to be validly made. But history had its own judgment to be rendered in due course.

The truth finds its way through the historic judgment of the High Court Division in the present case. The Judiciary, the third umpire lights the red holding:

'Taking over of power by Khandaker Mushtaq Ahmed, nomination of Justice Sayem as President, appointment of Ziaur Rahman as Deputy Chief Martial Law Administrator, handing over of the office of Chief Martial Law Administrator to Ziaur Rahman, nomination of Ziaur Rahman as the President and Referendum Order of 1977 - were all without lawful authority and in an unlawful manner' (p 240-241).

'The Constitution (Fifth Amendment) Act, 1979 (Act I of 1979) is illegal and void ab initio' (p 242).

Should the Court venture into political questions?

While judicial review of parliamentary legislation is marked as a precursor of constitutional supremacy, judicial review of the constitutional amendments is seen with both 'reverence and suspicion' (Kamal Mustafa J, Bangladesh Constitution: Trends and Issues, p 139). Some argue that constitutional amendment involves a Political Question to be better resolved within political discourse than in the court arena (Omar Imtiaz and Hossain Zakir, Coup d' etat, constitution and legal continuity, the Daily Star, Law and Our Rights, September 17 and 24, 2005). Judicial adventure into this field might perturb some fait accompli settled by the political and historical discourse and create confusion rather than clarification.

But the High Court Division in this instance considered itself a social, if not political institution and so couldn't keep its eyes shut to the legal needs of the society (p 164). The Judges felt themselves bound to declare what had to be declared, in vindication of their oath taken in accordance with the constitution, otherwise they themselves, they noted, 'would be violating the Constitution and the oath taken to protect the Constitution and thereby betraying the Nation' (p 239). In response to the political warmth of the issue the Court seems not to care who is pleased and who is hurt by its decision. It is better to hurt 'a few than the country' (p 204) to distinguish between right and wrong.

On 'Efficacy' and 'Necessity'

Kelsen's theory of Successful Revolution and its efficacy has long been a fascinating issue in Martial Law talk. Faced with intermittent coups d'etat, the courts used his theory of revolutionary legality, in pure or modified forms, as a rule of decision to validate the rule of guns while Kelsen himself emphasized that it is a theory of effectiveness, not a rule of decision to adjudicate validity (Tayab Mahmud, Jurisprudence of Successful Treason: Coup d'etat and Common Law, 27 Cornell Int'l L. J. 50 1994, p.136). The Court, in this instance, simply holds that Kelsen's theory can only be used to explain the past incidents. Any judge in deciding a case may call upon many a legal theory in establishing his own point of view but should not regard it as precedent (p 174).

As to the doctrine of necessity, the Court asserts, "The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances" (p 68). Emergency must be faced through constitutional method not by extra constitutional interventions (p 56) and so, turmoil or crisis in the country is no excuse for any violation of the Constitution (p 242).

On 'Acquiescence'

The plea that passing of a long time since its adoption without being challenged immunizes the Fifth Amendment from constitutional challenge was sharply rejected by the Court. 'No one acquires a vested or protected right in violation of the Constitution by long use even when that span of time covers our entire national existence and indeed predates it' (p 162).

Is there any 'Martial Law Jurisprudence'?

Relying on earlier Supreme Court decisions, one of the pleaders appearing before the Court tried to establish a sort of 'Martial Law Jurisprudence rising from the wake of two Martial Law regimes' (p 15). The Court rejected the contention in unequivocal terms, "We are not aware of any such Martial Law Jurisprudence either under our Constitution or any other laws of the land" (p 228). There is no such law in Bangladesh as Martial Law, no such authority as Martial Law Authority (p 240) and hence no such jurisprudence as Martial Law Jurisprudence.

An ill-tailored amendment

While invalidating the Fifth Amendment Act the Court found six major technical flaws in it:

First, the authority of a Marital Law Administrator to amend the Constitution is absolutely intolerable. An amendment can be made by proper authority as enjoined in the Constitution but not by any other person or group of persons how high or powerful or mighty they may appear to be (p 44).

Secondly, the Amendment being completely alien to the spirit and structure of the Constitution is attacked by the phrase 'any other law inconsistent with this constitution shall be void to the extent of inconsistency' in Article 7 (p 54).

Thirdly, the provisions sought to be ratified, confirmed and validated by the Fifth Amendment were illegal. If the provisions sought to be validated were illegal then how could the instrument itself be legal (p 155)? The Fourth Schedule is not meant to be the dumping ground for all illegalities (p 156).

Fourthly, Article 142(1)(a)(i) of the Constitution provides that no Bill for any amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution. The Fifth Amendment did not contain such long title (p 195).

Fifthly, the term 'amendment' does not mean the abrogation or destruction or a change in the fundamental character of the Constitution (1989 BLD Spl 1). The words 'ratified, confirmed and declared to be validly made' appearing in the Fifth Amendment Act are anything but amendment (p 198).

Sixthly, the Amendment was for collateral purpose which constituted a fraud upon the Constitution (p 206).

Condonation

Taking care of the concern that a legal vacuum may ensue if all the things from August 15, 1975 to April 9, 1979 were declared void, the Court condoned some illegalities on the greater interest of the community provided that those acts could have been legally done at least by the proper authority (p 216). Condonations were made in respect of provisions which did not change the basic structures of the Constitution (p 227) and which deleted the various provisions of the Fourth Amendment but not in respect of omission of any provision enshrined in the original Constitution. Nor were condoned the amendments made in the Preamble, Articles 6, 8, 9, 10, 12, 25, 38 and 142. It means the revival of those provisions as they were in the original Constitution (p 238).

But condonation does not mean that for the sake of continuity, 'the Constitution has to be soiled with illegalities'. Rather, the perpetrators of such illegalities should be suitably punished and condemned so that in future no adventurist, no usurper, would have the audacity to defy the people their Constitution, their Government, established by them with their consent (p 216).

Conclusion

Symbolising an extra ordinary legal scholarship, the judgment has put a high water mark in our constitutional history. Wherever may our political convenience or inconvenience lie, we must bow a judiciary which holds, "The Martial Law Authorities in imposing Martial Law behaved like an alien force conquering Bangladesh all over again, thereby transforming themselves as usurpers, plain and simple (p 239)."

Recently the Appellate Division has postponed the hearing of the appeal against the High Court Division's judgment for four weeks. So it is yet to be seen whether the Court has 'put our records correct'- forever or not.

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LAW *interview*

Trial of war criminals: Some issues

The movement to bring war criminals of '71 to trial has resurfaced with unstoppable vigour and continues gaining momentum at an unprecedented rate. Positive gesture by the government makes us believe that the incessant popular demand has yielded some results at the end. Our interview with **Professor Rafiqul Islam** will shed some light on the practical aspects of such trial. Dr. Islam is a Professor of Law at Macquarie University, Sydney, Australia. He teaches and has published extensively in the area of international criminal law and court. Today we publish the first part of the interview.

Law Desk(LD): Though the Bangladesh Collaborators (Special Tribunals) Order, 1972 was repealed, fortunately the International Crimes (Tribunal) Act 1973 did not suffer the same fate and still exists. However, do you think the International Crimes (Tribunal) Act 1973 in its current form is enough to provide for the trial of war crimes or it needs some adaptation?

Professor Rafiqul Islam (RI): The International Crimes (Tribunal) Act 1973 affords only a general legal basis and some procedural guidelines, among others, to be followed in the formation of the proposed tribunal. It is silent on a number of pressing legal matters that need to be taken into account at the formative stage of the tribunal. For example, provisions of International Covenant on Civil and Political Rights 1966 (ICCPR) of which Bangladesh is a party and Bangladesh constitutional guarantees in chapter 3 of the Constitution may be taken into account. ICCPR Article 9 on arrest and speedy trial and the right of the accused in Articles 14 and 15 together with a readily available appeal remedy, victim and witness protection would require a reconsideration of s10 (procedure of trial), s11 (power of the tribunal), s17 (right of the Accused) and s21 (right of appeal) of the 1973 Act. Section 20 (2) of the 1973 Act containing capital punishment may be revisited in view of Bangladesh's international human rights obligations emanating from various UN human rights instruments prescribing life imprisonment as the maximum penalty. Bangladesh must comply with its assumed international treaty and human rights obligations. Certainly, 1973 Act can serve as a starting point, which can be improved and tailored to cater for the special needs and conditions of Bangladesh in launching this trial.

LD: Applying conventional principles of law of evidence may defeat the purpose of such trial and let many perpetrators escape unpunished. But these norms are there for some reason. Any deviation from such standard norms of evidence may allow some to manipulate the trial and realise political objectives in the process. Where dose the balance lie in your opinion?

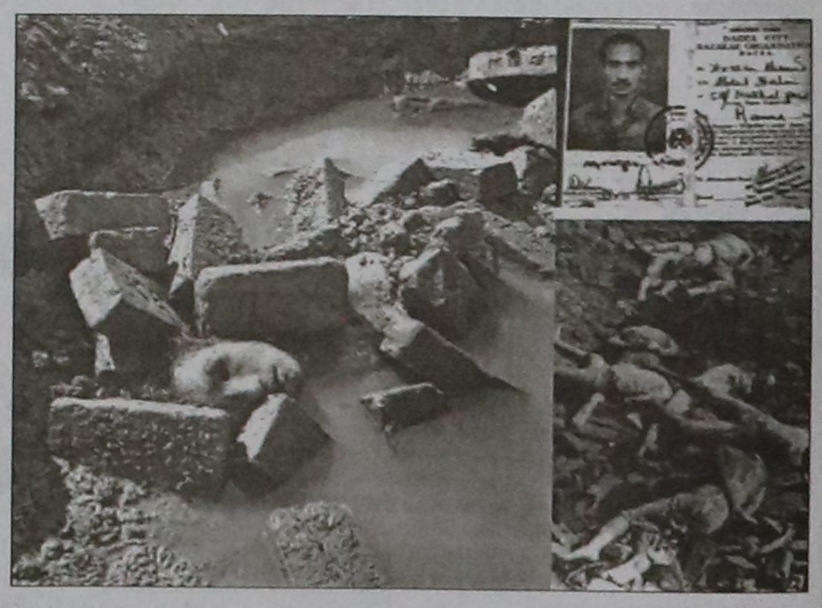
RI: Conventional principles of law of evidence have been developed to administer the admissibility of evidence primarily in national criminal justice systems. there are qualitative differences between the legal definition and constituent elements of ordinary crimes such as murder in national law and extra-ordinary crimes at international law such as genocidal mass killings. The former may be one off and secret while the latter is systematic and open. Their available evidence and investigative process are different. Whilst the conventional procedural rule of evidence is adequate in the former, it is not necessarily adequate and suitable in the latter to render justice. Since the war crimes are special in their nature and element, a special court or tribunal with specific mandate and jurisdiction is capable of addressing the usual procedural complexities in the admissibility of evidence. In order to avoid any politically motivated prosecution, an effective balance can be maintained through the creation of a pre-trial chamber consisting of judges of the tribunal to examine the prima facie evidence with a view to ascertain whether there is a legal case to answer. If there is, only then the pre-trial chamber issues an arrest warrant and the case can proceed to the trial chamber for hearing. This is how a judicial determination of the admissibility of evidence and the merit of the case can be determined prior to the proceedings of the tribunal. This practice is widespread to guard against the institution of any politically motivated prosecution.

LD: Not only the nature and constituent elements of war crimes but also the unavailability of typical 'admissible' evidence may have something to do with the differentiated treatment of war crimes. However, tribunals like Nuremburg are often viewed as victor's justice as those were formed or sponsored by winners of war. Is there any possibility of our to-be-formed tribunals being seen the same way?

RI: Yes, the Nuremburg judgement may be called, to an extent, "victor's justice" as its charter mandated to try war crimes committed only by the Axis Power, not by the Allied Power. The lesson from the Nuremberg for Bangladesh is not to look at the application of the law but the exposition of the applicable law itself. It added jurisprudential flesh and blood to the composition and construction of the crimes in question, which eventually led to the development of the 8 fundamental principles of international criminal law unanimously adopted by the UN and followed subsequently by other war crimes tribunals. All war crimes tribunals are case-specific, not general. So there is no room for generalising and comparing the Bangladesh one with the Nuremburg. Bangladesh should guard against any presumption of victor justice by providing ample checks and balances and successful precedents for such safeguards are readily available in the formation and operation of war crimes tribunals/courts established subsequent to Nuremburg.

LD: Ideally all war crimes should be tried without fail. But practically the idea seems to be enormously daunting. Would it be enough to try some leading culprits responsible for most heinous war crimes attaching some symbolic value to it by registering our disapproval of war crimes instead of trying all the suspects and making a mess of it at the end?

RI: Bangladesh must do its best to bring as many war criminals as possible to justice. Not to act now is to reinforce the long-standing status quo of evading justice and keeping the surviving victims and their relatives under a cloud of gross injustice. Persistent immunity in Bangladesh also undermines the international community's commitment to render global justice for heinous crimes. Not to commence this trial because it is not possible to try all suspects is equivalent to arguing that since all lawbreakers cannot be brought to justice, none should be. This all-or-none approach is no legal standard. It is rather hallow, self-defeating, and the enemy of justice.



LD: Did the other widely known war crimes tribunals take the same course i.e. tried as many war crimes as possible? And right now we may not have enough resources e.g. human, logistics etc to support such efforts? If so, how this deficiency can be remedied?

RI: War crimes trials are not one-off, but continuing. This is why trials of the 2nd World War criminals are still ongoing. So are the Bosnian and Rwandan. The tribunal should try as many alleged criminals as possible. There may well be resource constraints. But as the tribunal goes ahead, it will eventually be mature and resource-sufficient to carry out its task. Every such tribunal of the past started with a cautious approach and built on. In my view, one of the palatable options to remedy such deficiency is to rely on various national and international support systems - both public and private sectors alike. There are some resource-rich alliances for war crimes trials formed particularly in Rome in 1998 during the formulation and adoption of the Statute of the International Criminal Court.

The last part of the interview will be published on February 21, 2009 issue.

--Law Desk