IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7236 OF 2010

With

WRIT PETITION NO. 826 OF 2011

With

WRIT PETITION NO. 1048 OF 2011

AND

WRIT PETITION NO. 1059 OF 2011

IN THE MATTER OF :

An application under Article 102 of the Constitution of the People's Republic of Bangladesh;

A N D

IN THE MATTER OF

M. Anwar Hossain and others.
. . Petitioners in W.P.No.7236 of 2010.
with
Hasanul Huq Inu
. . . Petitioner in W.P.No.826 of 2011
with
Major Ziauddin and others
... Petitioner in W.P.1048 of 2011

And

Md. Abdul Mazid
... Petitioner in W.P.1059 of 2011.
Mr. Rokanuddin Mahmud
....For the petitioners in W.P. 826/2011.
Dr. Shahdeen Malik, with
Mr. Md. Tawhidul Islam, Advocates
... For the Petitioner in W.P.7236/10.
Major Ziauddin and others((In person)
... In W.P.1048 of 2011

And

Md. Abdul Mazid (In person)
... In W.P. 1059 of 2011

-Versus-

Government of Bangladesh and others
Respondents in all the Writ Petitions.
Mr. Mahbubey Alam, Attorney General with
Mr. ABM Altaf Hossain, DAG
Mr. Motaher Hossain Saju, DAG

Mr. Mohammad Salim, DAG and
Mr. Md. Shahidul Islam Khan, AAG
Mr. Amit Talukdar, AAG
Mr. Shoeb Khan, AAG
Ms. Purabi Saha, A.A.G.
... For the Respondents 1 and 2.
Mr. M.K. Rahman, Addl. Attorney General with
Mr. A S M Nazmul Haque, AAG
Mr. Delwar Hussain Samaddar, AAG
... For the Respondent Nos. 3 and 4.
Dr. Kamal Hossain,
Mr. M. Amir-ul Islam,
Dr. M. Zahir,
Mr. M.I. Farooqui,
Mr. Akhter Imam,
Mr. A.F.M. Mesbahuddin,
Mr. Yusuf Hossain Humayun,
Mr. Abdul Matin Khasru and
Mr. Z.I. Khan Panna, Advocates
... Amicus-Curaie
Heard on: The 12th, 13th 17th , 18th , 19th, 20th, 23rd January, 3rd February, 15th, 16th, 20th March, 2011 and Judgment on: The 22nd March, 2011.

Present:
Mr. Justice A.H.M. Shamsuddin Choudhury
And
Mr. Justice Sheikh Md. Zakir Hossain

A.H.M.Shamsuddin Choudhury,J.-

As many as four Writ Petitions, registered as Writ Petitions no. 7236 of 2010, 826 of 2011, 1048 of 2011 and 1059 of 2011 respectively had been filed challenging the validity of the (i) Proclamation dated 20th August, 1975, whereby the whole of Bangladesh was placed under Martial Law, (ii) the

Martial Law Regulation No. XVI of 1976, published in the Bangladesh Gazette Extraordinary dated 14th June, 1976 and (iii) the judgment and order dated 17th July, 1976 passed by the Special Martial Law Tribunal in Special Martial Law Case No. 1 of 1976, convicting all the petitioners in all the four petitions and the deceased husbands of Petitioner Nos. 2 and 3, in WP 7236/10 under section 121A of the Penal Code.

All the Petitioners were sentenced to suffer imprisonment for varying terms while Lt. Col. (retd.) M. A. Taher, Bir Uttam, husband of the Petitioner No. 2 in WP 7236/10, was sentenced to death, which was executed on 21st July, 1976. Flight Sergeant Abu Yusuf Khan, Bir Bikram, husband of the Petitioner No. 3, in WP 7236/10, was sentenced to suffer imprisonment for life.

Since the basic theme and the relief craved in all these petitions are identical, they are taken up for adjudication as a lump.

Professor M. Anwar Hossain, an eminent personality in our academic horizon, endowed with exquisite academic achievements gained from various educational institutes of universal acclamation, who attained wide spectrum notoriety, not merely by dint of his intellectual pursuit but also because of his active participation in our Glorious War of Liberation, filed

the first cited petition before us along with two other Petitioners, one of whom is his sister in law, invoking Article 102 of the Constitution.

Salient parts of the averments that emerge from the first aforementioned petition, i.e. the Writ Petition no. 7236 of 2010, run as follows;

On 20th August 1975 the whole of Bangladesh was purportedly placed under so-called "Martial Law", following a purported proclamation to that effect on the same day. One Khandakar Mushtaque Ahmed purportedly took over "all and full powers of the government of the People Republic of Bangladesh."

A succession of actions by the then so-called government followed the said proclamation, which included the arrest of the husband of the Petitioner no. 2 on 23rd November 1975 and the arrest of the Petitioner no. 1 himself on 15th November 1976. They were apprehended following the **lodgance** of a so-called first information report (FIR) with the Mohammadpur Police Station on 4th June 1976. Section 121 A of the Penal Code was cited in the said FIR along with some other provisions of the said Code.

The FIR led to the purported commencement of a case that was recorded as Special Martial Law Tribunal Case no. 1 of 1976. Both the Petitioners were purportedly found guilty following a so-called trial and the spouse of the Petitioner no. 2, a Valiant Freedom Fighter, named Lt. Colonel (Rtd), M.A. Taher, who was decorated with the Gallantry Award, Bir Uttam, the highest award for a surviving Freedom Fighter, for his spectacular contribution in the Liberation War, was purportedly sentenced to death, while, Flight Sergeant Abu Yusuf Khan, who was also honoured with another Gallantry Award, namely Bir Bikram, the spouse of the Petitioner No. 3, was purportedly sentenced to life imprisonment, while the Petitioner No. 1 was purportedly sentenced to a term of ten years imprisonment and to pay a fine or to suffer an additional term of 2 years in default of payment. The purported verdicts were delivered on 17th July 1976.

The so-called special tribunal was set up under the purported martial law regulation no XVI of 1976, section 3(4) which equipped the so-called tribunal with power to try any offence, whether committed before or after the commencement of the regulation. Crimes under Chapter VI and VII of the Penal Code were also brought within the so-

called tribunal's jurisdiction by section 3(4)(a) of the regulation. The so-called regulation empowered the tribunal to sit in camera at the so-called chair's discretion.

The so-called regulation placed a total clog on appeal, stipulating, "No appeal shall lie to any authority from any decision or judgment of the tribunal".

Section 4(10) thereto stipulated that when the tribunal would sit in camera, the chair would require persons attending or otherwise participating in the trial to subscribe to an oath of secrecy against disclosure of anything in connection with the trial.

The so-called special tribunal was composed of one Army Colonel, named Yusuf Haider (who chaired it), one Air Force Wing Commander an Acting Commander of the Navy and two Magistrates.

A handout dated 18th June 1976, issued by the chair of the so-called tribunal, required some 11 persons to surrender before the tribunal on or before 21st June 1976 in connection with the case in which Lt. Col. M.A. Taher, Bir Uttam, Flight Sergeant Abu Yusuf Khan, Bir Bikram and the Petitioner No. 1 were purportedly impleaded as accused.

The so-called trial of the so-called Special Martial Law Tribunal Case no. 1 of 1976 proceeded in total secrecy inside Dhaka Central Jail.

Although the Petitioner No. 1, and the spouse of the Petitioners no. 2 and 3 were allowed to be represented and defended by Advocates, the Petitioners No. 2 and 3 were never allowed to attend. Because of the so-called oath of secrecy, participants in the trial could never divulge any information on the so-called trial to the Petitioners no. 2 and 3.

The Petitioner no. 2 was never allowed, despite incessant requests, to meet her husband. Her written request to that effect was never responded to. It is only from the news paper reporting that she came to know of the purported conviction and the sentence that was passed on her husband.

On learning of the purported passage of death sentence on her husband, the Petitioner No. 2 preferred an application to the so-called president, to the so-called chief martial law administrator and to Major General Ziaur Rahman, the so-called deputy chief martial law administrator, seeking an abeyance on the confirmation of the sentence and to put the same on halt.

She was, however, told in reply, that the president has not been able to accede to her prayer.

The purported death sentence on Lt. Col. M. A. Taher, Bir Uttam, was executed on 21st July 1976, whereafter his corps was removed from Dhaka Central Jail in a pick up and then was flown by a helicopter to his village named Kazla, under Purbadhala Police Station in Noakhali.

The Petitioner No. 1 and the spouse of the Petitioner no. 3 were released from the prison in June 1980, yet they were not supplied with any official document as to their release at any point of time, not even today. No document or certified copy on the trial, the charge, deposition, proceeding, judgment or any other matter quo the trial was ever given to the Petitioner No. 1, although he tried heaven and earth to procure the same.

Through a purported Act of Parliament, purportedly passed on 06th April 1979, the so-called 5th Amendment Act, all so-called proclamations, proclamation order, martial law regulations, martial law orders and other laws (henceforth collectively cited as martial law instruments) as well as all amendments, modifications, substitutions made thereof, including amendments to the Constitution, brought about by such proclamations and regulations and all actions and

proceedings taken or purportedly taken under those proclamations during the period between 15th August 1975 and 9th April 1979, were ratified and confirmed.

That purported amendment, had, however, been declared void and non-est by this Division in the case of Bangladesh Italian Marble Works Ltd-V-Government of Bangladesh, best known as the 5th Amendment Case, reported in the Special Issue of Bangladesh Law Times 2006.

A leave petition filed with a view to challenge the said Judgment of this Division, was turned down by the Appellate Division, though certain minor modifications were infused into this Division's Judgment.

It is the Petitioners' emphatic assertion that since the Supreme Court has declared the so-called 5th Amendment to the Constitution illegal and void ab-initio, and has, thereby, wiped out the purported ratification, confirmation and validation of the so-called martial law instruments, the impugned purported trial and all the proceeding leading to the impugned judgment and order dated 17th July 1976 in the so-called special martial law tribunal were but devoid of legal sanction and as such, of no effect in law as being repugnant to the Constitution. They also assert that the whole

notion of camera trial, oath of secrecy, embargo on appeal are palpably abhorrent not only to our Constitutional Scheme, but also to minimum tenet of Justice.

By a supplementary affidavit the Petitioner No. 1 stated that one Mr. Lawrence Lifschultz, who was the South Asian correspondent of the Far Eastern Economic Review, is possessed of invaluable and, otherwise unobtainable and untraceable information on the whole episode by having been in Bangladesh to cover the so-called trial for his named Journal, although he was, subsequently expelled from Bangladesh by the government headed by General Ziaur Rahman. It has also been revealed through the said supplementary affidavit that Mr. Lifschultz had unveiled plentitude of precious and, hitherto, undisclosed, information on the trial, he gathered through his investigative journalistic pursuit, which was first published in 1977 in the Special Edition of an India based Journal, named "Economic and Political weekly" (Bombay) under the caption "Taher's Last Testament". It has further been stated that on 28th January 2011, two treatises authored by him on the so-called trial were published in Daily Prothom Alo and that they contained elaborate factual analyses of the said trial as well as the author's personal account on Col. Taher.

The Petitioners went on to narrate that Col. Taher, Bir Uttam, inspired his entire family to actively participate in the Triumphant Liberation War. He himself fled Pakistan to join the War being propelled by his own conscience to fulfill his long cherished dream, rather than being forced to do so by subordinates.

As a Sector Commander he led many historic battles to capture a strong Pakistani outpost, named Kamalpur, which was known as the "Gateway to Dhaka," and it was his strategy which was followed by the Freedom Fighters of Sector 11 along with the allied forces of India to mark their maiden entry into Dhaka on 16th December 1971. Although Col. Taher himself could not be present to witness the historic event due to the injury he sustained during the war, Flight Sergeant Abu Yusuf Khan, Bir Bikram, the spouse of the petitioner No. 3, represented Col. Taher on the occasion. Indeed, it was Ft. Sergeant Khan, who, along with the Indian Army went to the Eastern Command Head Quarters of the occupying Pakistani Army at Dhaka Cantonment on 16th December in the morning to negotiate the terms of surrender with the Pakistan Army and, as a member of the Victorious Liberation Army, it was him who plucked the flag from the staff car of Lt. General Niazi,

the defeated chief of the Eastern Command of the Pakistani Army.

All of the eight siblings, six male and two female, of Col. Taher directly participated in the War of Liberation, of whom four received Gallantry Awards.

The career of the Petitioner No. 1 as a Lecturer at the Department of Biochemistry in Dhaka University, came to an abrupt impasse with the arrest of his two brothers, Col. Taher and Ft. Sergeant Yusuf Khan, which event plunged his family into turmoil. The whole family found themselves at a paradoxical jeopardy, they fell prey to the vengeance of General Ziaur Rahman. The Petitioner No. 1 had to go to the ground. On arrest, he was interned in a clandestine torture cell known as "Safe Hole", located inside Dhaka Cantonment, and was kept there until 15th June 1976, the day on which he was handed over to the Dhaka Central Jail authority. The period in the said torture cell was kept concealed.

The so-called accused persons, 33 in number, included revered Sector Commanders and front line organizers of the Liberation War. It was a conglomerate of Politicians, Military Personnel, Writers, Journalists, Teachers, Economists and People engaged in intellectual cultivation, who volunteered to

stake their lives to secure the emancipation of their mother land after the Pakistan Army unleashed genocide on the Bengali People.

The person who chaired the so-called special tribunal, Col. Yusuf Haider, was one of those who collaborated with Pakistani Army of occupation. Mr. ATM Afzal, subsequently prized with elevation to the High Court Bench, acted as the special public prosecutor.

Although the martial law regulation, by which the purported tribunal was formed, was itself promulgated on 14th June 1976, it is that very day on which the tribunal personnel visited Dhaka Central Jail and, indeed it was on 12th June that the office of the Deputy Inspector General of Prison was vacated to accommodate the tribunal.

In his book, titled, "Democracy and the Challenge of Development: A study of Political and Military Interventions in Bangladesh", Barrister Moudud Ahmed, a close associate of General Ziaur Rahman, wrote; "Why did Zia allow Taher to be hanged, the person who freed him from captivity?..... In the difficult situation after independence, Zia had to strike a balance with repatriated officers to strengthen his own position in the army. The officers who had not taken part in the liberation war, had found a new ally in Zia after the killing of Mujib and removal of Mushtaque. They needed each other to survive both as a class

and a force in the Civil-Military structure of the country. When it came to sentencing of Taher, the repatriated officers wanted him hanged. Out of the forty six senior army officers, summoned by Zia to discuss the issue, all were in favour of this ultimate and final form of punishment" (page 29-30). In the foot note, Barrister Moudud mentioned, "This was disclosed to him by Zia himself".

In a recent Article under the caption, "Trial in Military Court. The documents of the hanging order of Colonel Abu Taher", Dr. AMM Showkat Ali, who was placed as the Deputy Commissioner of Dhaka in 1976, published in the Daily Prothom Alo on 19th September 2010, wrote, "At that time there was martial law in the country. It was alleged that a summary trial was held by a martial law tribunal formed by the then army chief. It is apparent that extrajudicial murder was committed in the name of trial because if a death sentence is pronounced by a court which is formed outside the jurisdiction of the Constitution, it will be termed extrajudicial murder by international standards".

It is obvious that the death sentence handed down on Col. Taher was not even based on the decision of the mock tribunal created by Zia, it was, indeed, the follow up of a

decision that was taken at the meeting of the formation commanders held at the Army Head Quarters at the Cantonment, where most of the officers present had not participated in the Liberation War. It is hence, evident that General Ziaur Rahman and his collaborators conspired to kill Lt. Colonel Taher in disguise of a mock trial: only one in the meeting opposed the idea.

Major (Rtd) Ziaudn, another triumphant Freedom Fighter, widely exalted for his rectitudeous contribution in the War of Liberation, also filed an application, along with Corporal (Rtd) Shamsul Haque and Habildar Abdul Hai Mazumdar, engaging Article 102 of the Constitution which was registered as Writ Petition No. 1048 of 2011, which also generated a Rule Similar to the one Writ Petition no. 7236/ 2010 engendered. Their averments, on primoradial counts and facts, are identical to those laid down by the petitioners in the earlier Writ Petition and hence we are figuring below only those averments which are unique to these Petitioners, in summarised version;

Major (dismissed) Ziauddin, the Petitioner no. 1 was a Major in the Bangladesh Army who was dismissed from the service in consequence of his conviction in the above

mentioned special tribunal case no. 1 of 1976, though he was never given any order or document regarding his dismissal. He actively participated in the liberation war in 1971 and primarily fought in Sunderban sub-sector under Sector-9 of Bangladesh Muktibahini. He was impleaded as an accused person in the special martial law tribunal case no. 1 of 1976. He was commissioned by Pakistan Military Academy on 6th September 1970. He was in the active service with the rank of a Major at the time of his arrest on or around 4th January, 1976.

The Petitioner no. 2 was a Corporal in the Bangladesh Air Force, who joined the then Pakistan Army in 1966 and was posted in the Radar Station in 1971. He escaped from the captivity in Pakistan and joined the Liberation War on 23rd August, 1971. After the Liberation of Bangladesh he joined the Bangladesh Air Force on 5th January, 1972 and was in the service until his arrest on the 23rd November, 1975;

The Petitioner no. 3 was a red-blooded Freedom Fighter, who actively participated and fought in the liberation war. He joined the then Pakistan army in 1965. He actively participated in the revolt in the Jessore Cantonment on 27th March, 1971. He remained posted as a Havildar in the 22 Bengal Regiment until his arrest in the last week of November, 1975.

All three of them were implicated as co-accused in the Special Martial Law Tribunal Case no. 1 of 1976. They were kept confined in a small room in the Central Jail, Dhaka all along, in strict secrecy and in a surreptitious manner.

They were never aware of the charges brought against them or the alleged offences they were arrested for. At no point of time were they supplied with any FIR, any complaint or any kind of paper whatsoever relating to the alleged arrest, custody or trial.

They were not allowed to talk to any lawyer or Advocate. Even their closest relatives did not have any access to them.

The so-called trial continued for about 17 days, during which they did not know what were the charges that they were implicated with, because they were neither supplied any paper nor were the charges read over to them. They did not have the slightest idea as to the evidence that were to be adduced against them.

All the accused, including the petitioner no. 1, were used to be brought in the so-called court room in the Central Jail, handcuffed and barefooted and were all put inside a barbed cage as if they were roman slaves.

Neither them nor the lawyers appearing for different accused, were ever allowed to cross examine the prosecution witnesses; they were escorted by guards to the court and were hurriedly taken away after their hasty deposition. The accused were not at all aware of the contents of the deposition.

The accused persons were hardly given a chance to say anything in their defense or to repudiate the accusation brought against them or to contradict the deposition of the witnesses or to produce any defense witness.

The so-called judgment and order was read out on 17th July, 1976. The Petitioners were sentenced to suffer rigorous imprisonment of varying terms and to pay fines.

After the pronouncement of the judgment and order, the judges of the tribunal swiftly went away and the accused were taken off to their cells.

In May, 1796 the Petitioner No. 2 was taken blindfolded to an unknown place and was inhumanly tortured with electric shocks amongst other, and was intimidated to become a prosecution witness against the other accused. He came to learn that his wife was told that he would face the same consequence as Col. Taher would.

He was made an accused in the said Case as he refused to turn into an approver.

The petitioner no. 3 was arrested around the last week of November, 1975 from 22 Bengal Regiment, was taken to an unknown place blindfolded, was kept in captivity therein for almost 8 (eight) days and was subjected to merciless physical torment.

He was asked to become a prosecution witness against Col. Taher and to depose that Co. Taher was a revolutionary who injected politics into the Army. He was severally excruciated and sent to Central Jail and was made an accused in the case because of his declination to depose for the prosecution.

The Petitioners were arrested along with other co-accused purportedly for crimes alleged in FIR no. 8, dated 4.6.1976 of Mohammedpur Police Station.

The above noted FIR purportedly animated the Special Martial Law Tribunal Case no. 1 of 1976 and the accused were tried and found guilty by the aforementioned tribunal along with others on 17.07.1976. Lt. Colonel (retd.) M. A. Taher, Bir Uttam, was sentenced to death.

The Petitioner No. 1 ranked 4th among Bengali officers, when he was commissioned in 1970. Of those 3 (three) Bengli officers, who ranked above him, one ultimately retired as a Lieutenant General and Chief of Army and 2 others as Majors General, who served the Army for about 25-30 years. The Petitioner No. 1 would have been in service for more or less at least until 1995 and, given his initial ranking and participation in the Great War of Liberation, he would and have retired at least as a Brigadier General, if not above, and as such he would have served the country for another 20 years with corresponding increase in salary, allowances, rank and status.

The Petitioner No. 1 achieved highest gradation number and stood 1st among 190 cadets showing the best rate of achievement and as such he would have had a bright and rewarding career in Bangladesh Army for at least another two decades with due financial and other benefits along with the prestige of the rank of a General, of which he was deprived due to the illegal conviction by a kangaroo court.

The Petitioner No. 2 and 3 were similarly deprived of their expected length of service respectively in the Air Force and the Army and were deprived of their legitimate service benefits due to the impugned conviction and sentence.

Provisions of the Army Act. 1952 or of any law relating to any disciplined forces was not applicable in the impugned trial, judgment and order as the tribunal included 2 (two) civilian Magistrates, who did not belong to any disciplined force and as such the proceeding, judgment and order of the impugned case is not protected by Article 45 of the Constitution and therefore being repugnant to the Constitution, is liable to be declared unconstitutional and void by this Hon'ble Court.

Refusal of the authorities to provide documents or papers, including certified copies of the proceedings, judgment and order to the Petitioners is **violative** of the elementary form of rule of law, constitutionalism as embodied in Articles 31 and 32 of the Constitution and as such the impugned proceeding is liable to be declared to be antipathetic to the Constitution.

Petitioners must not suffer the ignominy of having been convicted for crimes through an illegal and unlawful proceedings and as such they deserve to be cleared off.

Another set of petitioners filed another application, invoking 102 of the Constitution, which got registered as Writ Petition No. 826 of 2011, which also procreated a similar Rule. Again, averments scripted by the said Petitioners are, in most

respect, identical to those scribed by the Petitioners in the other Writ Petitions cited above. Those averments, which are specific to these Petitioners alone, are, summarised below;

The Petitioner No. 1 is the President of Jatio Shamajtantrik Dal (Jashad), a Member of Parliament and the Chairman of the Standing Committee on the Ministry of Post and Tele-Communications Affairs. He was a leader of erstwhile East Pakistan Students' League and Shadhin Bangla Chatra Sangram Parisad. He had indomitably contributed to our liberation war as the Chief Instructor of Bangladesh Liberation Force (BLF) Training Camp, which was set up at Tandua within the province of Tripura, India. Because of his proven patriotism, excellent organizational and leadership ability, sincerity and commitment, the Petitioner No. 1 was made the General Secretary of Jatio Krishak League, Central Committee in 1972. The Architect of Independent Bangladesh, Bangbandhu Sheikh Mujibur Rahman approved the said committee. In personal life he is an Engineer and obtained graduation in Chemical Engineering from Bangladesh University of Engineering and Technology (BUET) in early 1970.

The Petitioner No. 2 is the Vice-President of Jatio Shamajtantrik Dal (Jasad), Central Committee who also participated in the Historic War of Liberation as the Deputy Chief of Bangladesh Liberation Front, Jessore Sub-sector and has been actively participating in all kinds of social and political movements since 1969. He is also the former Upazila Chairman of Jessore Sadar Upazila and former General Secretary of the then East Pakistan Students' League, Jessore District Committee. By profession he is an Advocate, practicing from Jessore District Bar.

During 1975-76 both the petitioners were active in politics with a progressive-democratic political **programme** launched by Jatio Shamajtantrik Dal. They were never involved in any activities prejudicial to the interest or sovereignty of Bangladesh, for the liberation of which Country, they fought.

The police arrested the Petitioner No. 1 on 23.11.1975 and, without producing him before a competent court, sent him to Dhaka Central Jail, wherein, within a week, he was served with an order of detention under Special Powers Act 1974. While under detention, on 15.6.1976, he was taken to a room at the Dhaka Central Jail gate. On query, he came to know that a special martial law tribunal has been set up in that room which

will sit in camera and try the Petitioners for an alleged offence in connection with Mohammadpur Police Station case no. 08 dated 4.6.1976 under section 121A of the Penal code read with regulation 1/13 of MLR 1976. The Petitioners wanted to know the allegation laid against them and also asked for the copies of the FIR, charge sheet and other relevant papers, but their requests were turned down.

The above noted criminal case was registered as Special Martial Law Tribunal Case no. 1 of 1976, wherein the Petitioners, along with thirty three others, including Lt. Colonel (retired) Abu Taher, Bir Uttam, were tried by a special martial law tribunal. The said tribunal, by its so-called and illegal judgment and order, dated 17.7.1976, purportedly convicted seventeen accused persons, inclusive of the Petitioners and sentenced them to different terms of imprisonment and, acquitted sixteen. Out of them, Lt. Colonel (retired) Abu Taher, Bir Uttam, was sentenced to death. Petitioner No. 1 was sentenced to suffer rigorous imprisonment for 10 (ten) years with a fine while the Petitioner No. 2 was sentenced to suffer 5 (five) years and to pay fine.

The so-called proceeding of Special Martial Law Tribunal Case no. 1 of 1976 went ahead in total soltitude within the

bounds of Dhaka Central Jail and the accused were not allowed to be represented or defended by Advocates. Because of the oath of secrecy, the participants in the trial could not divulge any information to the Petitioners and their relatives about the purported proceedings.

Relatives of the Petitioners were never allowed to meet them. During the confinement of the Petitioner No. 1, his mother died, but this lachrymose news was not communicated to him nor was he allowed to attend his mother's Namaj-e-Zanaja. He came to know it from unofficial sources a couple months afterwards.

The news of the conviction was published in the Bangladesh Observer on 18.07.1976.

According to the news item published in the Bangladesh Observer on 18.7.1976, seventeen accused persons, including Lt. Col. (retired) Abu Taher, Bir Uttam and the Petitioners were found guilty of offence under section 121A of the Penal Code. A Hero of our Liberation War, Lt. Col. (retired) Abu Taher, Bir Uttam, was sentenced to death and within four days he was executed on 21.7.1976 within the four walls of Dhaka Central Jail.

The so called trial was conducted in camera, the petitioners were never given any paper or certified copy or any other documents relating to the charge, deposition of witnesses, proceeding, judgment and/or order relating to the case.

The Petitioner No. 1 was released from Dhaka Central Jail on 13.6.1980 while the Petitioner No. 2 was released on 19.10.1979, but they were not given any official document of release or any other documents pertaining to their conviction or sentence or release at any point in time.

The Petitioners never committed any offence under 121A of the Penal Code at any point of time in any manner, and the question of commission of any such offence by them did not arise as they fought for this Country not only by participating in the War of Liberation, but also by organizing the people of the then East Pakistan and motivating them politically to take preparation for the War and finally secured the emancipation of the Bengali Nation. Their patriotism, ideological conviction and commitment for the countrymen were beyond qualm. But the black ship among the freedom fighters, Lt. Gen. Ziaur Rahman, with a motive to set the Country against the spirit of the War of Liberation, tried them illegally, arbitrarily, vindictively and without any constitutional mandate or any other law in force.

He did it to usurp the power directly and to cling on to power illegally, and to serve the interest of the anti-liberation forces, and to make sure that no political opposition or resistance could thwart his misdeeds.

Inspite of being Freedom Fighters, Member of Parliament, people's representative, respected politicians, and above all, conscious citizens of the country, the Petitioners are carrying the stigma of their illegal conviction which labeled them as being 'offenders against the Country', for last 35 years, and hence they need to be cleared of the slur.

The Petitioners were not allowed to consult or engage lawyers of their own choice. Relatives of the Petitioners' were not allowed to consult or see them.

The Petitioners further stated that after the killing of Bangabandhu, they and their party protested the illegal usurpation of power by the military authorities and the killing of Banabondhu. Lt. Colonel Abu Taher BU wanted to from and organize a new army for the independent Bangladesh, wiping out the pattern, the colonial rulers established and left behind as their legacy. On the other hand Major General Ziaur Rahman, who was the Chief of Army Staff, and at the helm of state powers, became envious to Colonel Taher and looked at

Taher and other leaders, as his political adversaries as they protested the killing of Bangabondhu and usurpation of power by martial law proclamation. Zia did, hence, hatch an intrigue against them and thus implicated them in a concocted and framed case to fulfill his diobolic design. Major General Ziaur Rahman forged an alliance with anti liberation forces and allowed them to pursue communal politics in the country. He did not only rehabilitate Rajakers and Al Bodors, but also made one of the top leaders of anti liberation forces, named Shah Azizur Rahman, as the prime minister of the country. The Petitioners also asserted that Major General Ziaur Rahman resorted to all these illegalities to insulate his power against any challenge. He did not spare freedom fighters as they appeared to him as stumbling block to his authoritarian power. The Petitioners came to learn that their illegal trial and punishment were discussed at the meetings of the formation commanders led by Major General Ziaur Rahaman at the relevant time. Breaking all ethos of fundamental rights, the so called martial law tribunal concluded the so called camera trial and convicted and sentenced the Petitioners and others who fought for the liberation of this country.

The petitioners must not suffer the ignominy of having been convicted for crimes through an illegal and unlawful proceeding and as such they deserve to be cleared.

Yet another petition, registered as Writ Petition No. 1059 of 2011, was filed by Mr. Abdul Mazid, which has also been adjudicated upon, in conjugation with the three other petitions discussed above.

Again, in substantial respect, his averments are no different from those of others, and as such, we are recording hereunder, in summary form, those statement which are unique to him only.

The Petitioner was a Vibrant Freedom Fighter who joined the Bangladesh Air Force in February, 1972 and remained posted in Chittagong until June, 1976.

He was a co-accused in the Special Martial Law Tribunal Case no. 1 of 1976 which proceeded in a small room within the venue of the Central Jail, Dhaka, all along in strict seclusion behind dark curtains.

He was arrested in June, 1976 and flown to Dhaka by a special plane and then was taken to SB Office and thereafter to Dhaka Court, after confining him in a car for the whole day. He was then taken to Dhaka Central Jail.

He was never made aware of the charges or of the alleged offences, he was arrested and kept in custody for, as no FIR, complaint or other kind of paper relating to the alleged arrest, custody or trial, was ever supplied to him.

During the whole period of custody he was never allowed to talk to any lawyer or Advocate. Even his closest relatives were not allowed any access to him.

The so-called trial continued for about 17 days, during which time he did not exactly know the charges that were brought against him because he was neither supplied any paper nor were the charges read over to him. He did not have slightest idea of the evidences that were to be adduced against him.

All the accused, including the Petitioner, was used to be brought in the so-called court room handcuffed and barefooted and was put inside a barbed cage as if they were roman slaves.

The accused was never allowed to engage any lawyer or Advocate or even to talk to the lawyers who voluntarily appeared for others.

Neither the accused nor the lawyers appearing for different accused persons, were ever allowed to cross examine the prosecution witnesses who were guarded while they were

being produced and were hurriedly taken away after their hasty deposition; the accused were not at all aware of the contents of their deposition.

He was hardly given a chance to say anything in his defense or to repudiate the accusation brought against him or to contradict the deposition of the witnesses or to produce any defense witness.

The Petitioner was arrested along with other co-accused, purportedly for crimes alleged in the so-called FIR. The Petitioners were purportedly accused of committing crimes, among others, under Section 121A of the Penal Code.

The FIR purportedly culminated in Special Martial Law Tribunal Case no. 1 of 1976 and the accused were purportedly tried and found guilty by the afore-said tribunal. The impugned judgment and order was handed down on 17.7.1976.

As the Rule we issued in respect to all the petitions cited above ripened and steps were on the move for adjudication, we were intimated by the authorities that no paper in relation to the indictment, proceeding trial or conviction pertaining to the case in question could be located despite extensive search undertaken at all probable locations, apparently because the government of the day had destroyed them to make them

untraceable. Mr. A.B.M. Altaf Hussain, the Learned Deputy Attorney General, informed us that even the first information report could not be traced. All they could detect was a list of persons that were hanged to death in Dhaka Central Jail in 1976 as depicted in the record of the said Jail. Lt. Col. Taher is figured at the top of the list, whose death sentence is shown to have had been executed on 21st July 1976.

A document dated 28.10.2010 affixed with the signature of one Col. Syed Iftekharuddin, Additional Inspector General of Prison, forwarded for our consumption, divulges that a special martial law tribunal Dhaka, created pursuant to 13 MLR of 1975, handed down death sentence to Lt. Colonel (Rtd) Abu Taher, Prisoner no 3621/A, in Mahammadpur P.S. Case no 8(6) 76, Special ML Case no 01/76, under section 121A of the Penal Code, on 17.07.1976 and that in execution of the said sentence, Lt. Col. Abu Taher was hanged at 4.30 am on 21.07.1976 in Dhaka Central Jail.

That document further states that apart from a list of the executed persons, no other information has been retained in Dhaka Central Jail.

Another document, authored by Mahammad Monir Hussaion, Deputy Police Commissioner, Dhaka Metropolitan

Police, dated 16th January 2011, destined to the Officer-in-Charge, Mahammadpur Police Station, reveals that no copy of the FIR could be pinned down at the GR Section of the Magistracy in Dhaka. A copy of the letter the GRO addressed to the said Deputy Commissioner of Police, dated 16.01.2011, was attached to the Deputy Commissioner's letter: text of both of which are reproduced below, verbatim;

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
বাংলাদেশ পুলিশ
উপ-পুলিশ কমিশনারের কার্যালয়
অপরাধ তথ্য ও প্রসিকিউশন বিভাগ
ঢাকা মেট্রোপলিটন পুলিশ, ঢাকা ।
সিএমএম কোর্ট, নতুন ভবন, ২য় তলা, ঢাকা-১১০০ ।

স্মারক নং- তারিখ /০১/২০১১খ্রিঃ ।

প্রতি,
অফিসার ইন চার্জ
মোহাম্মদপুর থানা
ঢাকা মেট্রোপলিটন পুলিশ, ঢাকা ।

বিষয়ঃ মামলার এজাহার কপি সরবারহ করণ প্রসঙ্গে ।

সুত্রঃ মহামান্য হাইকোর্টের রীট পিটিশন নং-৭২৩৬/১০ ও মোহাম্মদপুর থানার মামলা নং-৮ তারিখ-০৪/০৬/৭৬ ইং ।

উপর্যুক্ত বিষয়ের আলোকে আপনার অবগতির জন্য জানানো যাইতেছে যে, সূত্রে বর্ণিত মামলার এজাহার কপি অত্র ম্যাজিষ্ট্রেসীর জিআর শাখায় খোঁজ করে পাওয়া যায় নাই। এতদবিষয়ে সংশ্লিষ্ট জিআরও মোঃ জাহাঙ্গীর আলম এর একটি প্রতিবেদন পরবর্তী কার্যক্রম গ্রহণের জন্য এতদসংঙ্গে প্রেরণ করা হইল।

সংযুক্তঃ ০১(এক) পাতা।

(মোঃ মনির হোসেন)

বিপি-৭৩৯৯০১০০৫৫

উপ-পুলিশ কমিশনার (চলতি দায়িত্ব)

অপরাধ তথ্য ও প্রসিকিউশন বিভাগ

ঢাকা মেট্রোপলিটন পুলিশ, ঢাকা।

ফোন-৭১১৬১৮৮ ফ্যাক্স-৭১১৪৪৭০

বরাবর,

উপ-পুলিশ কমিশনারের কার্যালয়

অপরাধ তথ্য ও প্রসিকিউশন বিভাগ

ঢাকা মেট্রোপলিটন পুলিশ, ঢাকা।

বিষয়ঃ মামলার এজাহার কপি সরবারহ করণ প্রসঙ্গে।

সুত্রঃ মোহাম্মদপুর থানা মামলা নং-৮ তারিখ-০৪/০৬/৭৬ খ্রিঃ।

বিনীত নিবেদন এই যে, আমি ১৯৭৬ সালের জিআর রেজিষ্টার পর্যালোচনা করিয়া দেখিতে পাই যে, সুত্র বর্ণিত মামলার এজাহার বিজ্ঞ আদালত/জিআর শাখায় গৃহীত হয় নাই। জিআর শাখায় বর্ণিত মামলার সংশ্লিষ্ট জিআর রেজিষ্টারে ঋওজ

ঘড়ঃ জবপবরাবফ, ঝবব গখ এজ-৮১/৭৬ লিখা আছে। তবে ঋওজ ঘড়ঃ জবপবরাবফ কথাটি একটি টান দিয়া কাটা আছে। আমি জিআর শাখায় বহু খোঁজাখুঁজি করিয়াও বর্ণিত মামলার এজাহার বা কোন রেকর্ড পত্রাদির সন্ধান করিতে পারি নাই। এই বিষয়ে কেহ আমাকে কোন তথ্য প্রদান করিতে পারে নাই। ফলে সুত্রে বর্ণিত মামলার এজাহার কপি প্রদান করা সম্ভব হইতেছে না।

ইহা আপনার সদয় অবগতির জন্য প্রেরণ করিলাম।

জিআরও

সিএমএম আদালত, ঢাকা।

The respondents forwarded to our office another document, authored by one Jahura Begum, a Senior Assistant Secretary at the Ministry of Defence, Government of the People's Republic of Bangladesh, dated 6.12.2010, the contents of which, reproduced undistorted, reads as follows;

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
প্রতিরক্ষা মন্ত্রণালয়
গণভবন কমপ্লেক্স
শেরেবাংলা নগর, ঢাকা।

নং প্রম/রীট-১৯৩/২০১০/ডি-২১/১৮৬ তারিখঃ ২২ অগ্রহায়ণ ১৪১৭/ ৬ ডিসেম্বর ২০১০।

বিষয়ঃ মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগের দায়েরকৃত রীট পিটিশন মামলা নং ৭২৩৬ প্রসংগে।

সূত্রঃ (ক) ৪০০৯/১/এএন্ডএল-১/১৩১০, তারিখঃ ০২ ডিসেম্বর ২০১০।

(খ) স্বাঃ মঃ (আইন-১)/রীট-২৭৯/২০১০/৬০৭৮, তারিখঃ ১৪ নভেম্বর ২০১০।

উপর্যুক্ত বিষয় ও সূত্রোক্ত পত্রের আলোকে জানানো যাচ্ছে যে, লেঃ কর্ণেল এম, এ, তাহের বীর উত্তম-কে মৃত্যুদন্ড প্রদানকারী সামরিক ট্রাইব্যুনালের রায়ের আদেশ/ডকুমেন্টস অনুসন্ধানপূর্বক এতদসংক্রান্ত ফলাফল সেনাসদর জেএজি বিভাগ-কে এ সংক্রান্ত তথ্যাদি প্রেরণের জন্য অনুরোধ করা হয়। সেনাসদর জানিয়েছেন লেঃ কর্ণেল এম,এ, তাহের বীর উত্তম-কে দি স্পেশাল মার্শাল ল ট্রাইব্যুনাল রেগুলেশন ১৯৭৬ বলে গঠিত স্পেশাল মার্শাল ল ট্রাইব্যুনালে বিচারের মাধ্যমে মৃতুদন্ড প্রদান করা হয়েছিল। তিনি বিচারের অনেক পূর্বেই ৬ অক্টোবর ১৯৭২ তারিখে এল,পি, আর, এ গমণ করেন এবং ৬ জুলাই ১৯৭৩ তারিখে সেনাবাহিনী থেকে অবসর গ্রহন করেন। যে কারণে লেঃ কর্ণেল এম, এ, তাহের বীর উত্তম-এর বিচার স্পেশাল মার্শাল ল ট্রাইব্যুনালের মাধ্যমে সম্পন্ন করা হয়। কোর্টমার্শাল-এর মাধ্যমে হয়নি। সেহেতু উক্ত বিচার সম্পর্কিত কোন নথিপত্র অথবা রায়ের আদেশ সেনাসদরে মওজুদ নেই।

২। সেনাসদর থেকে প্রাপ্ত উক্ত পত্রের ফটোকপি সদয় অবগতি ও প্রয়োজনীয় কার্যক্রম গ্রহণের জন্য এতদসংগে নির্দেশক্রমে প্রেরণ করা হলো।

সংযুক্তঃ বর্ণনা মোতাবেক-এক পাতা।

(জোহরা বেগম)
সিনিয়র সহকারী সচিব
ফোনঃ ৯১১২৩৯৬

সলিসিটর উইং
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
এটর্নী জেনারেল ও সলিসিটর কার্যালয় ভবন,
বাংলাদেশ সুপ্রীমকোর্ট ভবন, ঢাকা।

অনুলিপি সদয় জ্ঞাতার্থে ও কার্যার্থে (জ্যেষ্ঠতার ভিত্তিতে নয়)ঃ

১। সচিব, স্বরাষ্ট্র মন্ত্রণালয় (দৃঃ আঃ মোহাম্মদ আবু সাঈদ মোল্লা, সহকারী সচিব), বাংলাদেশ সচিবালয়, ঢাকা।

২। সচিব, আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা।

৩। রেজিষ্ট্রার, বাংলাদেশ সুপ্রীম কোর্ট, হাইকোর্ট বিভাগ, ঢাকা।

৪। জনাব আলতাফ হোসেন, ডেপুটি এটর্নী জেনারেল, এটর্নী জেনারেল ও সলিসিটর কার্যালয় ভবন বাংলাদেশ সুপ্রীম কোর্ট প্রাঙ্গণ, ঢাকা।

Another document, dated 2nd November 2010, which emanated from one Major Asif Iqbal, placed at the Armed Forces Division of the Prime Minister's Office, also revealed that no document pertaining to the so-called trial could be discovered.

Everything stated in all of the documents referred to above, are scripted herein under in original form;

জরুরী
গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
প্রধানমন্ত্রীর কার্যালয়
সশস্ত্র বাহিনী বিভাগ
প্রশাসন ও ব্যবস্থাপনা পরিদপ্তর
ঢাকা সেনানিবাস
টেলিফোনঃ ৮৭১৩২৯৭ সামরিক ৪৩৮৮
ই-মেইলঃ ধফসরহ ফঃব@ধভফ.মড়া.নফ
১৮ অগ্রহায়ণ ১৪১৭

৪০০০৯/১/এএন্ডএল-১/১৩১০ ০২ নভেম্বর ২০১০।

মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগের দায়েরকৃত রীট পিটিশন নং ৭২৩৬/২০১০ প্রসংগে।

বরাত

সূত্রঃ (ক) স্বারাষ্ট্র মন্ত্রণালয়, আইন শাখা-১ পত্র নং স্বাঃ মঃ (আইন-১)/রীট-৭৯/২০১০/৬০৭৮, তারিখঃ ১৪ নভেম্বর ২০১০ (সকলকে নয়)।

(খ) সেনাসদর, জেএজি বিভাগ, ঢাকা সেনানিবাস পত্র নং ৫৫২৫/২ (ডি-৬৮)জেএজি তারিখ ২৫ নভেম্বর ২০১০ (সকলকে নয়)।

১। লেঃ কর্ণেল (অবঃ) মোহাম্মদ আবু তাহের বীর উত্তম'কে " দি স্পেশাল মার্শাল লট্রাইব্যুনাল রেগুলেশন, ১৯৭৬" বলে গঠিত স্পেশাল মার্শাল লট্রাইব্যুনালে বিচারের মাধ্যমে মৃতুদন্ড প্রদান করা হয়েছিল। উল্লেখ্য, উক্ত বিচারের অনেক পূর্বেই অর্থাৎ ০৬ অক্টোবর ১৯৭২ তারিখে তিনি এল,পি, আর, এ গমণ করেন এবং ৬ জুলাই ১৯৭৩ তারিখে সেনাবাহিনী হতে অবসর গ্রহন করেন। যে কারণে লেঃ কর্ণেল (অবঃ) মোহাম্মদ আবু তাহের, বীর উত্তম-এর বিচার স্পেশাল মার্শাল ল ট্রাইব্যুনালের মাধ্যমে সম্পন্ন করা হয়, কোর্টমার্শাল-এর মাধ্যমে করা হয়নি। সেহেতু উক্ত বিচার সম্পর্কিত কোন নথিপত্র অথবা রায়ের আদেশ সেনাসদরে মওজুদ নেই।

২। আপনাদের অবগতি ও পরবর্তী কার্যক্রমের জন্য প্রেরণ করা হলো।

(মোঃ আসিফ ইকবাল)
মেজর
পক্ষে ভারপ্রাপ্ত পিএসও

বিতরণঃ

বহির্গমনঃ

কার্যক্রমঃ

সচিব

স্বরাষ্ট্র মন্ত্রণালয়

বাংলাদেশ সচিবালয়, ঢাকা

(দৃষ্টি আর্কষণঃ মোহাম্মদ আবু সাঈদ মোল্লা

সহকারী সচিব

সচিব

প্রতিরক্ষা মন্ত্রণালয়

গণভবন কমপ্লেক্স

শেরেবাংলা নগর, ঢাকা

There are several other letters which formed part of the documents transmitted to our Registrar, text of all of which are recorded below.

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
প্রতিরক্ষা মন্ত্রণালয়
গণভবন কমপ্লেক্স
শেরেবাংলা নগর, ঢাকা ।

নং প্রম/রীট-১৯৩/২০১০/ডি-২১/১৮৬ তারিখঃ ১৮ অগ্রহায়ণ ১৪১৭/ ২ ডিসেম্বর ২০১০ ।

বিষয়ঃ রীট পিটিশন মামলা নং ৭২৩৬/২০১০ এর দফাওয়ারী জবাব প্রেরণ।

উপর্যুক্ত বিষয়ে নির্দেশক্রমে জানানো যাচ্ছে যে, রীট পিটিশন মামলা নং ৭২৩৬/২০১০-এর বিষয়ে নিম্নলিখিত কার্যক্রম গ্রহন করা হয়েছে:

(ক) মামলাটি সরকার পক্ষে প্রতিদ্বন্দ্বিতা করার জন্য একজন উপযুক্ত বিজ্ঞ আইনজীবী নিয়োগদানের জন্য সলিসিটর, সলিসিটর উইং (রীট)-কে অনুরোধ করা হয়েছে (কপি সংযুক্ত) ।

(খ) উক্ত মামলার দফাওয়রী জবাব জরুরি ভিত্তিতে প্রেরণের জন্য সেনাসদর জেএজি বিভাগ-কে অনুরোধ করা হয়েছে এবং এর অনুলিপি জ্ঞাতের্থে ও

কার্যার্থে সচিব, স্বারাষ্ট্র মন্ত্রণালয়; সচিব, আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়, এবং সলিসিটর, সলিসিটর উইং (রীট) বরাবর প্রেরণ করা হয়েছে (কপি সংযুক্ত)

(গ) সেনাসদর জেএজি বিভাগ থেকে প্রাপ্ত উক্ত রীট পিটিশন মামলার আর্জির দফাওয়ারী জবাব ও লেঃ কর্ণেল এম,এ, তাহের বীর উত্তম (মৃত)-এর চাকুরিকালীন প্রয়োজনীয় নথিপত্রের ফটোকপি সলিসিটর, সলিসিটর উইং (রীট) বরাবর প্রেরণ করা হয়েছে (কপি সংযুক্ত)

(ঘ) লেঃ কর্ণেল এম,এ, তাহের বীর উত্তম-কে মৃত্যুদন্ড প্রদানকারী সামরিক ট্রাইব্যুনাল রায়ের আদেশ/ডকুমেন্টস অনুসন্ধানপূর্বক এতদসংক্রান্ত ফলাফল অবহিত করার জন্য স্বরাষ্ট্র মন্ত্রণালয় অনুরোধ করলে সেনাসদর জেএজি বিভাগ-কে এ সংক্রান্ত তথ্যাদি প্রেরণের জন্য নির্দেশনা প্রদান করা হয় (কপি সংযুক্ত) ।

২ । উল্লেখ্য যে, সামরিক ট্রাইব্যুনালের রায়ের বিষয়ে সশস্ত্র বাহিনী বিভাগ সংশ্লিষ্ট বিধায় এতদসংক্রান্ত সকল কাগজপত্র সেনাসদর থেকে সংগ্রহ করে সলিসিটর উইং-এ প্রেরণ করা হয়েছে ।

(জোহরা বেগম)
সিনিয়র সহকারী সচিব
ফোনঃ ৯১১২৩৯৬

জনাব আলতাফ হোসেন
ডেপুটি এটর্নী জেনারেল
এটর্নী জেনারেল ও সলিসিটর কার্যালয় ভবন,
বাংলাদেশ সুপ্রীম কোর্ট প্রাঙ্গণ, ঢাকা ।

অনুলিপি:

রেজিষ্ট্রার

বাংলাদেশ সুপ্রীম কোর্ট, ঢাকা ।

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
প্রতিরক্ষা মন্ত্রণালয়
গণভবন কমপ্লেক্স
শেরেবাংলা নগর, ঢাকা ।

নং প্রম/রীট-১৯৩/২০১০/ডি-২১/১৩৮ তারিখঃ ২৯-৯-২০১০ ।

বিষয়ঃ রীট পিটিশন মামলা নং ৭২৩৬/১০ বিজ্ঞ আইনজীবি নিয়োগ।

উপর্যুক্ত বিষয়ে নির্দেশক্রমে জানানো যাচ্ছে যে, এম, আনোয়ার হোসেন, পিতা মৃত জনাব মহিউদ্দিন আহমেদ প্রফেসর ডিপার্টমেন্ট অব বায়োকেমিষ্ট্রী এবং মলিকুলার বায়োলজি ঢাকা বিশ্ববিদ্যালয় কতৃক রীট পিটিশন মামলা নং ৭২৩৬/১০ আনায়ন করা হয়েছে। তিনি আবেদনে উল্লেখ করেছেন যে, ১৯৭৬ সারে লেঃ কর্ণেল আবু তাহেরকে কেন্দ্রীয় কারাগারে ফাঁসির মাধ্যমে মৃত্যবরণ করা হয়েছিল। উক্ত ফাঁসির বিরুদ্ধে সংক্ষুদ্ধ হয়ে তিনি সচিব আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়কে ১নং, সচিব প্রতিরক্ষা মন্ত্রণালয়কে ৪নং সহ মোট ৭ জনকে প্রতিপক্ষ করে সুপ্রিমকোর্টের হাইকোর্ট বিভাগে একটি রীট পিটিশন মামলা দায়ের করেছেন।

২। উক্ত মামলাটি সরকার পক্ষে প্রতিদ্বন্দ্বিতা করার জন্য একজন উপযুক্ত বিজ্ঞ আইনজীবি নিয়োগ দানের জন্য অনুরোধ করা হলো।

(জোহরা বেগম)
সিনিয়র সহকারী সচিব
ফোনঃ ৯১১২৩৯৬

সলিসিটর
সলিসিটর উইং (রীট)
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়,
এটর্নী জেনারেল ও সলিসিটর এর কার্যালয়,
ঢাকা।

অনুলিপিঃ
সেনাসদর জে এ জি বিভাগ
ঢাকা সেনানিবাস
ঢাকা।

অত্র সাথ হাইকোর্ট বিভাগের কাগজপত্র প্রেরণ করা হলো। উক্ত রীট মামলার আর্জির অনুচ্ছেদওয়ারী জবাব ২ প্রস্থ প্রস্তুতপূর্বক জরুরি ভিত্তিতে এ মন্ত্রণালয়ে প্রেরণপূর্বক মামলার প্রয়োজনীয় কার্যক্রম গ্রহণ করার জন্য অনুরোধ করা হলো।

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
প্রতিরক্ষা মন্ত্রণালয়
গণভবন কমপ্লেক্স, ঢাকা।
নং প্রম/রীট-১৯৩/১০/ডি-২১/১৪৭ তারিখঃ ১৩.১০. ২০১০ ইং।

বিষয়ঃ মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগে দায়েরকৃত রীট পিটিশন নং ৭২৩৬/২০১০ ও মহামান্য হাইকোর্ট কর্তৃক প্রদত্ত আদেশের আলোকে কার্যক্রম গ্রহণ।

সূত্রঃ (ক)স্মারক নম্বর-স্ব:ম: (আইন-১)রীট-২৭৯/২০১০/৫৫০০,০৩/১০/২০১০
(খ) স্মারক নম্বর-স্ব: ম: (আইন-১) রীট-২৭৯/২০১০/৫৫০১,০৩/১০/২০১০
(গ) প্রম/রীট-১৯৩/২০১০/ডি-২১/১৩৮, তাং ২৯/০১/২০১০

উপরোক্ত বিষয় ও সূত্রোক্ত স্মারকের ফটোকটি ও সংশ্লিষ্ট কাগজপত্র এতদসংগে প্রেরণ করা হলো ।মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগে দায়েরকৃত রীট পিটিশন নং ৭২৩৬/২০১০ ও মহামান্য হাইকোর্ট কর্তৃক প্রদত্ত আদেশের আলোকে কার্যক্রম গ্রহণের নিমিত্তে রীট পিটিশন নং ৭২৩৬/২০১০ এর দফাওয়ারী জবাব জরুরি ভিত্তিতে মন্ত্রণালয়ে প্রেরণের ব্যবস্থা গ্রহনের জন্য পুরনায় নির্দেশক্রমে অনুরোধ করা হলো।

সংযুক্তঃ বর্ণনা মোতাবেক।

(জোহরা বেগম)
সিনিয়র সহকারী সচিব
ফোনঃ ৯১১২৩৯৬

সেনাসদর

জে এ জি বিভাগ

ঢাকা সেনানিবাস

অনুলিপি সদয় জ্ঞাতার্থে ও কার্যার্থে ঃ

১। সচিব, স্বরাষ্ট্র মন্ত্রণালয় বাংলাদেশ সচিবালয় ঢাকা।

২। সচিব, আইন বিচার ও সংসদ বিষয়ক মন্ত্রণালয় বাংলাদেশ সচিবালয় ঢাকা।

৩। সলিসিটর, সলিসিটর উইং (রীট), আইন বিচার ও সংসদ বিষয়ক মন্ত্রণালয়, ঢাকা।

অতিব জরুরী

একই তারিখের একই নম্বর পত্রের প্রতিস্থাপক

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

প্রতিরক্ষা মন্ত্রণালয়

গণভবন কমপ্লেক্স

শেরে বাংলানগর, ঢাকা।

নং প্রম/রীট-১৯৩/ডি-২১/১৭৯ তারিখঃ ০১.১২. ২০১০ ইং।

বিষয়ঃ মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগে দায়েরকৃত রীট পিটিশন নং ৭২৩৬/প্রসংগে।

উপর্যুক্ত বিষযে স্বারাষ্ট্র মন্ত্রণালয় স্মারক নং স্বঃমঃ (আইন-১)/রীট-২৭৯/২০১০/৬০৭৮ তারিখঃ ১৪-১০-২০১০ ইং এর ছায়ালিপি সংলগ্নীসহ এতদসংগে প্রেরণ করা হলো।

২। বর্ণিত অবস্থায়, স্বরাষ্ট্র মন্ত্রণালয়ের উপরোক্ত পত্রের চাহিদা অনুযায়ী লেঃ কর্ণেল তাহের বীর উত্তমকে মৃত্যুদন্ড প্রদানকারী সামরিক ট্রাইব্যুনালের রায়ের আদেশ/ডকুমেন্টস অনুসন্ধান পূর্বক

এতদসংক্রান্ত ফলাফল এ মন্ত্রণালয়কে জরুরি ভিত্তিতে অবহিত করার জন্য নির্দেশক্রমে অনুরোধ করা হলো।

(জোহরা বেগম)
সিনিয়র সহকারী সচিব
ফোনঃ ৯১১২৩৯৬

সেনাসদর
জে এ জি বিভাগ
ঢাকা সেনানিবাস

অনুলিপি ঃ-
স্বরাষ্ট্র মন্ত্রণালয়
আইন শাখা-১
বাংলাদেশ সচিবালয়, ঢাকা।

সীমিত

সেনাসদর
জে এ জি বিভাগ
ঢাকা সেনানিবাস
তারালাপনীঃ ৮৭৫০০১১ বর্ধিত
২৯৩৮

৫৫২৫/২/(ডি-৬৮)/জেএজি

১৭ কার্তিক ১৪১৭
০১ নভেম্বর ২০১০।

রীট পিটিশন নং- ৭২৩৬/২০১০ এর দফাওয়ারী জবাব প্রেরণ প্রসংগে।

বরাতঃ

ক। প্রতিরক্ষা মন্ত্রণালয়ের পত্র নং প্রম/রীট-১৯৩/২০১০/ডি-২১/১৩৮ তারিখঃ ২৯ সেপ্টেম্বর ২০১০ (সকলকে নহে)।

১। বরাত পত্রের প্রতি সদয় দৃষ্টি আকর্ষণ পূর্বক ঢাকা বিশ্ববিদ্যালয়ের প্রফেসর জনাব এম আনোয়ার হোসেন কর্তৃক দাযেরকৃত বিষয়োক্ত রিট পিটিশনের ৪নং প্রতিবাদীর পক্ষে ইংরেজীতে দুই প্রস্থ পবাব ও লেঃ কর্ণেল এম এ তাহের, বীর উত্তম (মৃত) এর চাকুরীকালীন সময়ের প্রয়োজনীয় ফটোকপি আপনাদের পরবর্তী কার্যক্রমের জন্য এতদসংগে প্রেরণ করা হলো।

২। ইহা আপনাদের অবগতি ও পরবর্তী কার্যক্রমের জন্য প্রেরণ করা হলো।

(মোঃ মুস্তাকিন ওয়েদুদ)

মেজর

পক্ষে ভারপ্রাপ্ত জে এ জি

সংযুক্তঃ

১। দফাওয়ারী জবাব-০২ প্রস্থ (দুই পাতা)

২। চাকুরীকালীন সময়ের প্রয়োজনীয় নথিপত্র (ফটোকপি)-০৭ পাতা।

বিতরণঃ
বহির্গমনঃ
কার্যক্রমঃ

সচিব
প্রতিরক্ষা মন্ত্রণালয় (ডি-২১)
গণভবন কমপ্লেক্রস
শেরেবাংলা নগর
ঢাকা

অবগতিঃ

সলিসিটর

সলিসিটর উইং (রীট শাখা)

আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়,

এটর্নী জেনারেল ও সলিসিটর এর কার্যালয়,

ঢাকা ।

অভ্যন্তরীণঃ

অবগতিঃ

সামরিক সচিবের শাখা

পি এস পরিদপ্তর

সীমিত

In the backdrop of the dismaying messages on the traceability of trial records as depicted above, we reckoned that people who were, at the time under scrutiny, placed as the relevant government functionaries, should be directed to disclose, through affidavits, whatever information they are possessed of.

Before that, however, we asked ourselves about the permissibility of taking evidence in a judicial review matter and, on perusal of some authorities and instruments came up with the following finding;

"A proceeding of the kind we are adjudicating upon is a civil proceeding and hence, although provisions of the Code of

Civil Procedure should generally apply, a proceeding, whereby judicial review of administration or legislative action is craved, is a proceeding of extra-ordinary nature. Unlike other civil proceedings the fate of the petition in a judicial review case is determined by reference to indisputable facts as are narrated in the affidavit, where evidence on facts, as a matter of general norm, can not be taken. The proceeding is of summary nature and factual questions are to remain beyond controversy. This view, however, does not reflect a rule of thumb, and there are cases, very sparing though, where the Courts can, if the interest of justice so warrant, take evidence, and can ask a deponent to proceed with verbal elaboration and that is consistent with the High Court Rules which provide; "all questions arising for determination of such petition shall be decided upon affidavits. But the Court may direct that such questions, as it may consider necessary, be decided on such other evidence and in such manner as it may deem fit and in that case it may follow such procedure and make such Orders as may appear to it to be Just" (Rule 11).

Hence it is envisaged by the Rules that the Court may, in the interest of Justice, take oral evidence at its discretion.

The Indian Supreme Court in ITO-V-M/S Seth Brothers (AIR 1970 SC 292) ordained that it is within the competence of the High Court to take or call for appropriate evidence at any stage of the proceeding when such a course appears to the Court to be essential for a just decision of the case and the exercise of such power is certainly called for where the Court feels that such a move is necessary for the protection of the Court against any farud and deception attempted to be practiced upon it.

In Smt. Guwant Kaur and others-V-Municipal Committee, Bhathnda and others (1969(3) SCC 769), the Indian Supreme Court expressed, "The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioners' right to relief questions of fact may fall to be determined. In a petition under Article 226, the High Court has jurisdiction to try issues both of facts and law. Exercise of the Jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound Judicial principles. When the petition raises questions of fact of complex nature, which may, for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a

writ petition, the High Court may decline to try a petition. Rejection of a petition in **limine** will normally be justified, where the Hgih Court is of the view that the petition is frivolous as because of the nature of the claim made, dispute sought to be agitated or that the petition against the party against whom relief is claimed, is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the Writ Jurisdiction, or for analogous reasons."

In Century Spg. And Mfg.Co Ltd-V- Ulhas-nagar Municipal Council (1970 I SCC 582), the Supreme Court of India observed "merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of facts raised by the petition are elementary"

In ABL International Ltd and Another–V-Export Credit Guarantee Corporation of India Ltd and Others (2004 3 SCC 553), the Indian Apex Court came up with a clear finding that in an appropriate case the Writ Court has the Jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same involves some disputed questions of fact.

In mofsin Sharif-V- Bangladesh 27 DLR 186, it was held that the Court may allow one party to cross examine the other with a view to ascertain the veracity of the deponents sworn statement In APSRT Corp.-v-Satya Narayan (AIR 1965 SC 1303), the top Court of India expressed the view that to ascertain the truth from conflicting stories figured in two countervailing affidavits, cross examination of the deponents may be desirable.

The factual matrix that the petitions before us invite are to be decided on the anvil of the above cited authorities, because it can be said with all certitude that this is one of the most apposite cases where we ought to exercise our discretion to take evidence given that no document pertaining to crucial fact on the trial under review could be located, and the petitions can, by no means, be termed, vexatious.

Mostafa Kamal J stated "Writ Petitions are generally disposed of on affidavits and on facts admitted or accepted by opposing contenders" (Page 143, Bangladesh Constitution: Trends and Issue). What we deduce from the above quoted observation is that facts narrated through affidavit and facts admitted or accepted by adversaries can be taken account of in judicial review proceedings. In the petitions before us

statements made by the deponents are (a) in the form of affidavits and (b) they have either been admitted or at least been accepted as true by all the parties. In other words no dispute had been raised as to their authenticity and as such, no question of determination of the veracity of those statement through examination and cross examination, cropped up.

As Mr. Rokanuddin Mahmud rightly opined oral statement made by some deponents at our instance, were in elaboration of their affidavit statement, not by opening any new window of evidence.

Having so concluded, we admitted affidavit statement, coupled with explanation and elaboration, from Dr Shaukat Ali, who was employed as the Deputy Commissioner Dhaka at the time in question and, who eventually retired as a Secretary to the Government, Mr. Maqbul Hussain, who acted as the Sub-Divisional Officer and Magistrate of Dhaka Sadar (South) and retired as an Additional Secretary, Mohammad Abdul Ali, who was positioned as a first class Magistrate Dhaka Sadar (south) and retired as a Joint Secretary, who was indeed a member of the so-called special tribunal, Khandakar Fazlur Rahman, who, was a Magistrate too in Dhaka at the pointed time and then ended up as the Secretary at the National Parliament, and who,

in his capacity as a Magistrate, witnessed the event of execution of Lt. Col. Taher, Bir Uttam, in Dhaka Central Jail as they came forward to enlighten us with such information as we desperately needed on the event. Major General Nurul Islam transmitted his affidavit only, from the United States attributing frail state of health for his inability to appear. All save the last one, made themselves available before us with affidavits, portraying the facts they are familiar with. We had been given to believe that Mr. Lawrence Lifschultz, who, as an internationally approbated journalist of a prestigious global magazine named Far Eastern Economic Review, may also prove to be a veritable mine of information and, hence, we asked him as well to emerge with his versions, and he complied. They all furnished such mega scopic information, which are truly indispensable.

Prized information also emanated from all of the Petitioners who, as accused persons in the same purported proceeding had first hand knowledge on the sequence of events under scanning. Averments placed by them have already been figured above.

All these deponents were present in the Court and provided elaboration and clarification on their sworn statement as and when we asked for.

Mr. Lawrence Lifschultz, whose name and identity have already been scripted above, sprang up as the singularly most important fountain of such tiding.

Following the receipt of the Petitioner No. 1s' supplementary affidavit, Mr. M.K Rahman, the learned Additional Attorney General, gave us to believe that it may be possible on Mr. Lifschultzs' part to appear before us in person if that be our desire, to proffer comments and elaboration on his affidavit: he can shortly fly. Having perused the articles, Mr. Lifschultz had authored on the bout, we felt that he may turn up to be a treasure trove of inestimable information and hence, we reckoned that the interest of justice may be impregnated with spectacular wealth if we can take elaboration from Mr. Lifschultz on his sworn statement.

After some uncertainties, Mr. Lifschultz eventually found it possible to make his odyssey to Dhaka, having received our direction, which we channeled through the Secretary at the Ministry of Foreign Affairs, Government of the Peoples Republic of Bangladesh. The Secretary, Mr. Mizarul Qayes and his colleagues as well as Mr. M.K. Rahman, the Additional Attorney General, are owed a lot in acting with a commendable

degree of promptitude, demonstrating their deep sense of commitment.

Before his arrival, however, Mr. Lifschultz filed a couple of affidavits, one of which was sworn in the United States and had been duly authenticated by our Mission in that Country, as he is an American citizen and is ordinarily resident in that part of the world.

Averments Mr. Lifschultz figured in his affidavits are recorded below, verbatim;

1. My name is Lawrence Lifschultz. I am an American citizen and a writer by profession. I am resident of Stony Creek, Connecticut in the United States.

2. On January 21,2011 I was contacted by email by M. K. Rahman, the Additional Attorney General of Bangladesh and informed that the Supreme Court had made a request that I appear before it by January 26, 2011 in order to share with the Court "necessary information as to the so-called trial and conviction of Colonel Abu Taher by a Special Military Tribunal in 1976."

3. This is a request I had hoped to receive for more than 30 years. I would consider it one of the great honors of my life to stand in Justice Shamsuddin's and Justice Hossain's court room in Dhaka. In my view a tragic crime was committed in Dhaka during June and July 1976. I was one of the few witnesses to what happened in this case. On June 28, 1976 I stood in front of Dhaka Central Jail. It was the day the "so-called trial" of Abu Taher and his Colleagues began in secret hidden, behind the walls of a prison. When I arrived that morning, the security around the prison appeared as if the Army was preparing for a war. Machine gun nests were set up all along the prison walls with their guns pointing outwards. What were these guns defending? Secrecy? Who were they prepared to shoot? Why was a trail taking place in a prison instead of in Court?

4. As one of the only independent witnesses at the prison that day, I believe it is my responsibility to describe what I saw and why I believe these

events transpired as they did. In a letter to Justices Shamsuddin and Hossain I explained it was impossible for me to travel to Dhaka at this moment. My son was recently in a serious accident. He was badly injured. He is in the process of recovery and has passed a critical point in a three month process of recuperation. My presence is required for at least another month. Furthermore, another matter has also made it impossible for me to travel to Dhaka until the end of February. Thus, not wishing to delay the proceedings of the Supreme Court in this matter, I am submitting an affidavit.

5. In 1976 I was South Asia Correspondent of the Far Eastern Economic Review (Hong Kong). I had been based in New Delhi. Two years earlier I lived in Dhaka, where I was the Bangladesh Correspondent of the Review. Thus, I knew many of turmoil and conflict then roiling Bangladesh society.

6. In June of 1976 I arrived in Dhaka from Katmandhu. Abu Taher had been arrested

following the November 7th Uprising. As South Asia Correspondent of the Review, I reported on the tragic events of august 1975 when Sheik Mujib was murdered. I also returned to Dhaka following the insurrection and **Sepoy** Mutiny of November 7th. This is not the place to review these events. I have written elsewhere in detail about these matters.

7. In my view the critical issue which faces the Supreme Court is whether Abu Taher's constitutional and human rights were fundamentally violated, by a military regime that had no democratic or constitutional legitimacy. On what legal basis was "Special Military Tribunal No. 1" constituted? Were those facing trial before this Tribunal given adequate time to prepare their defense? Or, in fact were they denied access to legal representation until only a few days before the proceedings began? What standing did this Tribunal have constitutionally or morally to pass a death sentence? Would it be accurate to describe the Tribunal headed by

Colonel Yusuf Haider as simply a kangaroo court which implemented a sentence pre-determined? These are the questions that need to be addressed and answered. Furthermore, those need to be answered within the framework of rights defined and ostensibly guaranteed to all the citizens of Bangladesh by the country's Constitution.

8. I wish to place before the Court an important point of evidence that I believe may assist in answering these questions. When I arrived in Dhaka in early June 1976, I contacted General Mhd. Manzur. I indicated that I was in Bangladesh. At the time Manzur was Chief of General Staff. I had previously met General Manzur in New Delhi in the summer of 1974 when he was Bangladesh's military attaché in India. At that time I was curious to speak with him about his experiences in the Liberation War and his escape as a junior officer from Pakistan following the Pakistan army's violent crackdown in Dhaka on March 25, 1971.

9. Manzur, together with Abu Taher and Mohammed Ziauddin, bravely crossed the border into India administered Kashmir in order to join the Liberation War. Within weeks all three would become sector commanders. Taher, who I had already met in Dhaka, suggested that summer of 1974 I meet Manzur in New Delhi on my way back to the United States. I was in the process of moving to New Delhi to become the Review's South Asia Correspondent. The day I met Manzur, the two of us spent most of a long afternoon talking about history.

10. Thus, two years later in June 1976, when I called and told him I was in Dhaka he was pleased to hear I was in town. However, I was soon to discover he had a great deal on his mind. He told me that he would send someone to meet me in order to make arrangements for us to get together. He insisted that we meet late at night at his headquarters in the Cantonment. I arrived about nine in the evening. I stayed for nearly three hours.

11. During the evening, General Manzur focused most of all on speaking to me about Taher who by then had been in prison for more than six months. He told me Taher had been kept mostly in solitary confinement. He asked me about my travel plans. I told him I was expected in the United States by the end of June. He urged me not to leave. He feared that Zia would go through with plans to put Taher on trial. Manzur and other officers who participated in the Liberation War were trying to dissuade Zia but in early June Manzur was uncertain he could stop the trial proceeding. He spoke of repatriated forces that had not participated or supported the independence movement as having a growing influence in the Army. He again emphasised to me that I should stay in Dhaka. He said if there was a trial someone should report on it in the international press. I could see he was worried. I changed my travel plans and stayed.

12. I did not see General Manzur again that June. Tension was mounting in Dhaka. I attempted to

interview General Zia. His staff asked me to write out a list of questions. They covered many issues such as the Farraka Barrage which at the time was emerging as a crisis between India and Bangladesh. But, the list also included several questions concerning the November 7th Uprising and Abu Taher's arrest. I asked Zia, among other matters, to confirm that Taher and forces under his command had saved Zia's life that evening. If that were the case, why had he arrested Taher and freed those who had, in fact, detained him. I was not granted an interview by Zia. This was not surprising. The General had other plans and they did not include being asked troubling questions.

13. I was arrested and deported in the midst of Taher's trial. On the 30th Anniversary of Taher's execution I spoke at a memorial gathering at Dhaka University in which I described how an effort was made to impose complete and total censorship of the trial. (See "The Trial of Colonel Abu Taher" by Lawrence Lifschultz, The Daily Star, July 24, 1976. See also "The Taher I Knew"

by Lawrence Lifschultz, The Daily Star, July 23, 1976. Both articles are attached as exhibits to this affidavit.)

14. The reason I have brought up my meeting in early June 1976 with General Manzur is because of what happened later. The night I met Manzur at the Cantonment he clearly feared that Zia would go ahead with Taher's trial but he did not say that he feared this would end with Taher's execution. I don't think at that stage such a thing was quite imaginable. However, several months after the trial Manzur sent me a message through an intermediary. I was then living in Cambridge, England. Manzur's emissary told me that Manzur wanted me to know that he had tried to stop the trial but clearly had been powerless to do so even though he ranked third in the Army's High Command. His opposition to Taher's trial had made him a marked man inside the Army among those who wanted Taher dead. Although many of us had suspected it, Manzur's representative told me that General Manzur also wanted me to know

one thing above all else: Manzur knew with absolute certainty that Zia had personally taken the decision before the "so-called trial" even began that Taher would be hanged. Subsequently, this fact was also confirmed to me by two high ranking military officers who were close to Zia at that time.

15. What are the implications of such a fact within the framework of the judicial review taking place today by the Supreme Court? Can what happened in Dhaka Central Jail in July 1976 even be termed a trial? If the death sentence was determined prior to the Tribunal convening, then was the Tribunal in reality simply a mechanism used by extra-judicial forces to stage an execution. If this is the case, then Special Tribunal No. 1 which sat only once, and was never convened again, should be named for what it truly was. In reality it was an illegal entity established to commit murder and to imprison men and women who were denied their constitutional rights. Hopefully, the Bangladesh Supreme Court will today, in an

atmosphere largely free of the fear, threat and coercion that so pervaded the past, find its way to overturning a verdict of a Tribunal which in every respect was a negation of the principles underlying Bangladesh's Constitution and the rights guaranteed to its citizens by law.

16. I believe independent of the fact that the verdict was pre-determined before the Tribunal convened there are ample grounds to overturn Taher's so-called conviction and to vacate the verdict. Taher's execution ought to be called not only a miscarriage of justice but "a crime committed by the state". Such a crime ought to be remedied by an institution of the State that has power and capability to look back historically on crimes of the past. This has been done by several societies in modern times including Germany, Argentina, Chile and South Africa, to name only a few. One institution that has that capability is Bangladesh's Supreme Court.

17. Those on trial were denied access to adequate legal representation. Their fundamental rights

under the Bangladesh constitution were violated. The trial was in secret before an illegal entity which had no foundation in law. The trial was held in a prison, not a Court of Law. The press was shackled so public anger at the injustice being carried out in camera would be contained. Journalists were threatened and deported. Imagine the public response. If Taher's closing speech before the Tribunal had been published the day after he spoke?

18. Here, being tried in secret, was a Sector Commander of the Liberation War who lost his leg in a battle for his country's independence and who was awarded the highest military distinction, Bir Uttam, for courage, shown by those who fought and survived the 1971 war. By what fiction could any Court maintain that Taher's trial was lawful?

19. Five years ago, when I spoke at the Teacher-Student Center at Dhaka University, I made the following observation: "Thirty years have now passed. We are all aware of what happened.

Today marks the 30th anniversary of Taher's execution. It is time in many view for a public act by the state and judicial authorities to publicly declare that Abu Taher was wrongfully tried and wrongfully executed. The verdict of July 17, 1976 should be vacated and a public acknowledgment should be made that Taher's civil and legal rights were grossly violated by the government which put him on trial.....Appropriate mechanisms to accomplish this task need to be found. Justice requires that the verdict be formally overturned and that there be an official acknowledgement that the entire so-called 'trial of Abu Taher' was a violation of proper legal procedure and represented a violation of the fundamental rights of the accused to due process.....My own view is that some future government [or Court] will act in a moral and ethical way on this issue. We must not rest until the verdict in the Taher case has been overturned. It is, my friends, a matter of justice." ("The Trial of Abu Taher", Keynote Address by Lawrence Lifschultz, Dhaka

University, The Daily Star, July 24, 1976. See also "Colonel Taher, Lifschultz & Our Collective Guilt" by Syed Badrul Ahsan, The Daily Star, July 26, 1976.)

20. Justice Shamsuddin and Justice Hossain, you have before you a great moral and legal challenge. Whatever you decide in this case will have historic significance. The Taher case in my view has important international implications. The petitioners in this case have been on a long journey. It is a journey that for so many men and women is painfully elusive. To find justice at the end of such a long road for an event that had shaken one's life happens so rarely in human experience. I know each of the petitioners in this case. They deserve our profound respect and respect of the world. There is only one way to provide that respect to them. It is to provide them a sense that finally at the end of a journey of more than three decades, justice has been done. This is your task.

21. I submit this Affidavit to the Bangladesh Supreme Court by electronic mail through the

office of M. K. Rahman, the Additional Attorney General, who contacted me on behalf of the Supreme Court. Simultaneously, there follows by courier a notarized and authenticated copy of this affidavit and its attachments which will be forwarded to the Bangladesh Supreme Court by Shabbir Chowdhury, Consul General of Bangladesh in Now York City through the office of the Foreign Secretary in Dhaka. It is with great regret that I cannot be present before the Court in Dhaka to deliver my affidavit in person. It would have been a great honor which I would have treasured for the rest of my life.

The other affidavit by Mr. Lifschultz is also reproduced below, to the letters;

I, Lawrence Lifschultz, son of Sidney Lifschultz, a resident of Stony Creek, Connecticut, USA, 06405, Post Box No. 3056, presently on a visit to Bangladesh, staying at Ambrosia, House No. 17, Road No. 3, Dhanmondi R/A, Dhaka-1205, Bangladesh; aged about 61 (sixty one)

years, by profession a writer by Nationality-American, do hereby solemnly affirm and say as follows:

1. That the instant writ petition was filed challenging the constitutional validity of Martial Law Regulation No. XVI dated 14th June, 1976 providing for trial in camera [section 4(2)], prohibition of any appeal against decision or judgment and sentence of the Special Martial Law Tribunal [section 4(8)], provision of oath of secrecy of all participants in the proceedings of the Special Martial Law Tribunal [section 4(10)] and the pronouncements of guilt, and the sentence of death purportedly under section 121A of the Penal Code upon Lt. Col. (retd.) M. A. Taher Bir Uttam (the husband of the petitioner No. 2) and his execution on 21st July, 1976; and this Hon'ble Court issued Rule Nisi as prayed for.

2. That during hearing of the Rule Nisi this Hon'ble Court by Order dated 20/01/2011 directed the Foreign Secretary, Government of the People's Republic of Bangladesh and Mr. M.K. Rahman, Additional Attorney General for Bangladesh to approach me with a request to appear before this court at my convenience by 26/01/2011 to intimate this Hon'ble Court with

necessary information as to the so called trial and conviction of Colonel Abu Taher by a Special Martial Law Tribunal in 1976, and it was also desired by this Court to communicate the Order to me through my e-mail address.

3. That accordingly the Foreign Secretary of the Government of the People's Republic of Bangladesh contacted me through the Consulate General of Bangladesh, New York, about the Order of the Court and Mr. M. K. Rahman, Additional Attorney General for Bangladesh also communicated with me informing about the Order of the court through my e-mail address, and having received the afore-said communications I agreed to come to Dhaka with a view to stand before this Court to make an statement in connection with the tragic crime committed in Dhaka during June and July, 1976 which ended in the hanging of Colonel Abu Taher through a so called trial by a Special Martial Law Tribunal.

4. That this Hon'ble Court, I understand that, on the prayer of Mr. M. K. Rahman, the learned Additional Attorney General extended time for my appearance before this Hon'ble Court to enable me to make a statement as stated

supra, for which I am extremely gratified and obliged to this Court.

5. That in this connection, I affirmed an Affidavit on January 31, 2011 before the Notary Public, Connecticut, USA stating the entire facts relating to the so called trial of Colonel Taher and his execution by a Special Martial Law Tribunal; and the said Affidavit having been duly authenticated by the Consulate General of Bangladesh was transmitted to Mr. M. K. Rahman, Additional Attorney General for Bangladesh for submitting the same before this Hon'ble Court, accordingly the same was submitted before this Hon'ble Court on 14/03/2011 (electronic transcript of the Affidavit was earlier submitted to this Hon'ble Court on 03/02/2011).

6. That responding to the request of this Hon'ble Court for which I have been waiting for more than 30 years and considering the same as a great honor of my life, I arrived in Dhaka on 12/03/2011 and made written and verbal statement before this Hon'ble Court regarding the so called trial of Colonel Abu Taher by a Special Martial Law Tribunal and his execution.

7. That the written statement that I handed over to the Hon'ble Court is required to be brought on record to arrive at a correct decision in the matter, accordingly the nine page statement signed by me is annexed hereto and marked as Annexure "1".

Text of the Statement in Annexure 1 are recorded below word to word;

A STATEMENT BEFORE THE SUPREME COURT OF BANGLADESH

By Lawrence Lifschultz

Ref: Writ Petition 7236 of 2010

Regarding the Trial & Execution of Abu Taher in July 1976

My name is Lawrence Lifschultz. I am a writer by profession. In July 1976 I was South Asia Correspondent of the Far Eastern Economic Review (Hong Kong) and a contributor to the BBC and The Guardian (London). In January this Court requested that I appear before in order to give evidence on what knowledge I may possess pertaining to the case of Colonel Abu Taher.

On 3 February 2011, M.K. Rahman, the Additional Attorney General of Bangladesh, read out my Affidavit to this Court. I was unable to travel to Bangladesh in January because

a family member had recently been in a serious accident and I was simply unable to leave.

Today it is one of the great honors of my life to be present before you in this Court. As the Court drew its deliberations to a close, you again graciously made a second request that I travel to Dhaka and appear before you. By then circumstances had changed and I was able to make the journey.

We are all here because of one of the most essential elements of civilized society. It is called "memory". We have come to remember what happened in this city nearly thirty-five years ago. Some of us remember it well. Others were just children then. But, we are here because many of us refused to forget. It became our duty to remember.

For thirty-five years it has been my hope that one day I would stand in a courtroom aware that a verdict would soon be rendered in Taher's case, and that the verdict would declare, whether or not, Abu Taher's trial and execution in 1976 had been illegal, but also a fundamental violation of both his constitutional and human rights.

I did not know until a few months ago that it would be your Courtroom, nor did I know your names would be Justice Shamsuddin and Justice Hossain. We do not pre-judge your

verdict. But, like others, I have hoped for a day like this one, these many decades. Only last week, Taher's daughter Joya told me, "I have been waiting my whole life for this particular moment." She was five years old when her father died. So you see, after a lifetime of waiting, many have come before you in search of Justice for Abu Taher.

A year after Abu Taher was executed a meeting was organized at Conway Hall in London by a group of relatives and some of Taher's former colleagues. Only a year after he had died people gathered to remember him. As you know, such a meeting in Dhaka would have been impossible in 1977. many who might have attended were in prison. I was asked to speak at the Conway Hall meeting. As a journalist, I was not certain I should accept the invitation. Would my independence and objectivity be questioned? At the time I explained to those in attendance why in the end I accepted the invitation to speak. Certain of the remarks I made then I believe still have meaning today.

As I stood at a podium in Conway Hall, I said:

"As a writer and journalist, I make a distinction, which some may find hard to see, between objectivity and neutrality. There can be no compromise or qualification on objectivity, as

there can be no compromise with the pursuit of accuracy, but I also recognize there is no 'neutrality' on certain questions. That is why I have accepted the Taher Memorial Committee's invitation to speak. When it comes to a question of secret trials and secret executions, I am not neutral. I condemn them whether they have been carried under the orders of Franco, Stalin or General Ziaur Rahman."

"A year ago, by a coincidence of timing, I happened to arrive in Bangladesh as just such as case was about to begin, full of its own dimensions of death, betrayal and tragic injustice…….. I am an American by nationality, and in American we too have had in our history famous incidents of exceptional judicial debasement, where the institutions of law have been used to commit crimes 'for reasons of state'. In America the names and memory of the executions of the Rosenbergs, Joe Hill and Sacco & Vanzetti stand out most starkly."

"Today I am reminded most clearly of Nicola Sacco and Bartolomeo Vanzetti, two poor Italian immigrants who came to American for a better life and instead found a frame-up. They were killed because we in America also have our Salauddin Ahmeds and our A.M.S. Safdars. In the time of Sacco and

Vanzetti they were called Attorney General Palmer and J. Edgar Hoover."

"Today I mention Sacco and Vanzetti because last month [June 1977]-50 years after their execution-Governor Michael Dukakis of the State of Massachusetts declared that in the official view of the state, Sacco and Vanzetti were innocent men and were wrongly executed. Governor Dukakis declared that each year, on the anniversary of their execution, the people of the State of Massachusetts where these two men were executed would observe 'Sacco and Vanzetti Memorial Day'. I doubt whether it will take the people of Bangladesh so long to set right what happened on the gallows of Dhaka Central Jail a year ago."

Who could have known it would have taken this long? Fifty years have not passed as in the Sacco and Vanzetti case. However, nearly thirty-five years have elapsed since Taher's death. The time has come to face the issues squarely. Can we even call what Taher and his colleagues faced a "trial"/ there existed a "special Military Tribunal No. 1" which convened in Dhaka Central Jail. I was there. I stood outside the prison. I watched men, like Colonel Yusuf Haider, the so-called Tribunal's chairman, walk through the prison gates.

Although they tried to hide themselves and cover their faces, I took their photographs. Soon they took my camera, my film and arrested me, under what charge I was never told. But, today no records can be found of this "ghost" Tribunal. Even, back then, they were trying to cover their tracks and keep hidden what they had done. Perhaps, only George Orwell, could explain to us where the records and transcripts have gone.

These men who committed this crime against Taher, were not like us, who gather here today. They did not want anyone in the future to come together to remember what they had done and who they were. They preferred that their crime stay hidden. As this Court has discovered, there are no documents. There are no transcripts. There are no "official records". At the outset they sought to cover up what they were doing.

What these "men of power" did not reckon on was the persistence and determination of a handful of people that this history would not be lost but would be remembered. We are here to remember, and the Supreme Court of Bangladesh has now become an integral part of a 'process of remembrance'.

This Court has arduously reconstructed a picture of what took place by requesting witnesses to voluntarily appear and

also ordering reluctant witnesses to give testimony. The Court has also ordered a search for any and all surviving documents. You are to be commended for your diligence and seriousness of purpose.

As I indicated in my Affidavit, I do not believe what happened can even be formally called a "trial'. It was not even a "show trial" because the military government did not want to "show it". Generally Zia's regime feared the repercussions of an open court of law and the public reaction that would have ensued had a trial been held by a lawfully constituted court with a free press being able to report.

In my January 31st Affidavit I have described in some detail how I met General Mhd. Manzur, Chief of General staff, at his office in the Cantonment a month before the Special Tribunal. I had known Manzur for several years. I also explained how Manzur had opposed Taher's so-called trial, and according to what he told me in June 1976, he was doing everything he could to see that it would not take place.

Clearly, Manzur was outnumbered and outflanked. It would only be a matter of time before they would come for him. However, as I discussed in the Affidavit, Manzur sent an emissary to see me in England after Taher had been executed.

He wanted me to know that he knew positively that General Zia had personally taken the decision to executed Taher well before Colonel Yusuf Haider and his team "opened for business", albeit sordid business, behind the walls of Dhaka Central Jail.

At the end of January, Moudud Ahmed, who I once knew as a young human rights lawyer, made certain claims in the press, citing my work repeatedly but in almost every instance inaccurately. Mr. Ahmed has travelled far from the principles I once associated him with when he was young. This is not an uncommon phenomenon on the road to power. But, he did make one claim, which if true, has importance for this Court's deliberations.

Moudud Ahmed claimed that Ziaur Rahman had convened a gathering of 46 "repatriated" officers to discuss the sentence that should be passed on Taher. It is well known that not a single officer who had participated in the Liberation War was willing to serve on special Military Tribunal No. 1. But, General Zia's special convocation of repatriates appears to have ended with a unanimous decision. They wanted Taher to hang. Moudud claims his source for this story was General Zia himself. In this respect, Moudud's version of events tallies with

what General Manzur claimed to me regarding General Zia having personally taken the decision on what the verdict would be. One man, Ziaur Rahman, decided, on his own, to take another's life. He then asked a group of about fifty military officers to endorse his decision.

What can we say about this? By what stretch of the imagination can we call this a "lawful procedure"? by what authority or law did this klatch of military men render unto themselves the role of judge and jury? Military dictatorships write their own rules and that is precisely what happened in this instance.

In my view, perhaps the most accurate way to describe the events that took place behind the gates of Dhaka Central Jail in July 1976, would be to recognize that what really occurred was simply a form of "lynching" organized by the Chief Martial Law Administrator, General Ziaur Rahman. There was no trial. A façade was created and dressed up to look like a trial. Yet, even the façade quickly crumbled. If it was a trial, why was it not taking place in a Court? It took place in a prison. What sort of trial occurs in a prison? The answer is a trial that is not a trial.

Joya Taher has characterized what happened to her father as an "assassination". The Special Military Tribunal No. 1 was the mechanism by which the assassination was accomplished. Perhaps, Joya Taher's view is closest to the mark.

Syed Badrul Ahsan, has called the Taher case "murder pure and simple". In an article published in July 2006, Ahsan writes, "When he [Lifschultz] speaks of Colonel Abu Taher and the macabre manner of his murder (it was murder pure and simple), in July 1976, he revives within our souls all the pains we have either carefully pushed under the rug all these years or have not been allowed to feel through the long march of untruth in this country." (Syed Badrul Ahsan, "Colonel Taher, Lifschultz & Our Collective Guilt". The Daily Star, 26 2006.)

Ahsan was only partly right. When he called the Taher case "murder pure and simple", he left out the element of premeditation or perhaps he assumed it. Moudud Ahmed, whateven else he has done, has made clear that General Zia went about his murderous work in a premeditated fashion, and pre-meditation under the law, has great significance.

It means you understood what you were doing and you planned your crime accordingly. In criminal law premeditated

murder is murder in the fires degree. (Why Mohdud Ahmed was an associate of this man and a minister in his government is a question for another day.

In his 2006 article Ahsan also referred to the "long march of untruth" in Bangladesh. He was certainly correct about the 'state of affairs' five years age. However, new phase appears to have opened. The Supreme Court has declared the 5th and 7th amendments to be at variance with the Constitution thereby invalidating the attempt of two successive martial law regimes to retrospectively immunize their past actions from any form of accountability. This Court in my opinion is boldly taking on issues that are at the very heart of a new and challenging period.

This Court is an integral part of the culture of this society and it is potentially an instrument of charge. In the United States the Warren Court broken down the doors of racial segregation and became a critical force in changing American society. Bangladesh in 1971 sought to break from the disastrous traditions of Pakistan's history of martial law regimes and dictatorship. If the inviolability of the Constitution and the "rule of law" are to mean anything, the civilian courts must become paramount, indeed hegemonic.

It must become impossible for a small group of military officers to even again establish themselves as "judge and jury" and thus supersede the civilian judicial authorities. This is the heart of the matter. The question is not only whether "the rule of law" will be paramount, but also whether the judiciary can acquire the strength to secure its paramount position? The Supreme Court clearly shows its intent on doing so. Of course, there is no guarantees.

The "mindset", so characteristic of the Pakistan Army and other military dictatorships, must be broken if democracy and democratic freedoms are not once again to be endangered in this court. The courts can play a critical role in strengthening the institutions of democratic rule. By overturning the 5th and 7th amendments a significant step has been taken in making unambiguously clear to the armed forces that if they ever cross the line again and embrace armed dictatorship, they will face grave consequences for breaching the Constitution and the "rule of law".

The challenge before the Supreme Court in the Taher cases is to determine whether the procedures that were followed by "Special Military Tribunal No. 1" can be

considered in any way to have been legal or constitutional. If they were not, they should be appropriately characterized.

For Taher's family this is the essential matter. Will the "verdict" of a Tribunal that had no legal standing under the Constitution and whose own records have "disappeared"" be allowed to stand, or will the secret proceedings of July 1976 at Dhaka Central Jail be overturned and declared to have been unconstitutional and illegal? To Taher's wife and three children this is what matters. Everything else is detail.

"Now I am eagerly waiting for the verdict," Taher's daughter, Joya, wrote me ten days ago. The verdict "will not bring back my Dad," she said, but it will bring an end the "kind of assassination" which took her father from her and her two brothers at such an early age. To have their father exonerated, and admired for the remarkable man he was, will bring some peace to their hearts. If you accomplish this Justice Shamsuddin and Justice Hossain, you will have accomplished a very great and good deed.

It was almost exactly thirty-five years ago this month that I finished writing "Abu Taher's Last Testament". It was the spring of 1977. I was young then. I was only twenty-six. Less

than a year had passed since Taher's trial and my deportation from Bangladesh. I was living in Cambridge, England at that time. I remember when I typed the last page. I reread the text and put a copy in an envelope.

I was living in a small house on Clare Street. I remember waling around the corner to a tiny post office where I knew the staff. I bought the requisite number of stamps and two Air Mail stickers. The envelope was addressed to Krishna Raj, Editor of the Economic & Political Weekly in Bombay. I wondered if he would publish it. I slipped the envelope into the mailbox.

It was published as a Special Issued of EPW in August 1977 and would soon become part of a book on Bangladesh. The book would be banned in Bangladesh for over a decade. Of course, my first desire would have been to publish the manuscript in Bangladesh. Yet, for obvious reasons that was not possible.

Two crucial events compelled me to writ "Taher's Last Testament". I had been trying to decide how to write an account of all that had taken place. Then two things happened. A copy of Taher's secret testimony before the Special Military Tribunal arrived on my doorstep. Someone had called me from

London saying they were mailing me an important document that had been brought from Dhaka. When I received it, I read remarkable courage and integrity.

What happened next settled the matter. I received a translation of letter that Lutfa, Taher's wife, had written to her brother at Oxford. It was one of the most beautiful letter I've ever read.

I would like to conclude my testimony to this Court by reading an excerpt from Lutfa's letter. She is here today.

"my dear bora bhaijan,

I cannot think of what to write you today. I cannot realize that Taher is no longer with me. I cannot imagine how I will live after the paratner of my life has left. It seems the children are in great trouble. Such tiny children do not understand anything. Nitu says, 'Father, why did you die? You would have been alive, if you were still here.'

The children do not understand what they have lost. Every day they go to the grave with flowers. They place the flowers and pray, 'Let me become like father.' Jishu says that father is sleeping on the moon……

I am very fortunate……. When he was alive, he gave me the greatest honour amongst Bengali women. In his death he gave me the respect of the world. All my desires he has fulfilled in such a short time. When the dear friends and comrades of Taher convey their condolences to me, then I think: Taher is still alive amongst them, and will live in them. They are like my own folk. I am proud. He has defeated death. Death could not triumph over him……..

Although it is total darkness all around me and I cannot find my moorings, and am lost, yet I know this distress is not permanent, there will be an end. When I see that the ideals of Taher have become the ideals of all, then I will find peace. It is my sorrow that when that day comes, Taher will not be there.

Affectionately,

Lutfa

Having found him in the Court room we asked Mr. Lifschultz, to advance some elaboration and clarification on his affidavits. Some abstracts from what he stated, are put below in black and white.

In July 1976 I was South Asia Correspondent of the Far Eastern Economic Review (Hong Kong) and a contributor to the BBC and The Daily Guardian (London).

However, nearly thirty-five years have elapsed since Taher's death. The time has come to face the issues squarely. Can we even call what Taher and his colleagues faced, a "trial"? There existed a "special military tribunal no.1" which convened in Dhaka Central Jail. I was there. I stood outside the prison. I watched men, like Colonel Yusuf Haider, the so-called tribunal's chairman, walk through the prison gates.

Although they tried to hide themselves and cover their faces, I took their photographs. Soon they took my camera, my film and arrested me, under what charge I was never told.

Moudud Ahmed claimed that Ziaur Rahman had convened a gathering of 46 'repatriated" officers to discuss the sentence that should be passed on Taher. It is well known that not a single officer who had participated in the Liberation War was willing to serve on special military tribunal no. 1. But, General Zia's special convocation of repatriates appears to have ended with a unanimous decision. They wanted Taher to hang.

Moudud claims his source for this story was General Zia himself. In this respect, Moudud's version of events tallies with

what General Manzur claimed to me regarding General Zia having personally taken the decision on what the verdict would be. One man, Ziaur Rahman, decided, on his own, to take another's life. He then asked a group of about fifty military officers to endorse his decision.

In my view, perhaps the most accurate way to describe the events that took place behind the gates of Dhaka Central Jail in July 1976, would be to recognize that what really occurred was simply a form of ":lynching", organized by the chief martial law administrator, General Ziaur Rahman. There was no trial. A facade was created and dressed up to look like a trial. Yet, even the facade quickly crumbled. If it was a trial, why was it not taking place in a Court? It took place in a prison. What sort of trial occurs in a prison? The answer is a trial that is not a trial.

Md. Maqbul Husain, former subdivisional officer and subdivisional magistrate, Dhaka Sadar (South) who retired as an Additional Secretary, Government of Bangladesh, also filed an affidavit, texts of which are reproduced below verbatim;

"I Md. Maqbul Husain, son of Asmat Ali (since deceased), former Subdivisional officer and Subdivisional Magistrate, Dhaka Sadar (South) and retired Additional

Secretary, Government of Bangladesh, now residing at House No. 25, Road No. 2, Block No. F, Mohammadpur Pisciculture Co-Operative Housing Society, Adabar, Dhaka: Bangladesh: aged about 70 (seventy) years, by profession-retired Government Servant, by faith- a Muslim, by Nationality-Bangladeshi, do hereby solemnly affirm and say as follows:

That the instant writ petition was filed challenging the constitutional validity of Martial Law Regulation No. XVI dated 14th June, 1976 providing for trial in camera [section 4(2)], prohibition of any appeal against decision or judgment and sentence of the Special Martial Law Tribunal [section 4(8)], provision of oath of secrecy of all participants in the proceedings of the Special Martial Law Tribunal [section 4(10)] and the pronouncements of guilt, and the sentence of death purportedly under section 121A of the Penal Code upon Lt. Col. (retd.) M. A. Taher Bir Uttam (the husband of the Petitioner No. 2) and his execution on 21st July, 1976; and this Hon'ble Court issued Rule Nisi as prayed for.

That during hearing of the Rule Nisi, a writ Bench of this Hon'ble Court comprising their Lordships Mr. Justice A. H. M. Shamsuddin Chowdhury and Mr. Justice Sheik Md. Zakir Hossain directed the deponent to appear before this Court on

19.01.2011 to make statement providing with necessary information as to the so called trial and conviction of Colonel Abu Taher by a Special Martial Law Tribunal in 1976.

That accordingly I appeared before this Hon'ble Court on 19.01.2011 and made verbal statements in connection with the tragic crime committed in Dhaka during June and July, 1976 which ended with the hanging of Colonel Abu Taher, BU, through a so called trial by a Special Martial Law Tribunal.

That the verbal statement that I have made is required to be brought on record to arrive at a correct decision in the matter and hence this Affidavit.

That from February, 1976 to March, 1977, I served as the Subdivisional officer and Subdivisional Magistrate, Dhaka Sadar (South). During June and July, 1976, Colonel Abu Taher. BU was tried by a Special Martial Law Tribunal sitting in camera in Dhaka Central Jail. The case records including the FIR and other connected papers were never placed before me but in law those were required to be placed before me for taking cognizance and necessary orders as Subdivisional Magistrate. Mr. Mohammad Abdul Ali, Magistrate First Class, Dhaka Sadar (South) was posted as one of the five members of the Special Martial Law Tribunal which tried Colonel Abu Taher and

others and before his posting it was never discussed with me and such posting was beyond my knowledge. The whole country was under Martial Law and the trial was conducted wholly in camera by the Special Martial Law Tribunal."

Dr. A. M. M. Shawkat Ali, the person who was placed as the Deputy Commissioner and District Magistrate, Dhaka, at the germane time and retired as a Secretary to the Government of Bangladesh and also acted subsequently as an Advisor to the Caretaker Government during 2007-2008, filed an affidavit, in following terms;

"I Dr. A. M. M. Shawkat Ali, son of M. Hossain Ali (since deceased), former Deputy Commissioner and District Magistrate, Dhaka, and retired Secretary, Government of Bangladesh and former Advisor to Caretaker Government during 2008, now residing at House No. 44, Road No. 23, Block-B, Banani, Dhaka-1213 Bangladesh; aged about 68 (sixty eight) years, by occupation-retired Government Servant, by faith a Muslim, by Nationality- Bangladeshi, do hereby solemnly affirm and say as follows;

That the instant writ petition was filed challenging the constitutional validity of Martial Law Regulation No. XVI dated 14th June, 1976 providing for trial in camera [section

4(2)], prohibition of any appeal against decision or judgment and sentence of the Special Martial Law Tribunal [section 4(8)], provision of oath of secrecy of all participants in the proceedings of the Special Martial Law Tribunal [section 4(10)] and the pronouncements of guilt, and the sentence of death purportedly under section 121A of the Penal Code upon Lt. Col. (retd.) M. A. Taher Bir Uttam (the husband of the Petitioner No. 2) and his execution on 21st July, 1976; and this Hon'ble Court issued Rule Nisi as prayed for.

That during hearing of the Rule Nisi, a writ Bench of this Hon'ble Court comprising their Lordships Mr. Justice A. H. M. Shamsuddin Chowdhury and Mr. Justice Sheik Md. Zakir Hossain directed the deponent to appear before this Court on 18.01.2011 to make statement providing with necessary information as to the so called trial and conviction of Colonel Abu Taher by a Special Martial Law Tribunal in 1976.

That accordingly I appeared before this Hon'ble Court on 18.01.2000 and made verbal statements in connection with the said trial held in Dhaka during June and July, 1976 which ended with the hanging of Colonel Abu Taher, BU, through a so called trial by a Special Martial Law Tribunal sitting in camera in Dhaka Central Jail.

That the verbal statements which I have made are required to be brought on record to facilitate the disposal of the instant writ petition.

That from 1976 to 1978, I served as the Deputy Commissioner and District Magistrate, Dhaka, During June and July, 1976, Colonel Abu Taher. BU and others were tried by a Special Martial Law Tribunal sitting in camera in Dhaka Central Jail. While serving as Deputy Commissioner and District Magistrate, Dhaka, the Government in the Ministry of Law and Parliamentary Affairs, Justice Brach, by Notification No. 430-JI/2T-2/76 dated 14.06.1976 constituted a 5(five) member Special Martial Law Tribunal in exercise of powers conferred by paragraph no. 3 of the Special Martial Law Tribunal Regulation, 1976 (Regulation No. XVI of 1976) with Mohammad Abdul Ali, Magistrate First Class, Dhaka Sadar (South) as one of its Members. Before his appointment as a Member of the Tribunal, I as the District Magistrate, Dhaka was never consulted nor informed by the relevant authority although procedures and convention demand that.

That Tribunal sat in Dhaka Central Jail in camera and proceeded with the trial of Colonel Abu Taher, BU and others. Since the country was under Martial Law and the Special

Martial Law Tribunal concluded the trial of Special Martial Law Tribunal Case No. 1 of 1976 in a hurry in camera. I came to know that the case ended in conviction and in sentence of death on Colonel Abu Taher and for different terms of sentence on other accused by a pronouncement dated 17/07/1976. The trial was not fair and impartial under the Martial Law dispensation. Lt. Colonel Abu Taher, BU much before the trial by the Special Martial Law Tribunal retired from Army and joined as Director, Dredger Division, Bangladesh Water Development Board and thus during trial he was no longer in the service of the Bangladesh Army. Had it been so that he was involved in any crime, he could be tried under the Penal Code by ordinary Court. It is further stated that Lt. Colonel Abu Taher, BU actively participated in the historic war of Liberation and served as a Sector Commander and took part in front fighting and lost one of his legs. Before he joined the Dredger Division of BWDB as its Director in 1974, he met me in office when I was Member Director of BWDB."

Mohammad Abdul Ali, former Magistrate first class, Dhaka Sadar (South), and a retired Joint Secretary, Government of Bangladesh, also filed his affidavit, contents in which are, as hereunder,

"I, Mohammad Abdul Ali, son of Hajee Abul Quasem (since deceased), former Magistrate, First Class, Dhaka Sadar (South) and retired Joint Secretary, Government of Bangladesh, now residing at 50/A Azimpur Government Colony, Dhaka; Bangladesh; aged about 70 (Seventy) years, by profession-retired Government Servant, by faith-a Muslim, by Nationality-Bangladeshi, do hereby solemnly affirm and say as follows:

That the instant writ petition was filed challenging the constitutional validity of Martial Law Regulation No. XVI dated 14th June, 1976 providing for trial in camera [section 4(2)], prohibition of any appeal against decision or judgment and sentence of the Special Martial Law Tribunal [section 4(8)], provision of oath of secrecy of all participants in the proceedings of the Special Martial Law Tribunal [section 4(10)] and the pronouncements of guilt, and the sentence of death purportedly under section 121A of the Penal Code and 13 MLR, 1975 upon Lt. Col. (retd.) M. A. Taher Bir Uttam (the husband of the petitioner No. 2) and his execution on 21st July, 1976; and this Hon'ble Court issued Rule Nisi as prayed for.

That during hearing of the Rule Nisi, a writ Bench of this Hon'ble Court comprising their Lordships Mr. Justice A. H. M. Shamsuddin Chowdhury and Mr. Justice Sheikh Md. Zakir

Hossain directed the deponent to appear before this Court on 13/01/2011 to make statement providing with necessary information as to the so called trial and conviction of Colonel Abu Taher and others by a Special Martial Law Tribunal in 1976.

That accordingly I appeared before this Hon'ble Court on 13/01/2011 and made verbal statements in connection with the tragic crime committed in Dhaka during June and July, 1976 which ended with the hanging of Colonel Abu Taher, BU, through a so called trial by a Special Martial Law Tribunal.

That the verbal statements which I have made are required to be brought on record to arrive at a correct decision in the matter and hence this Affidavit.

That from March, 1975 to 14/10/1976, I served as the Magistrate First Class, Dhaka Sadar (South). During June and July, 1976, Colonel Abu Taher. BU and others were tried by a Special Martial Law Tribunal sitting in camera in Dhaka Central Jail. While serving as Magistrate First Class, Dhaka Sadar (South), the Government in the Ministry of Law and Parliamentary Affairs, Justice Brach, by Notification No. 430-JIV/IT-2/76 dated 14/06/1976 constituted a 5(five) member Special Martial Law Tribunal in exercise of powers conferred by

paragraph no. 3 of the Special Martial Law Tribunal Regulation, 1976 (Regulation No. XVI of 1976) with me as one of its members. Before my appointment as a member of the Tribunal,

I was never consulted nor informed.

That Tribunal sat in Dhaka Central Jail in camera and proceeded with the trial of Colonel Abu Taher, BU and others. Since the country was under Martial Law and the Special Martial Law Tribunal concluded the trial of Special Martial Law Tribunal Case No. 1 of 1976 in a hurry in camera. The trial concluded awarding sentence of death on Colonel Abu Taher and different terms of sentence on other accused by a pronouncement dated 17/07/1976."

In reply to our question this deponent stated that no document Relating to the case and no file was given to him during the trial, that he knew the laws invoking which Col. Taher was indicted, did not provide for death sentence as on the date the trial commenced, but the chair of the tribunal did not ask for his view on the conviction or the sentences, there was no consultation between the members, procedure followed in an ordinary criminal trial was not followed and that, as the

country was under martial law, he was left with no choice but to affix his signature on the conviction and sentencing orders.

Khandoker Fazlur Rahman, a former Magistrate, Dhaka District Magistracy and a retired Secretary, Bangladesh National Parliament, in his affidavit recorded the following statements;

"I, Khandoker Fazlur Rahman, son of Khondoker Lutfur Rahman (since deceased), former Magistrate, Dhaka District Magistracy and retired Secretary, Bangladesh National Parliament, now residing at 89/119 (89/3 old) RK Mission Road, Gopibagh, Dhaka-1203; Bangladesh; aged about 65 (Sixty five) years, by profession-retired Government Servant, by faith-a Muslim, by Nationality-Bangladeshi, do hereby solemnly affirm and say as follows:

That the instant writ petition was filed challenging the constitutional validity of Martial Law Regulation No. XVI dated 14th June, 1976 providing for trial in camera [section 4(2)], prohibition of any appeal against decision or judgment and sentence of the Special Martial Law Tribunal [section 4(8)], provision of oath of secrecy of all participants in the proceedings of the Special Martial Law Tribunal [section 4(10)] and the pronouncements of guilt, and the sentence of death

purportedly under section 121A of the Penal Code and Lt. Col. (retd.) on M. A. Taher Bir Uttam (the husband of the petitioner No. 2) and his execution on 21st July, 1976; and this Hon'ble Court issued Rule Nisi as prayed for.

That during hearing of the Rule Nisi, a writ Bench of this Hon'ble Court comprising their Lordships Mr. Justice A. H. M. Shamsuddin Chowdhury and Mr. Justice Sheikh Md. Zakir Hossain directed the deponent to appear before this Court on 19/01/2011 to provide necessary information as to the so called trial and conviction of Colonel Abu Taher and others by a Special Martial Law Tribunal in 1976.

That accordingly I appeared before this Hon'ble Court on 19/01/2000 and made verbal statements in connection with the tragic crime committed in Dhaka during June and July, 1976 which ended with the hanging of Colonel Abu Taher, BU, through a so called trial by a Special Martial Law Tribunal.

That the statement that I have made is required to be brought on record to arrive at a correct decision in the matter and hence this Affidavit.

That from November 25, 1975 to January, 1978, I served as Deputy Magistrate in the Dhaka District Magistracy and by an order dated 20.07.1976 issued by the Additional District

Magistrate, Dhaka, I was deputed as Magistrate to remain present during the execution of Lt. Colonel Abul Taher, Bir-Uttam, accordingly after midnight of 20.07.1976, that is in the early hours of 21.07.1976, I went to the Dhaka Central Jail with a view to complete the legal formalities in connection with the execution of Lt. Colonel Abu Taher, Bir-Uttam and met him in front of condemned cell, wherein he was kept confined. He was very calm and quiet, asked me about my well-being and offered me a cup of tea, to which I humbly declined. He further requested me as to whether he can be taken to the gallows without mask and in reply I very humbly said that the rule does not permit. At this stage Colonel Taher requested me to complete the process of execution within the shortest possible time. After the wordings, he recited a poem wherein it was stated that unjust would be perished under the rolling stone. Before he was taken to the gallows, Colonel Taher said that the Tribunal and the trial by which he was convicted and sentenced was not legal and fair. His last words on the gallows **"long live my countrymen and Bangladesh".**

That on being asked by the Hon'ble Court, I replied that the question of this trial would be raised later and for that matter, I preserved the office order made by ADC (General)

Dhaka. I also informed the Hon'ble Court that the death warrant issued by the Special Martial Law Tribunal sent to Dhaka District Magistracy for taking steps for execution was referred to the Ministry of Home Affairs, seeking clarification whether the death warrant of Colonel Taher could be executed in the civil jail, following which the Ministry of Home Affairs got the Jail Code amended by Presidential Order to execute the death warrant issued by Special Martial Law Tribunal in civil Jail and Accordingly Colonel Taher was executed in Dhaka Central Jail."

Major General Nurul Islam, who retired from the Bangladesh Army as a Major General in April, 1979, transmitted an affidavit from the United States, where he is now permanently settled as a citizen, claiming his total ignorance on the event as he was, as he says, posted at the Bangladesh Mission in Rangoon at that time.

As none of the respondents filed any affidavit to rebut any statement, assertions, insistence, allegation, aspersion, insinuation that found places in the pleadings of all the petitioners, which are broadly identical, under the rules pertaining to pleadings, we are ordained to accept those as admitted and accurate.

As the hearing dawned a plethora of Advocates of iconic gradation with adulation beyond our realm, appeared to assist this court, a couple of them to represent some petitioners while the others did so pro-bono, with their treasure trove of high profile juristic excellence.

They included none other than Dr, Kamal Hussain, Mr. M. Amirul Islam, Dr. M. Zahir, Mr. M. I. Faruqui, Mr. Rokanuddin Mahamud, Mr. Aktar Imam, Mr. AFM Mejbahuddin, Mr. Abdul Matin Khashru, Mr. Yusuf Hussain Humayun and Mr. Z. I. Khan Panna, Dr. Shahdeen Malik and ofcourse Mr. Mahbubey Alam the Attorney General, Mr. M.K. Rahman the Additional Attorney General and a brigade of law officers.

The petitioner in Writ Petition no. 826 of 2011 were represented by Mr. Rokanuddin Mahmud while Dr. Shahdeen Malik appearing with Mr. Tawhidul Islam, represunted the Petitioners in Writ Petition no. 7236 of 2010. The learned Attorney General appeared for the state with his fully equipped contingent, composed of Deputy Attornies General Mr. A.B.M. Altaf Hussain, Mr. Motaher Hussain Sazu, Mr. Mohammad Selim, and Assistant Attorneies General Mr. Shahidul Islam Khan, Mr. Amit Talukdar, Mr. Shoeb Khan and Ms. Purabi

Shaha. Mr. M K Rahman, the learned Additional Attorney General, appeared with Mr. A S M Nazmul Haque, AAG Mr. Delwar Hussain Samaddar, AAG for respondents no 3 and 4.

With a rare exhibition of unanimity, they all agreed that the so-called trial was but a farce, a pure and simple mockery in the pretext of the judicial process and hence, at the end, what was done in the garb of a judicial order, was a cold blooded murder. "It was not even a show trial," said Dr. Kamal, "and the so-called tribunal can not be described even as a kangaroo court," louded Mr. M. Amirul Islam. The whole episode, in Mr. Rukonuddin Mahmud's visualisation, put a stigma on our nation. According to Mr. Aktar Imam, who submitted a well researched comprehensive treatise, proffered with an stentorian emphasis, that the so-called trial did not reflect even microscopic trace of what should be the attributes of a criminal proceeding. Mr. M. I. Farooqui in his philosophically tuned written submission underscored the impoartance of fair trial with reference to the historical development of human rights and projected Col. Taher as a champion of those propitious.

The learned Attorney General termed the trial as a national disgrace while M/S Khashru, Humayun and Panna branded it as a deplorable syndrome in our history.

Mr. MK Rahman and Dr. Malik termed the so-called trial and its after math as diabolically outrageous, which, in their view, is reflective of a crude act of vendetta, reminiscent of the medieval feud.

All the learned Advocates, inclusive of Dr. Kamal Hussain and Mr. M. Amirul Islam tabled their submission with dispassionate rhetoric, suggesting that trials even under an authoritarian regime contain certain norms to give it at least some kind of judicial facade yet, in the instant case, even those pretentious elements were missing. "The verdict," said Dr. Hussain, "was pre-determined, not by the so-called tribunal, but by the persons who were at the helm of the state affairs."

Mr. Islam said it as clear as a see through crystal stone that the purpose behind the whole gimmick was vindictively designed with a mind set to annihilate Colonel Taher Bir Uttam, who shall never disappear from the minds of the people because of the contribution he left behind to secure the emancipation of the Bengali People.

Dr. Hossain, Mr. Islam, Dr. Zahir, Mr. Faruqui, Mr. Rokanuddin Mahmud, Mr. Imam, Mr. Kashru, Mr. Humayun and Mr. Z. I. Khan Panna, expressed without any equivocation that nothing can be designated as a judicial or even a quasi

judicial proceeding where the accused is not feeded with the information as to the indictment, is not allowed legal representation, to cross examine witness, have access to what the prosecution witnesses are to depose, to call defence witnesses. Absence of right to appeal rendered the scenario worse even.

Mr. Rokanuddin Mahmud, representing Mr. Hasanul Haque Inu (W.P. No. 826/2011) and others, relied on the 5th Amendment judgment and said the subject trial is not covered by condonation as it was not a routine work that could be undertaken by a lawful government. He went on saying that it was not an ordinary martial law court and that the proclamation of 8th November 1975-is not condoned by this Courts' Judgment in the 5th Amendment case.

On the question as to our competence to receive evidence, he illuminated that affidavits are the basis of Article 102 cases- they are not depositions. There is no disputed question of fact and hence there is nothing to stop us to procure information from those who are familiar with all that we need to know for the appropriate disposal of the Rules.

Extracts from his marathon submission are as under;

Oral statement made by swering deponents were by way submission in furtherance of what they stated in their affidavits; they were not deposition in the strict sense, but submissions. They did not submit on any disputed question, they are jurisdictional questions. This Bench is not examining any disputed question of fact, but jurisdictional, collateral facts. The deponents only advanced clarification on their affidavit statement when the courts asked for. This Court has all the power to ask questions to deponents or lawyers for clarification.

He stated "an act of execution is a murder if killing is not authorised by law: execution through lawful trial is only exception- that is why it is a murder."

"The Magistrate can not escape sanction."

Mr. Mahmud went on to say;

"The Father of the Nation, Bangabandhu Sheikh Mujibur Rahman was brutally killed along with his other family members on the ill-fated morning of 15th August, 1975, and Khandaker Moshtaque Ahmed along with his other accomplices, after most illegally usurping state power proclaimed so-called martial law over the country on 20th August, 1975, during which period, various martial law orders,

regulations, notifications including the Martial Law Regulations, 1975 and the Special Martial Law Tribunal Regulation, (which gave birth to the tribunal concerned) were passed. Although they purportedly legalised by the Constitution (Fifth Amendment) Act, 1979, the Hon'ble High Court Division, in the landmark Judgment delivered in Writ Petition No. 6016 of 2000 (popularly known as Fifth Amendment Case) declared that the Act was in toto unconstitutional, illegal and void ab initio and without any lawful effect and all the proclamations, regulations, orders and notifications were equally unconstitutional and void and as such and all acts purportedly done under those proclamations, regulations, orders were also illegal and void subject to some condonations and from that point of view the so-called tribunal was totally bereft of validity and authority, as a corollary all the purported convictions were non-est."

In his view Lt. Colonel Taher was in any event, totally deprived of a fair trial in as much as no proper defense was allowed in the secluded trial inside the jail without any or little access to lawyers. "This is one of the inalienable fundamental right of all the citizens of the country to defend himself through lawyers of his choice", said Mr. Mahmud. He

reminded us that in one of his Judgment [The State vs. Purna Chandra, DLR (1970), 289-92], a Bench presided over by Justice AM Sayeem, set aside a capital punishment, saying "the Code of Criminal Prodecure confers a right on every accused person brought before a criminal court to be defended by a lawyer. That right extends to access to the lawyer for private consulation and also affording the latter an adequate opportunity of preparing the case for the defense. A last moment appointment of an advocate for defending a prisoner accused of a capital offence not only results in a breach of the provision of the 6th paragraph of Chapter XII of the Legal Remembrance's Manual (1960), and frustrates the object behind the elaborate provision of that Chapter.....The denial of this right must have reduced the trial into a farcical one."

Mr. Mahmud raised a question as to how the same Justice A. M. Sayem, as the then president and the chief martial law administrator overlooked his own judgment and rulling and did not accept the mercy petition of Col. Taher and sent him to the gallows.

He asserted that it is also well established that under the constitutional jurisdiction of the Hon'ble High Court Division, every sentence of death must be placed before this Hon'ble

Court for confirmation, and this is a constitutional safeguard to which every citizen of this counrty is entitled, as an imutable right, yet the Special Martial Law Regulation did not provide for any such sefty valve. "The conviction," he said, "was wholly unconstitutional and void."

According to him the right to prefer appeal against any conviction is a part and parcel of the notion of fair trial; and the fact that the Regulation No. 4(8) of the MLR XVI of 1976 took away that right of an accused, by itself made trial and conviction passed by that tribunal wholly unacceptable, unconstitutional and void.

As he looks at it, a criminal trial must be held ***in public*** as ordained by Article 35(3) of the Constitution and the idea of a criminal trial in camera is absolutely unknown and repugnant to the Constitution and to the basic notion of fair trial. "It is an unfortunate part of our history that an unflinching Freedom Fighter like Col. Taher had to face a so-called trial in the dark chamber of the jail", voiced Mr. Mahmud.

He went on saying;

"It was malafide on the part of the martial law rulers at that time. It is anybody's guess when it is seen how hastily Col. Taher was executed within 4(four) days of the conviction,

which by itself depicts that the authorities of the day were bent to annihilate him at all cost."

"It is so melancholic and anguishing to think that a person who had wagered his life for this country and, lost one of his legs in the War of Liberation, had to face such disgrace and injustice in this land for which he sacrificed so much," verbalised Mr. Mahmud.

In his view the perpertrators, who are usurpers of the Constitution and the state power, utterly and overtly disregarded, disrespected and distorted all notions of justice while convicting and executing a man like Col. Taher.

"Human civilization has witnessed very few of such a travesty of the truth and justice: the martial law rulers, to gratify their own grotesque ambition, killed an intrerpid Freedom Fighter and righteous man in the pretext of so-called justice."

Dr. Shahdeen Malik, the Learned filing lawyer for Prof Anwar Hussain and others (W.P.No. 7236/2010), asked us to take particular note of the statement, the person who was a member of the so-called tribunal, made to the effect that no paper was placed before him when he was sitting in the tribunal and the procedure which are mandatory for criminal trials, were not followed. "It was an absolutely weird situation,

which can only be branded as a cruel joke, which eventually led to an extra judicial homicide," Dr. Malik uttered. He also echoed the theme that after the decisions in 5th and 7th Amendment cases, the purported verdict of the so-called tribunal is bound to fall apart in any event.

Submissions advanced by the learned Advocates, who made themselves available ex-gratia, some in writing, are recorded below, a bit elaborately in the interest of precision.

Dr. Kamal Hossain

"It was as if army was preparing for a war-

Turmoil put everything topsy turvy in the vicinity.

"On what legal basis?" asked Dr. Hossain.

"It was nothing else than a kangaroo court, where the verdict was pre-determined by those in de-facto authority. They super imposed it on the so-called tribunal."

Quoting General "Manzoor, Dr. Hossain stated that Taher was in solitary confinement. "If death sentence was determined prior to the trial, it was illegal", insisted Dr. Hussain. Journalists were threatened and deported. According to him, justice now seems to be trailing through the right track after 3 decades.

He went on saying, "Justice reigns some where in the universe-crime should never go unpunished: pannacle of power never lasts long, it did not glorify Hitler or Lewis 14th. Many were tried-people can not commit crime in the name of the state."

Dr. Hossain, through the written part of his profferment asserted that in 1976 when living in Oxford, he was contacted by Mr. Syed Ishitaq Ahmed, who had just relinquished the office of the Attroney General of Bangladesh, and arrived in London. He informed Dr. Hossaion that as the Attorney General he had been sent the file relating to the case of late Col. Taher, containing the judgment by which the latter had been convicted and sentenced to death, containing the proceedings of the purported trial held in Dhaka Central Jail, and he had formed his view that the judgment bore no relation to those proceeding and Mr. Ahmed therefore, expressed his inability to give his opinion regarding the validity of the judgment and instead, tendered his resignation.

Dr. Hossain emphasised the omnipatence of fair Investigation, equality, right against torture, and the requirement ordained by Article-35 of the Constitution. He expressed in black and white that right to legal assistance, duty

to keep record right, to be tried by competent, independent, qualified judges- right to a public hearing, right to examine witnesses, right to appeal are all inseperable adjuncts of a fair trial.

He continued to state that right of free trial is part of Due Process and that to prepare the defence case, access to papers, to lawyers, right to cross examination, are minimum desideratum warranted by any civilised standard.

In Dr. Hossain's view none can defend this so-called trial. He expressed a dream of vision of the future.

Dr. M. Zahir submitted that Section 121A of the Penal Code did not provide for death sentence. MLR 30 was declared illegal-5th Amendment has been declared invalid.

"This case," said Dr. Zahir, "does not come under condonation, it is not an executive act and it was an action that was derogatory to the rights of the citizens."

"That can not be termed a trial at all", expressed Dr. Zahir, "where the accused is not told of the offence he stands in the dock for." He stated that absence of records sheds a thick cloud over the whole scenario. "All is not well in Denmark," uttered Dr. Zahir. On reception of evidence, he

insisted that the Writ Court originates from the Court of Star Chamber and hence it has jurisdiction to take evidence.

"Zia was bent to kill Taher," emphasised Dr. Zahir.

Mr. M. Amirul Islam submittted that the decision in the 5th and the 7th Amendment cases are irreversible milestones. Inalienable rights under Article 30 of the Constitution can not be snatched away.

He echoed what Justice G. Jackson, Prosecuter in Nuremberg Trial had to say on fair trial.

He said Article 32 is also inalienable. It is much more than a basic feature; it is part of our civilisation.

The offence was alleged to have had taken place in July 76, but there was no death penalty for the alleged offence. It carried custodial sentence of 10 years R.I. only.

This punishment was the invention of the martial law.

This is the case of a killing under the pretence of a trial-a kind of an extra judicial killing. "Even Bhutto was a judicial killing. Justice Nasim Hasan is reported to have said Bhutto was a judicial killing."

Right to life is a person's most covetted constitutional possession.

Retrospective effect was totally outside the arena of law.

"Taher didn't commit any crime," submitted Mr. Islam.

Mr. Islam was in concert with others in expressing that the nation must be relieved from the smirch it has been trailing, by pronouncing that Taher was actually killed in the pretext of a trial- "It is a national affront", voiced Mr. Islam, "that a Freedom Fighter of his standing had to see the end of his life under the gallows."

Mr. M. I. Farooqui, who placed his submission partly in black and white and partly verbalised, stated that Col. Taher was virtually killed- it was clearly a cold blooded murder through a show trial-Taher was a democrat, a socialist. The people who ascended to power after Bangabondhu's killing, felt Taher would stand on their way-Constitution is a social contract-wisdom of Rennaisance. They felt Taher was an obstacle on their way to change the Constitution. He was vocal for the basic structure of the Constitution.

It is obvious that the trial was without jurisdiction-

He submitted that there is no bar in taking evidence. In India evidence were taken after Railway accidents- PIL Cases-A man was killed with the allegation of sedition- Fundamental Character of the Constitution can't be changed even by the Parliament.

He reminded us of Reoussau's Social Contract.

Mr. M. I. Farooqui's written submissions, founded on metaphysical consideration, are reprinted below verbatim;

"Known trial in Antiquity resulting in the dreadful sentence of death by drinking a cup of hemlock poison against Socrates, the greatest thinker of ancient Greece,who gave the priceless gifts of "Dialectics" to humanity-his pleading for taking 'reason' as the supreme judge of every thing. He pleaded for expression of one's thought. He is said to be the Father of Human Rights.

In Antiquity when the use of might alone was considered as the right policy the kings and ruling chiefs, waged incessant wars against their neighbouring rivals and adversaries and by sheer force of arms defeated and brought in chains men, women, young and old without number. The gallant and brave soliders fighting on the opposite side so long, overnight, became helpless captives and were put down with brute froce. In ancient slave-owning Greek States, thousands of sick, old useless or rebellious slaves were killed and offered as sacrifices on the occasion of national rulers, was unquestionable; none could even whisper a word in anguish or protest. The very first attempt to speak aloud against this outrage, by Socrates, who

urged the people and the rulers to test everything said or done "on the touchstone of reason" was sought to be silenced with a savage sentecne of death. Socrates emerged as Father of Human Rights. The martyrdom of Socrates gave rise to a rich crop of fighters for human rights, liberators and revolutionaries. Tahir is one of them.

In the middle of fifteenth century, particularly in the wake of scientific inventions, geographical discoveries, introduction of printing press, improved use of gunpowder, besides the new awakening after Reformation and Renaissance, in Europe, man came to be regarded as centre of universe with main focus concentrated on human dingity and happiness.

Many prominent thinkers had to pay with their lives, exiles and imprisonemnt for spreading the gospel of human dignity, rights and liberty, after mock trials to give the savage verdicts a semblance of legality. However with undying dedication to the cause of humanity new liberators stepped in declaring that "Loss of liberty is worse than death." Tahir is one of them.

Dissenting voice of progressive patriots, journalists and freedom fighters was gagged by inhuman bans and restrictions

during the dark colonial rules. Local customs and traditions were shot to eternity.

People started sending memoranda and deputations to the rulers to ameliorate their pathetic plight. Peaceful demonstrations were, however, brutally dispersed with a hail of bullets and baton blows. Heroes like Mahama Gandhi and Martin Luther King were sentenced to imprisonment even though they firmly believed in non-violence, in trials before colonial judges. Those like Surja Sen, Madan Lal, Bhagat Singh, Udhan Singh, who believed in violent overthrow of the colonial regimes, were led to the gallows on the basis of false evidence of police informers and tutored witnesses. These patriots, though gone physically, became a source of inspiration for countless of people at national and international level.

During colonial period, the courts handed down barbarous sentences of death, exile and long imprisonment with hard labour, by resort to notorious 'conspiracy' cases in India and other subjugated countries.

Conspiracy trial, in fact, solely has ever been aimed at hastening the prominent defendants to the gallows or prisons to languish there for years. The only fault on their part having been their "loud voice for freedom to change the socio-

economic strata", which was magnified into allegaions of crime of 'sedition' or 'violent' overthrow of the regimes, Tahir is one of them.

His trial is unique. He was subjected to conspiracy trial in independent Bangladesh, which he, along with the nation, fought for and won. He wanted to uphold the social contract. The trial was made clear when Martial Law decrees (between 15 August 1975 and 9 April 1979) amended, among others, the Constitution's Preamble and Article 8, when principles of nationalism, socialism, and secularism were jettisoned.

Thaher's political philosophy and Constitution:

Tahir's political philosophy, we find enshrined in the very Constitution of "high ideas of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national struggle" as the fundamental priciples" of Constitutionalism. These high ideas were given go by. And by 5th Amendment the ratification was sought to be effected. This amendment was however declared void on 29 August, 2005. It was upheld with some variations by the Appellate Division on February 01, 2010. See 2010 BLD (Special issue) on judgments

on 5th Amendment. This case has opened the scope for the judiciary to put' the farcical trial' on trial.

Thaher speaks from the scaffold:

"... I have given my blood for the creation of this country. And now I shall give my life. Let this illuminate and infuse new strength into the souls of our people. What greater reward could there be for me? No one can kill me. I live in the midst of the masses. My pulse beats in their pulse. If I am to be killed; the entire people must also be killed. What force can do that? None...." See Tahir;s letter dated 18th July 1976 from Dhaka Central Jail] He was convicted on 17th July 1976, and executed on 21st July 1976.

Nation should remember Thahir:

Tahir in fact fought for the supremacy of the Constitution of the Republic- the social contract of the nation, of which he, with entire nation, was a party to, to lead a national life in accordance with the dictates of the Constitution. But the conspiracy was hatched to eliminate him by a fake trial to gag his strong voice. This was in active amendment of the Constitution. It was the cold blooded murder in the name of sham trial that ended with shrouds of secrecy around in central

jail with the defense lawyers put under the embargo of oath of secrecy.

I would suggest we should put up his statue as statue of "CONSTITUTION UP-HOLDER" that may inspire the nation to fight for the supremacy of the Constitution."

Some extract from the written submission by Amicus Curiae Mr. Akhter Imam, goes as hereunder;

1. Lord Denning said, "To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you ever so high, the law is above you."

(Gouriet v Unioin of post Office Workers and Others [1977]1 CA All ER)

The supreme and fundamental law of the land is the Constitution and all laws formed or formulated under and within the vires of Constitution are recognised by it and nothing else.

The law should be applied without fear or favour, malice or ill will, or prejudice, bias or fear from others, particularly the high and mighty. This, inter alia means, there must be an independent and impartial judiciary which is the cornerstone of any credible justice delivery system in a civilised country.

2. **Status of Martial Law Regulation No. XVI of 1976**

Martial Law Regulation No. XVI and all its contents including s. 3(1) which set up the Special Martial Law Tribunal (SMLT), has been declared illegal, void and non-est in the eye of law. In the 5th Amendment case the Apex Court held:

"(270) Since the Constitution is the Supreme Law of the land, the Martial Law Proclamations, Regulations and Orders promulgated/made by the usurpers, being illegal, void and non-est in the eye of law, could not be ratified or confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the above Proclamations, Martial Law Regulation or orders.

(271) Moreover the Fifth Amendment ratifying and validating the Martial Law Proclamations, Regulations and Orders not only violated the Supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other basic features of the Constitution, namely, independence of the judiciary and its power of judicial review." In Siddique Ahmed v Bangladesh and others (W. P. No. 696 of 2010), otherwise known as the 7th Amendment case, the High Court Division echoed the Apex Court's Decision and held that,

(67) "These Constitutional provisions have been mirrored above for the sole purpose of vindicating the assertion that (1) martial law or any similar usurpation of power has no threshold under our constitution (2) our Constitutional Scheme, from the top to the toe, owes its existence to the will of the people (3) it is the Parliament, elected through popular vote, which is the centrifugal body for all democratic activities (4) the Head of the Executive Government, along with his colleagues survive so long as they command the support of the majority members of parliament (5) members of Parliament, who alone enjoy prerogative to legislate, with the only exception of parochial and short lived legislative power of the President, and who do effectively and virtually form the electoral college for the formation of the executive Government, are all elected directly by the people, (6) a set of fundamental rights, which correspond to the Universal Declaration of Human Rights, 1948, and other U N Covenants on human rights, remain stoutly erected as the Constitutional Arch Stone to insulate every individual's fundamental rights (7) there is a Supreme Court, comprising two hierarchical Divisions, to act as the invincible vanguard, to shield the sacrosanctity of the Constitution by performing the sacred duty of being it's

Guardian and to protect and enforce the fundamental rights, firmly and inflexibly secured by the Constitution and, most importantly, to act as the inviolable bastion to keep the Constitution immune from extra-Constitutional infringement and also to ensure that no law, contravening any provision of the Sacred Instrument, is passed."

3. **Court Martial/Special Martial Law Court or Tribunal**

The proceedings corresponding to Special Martial Law Tribunal Case NO. 1/76 do not fall within the ambit of Court Martial as envisaged under the Army Act 1952, the Air Force act 1953 and the Navy Ordinance 1961. These legislations provide for trial by Court Martial of persons "subject to the Act" and contain specific procedural safeguards (such as power to appoint counsel and right to object to being tried by any officer sitting on the court) in respect of the rights of the accused.

In contrast, the Special Military Tribunal was set up purportedly under a special law. It allowed for civilian members to sit on the Tribunal (two members of the tribunal were magistrates of the first class). Section 4 of the Martial Law Regulation (MLR) No. XVI of 1976 gave the tribunal the jurisdiction to try virtually any offence. The regulation is completely silent on the rights of the accused (the regulation does not even provide for the cross-

examination of witnesses). Shockingly, section 8 of MLR No. XVI provides that " No appeal shall lie to any authority whatever from any decision or judgment of the Tribunal".

4. Protection of Law & Process of Law-

4.a) See Mohmudul Islam p. 2.94-2.155

From Suspect to Trial, Andrew Sanders in The Oxford Handbook of Criminology, 2nd Edition, edited by Mike Maguire, Rod Morgan and Robert Reiner:

"The principles underlying different criminal justice systems vary according to history, culture, and ideology. The adversary principle is an important characteristic of the English system and of other common law systems such as those of Australia, Canada, and the United States. This principle is often characterised as embodying the search for 'proof' rather than 'truth'. The search for 'truth' is usually said to be embodied in 'civil law' systems (such as the French), which are 'inquisitorial'. It would be nice if 'proof and 'truth' were synonymous and sought with equal vigour, as one of Britain's leading Chief Constables has advocated, but examination of the due process' and 'crime control' models developed by Packer (1968) will show that this is unrealistic

'Due process' values prioritise civil liberties in order to secure the maximal acquittal of the innocent, risking acquittal of some guilty people. 'Crime control' values prioritize the conviction of the guilty, risking the conviction of some (fewer) innocents and infringement of the liberties of some citizens to achieve the system's goals. Due-process-based systems rightly control the actions and effects of crime-control agencies, while crime-control-based systems, with their concern for convictions, do not. A pure crime-control system would prioritize the search for truth by adversarial law enforcement agencies at literally all costs. Police officers who 'knew' that someone is guilty would either have this knowldged accepted as proof by a court or would be allowed to seek proof of it by any means. Put in this way, of course, the need for controls in a crime-control system becomes clear. Objective proof is needed and law enforcement methods must be limited by humanitarian or libertarian standards even at the cost of knowledge. However, a pure due-process system would prioritize proof and controls at literally all costs. Guilty verdicts would be allowed only on proof beyond literally all doubt, and law enforcement officials would need objective evidence before interfering with any civil liberties, however slight. And so we see the criminal justice

system dilemma. Absolute proof, and completely innocuous methods of securing it, cannot be insisted upon. But to insist on uncontrolled discretion in the way the truth is sought is equally unacceptable. No system can correspond exactly with either model (as no system is entirely adversarial or entirely inquisitorial), but in most systems the values of one or the other model appear to predominate".

"Due process" includes the following rights of an accused:

-Presumption of Innocence

-Right to be heard

-Right to have access to Counsel

-Right to be informed of the grounds of arrest

-Right to speedy and impartial and public trial

Protection against self-incrimination

-Right to cross-examine prosecution witnesses

Under art. 32 any law depriving a person, citizen or non-citizen, of personal liberty must not be arbitrary and must be reasonable and fair. Art. 33 provides for specific procedural safeguards against arbitrary arrest and detention and together with arts. 32 and 35 make a total code in respect of arrest, detention and trial.

Implicit in arts. 31 and 32 is the right of access to justice as a man cannot be said to have been dealt with in accordance with law unless he has a reasonable opportunity to approach the court in vindication of his right or grievance (Liquat Hossain v Pakistan PLD 1999 SC 504, 652; see also Mahmudul Islam p. 2.111A)

Mahmudul Islam p. 2.149; Fair Trial- The gist of art. 35(3) is fair trial which requires public trial by an independent and impartial court or tribunal. In addition, in a democratic society, there are specific safeguards in the form of rules of evidence which operate to protect an accused against unlawful deprivation of life and liberty.

It appears that none of the above procedural safeguards was existent in Special Martial Law Tribunal (SMLT) Case No. 1/76. Consider the following extract from "The trial of Colonel Abu Taher", Daily Star, 24 July 2006, Lawrence Lifshultz:

"Just over thirty years ago I stood outside Dhaka Central Jail. I had arrived early for a day that would become a "day to remember." It was June 28, 1976.

A week earlier, Special Military Tribunal No. 1 had begun its work in secret. It convened for a single day and then immediately recessed for a week to permit defence lawyers

seven days to prepare for a case which the prosecution had been working on for six months. The trial of Colonel Abu Taher and more than twenty others had begun. The accused, despite repeated requests throughout the period of their detention, had been denied access to legal counsel and communication with relatives."

In addition, all the defence counsels were sworn to an oath of secrecy. In fact, s. 4(10) of MLR No. XVI provided that the Chairman of the Special Martial Law Tribunal would require any person attending or otherwise participating in the trial to make an oath of secrecy and the violation of such oath was made punishable by imprisonment for a term of up to 3(three) years. The fact that trial was held within the confines of Dhaka Central Jail is in itself evidence that the proceedings were not just.

It should also be mentioned that no documents pertaining to the trial, conviction or sentence of the convicted has ever been made available by the authorities. The only reasonable inference is that all such documents have probably been destroyed to hide the evidence of illegalities committed therein.

M.C. Kane, an American lawyer in research on 'Military Commissions and the Guantanamo Detainees' titled "Safeguards Missing" observed as follows:

One of the most controversial sections involves the use of secret evidence. No one can legitimately argue, however, that vital confidential information, such as the details of military operations or the identities of undercover operatives, should be disclosed in public. Whether that information should be allowed to convict is another matter altogether. Nonetheless, statutes and judicial proceedings in the US have regularly recognised the necessity for secrecy in certain limited conditions.

Typically, when military commissions were used, no civilian courts were functioning adequately to conduct such proceedings.

Both US and international law have undergone radical transformations since military commissions were last used. At the time of the German trial, much of the Bill of Rights, with its substantial safeguards, had not been applied in domestic law outside the federal judicial scheme. Such additional rights should then arguably be extended to the military commissions, much as they were to state judicial proceedings. Internationally,

the US has since become party to the International Covenant for Civil and Political Rights and many other treaties and conventions, which require a fair trial and protection from arbitrary arrest and detention."

Another commentator has noted:

"One of the most fundamental principles of human rights as stated above, 'is the protection of individual liberty, especially from the undue exercise of state power.' This principle is also applicable at the international level and the concern for personal liberty is reflected in the Statutes of the ICTY (International Criminal Tribunal for The Former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda) and their rules of procedure and evidence. These instruments limit the extent to which persons may be deprived of their liberty befor they are brought to trial and set out rules aimed at preventing the innocent from being convicted and imprisoned by protecting the integrity of the trial itself."

Stuart Beresford, Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals, 96 AM. J. INT'L. L. 628, 631 (2002).

4.b) Special Martial Law Tribunal (SMLT) Case No. 1/76 held in camera and conducted in an aura of utmost secrecy by SMLT whose constitution, jurisdiction, authority, function and procedure wihtout any right of appeal are and have been held to be ultra vires the Constitution and outside all civilised norms of criminal justice delivery system.

4.c) The unholy and unnatural haste in rejecting the mercy petition and executing Lt. Col. (ret) M. A. Taher was ex-facie mala fide and for a collateral purpose and beyond/outside, and, repugnant to all civilised cannons of Justice and Articles 31, 32 and 35 of the Constitution.

5. **Condonations as to past and closed transactions**

In the 5th Amendment case, questions arose as to whether to prevent chaos and confusion and to avoid anomaly and to preserve continuity, the actions and the legislative measures taken during Martial law period needs to be condoned/cured by the doctrine of necessity.

The doctrine of necessity originated from the following maxims:

-Id Quod Alias Non Est Licitum, Nexessitas Licitum Facit (that which otherwise is not lawful, necessity makes lawful);

-Salus populi Suprema lex(safety of the people is the supreme law); and

-Salud republicae est suprema lex (safety of the State is the supreme law)

BIMW Ltd. Vs Bangladesh and Others 2006 (Special Issue) BLT HCD [Part XXXV at pg. 214-216] (hereinafger referred to as the 5th Amendment case, HCD)

"This doctrine of State Necessity is no magic word. It does not make an illegal act a legal one. But the Court in exceptional circumstances, in order to avert the resultant evil of illegal legislations, may condone such illegality in the greater inerest of the community in general but on condition that those acts could have been legally done at least by the proper authority."

In the case of Asma Jilani v Government of Punjab PLD 1972 SC 139, Hamoodur Rahman, C.J. held at page 207;

"I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequence to the body politic and upset the social order itself but, I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. In my humble opinion this doctrine can be involved in aid only after the court has come to the conclusion that the

acts of the usurpers were illegal and illegitimate. It is only then the question arises as to how many of these acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization. Applying this test, I would condone (1) all transactions which are past and closed for no useful purpose can be served by reopening them (2) all acts and legislative measures which are in accordance with or could have been made under the abrogated constitution or the previous legal order (3) all acts which tend to advance or promote the good of the people (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to establishment of in our case the objectives mentioned in the Objectives Resolution of 1954. I would not however condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to the legitimate objectives. I would not condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity."

The proceedings that have been impugned in the present writ petition undoubtedly were carried out as a means for

entrenching the then usurpers more firmly in power. The proceedings were merely a mechanism for a military ruler to remove certain progressive, pro-people, pro-democratic elements that were willing to challenge the authority of the said ruler.

In the 7th Amendment case, the High Court Division in relation to the issue of condonation observed;

"So where does the petitioner stand in the backdrop of our unequivocal findings as figured above, particularly in the light of the synthesis that martial law courts were bereft of authority as much as the martial law itself was? This would, a fortiori, entail that convictions passed by such purported courts are of no effect in the eye of law. In view of the fact that such a finding can create in-surmountable administrative problems, and can, to some extent, import confusion, wilderness and anarchy, this Division, in the Fifth Amendment case, granted condonation to a number of circumstances and events, which was endorsed by the Appellate Division with some modification."

In the 5th Amendment case (AD) the Appellate Division at para 353, modified the condonations made by the High Court Division and condoned, inter alia, the following:

(a) All executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;

(b) The actions not derogatory to the rights of the citizens;

(c) All acts during that period which tend to advance or promote the welfare of the people; and

(d) All routine works done during the above period which even the lawful government could have done.

The High Court Division applied the above test in the 7th Amendment case and held that:

"The above index of condonation being binding upon us, there is no need to repeat them, save saying that so far as the instant case is concerned the index shall apply mutatis mutandis.

Having thus auto incorporated the above list in this judgment, our view is that the said list does not apply to the petitioner. As his sentence is still executory, he cannot be compartmentalised within the 'past and closed criteria'. Additionally, the petitioner's case involved questions of his

"citizen's rights" protected by clause (b) in the Appellate Division's catalogue printed above.

The petitioner's entitlement to have access to fair justice in accordance with the provision contemplated by the Constitution, i.e. through the Courts created by statutes in accordance with Constitutional commandments, not through Kangaroo courts, set up by extra-Constitutional means, is indeed his Constitutional right as secured by Articles 27, 32, 33, 35."

Similarly, in the instant writ petition, the Petitioner's case involves questions of their and Lt. Colonel (retd.) M.A. Taher's citizens right and as such, the sham proceedings carried out against them cannot be condoned.

In this regard, Justice A. B. M. Khairul Haque's mentioned of the case of Ex parte Milligan in the 5th Amendment Case, HCD also merits consideration.

BIMW Ltd. Vs Bangladesh and others 2006 (Special Issue) BLT (HCD) at page 67:

"The famous case of Ex parte Milligan 71 US (4Wall) 2, L.Ed. 281 (1866), glorified the rights of people even during war.

Milligan, a civilian resident of Indiana, was a Southern sympathizer. On an allegation of treason against Northern

America, he was arrested on October 5, 1864 and on the orders of General Hovery, he was tried by a military commission and sentenced to be hanged on May 19, 1865.

On a writ of habeas corpus, the following questions were before the Supreme Court of the United States:

I) Whether the Court had jurisdiction in view of legislation suspending the writ of habeas corpus;

II) Whether Milligan should be discharged.

This was a time when civil war was raging for more than three years and the very existence and foundation of the Republic was severely threatened. Even in that trying and precarious situation the Hon'ble Judges of the Supreme Court did not relent from upholding the fundamental principles of the Constitution in obedience to their oath and held that Congress was without Constitutional authority to suspend the privilege of habeas corpus and to allow exercise of Martial law in the State of Indiana where there was no rebellion at the relevant time."

In the 7th Amendment case however, the HCD was not inclined, under their writ jurisdiction, to interfere with the Petitioner's conviction and sentence and held:

"Our above observation notwithstanding, we are still not inclined to interfere with the conviction, with the reckoning

that this is not the proper forum because of the following reasons:

Firstly, although the conviction was handed by a void forum, a military court, original cognisance was nevertheless, taken by a properly constituted Court Viz, a Court of Session, and hence the notion of justice will be frustrated if through a writ of certiorari the conviction is completely set aside, because in that event he will go scot free without facing a fresh trial de-novo. Secondly, other complicated issues are also blended with this case, such as whether a second FIR is recognised by the Cr PC and what consequences would flow if it is not recognised, which issues are not apposite for a writ Bench . . . . ."

It is submitted that instant petition is distinguishable from the 7th amendment case in that it is apparent from the facts available before this Court that there was no case to be made out against the accused in Special Martial Law Tribunal (SMLT) Case No. 1/76. Numerous accounts have since confirmed that the military regime had decided on the punishment long before the trial had even begun. Martial Law Regulation (MLR) No. XVI of 1976 was proclaimed for the sole purpose of convening a tribunal so that pre-determined punishments could be imposed on potential opposition. It should also be mentioned

that the "Taher trial" was the first and the last time such a tribunal ever convened under Regulation XVI of 1976. It is also submitted that the impugned sentences have already been executed. In fact, Col. Taher was executed purportedly for a crime which carried a maximum sentence of imprisonment up to 10 years.

8. Finally, a delay of 35 years does not render valid or constitutional what are otherwise invalid and unconstitutional in that those acts were not challenged in view of the so-called cloak of constitutionality surrounding the 5th and 7th Amendments in particular in view of the ratifications thereof by the then Parliament. Just because no one has challenged before and no previous case can be found where it has been done before, it cannot be said that the amendments have been accepted and are now immune from legal challenge.

Oacker v Packer (1953) 2 All ER 127 at page-129H, per Denning L.J. "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."

The Appellate Division was in agreement with Denning L. J. in the Fifth Amendment Case;

"Accordingly, we are also of the view that it is far, far better thing that we do now, what should be done in the interest of justice, even if it was not done earlier" (at p. 132)."

Mr. A F M Mesbahuddin echoed the view that in the backdrop of this courts unequivocal pronouncement in the 5th and the 7th Amendment cases, all the Rules are but destined to end in success and that the unlawful convictions handed down by the illegally constituted tribunal is not saved by condonation. He had no qualm on the assertion that the whole episode was gestated by General Ziaur Rahman to vindicate his personal ambition. He insisted that the history will not forgive General Zia for this heinous act.

Mr. Yusuf Hussain Humayun outlined the illegality of the tribunal and the rogue nature of the trial process insisting that the whole episode was **embryogenesisd** for the sole purpose of impelling General Ziaur Rahman's diabolic lurch, a bit indexterously though. Mr. Humayun urged that this court does set up an example to vilify and thwart potential **adventurists**. He expects a judgment that shall survive through eternity and

aspires that General Zia should face the same consequence as Oliver Cromwel did.

Mr. Matin Khashru submitted that the authority of the Tribunal was void ab-initio. It was an usurpation of power in the name of martial law. "Duty of the state is to uphold the lives and liberties of the citizens," said Mr. Khashru. He added that usurpation of power is treason and the perpetators should be brougnt to the book with the ultimate sanction of the penal laws.

He cited Mexican constitution and submitted that Rule of law is a fundamental feature of our constitution too, which can not be changed even by the Parliament.

"It was Jungle law, masterminded by Ziaur Rahman", said Mr. Khashru.

He insisted that this court has every jurisdiction to consider evidence and that by reversing the purported verdict of the so-called tribunal, we should show the world that we are a civilised nation.

"It is more than a cold blooded murder", submitted Mr. Khashru, adding that it was a betrayal.

He concluded submitting that this Court should come up with a judgment that must act as a deterrent against any **adventurist** like Zia.

Mr. Z. I. Khan Panna commenced submission by adducing some books to show that during the period from 75-81, innumerable killings took place and Gen Zia was the prime culprit.

In his view absence of papers prove that an attempt was made to conceal facts. "Blayat Sing's trial was also in public", said Mr. Panna.

He said "Zia is the only traitor after Mirzafor"

"We have no information about Zia's role in the war of liberation" uttered Mr. Panna.

He expressed that an Inquiry Commission be set up to examine how many and who were killed by Zia and what was his role in Bangabandhu killing. That Committee should include journalists, advocates, civil society people, people from other professions, retired Supreme Court Judges, etc and should be independent.

According to him conviction handed down by the so-called tribunal has no leg to stand on after this Court's judgments in the 5th and 7th Amendment cases. He asked us to accept Mr. Lifschultz's statement as gospel.

Mr. Mahbubey Alam, the learned Attorney General, representing the state tabled comprehensive submission with formidable stimulus, leaving no stone untouched.

On the 5th and 7th Amendment judgments' impact on the special tribunal, the learned Attorney General was quite spontaneous and fervent in uttering that it goes without saying and, can be asserted even without any pre-meditation, that the ratio in the decisions of the two above cited judgments throw the validity of the so-called special tribunal into total abnegation. He iterated that the validity of the so-called tribunal, conviction and the sentence passed by it are not embraced by the principle of condonation as projected by the Appellate Division in the 5th Amendment case.

On the propriety of the trial the learned AG emphasised that even a mockery has a limit and even that limit was not adhered to by the then so-called authorities in respect to Taher case. He insisted that all that we have heard from well endowed people can lead us to one synthesis only, which is that the whole melodrama was directed by General Ziaur Rahman who was bent to appease anti liberation forces and to perpetuate his authoritarian power. The learned AG wished to have us to accept that we do not have to travel too far to be swayed to the

equation that Zia decided the fate of Col. Taher Bir Uttam, well before even the tribunal was set up, as this fact is obvious from Barrister Moudud Ahmed's writing, which stands corroborated by what Mr. Lifschultz narrated in his sworn statement, citing General Manzur. He asked us to attribute due weight to Mr. Lifschultz's statement, who was an objective, yet a conscientious observer.

Mr. Alam submitted that very few examples of such a bizarre trial can be found in the whole world. He insisted that it was a dastardly murder at the behest of General Zia and his anti liberation cohots. He echoed the view that the authorities of those days deliberately destroyed all the documents to cover up the truth, and submitted that this is an appropriate case where we have quite cogently and lawfully resolved to take evidence from those acquainted with pertinent facts, which are not in dispute any way. He lent support to the view that surviving accomplices in Ther murder should be brought to justice.

He shared with others the emotion in expressing that it was a national tragedy that an intransigent Freedom Fighter like Taher was murdered following such a recreant yet, dreadful intrigue.

Mr. M. K. Rahman, representing the respondents no. 3 and 4, found no alternative but to lend his unhesitant and overwhelming support to the contention the exalted Advocates propounded. He placed utmost emphasis on what Mr. Lifschultz observed, who, in Mr. Rahman's vision, is a disinterested person-"the only interest he had, was to see that the rule of law reigned supreme, which, unfortunately faced a frantic hacking by the so-called tribunal and those who animated it." Mr. Rahman echoed that even a **microgenic** dew of judicial norm can not be discovered from the purported trial. He shared Mr. Lifschultz's view that it can only be termed as a pre-ruminated murder. He expressed that Mr. Lifschultz's presence showered a "3d" dimension to the instant proceeding. Mr. Rahman, in orchestra with all other learned Advocates, proffered that in any event, the trial and the verdict as a whole is bound to be declared illegal as that must be the only outcome if the ratio of the decisions in the 5th and the 7th Amendment cases are followed without distortion. He concluded saying that the nation should be spared of the burden of slur it has been carrying for three decades, by crucifying the purported verdict of the misbegotten tribunal.

At one stage of the proceeding before us, Mr. Maudud Ahmed, who had authored the book referred to above, titled, "Democracy and challenge of Development: A Study of Political and Military Intervention in Bangladesh," appeared in the court room in **connexion** with a different case, he was engaged in. We took that opportunity to ask him whether he was actually the author of the book, and whether it is truly him who wrote the passages, Mr. Lifschultz referred to and produced before us.

With the highest degree of candour, Mr. Moudud Ahmed intimated that he had indeed authored that book and the quoted passages, stating further that he had a verbal discussion with General Ziaur Rahman, on Taher's fate and he has reproduced in his book exactly what General Zia told him.

In order to adjudicate upon this Rule we are, we reckon, to address the following questions: (i) whether the proclamation dated 20th August, 1975 subjugating the whole country with martial law, enjoyed legal validity or not, (ii) whether the judgment and order dated 17th July 1976 was with lawful authority or not (iii) whether, if the answer to (ii) above be in the negative, this case falls within the index of condonation set apart by the Appellate Division in the 5th Amendment case, (iv)

irrespective of the question of the constitutionality of the so-called martial law instruments, whether the so-called trial and the verdict in any event went hand in gloves with the minimum standard required for a fair trail, (v) whether Col. Taher's execution can aptly be described as a cold blooded murder as suggested by many of those who appeared before us, inclusive of Mr. Lifschultz and some learned Advcoates (vi) whether the Petitioners are entitled to the reliefs they crave.

At the very inception we wish to put on record that we are about to express our detailed judicial views on an event that has, for a couple of decades, remained puzzled in the maze of obscurity. It is generally known, and we take judicial notice of it, that Lt. Colonel Abu Taher, an acclaimed Freedom Fighter with unquestionable reverence, who was an invincible and resilient Sector Commander and was, after liberation, decorated with the highest Gallantry Award for living Fighters, Bir Uttam, was hanged within the precincts of Dhaka Central Jail on 21st July, 1976. What however, have remained in obfuscation are the inquisitives as to why he was hanged, what were the charges against him and his co-accused, what evidences were adduced, whether the trial was in concord with accepted and recognised judicial norms, etc.

We do not see much of a hurdle in resolving the first issue in the Petitioners' favour.

There was a time, not beyond the cavity of memory, when the reigning judicial attitude was retreat prone, superior courts were ready to endorse martial law proclamation and all that followed. That attitude, in our introspection, prevailed due to judicial timidity. Such a judicial recoiling was based on agreeability to concede defeat rather than on any legal dogma, though Kelsen's theory of "state necessity" was frequently invoked, we beleive, to justify decisions which were in truth, reflection of appeasement.

That taboo has, however, gracefully been dismantled by this Court through the decision in the celebrated case of Bangladesh Italian Marble Works Ltd –v-Bangladesh, the so called 5th Amendment Case, whereby this Division unequivocally declared ultra vires the purported 5th Amendment Act, by which the Parliament embarked **upon an** abortive attempt to validate all the proclamations, and martial law instruments framed by those who usurped state power through the barrels of guns.

Proclamation of martial law in its entirety, along with everything that flocked with it, had been declared unlawful and

of no effect. All that emassed with the martial law proclamations, save certain specifically catalogued aspect, which had been spared through the doctrine of condonation, had been ravaged along with the illusory application of the so-called Kelsen doctrin of "state necessity", which found favour of Munim J, of Pakistan Supreme Court in the case of State-v-Dosso (1959 11 DLR SC 1), a case that reflects highest watermark of judicial retreat.

The Appellate Division endorsed this Division's ratio with some modification.

Some extract of this Division's volumous judgment in the 5th Amendment case needs re-printing for the purpose of clarity. They run as follows;

"Under the circumstances, we declare the Constitution (Fifth Amendment) Act, 1979, ultra virus the constitution for the following reasons:

Firstly, Section 2 of the Constitution (Fifth Amendment) Act, 1979, enacted Paragraph 18, for its insertion in the Fourth Schedule to the Constitution in order to ratify, confirm and validate the Proclamations MLRs and MLOs etc. during the period from August 15, 1975 to April 9, 1979. Since those

Proclamation MLRs, MLOs etc. were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.

Secondly, on lifting the veil of enactment, we find that the real purport and reason, 'the pith and substance' for the amendment was for ratification confirmation and validation which do not come within the ambit of 'amendment' in Article 142 of the Constitution.

Thirdly, the Proclamations etc., being illegal and constitute offence, its ratification confirmation and validation by the Parliament were against common reason.

Fourthly, the constitution was made subordinate and subservient to the Proclamations etc.

Fifthly, those Proclamations etc. destroyed its basic features.

Sixthly, lack of long title which is a mandatory condition for amendment, made the amendment void.

Seventhly, the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the People of Bangladesh and its Constitution.

In short, The Constitution (Fifth Amendment) Act, 1979, protected the Proclamations, MLR, MLOs etc. and the actions taken thereon from being challenged in Court but after its

declaration as void, all those Martial Law provisions and actions become justiciable before the court.

We have already found earlier that the Constitution (Fifth Amendment) Act, 1979, ratified, confirmed and validated all those Proclamations, MLRs and MLOs and the actions taken on the basis ot those Proclamations etc. but since all those Proclamations etc. were illegal, its ratification, confirmation and validation, by the Fifth Amendment was illegal and void. Since the very purpose and object of the enactment of the Fifth Amendment was illegal and void ab initio, so also the Fifth Amendment itself, as it was enacted for a collateral purpose. Besides, since the Martial Law Proclamations etc. were void and non-est, there were nothing for the Second Parliament to ratify or confirm or validate by the subsequent Fifth Amendment."

"We have already held that all the Martial Law Proclamations including the one issued on November 29, 1976, were not issued under any legal authority and since we refuse to acknowledge Martial Law as legally enforceable provision and a source of law and the office of the Chief Martial Law Administrator as a lawful office, both are non-existent in Jurispruduce and we emphatically hold that there is no such concept as Martial Law Jurisprudence or Martial Law culture.

As such, in any view of the matter, handing over of the office of Martial Law Administrator to Major General Ziaur Rahman B.U., psc. was without any lawful authority.

Under such circumstances, we are unable to accept his argument as to the existence of the so called Martial Law Jurisprudence or Martial Law culture, in order to give validity to those.

As such, the legality of the Proclamation dated November 29, 1976, is next to nothing. It cannot confer any office or power on any body, because such way of transferring authority which was not in existence either under the Constitution or under any law prevalent at the time, cannot be done. We have already found and held that neither Martial Law nor the office of Martial Law Administrator had or has any existence in our law and Jurisprudence. As such, the handing over of the office of the martial Law Administrator in favour of Major General Ziaur Rahman B.U., psc., was illegal and void. Under the circumstances, the Proclamations, MLRs and MLOs issued during the period from November 29, 1976 to April 9, 1979, were all illegal, void and non est in the eye of law.

The same goes for all the Martial Law Regulations and Martial Law Orders, issued from the period of November 6,

1975 to November 29, 1976. We, however, condone the illegalities in respect of the actions taken on all the MLRs and MOLs, as past and closed transactions during the said period. Besides, we also condone various Ordinances passed during the above period."

"It appears that Justice Abusadat Mohammad Sayem by his Order No. 1/1/77-CD(CS)01 dated April 21, 1977, nominated Major General Ziaur Rahman, B.U Psc. to be the President of Bangladesh. This order was published in the Bangladesh Gazette Extraordinary on Arial 21, 1977.

This kind of nomination in the Office of President is unheard of. Even nomination to the office of President (or Chairman) of a mere local union council is not permissible but it was made possible in the highest office of the Republic of Bangladesh. It was done in violation of the Constitution of Bangladesh, and as such, it was illegal, void ab initio and non-est in the eye of law.

Lieutenant General Oliver Cromwell even after waging war for more than eleven years, could only become a Lord Protector in 1653 but Khandaker Moshtaq Ahmed, Justice Sayem and Major General Ziaur Rahman BU, could attain the highest office in Bangladesh apparently without much efforts.

It may be noted that on April 21, 1977, Major General Ziaur Rahman, B.U., as the Chief of Army Staff, was in the service of the Republic, as such, was oath bound to bear true allegiance to the Constitution but he assumed office of the President of Bangladesh, in utter violation of the said very Constitution.

Under such circumstances, since he assumed the office of President in violation of Constitution and since the Martial Law Proclamations and MLRs and MLOs were made in violation of the Constitution and the Army Act or any other law prevalent at the relevant period of time, those Proclamations etc. were all illegal void and non-est in the eye of law."

"We have held earlier in general that there was no legal existence of Martial Law and consequently of no Martial Law Authorities, as such, all Proclamations etc. were illegal, void ab initio and non est in the eye of law. This we have held strictly in accordance with the dictates of the Constitution, the supreme law to which all Institutions including the Judiciary owe its existence. We are bound to declare what have to be declared, in vindication of our oath taken in accordance with the Constitution, otherwise, we ourselves would be violating the Constitution and the oath taken to protect the Constitution and

thereby betraying the Nation. We had no other alternative, rather, we are obliged to act strictly in accordance with the provisions of the Constitution."

"The learned Advocates for the respondents raised the possibility of chaos or confusion that may arise if we declare the said Proclamations, MLRs and MLOs and the acts taken thereunder as illegal, void ab initio and non est. We are not unmindful of such an apprehension although unlikely but we have no iota of doubts about the illegalities of those Proclamations etc. What is wrong and illegal shall remain so for ever. There cannot be any acquiescence in case of an illegality. It remains illegal for all time to come. A Court of of Law cannot extend benefit to the perpetrators of the illegalities by declaring it legitimate. It remains illegitimate till eternity. The seizure of power by Khandaker Moshtaque Ahmed and his band of renegades, definitely constituted offences and shall remain so forever. No law can legitimize their actions and transactions. 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.

Be that as it may, although it is very true that illegalities would not make such continuance as a legal one but in order to protect the country from irreparable evils flowing from convulions of apprehended chaos and confusion and in bringing the country back to the road map devised by its Constitution, recourse to the doctrine of necessity in the paramount interest of the nation becomes imperative. In such a situation, while holding the Proclamations etc. as illegal and void ab initio, we provisionally condone the Ordinances, and provisions of the various Proclamations, MLRs and MLOs save and except those which are specifically denied above, on the age old principles, such as, Id quod Alias Non Est LIcitum, Necessitas Licitum Facit (That which otherwise in not lawful, necessity makes lawful), Salus populi suprema lex (safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law).

In this connection it may again be reminded that those Proclamations etc, were not made by the Parliament but by the usurpers and dictators. To them, we would use Thomas Fuller's warning sounded over 300 years ago: 'Be you ever so high, the law is above you.' (Quoted from the Judgment of Lord

Denning M. R., in Gouriet V. Union of Post Office Workers (1977) 1 QB 729 at page-762).

Fiat justitia, ruat caelum."

"Summary"

7. "A proclamation can be issued to declare an existing law under the Constitution, but not for promulgating a new law or offence or for any other purpose.

8. There is no such law in Bangladesh as Martial Law and there is also no such authority as Martial Law Authority as such and if any person declares Martial Law, he will be liable for high treason against the Republic. Obedience to superior orders is itself no defence.

9. The taking over of the powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15th August, 1975, by Khandaker Mushtaque Ahmed, an usurper, placing Bangladesh under Martial Law and his assumption of the office of the President of Bangladesh, were in clear violation of the Constitution, as such, illegal, without lawful authority and without jurisdiction.

10. The nomination of Mr. Justice Abusadat Mohammad Sayem, as the President of Bangladesh, on November, 6, 1975, and his taking over of the Office of

President of Bangladesh and his assumption of powers of the Chief Martial Law Administrator and his appointment of the Deputy Chief Martial Law Administrators by the Proclamation issued on November 8, 1975, were all in violation of the Constitution.

11. The handing over of the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., by the aforesaid Justice Abusadat Mohammad Sayem, by the Third Proclamation issued on November 29, 1976, enabling the said Major General Ziaur Rahman, to exercise all the powers of the Chief Martial Law Administrator, was beyond the ambit of the Constitution.

12. The nomination of Major General Ziaur Rahman, B.U., to become the President of Bangladesh by Justice Abusadat Mohammad Sayem, the assumption of office of the President of Bangladesh by Major General Ziaur Rahman, B.U., were without lawful authority and without jurisdiction.

13. The Referendum Order, 1977 (Martial Law Order No. 1 of 1977), published in Bangladesh Gazette On 1st May, 1977, is unknown to the Constitution, being made only to ascertain the confidence of the people of Bangladesh in one person, namely, Major General Ziaur Rahman, B.U.

14. All Proclamations, Martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and non est because;

i) Those were made by persons without lawful authority, as such, without jurisdiction.

ii) The Constitution was made sub-ordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders,

iii) Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also,

iv) From August 15, 1975 to April 7, 1979 Bangladesh was ruled not by the representatives of the people but by the usurpers and dictators, as such, during the said period the people and their country, the Republic of Bangladesh, lost its sovereign republic character and was under the subjugation of the dictators.

v) From November 1975 to March, 1979 Bangladesh was without any Parliament and was

ruled by the dictators, as such, lost its democratic character for the said period.

vi) The Proclamations etc. destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee Nationalism, negation of Rule of law, ouster of the jurisdiction of Court, denial of those constitute seditious offence.

15. Paragraph 3A was illegal, "Firstly because it sought to validate the Proclamations, MLRs and MLOs which were illegal", and "Secondly, Paragraph 3A, made by the Proclamation Orders, as such, itself was void".

16. The Parliament may enact any law but subject to the Constitution. The Constitution (Fifth Amendment) Act, 1979 is ultra vires, because:

Firstly, Section 2 of the Constitution (Fifth Amendment) Act, 1979, enacted Paragraph 18, for its insertion in the Fourth Schedule to the Constitution, in order to ratify, confirm and validate the Proclamations, MLRs and MLOs etc. during the period from August 15, 1975 to April 9, 1979. Since those Proclamations, MLRs, MLOs etc., were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.

Secondly, the Proclamations etc. being illegal and constituting offence, its ratification, confirmation and validation, by the Parliament were against common right and reason.

Thirdly, the Constitution was made subordinate and subservient to the Proclamations etc.

Fourthly, those Proclamations etc. destroyed its basic features.

Fifthly, ratification, confirmation and validation do not come within the ambit of 'amendment' in Article 142 of the Constitution.

Sixthly, lack of long title which is a mandatory condition for amendment, made the amendment void.

Seventhly, the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the People of Bangladesh and its Constitution."

The Appellate Division infused some modification into this Division's judgment in the 5th Amendment Case and, added some observation thereto, in following terms;

"Before we conclude, we would like to quote the following:

"The greatest of all the means . .. . for ensuring the stability of Constitution-but which is now a days generally neglected is the education of citizens in the sprit of the Constitution . . . . . To live by the rule of the Constitution ought not to be regarded as slavery, but rather as salvation." (Artistotle's Politics (335-332 BC) pp [233-34]"

We would also quote the following passage from the conclusion in an essay on Noni Palkivala in . . . . . "Democracy, Human rights and Rule of Law" edited by Venkat Iyer, 2000 regarding the "Period of Deliquency" in India in 1975-1977:

> "Despite the traumatic events of 1975-1977, the lessons of that emergency have now, alas, also been forgotten by a vast majority of Indian citizenery. It is said that people do not realize the benefits of freedom until they are lost. Twenty five years have passed and a new generation of Indians is not even aware of what happened during those eventful months.
>
> It is essential that if India is to preserve her democratic freedom, each generation must be taught, educated and informed about those dark days. Every Indian needs to renew and refresh himself at the springs of freedom."

We will simply echo those words by replacing the period and the word India with Bangladesh. We emphasize each of our generation must be taught, educated and informed about those dark days: the easiest way of doing this is to recognize our errors of the past and reflect this sentiments in our judgment. This will ensure that the sovereignty of "we, the people of Bangladesh" is preserved forever as a "pole star".

We are of the view that in the spirit of the Preamble and also Article 7 of the Constitution the Military Rule, direct or indirect, is to be shunned once for all. Let it be made clear that Military Rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever as the same is against the dignity, honour and glory of the nation that it achieved after great sacrifice; it is against the dignity and honour of the people of Bangladesh who are committed to uphold the sovereignty and integrity of the nation by all means; it is also against the honour of each and every soldier of the Armed Forces who are oath bound to bear true faith and allegiance to Bangladesh and uphold the Constitution which embodies the will of the people, honestly and faithfully to serve Bangladesh in their respective services and also see that the Constitution is upheld, it is not kept in

suspension, abrogated, it is not subverted, it is not mutilated, and to say the least it is not held in abeyance and it is not amended by any authority not competent to do so under the Constitution.

We, therefore, sum up as under:

1. Both the leave petitions are dismissed:
2. The judgment of the High Court Division is approved subject to the following modifications:-
    (a) All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved;
3. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:
    (a) all executive acts, thing and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;
    (b) the actions not derogatory to the rights of the citizens;

(c) all acts during that period which tend to advance or promote the welfare of the people;

(d) all routine works done during the above period which even the lawful government could have done.

(e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;

(ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution.

(iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;

(iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it relates to substituting Bengali text of Article 44;

(v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and

(f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution.

While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard, let us bid farewell to all kinds of extra constitutional adventure for ever."

Another case, namely the case of Siddique Ahmed-V-Bangladesh popularly known as the 7th Amendment case, stated above, reported in the Special issue of the Law Reporter March 2011, came up before this Court in which the issues revolved

round the question of constitutionality of a subsequent martial law as well as upon the legality of the conviction, a so-called martial court, created by a so-called martial law instrument, purportedly handed down. This Division's judgment, which was affirmed subject to some alterations by the Appellate Division, was summed in following terms;

1) "Martial Law is totally alien a concept to our Constitution and hence, what Dicey commented about it, is squarely applicable to us as well.

2) A fortiori, usurpation of power by General Mohammad Ershad, flexing his arms, was void ab-initio, as was the authoritarian rule by Mushtaque-Zia duo, before Ershad, and shall remain so through eternity. All martial law instruments were void ab-initio. As a corollary, action purportedly shedding validity through the Constitution (Seven Amendment) Act 1986, constituted a stale, mori-bund attempt, having no effect through the vision of law, to grant credibility to the frenzied concept, and the same must be cremated without delay.

3) The killing of the Father of the Nation, which was followed by successive military rules, with a few years

of intermission, was not an spontaneous act-it resulted from a well intrigued plot, harboured over a long period of time which was aimed not only to kill the Father of the Nation and his family, but also to wipe out the principles on which the Liberation War was fought.

4) During the autocratic rule of Khandaker Mushtaque and General Ziaur Rahman, every efforts were undertaken to erase the memory of the Liberation War against Pakistan.

5) Two military regimes, the first being with effect from 15th August, 1975, and the second one being between 24th March 1982, and 10th November 1986, put the country miles backward. Both the martial laws devastated the democratic fabric as well as the patriotic aspiration of the country. During Ziaur Rahman's martial law, the slogan of the Liberation war, "Joy Bangla" was hacked to death. Many other Bengali words such as Bangladesh Betar, Bangladesh Biman were also erased from our vocabulary. Suhrawardy Uddyan, which stands as a relic of Bangabandhu's 7th March Declaration as well as that of Pakistani troops'

surrender, was converted into a childrens' park. Top Pakistani collaborator Shah Azizur Rahman was given the second highest political post of the Republic, while other reprehensible collaborators like Col. Mustafiz (I O in Agartala conspiracy case), A S M Suleiman, Abdul Alim etc were installed in Zia's cabinet. Many collaborators, who fled the country towards the end of the Liberation War, were allowed, not only to return to Bangladesh, but were also greeted with safe haven, were deployed in important national positions. Self-Confessed killers of Bangabandu were given immunity from indictment through a notorious piece of purported legislation. They were also honoured with prestigious and tempting diplomatic assignments abroad. The original Constitution of the Republic of 1972 was mercilessly ravaged by General Ziaur Rahman who erased from it, one of the basic features, Secularism and allowed communal politics, proscribed by Bangabandhu, to stage a come back.

6) During General Ershad's martial law also democracy suffered devastating havoc. The Constitution was kept in abeyance. Doors of communal politics, wide opened

by General Zia, were kept so during his period. Substitution of Bengali Nationalism by communally oriented concept of Bangladeshi Nationalism was also allowed longevity during Ershad's martial law period.

7) By the judgment in the Fifth Amendment Case all the misdeeds perpetrated by Mushtaque-Zia duo have been eradicated and the Constitution has been restored to its original position as it was framed in 1972.

8) It is about time that the relics left behind by martial law perpetrators be completely swept away for good.

9) Steps should be taken by the government to remove the impeding factors, the Appellate Division cited, in order to restore original Article 6, i.e., Bangalee Nationalism.

10) Those who advised Ershad, including his law minister and Attorney General during his martial law period to keep the Constitution suspended, should also be tried.

For the reasons assigned above, the Rule is made absolute in part. The Constitution (Seventh Amendment) Act 1986 is hereby declared to be thoroughly illegal, without lawful authority, void ab-initio and the same is, hence invalidated

forthwith through this judgment, subject however, to the condonation catalogued above, where they would apply.

Paragraph 19 of Fourth Schedule to the Constitution, is hereby declared extinct wherefor the same must be effaced from the Constitution without delay.

The Respondents are further directed, having regard to the Appellate Division's modifying Order in the Fifth Amendment case, to take steps to clear the impediments, cited by the Appellate Division, with a view to eventual restoration of original Article 6.

The Respondents No. 1 is directed to reflect this judgment by re-printing the Constitution.

No Order, however, is made to interfere with the petitioner's conviction or the sentence for the reasons stated above and hence he must surrender to his bail."

This Division in the 7th Amendment Judgment also expressed;

(67) "These Constitutional provisions have been mirrored above for the sole purpose of vindicating the assertion that (1) martial law or any similar usurpation of power has no threshold under our constitution (2) our Constitutional Scheme, from the top to the toe, owes its existence to the will of the people (3) it

is the Parliament, elected through popular vote, which is the centrifugal body for all democratic activities (4) the Head of the Executive Government, along with his colleagues survive so long as they command the support of the majority members of parliament (5) members of Parliament, who alone enjoy prerogative to legislate, with the only exception of parochial and short lived legislative power of the President, and who do effectively and virtually form the electoral college for the formation of the executive Government, are all elected directly by the people, (6) a set of fundamental rights, which corresponds to the universal declaration of Human Rights, 1948, and other U N Covenants on human rights, remain stoutly erected as the Constitutional Arch Stone to insulate every individual's fundamental rights (7) there is a Supreme Court, comprising two hierarchical Divisions, to act as the invincible vanguard, to shield the sacrosanctity of the Constitution by performing the sacred duty of being it's Guardian and to protect and enforce the fundamental rights, firmly and inflexibly secured by the Constitution and, most importantly, to act as the inviolable bastion to keep the Constitution immune from extra-Constitutional infringement

and also to ensure that no law, contravening any provision of the Sacred Instrument, is passed."

The High Court Division in the 5th Amendment case was rather repetitive in invalidating martial law and all the proclamations and the purported edicts that tagged along, while the Appellate Division in the said case, denounced martial law and all its spawns in no ambiguous terms with a view to warn potential adventurers.

This Division in the 7th Amendment case did not lag behind in nullifying martial law and its offshoots with conspicuous audibility but went all the way to make identical finding on the so-called martial law tribunal's enervation to try the Petitioner in that case, though, on a technical ground refused to interferer with the Petitioner's conviction expressing that a different forum, instead of a Writ Bench, should resolve that question. This Division's said finding on conviction, was, nevertheless, reversed by the Appellate Division, which finally set aside the purported conviction pretentiously handed down by a so-called martial law tribunal on the ground of the nullity of all martial law **pronunciamento**.

The ratio in those two decisions, command us to be swayed to the irrestible and immutatable conclusion that the

proclamation dated 20th August, 1975 and all the so-called martial law instruments that followed were totally divorced from legal sanction, which follows, as day follows night, that the purported trial of all the Petitioners, was also a sham one equally well.

The questions no (I) and (II) are, as such, answered in the negative, ie in favour of all the Petitioners in all the Writ Petitions, viz W.P. 7236/10, W.P. 826/11, W.P. 1048/11 and W.P. 1059/11.

Having found, as above, that the trial conviction and sentence purportedly pronounced by the said trubunal was void from the top to the toe, we are now swang to address question no (III) i e, whether the impugned conviction is, nonetheless, protected by the index of condonation, the Appellate Division finally formulated, supra.

Again, on perusal of the said table, we are oscillated to the invariable synthesis that the action purportedly resorted to by the hollow tribunal, is not embraced by the doctrine of condonation as enunciated by the Apex Division, because it kept within the exclusionary zone actions which were derogatory to the rights of the citizens.

True it is that the Appellate Division directed de-novo trial of the Petitioner in the 7th Amendment case, but that scenario was distinctively at variance with the instant one in that in the earlier case initial cognisance was taken by, and the proceedings first commenced in, a properly and validly constituted court, i.e. the court of sessions, having its origin in the Code of Criminal Procedure.

The issue no (III) also is, thus, resolved in all the Petitioners' favour.

Although with our above finding we need go no further to declare illegal and set aside the trial, sentence and the conviction of the Petitioners and to make all the Rules absolute, we are, nonetheless, inclined to explore the quality of the so-called trial process because of the general inquisitiveness on the question of the propriety of that trial irrespective of the Constitutional consideration.

Nothwithstanding an initial quandary and somewhat enigma that resulted from the absence of vital documents, we did not, at the end of the day, find the issue no (IV) very cumbersone either, because the lacuna so caused was cured by the information otherwise procured from the averments of all the petitioners, as well as from some people who were placed at

the relevant offices in those days and also from the information, an internationally acclaimed journalist, Mr. Lawrence Lifschulz, furnished.

Those who were proximate state functionaries during the period in issue proved immenesly resourceful. Their memory had not faded. They yielded all the information we needed to adjudicate upon the factual **inquisitories**.

It goes without saying that information and data provided by Mr. Lawrance Liftschulz and assistance provided by the learned Advocates of great bestowal had been quite prolific while the Gazette notificatiions supplied by the Petitioners also appeared to be of exquisitive value.

Facts that emerged from the uncontroverted statement made by the Petitioners, and those functionaries who deposed before us, as well from the information supplied through various documents, we can safely deduce the following facts as established;

(1) The Father of the Nation along with all the members of his family, save two daughters, were gruesomely assassinated by a few disgrantled army officers at the early hours on 15th August 1975, following which Khandakar

Mustaque, who was a member of the cabinet, occupied the seat of the President of the country as an usurper.

(2) The whole of Bangladesh was placed under military rule as from 20th August 1975, a couple of days after the diobolic slaying of the Founding Father of the Nation.

(3) Althouth initially Khandakar Mushtaque Ahmed was seen to have been placed as the so-called president, for all practical purposes real power rested with General Ziaur Rahman.

(4) On 20th August 1975, a so-called martial law was proclaimed with Mostaque as the titular head.

(5) A succession of events followed, which included the arrest of all the Petitioners in all the Writ Petitions under review, as well the husbands of the petitioner nos. 2 and 3, in Writ Petition No. 7236 of 2011.

(6) Their arrest was preceded by the lodging of a first informatiion report with the Mahammadpur Police Station in Dhaka on 4th

June, 1976, invoking martial law regulatiions as well as Section 121A of the Penal Code.

(7) A special martial law tribunal was animated on 14th June 1976 pursuant to so-called power, purportedly conferred by regulation no. XVI of 1976, section 3(4), with a Colonel in the Army as its chair, flanked by four members, one of whom was a Wing Commander in the Air Force, another one being an Acting Commanders of the Navy and Two from Dhaka Magistratcy.

(8) The said tribunal was purportedly fortified with power to try any offence under the so-called martial law regulations as well as those covered by Chapter VI and VII of the Penal Code.

(9) The regulation aforementioned, empowered the tribunal to sit in camera if the chair so decided.

(10) The chair could, and did, administer oath of secrecy to bar those present before it from diclosure of anything on the proceeding.

(11) There was no right of appeal against the tribunal's purported verdicts.

(12) The case in which all the Petitioners were tried was registered as Special Martial Law Tribunal Case No. 1 of 1976.

(13) The Proceeding took place within the eclosure of Dhaka Central Jail in total seclusion and surreptitiousness: even the close ones were not allowed to attend or have access to the accused, it continuned for 17 days and the verdict was delivered on 17th July 1976, by which all the Petitioners and the spouses of the Petitioners no. 2 and 3 of the Writ Petition No. 7236, were declared guilty and sentenced to imprisonment of various terms, save the spouse of the petitioner no. 2 in Writ Petition no. 7236 of 2010, who was condemned with capital punishment.

(14) Neither the accused persons nor the lawyers appearing for different accused were allowed to cross examine the prosecution witnesses. The witnesses were ushered to the court room

heavily guarded and used to be hurriedly escorted away after their hasty deposition. The accuseds were not at all aware of what the witnesses uttered. They were not given any chance to say anything in their defence or to produce any defence witness.

(15) Some of the accused were not allowed to engage lawyers or to talk to the lawyers that voluntarily appeared for other accused persons.

(16) Case records, including the first information report, and other connected papers were never placed before the Sub-Divisional Officer, Dhaka Sadar (South), although the law required them to be put before him for taking cognisance and passing necessary orders as the Sub-Divisional Magistrate.

(17) The District Magistrate, Dhaka was never intimated that one of the Magistrate under him would be deployed in the said tribunal as a member, although the procedure and the convention demanded it.

(18) As Colonel Taher retired from the Army long ago, he should have been tried in ordinary Court.

(19) No papers pertaining to the indictment was placed before the member of the so-called trubunal, who filed affidavit before us, **he was not consulted on the conviction** nor was the mandatory procedures ordinarily followed or ought to be followed in a criminal, trial, was adopted during the subject so-called trial.

(20) Most importantly, none of the offences the Petitioners were purportedly indicted with, carried death sentence.

(21) The so-called tribunal went into oblivion after passing the purported verdict on 17th July 1976 on the Petitioners, the spouses of the Petitioner no. 2 and 3 in WP 7236/10 and the other co-accused who were simultaneously tried with them, never to convene again.

We find no reason to deprecate those facts: not only that they emanated from persons credited with impeccable integrity, but also because none came forward to refute them.

Question is what nomenclature can be attributed to that which went on within that chamber of Dhaka Central Jail upto the period that ended on 21st July, 1976? Can it be described as a judicial proceeding?

Blacks Law Dictionary contemplates a judicial proceeding as one whcih encapsulates (i) the taking of testimony and (ii) the trial.

The same dictionary defines a trial as a formal judicial examination of evidence and determination of legal claims in an adversary proceeding.

A "fair trial", according to Blacks Law Dictionary, encompasses a trial by an impartial and disinterested tribunal in accordance with regular procdure; specially in criminal trial in which the defendants' constitutional and legal rights are respected.

The concept, "fair trial" invariably embraces due process, where the following incidences must show up;

(a) Presecmption of innocence

(b) Arraignment

(c) Right to be heard

(d) Right to counsel

(e) Right to be informed of the grounds of arrest.

(f) Right to speedy, impartial and public trial

(g) Protection against self incrimination

(h) Right to cross examine presecution witness.

(i) Right as granted by Section 342 of the Code of Criminal Procedure.

Mr, Mahbubey Alam, the learned Attorney General, Dr. Kamal Hussain, Mr. M. Amirul Islam, Dr. Zahir, Mr. M.I. Faruqui, Mr. Rukounddin Mahmood, Mr. Akter Imam, and Mr. M.K Rahman projected comprehensive lists containing such aspects which are sine qua non for a judicial proceeding and we do fully endorse and adopt the catalogue they portrayed.

It is amply clear form the sequence of events, displayed earlier, that the above requirements were conspicuously missing during or at the outset of the trial. The so-called regulation that engendered the so-called tribunal did not lay down the above cited requirements. The trial was held in camera and thus it lacked public character. An oath of secrecy further devastated the pellucidity and rendered the purported trial, virtually a clandastine process.

In this respect we endorse Mr. Lifschulz's view that it was not even a show trial as it was not visible.

While some accused may have been lucky enough to be theoritically allowed legal representation, the same was reduced to burlesque any way because they were not allowed (i) to cross examine prosecution witnesses, (ii) to call defence witnesses.

No accused was allowed to make any effort to refute what the prosecution witnesses deposed or to make any submission in their defence. What appeared to be more reproachful was the declination to intimate the accused as to the so-called allegation against them-they were not supplied copy of the so-called first information report, charge sheet or charges as may have been framed, even purportedly.

There was no arraignment, the charges were not read over to them, they were not asked about pleading, were not reminded of their right to call defence witnesses. No copy of the prosecution witnesses' deposition was made available to them, no examination mandatorily warranted by section 342 of the Code of Criminal Procedure.

There was no right of appeal, no procedure for confirmation by the High Court Division or an alternative superior judicial body.

It is quit possible, as Mr. Aktar Imam wished to have us to believe, these documents may very well have been destroyed

to conceal the evidence of illeglities committed by the tribunal as well as those who brought it into being.

According to Mr. Alim, who was a member of the so-called tribunal, no paper was placed before him and he was not consulted on the verdict.

Death sentence passed on Col. Taher was, by far, the most dreatful factor that totally and, indeed, conspicuously, infested the whole secnario with squalid stink because the legislative schemes, and even the so-called martial law regulations that were showingly invoked, did not allow the so-called tribunal to pass death sentence on the date the so-called trial commenced. The purported death sentence was, thus, imposed flexing sheer gun power in whimsical and ludicrous defiance of even those laws that were promulgated by the military usurpers.

Can the execution of the death sentence, be termed as anything other than a cold blooded murder as some of those who appeared before us have posited? The answer in our brooding must be in the affirmative for three reasons; firstly when an execution is carried out barren of legal sanction, that is nothing but murder, secondly, and that is irrespective of the invalidity of the tribunal, it was a murder because even on the date of the commencement of the so-called trial, none of the

charges labelled against Taher prescribed death sentence, **no** procedure appertaining to criminal trials, was followed, finally, and indeed most significantly, as pointed out by Mr. Moudud Ahmed in printed form and then verbally before us, Taher's sentence was pre-determined by General Ziaur Rahman well before even the tribunal was constituted, at the meeting of the formation commandars, which statement of Mr. Moudud Ahmed vindicates the allegation that it was General Zia, rather than the tribunal that decided on the death sentence, though sentencing is a judicial, not an executive, matter and that the tribunal only acted as a surrogate mother.

We have no reason to brush aside Mr. Moudud Ahmed's written assertions, on the truthfulness of which he quite guilelessly vowed when we asked him verbally as to his written version. He was, and we do take judicial notice of this fact, a very close associate of General Ziaur Rahman, which fact make his statement all the more eredible. His account has been corroborated in toto by Mr. Lifschultz, who relied on the information divulged by General Manzur, who was a reigning general at the postulated time and, who, in Mr. Lifschultz's portrayal, attended the decisive meeting of the formation commandars. Both of them indicated that General Ziaur Rahman was bent and, resolved to annihilale Lt. Colonel Taher, Bir Uttan, before the so-called tribunal passed its purported judgment on 17th July 1976. As evinced by Mr. Moudud Ahmed, this decision was aimed to appease officers re-patriated from Pakistan.

Mr. Lifschultz's claim, which lends support to what Mr. Moudud Ahmed stated, deserves credence as he cited General Manzur's statement in this respect.

These scenario naturally led to the irresitible narrative that the so-called tribunal was nothing other than a device to air its "Masters' Voice", it's verdicts were spurious and the capital punishment it inflicted on Lt. Col. Taher, Bir Uttam, as Syed Badrul Ahsan expressed, amounted to an extra-judicial murder, "pure and simple," when the same was executed.

Hence, irrespective of the question of the legal status of the so-called tribunal, which question has been answered in the negative, the event that proceeded within the canopy of Dhaka Central Jail, can by no means, be termed as a judicially recognised criminal trial. It can not even be termed as a drama of a criminal trial-it was a hoax, in the pretext of a judicial trial.

The ramification of the said murder has, as all conscientious and self righteous people would agree, been very severe indeed. Dastardly killing of Colonel Taher, Bir Uttam, means depriving this Republic of such a valorous Freedom Fighter whose contribution for our liberation can not be exaggerated. This loathsome event will represent a blotted era in our history.

Be it as may, everything stated above lead to the inevitable conclusion that all of the 4 Rules under review are foreordained to be crowned on counts no. (i) through (iv).

Resultantly, it is reiterated that the proclamation of martial law dated 20th August 1975 and all the chicks the said proclamation breeded, viz, all the proclamations, regulations, orders, ordinances, directives and instruments and everything that flowed therefrom, save those saved by the condonation indexed by the Appellate Division in the 5th Amendment Case, supra, were void and non-est, the so-called martial law instrument that caused the abortive embryogenesis of the so-called special Martial Law Tribunal along with the Tribunal itself is declared to have been a still born one which follows that the purported convictions passed by the said stale tribunal are but vacuous, void and non est. That leaves us to address the count no. (v) which relate to the relief craved.

It can not be gainsaid that the sequel of our above finding would invariably impose upon the authorities an obligation to wipe out the names of all the Petitionres in W.Ps 7236/10, 826/11, 1048/11 and 1059/11 and the spouses of the Petitioners no. 2 and 3 in W.P. 7236/10 from the criminal records that came into being in consequence of the

aforementioned illegal convictions and to project them with unblemished image, while the execution of Col. Taher, Bir Uttam, must be recorded as a clear cut extra-judicial murder. Orders dismissing Major Ziauddin, Corporal Shamsul Haque, Habildar Ahdul Hai Mazumdar (W.P No. 1048/11) and Abdul Mazid (WP. No. 1059/11) must also be reversed to treat them to have been in the service till their normal retirement age.

However, Major Ziauddin, a Freedom Fighter of national repute claims that given his commendable achievement during his cadetship and the War of Liberation and given that his fellow peers rose to the highest strata of the army, he has every reason to believe that he would also have rosen at least to the rank of a Brigadier General had he not been illegally dismissed.

We are in total agreement with his claim that in the attendant circumstances and because of his glorious antecedent he would, in all possibility, have ended up with such a superior rank. That said, however, we find ourselves a bit handicapped to apply the doctrine of legitimate expectation in this respect for the reason that unlike in the civil service, promotion prospect of the officers in the armed forces is not automatic or contemplatable, while recognising that the illegal conviction

and the resultant dismissal wrecked a havoc on his personal life and career.

We can, however, to mitigate as far as law permits us, the losses he suffered, as a result of the illegal conviction and followant illegal dismissal, by directing the authorities to pay him the money he would have received as salary and other benefits till the last day that he would have served as a Major had he not been illegally dismissed. Accordingly we direct the respondents to remove the illegal dismissal order and to treat him to have been in the service as a Major till that date on which he would have normally retired as a Major and to pay him all the arrear salaries, and other benefits, inclusive of retirement benefit, pension etc., he would have received. Same shall apply to Corporal Shamsul Haque, Habildar Abdul Hai Mazumdar and Md. Abdul Mazid. They must also be treated to have been in their respective jobs until the date on which they would have normally retired had they not been illegally convicted and dismissed, and, shall be paid all arrear salaries, benefits and pensions accordingly as if they were not terminated from their jobs premature.

So far as Major Ziauddin is concerned it will however, remain open to the authorities to decorate him with superior

ranks and honour at their discretion in recognition of his Spectacular and Tireless contribution in our War of Liberation, taking into account the predicament he was subjected to by the said vile trial, which plunged his potentially bright career to devastation.

Subject to certain reservation as to the relief sought by Major Ziauddin (WP. 1048/11) as stated in the preceeding paragraphs, all the Rules that sprang from Writ Petitions no 7236/10, 826/11, 1048/11 and 1059/11 are made absolute on all counts with the following declaration and directions, without, however, any order on cost;

(i) Proclamation of martial law dated 20th August 1975 and all the ensuing proclamation, orders, ordinances, regulations, directions, rules, and all martial law instruments are declared to be void ab-initio and non-est.

(ii) All so-called martial law tribunals and martial law courts stemming from or created by any martial law instrument, inclusive of the Special Martial Law Tribunal that operated inside Dhaka Central Jail in July 1976 which purportedly

tried and convicted all of the instant Petitioners of W.Ps 7236/10, 826/11, 1048/11 and 1059/11 and the spouses of Petitioners no. 2 and 3 in WP 7326/10 in Special Tribunal Case no 1 of 1976, are declared to have been barren of lawful authority and hence void and non-est at all times.

(iii) Since all orders, convictions, sentences purportedly passed by the so-called Special Martil Law Tribunal, which purportedly tried and convicted all of the instant Petitioners, supra, and the spouses of the petitioners no 2 & 3 WP 7236/10 are declared to have been without lawful authority and hence void and non-est ab-initio, inclusion in criminal record of all the Petitioners, as well as the spouses of Petitioners no 2 & 3 in WP 7236/10, are declared to have been without lawful authority and , hence, void ab-initio in respect to the purported convictions

passed by the said unlawful Special Martial Law Tribunal in Special Tribunal Case No. 1 of 1976, and, as such, the respondents are directed to erase the names of (1) Lt. Col. Abu Taher, Bir Uttam,(2) Flight Sergeant Abu Yusuf Khan, Bir Bikram (3) Prof. Anwar Hussain (4) Mr. Hasanul Haque Inu M. P. (5) Mr. Rabiul Alam (6) Major Ziauddin (7) Corporal Shamsul Haque (8) Habildar Abdul Hai Mazumdar (9) Md. Abdul Mazid from the criminal list that was compiled pursuant to the illegal conviction passed by the aforementioned unlawfully constituted Special Martial Law Tribunal, mentioned above, to treat them as utter Patriots and to record as an act of culpable murder the illegal execution of Lt. Col. Taher, Bir Uttam, on 21st July 1976 following the illegal order passed by the said unlawful, surrogate tribunal, treat him as a Martyr and to duly compensate his family.

(iv) the respondents are directed to efface illegal dismissal order passed on Major Ziauddin, Corporal Shamsul Haque, Habildar Abdul Hai and Md. Abdul Mazid and treat them to have been in their respective jobs until their normal retirement age from those positions and to pay them all arrear salaries, other benefits and pension money that they would have received had they not been unlawfully dismissed in consequence of the said illegal orders of conviction and the consequential illegal orders of dismissal passed on them, within 180 days from the date of the receipt of this judgment (vi) General Zia, who according to Mr. Moudud Ahmed and Mr. Lifschultz, pre-determined and thereby Masterminded Col. Taher Bir Uttam's death sentence, now being dead and being beyond the clutches of our Penal Code, the authorities should, nonetheless, track and indict those who may still be alive and, since one case of murder stands proved, and there are allegations of more killing during that authoritarian period, these should be investigated by a Commission as suggested by Mr. Panna and, as Mr. Moudud Ahmed stated, "it seems that Zia also maintained close link with officers that killed Mujib....."(page 33 of his book), it should also be investigated whether General Zia had a role in Bangabandhu's killing.

(vi) Neither the orders passed by the aforementioned Special Martial Law Tribunal unlawfully convicting and sentencing all the Petitioners in all the 4 Writ Petitions and the spouses of the Petitioners No. 2 and 3 in WP No. 7236/10, nor the unlawful orders dismissing from

> the services Major Ziauddin, Corporal Shamsul Haque, Habildar Abdul Hai and Md. Abdul Mazid is saved by condonation and, hence, they are beyond the ambit of condonation.

Before parting we would take the opportunity to thank all the Learned Advocates and all those, inclusive of Mr. Lawrence Lifschultz, who devoted their valued time to assist us to adjudicate upon these Cases.

We would also like to conclude this judgment by reproducing hereunder what Dr. Humayun Ahmed, (popularly known as Humayun Ahmed), a living Mega Star in our literary horizon, who inspired millions of Bengali people to read novels, who had succeeded to accumulate immense popularity from the Bengali people on both sides of the territorial boundary, and who had been compared with Immortal Sharat Chandra Chattapadhya by none other than another Living Legend in Bengali literary realm, Mr. Sunil Gangapadhya, once expressed, while he was in the process of a research work as a prelude to author a period confined history based novel, to be named, "Deyal";

"প্রহসনের এক বিচার শুরু হলো ঢাকা কেন্দ্রীয় কারাগারে। মামলার নাম 'রাষ্ট্র' বনাম মেজর জলিল গং'। কর্নেল তাহেরসহ অভিযুক্ত সর্বমোট ৩৩ জন।

মামলার প্রধান বিচারকের নাম কর্নেল ইউসুফ হায়দার। মুক্তিযুদ্ধের পুরো সময়টা এই বাঙালি অফিসার বাংলাদেশেই ছিলেন। মুক্তিযুদ্ধে যোগদান না করে পাকিস্তান সেনাবাহিনীর খেদমত করে গেছেন।

মামলা চলাকালীন একপর্যায়ে কর্নেল তাহের প্রধান বিচারকের দিকে তাকিয়ে আঙুল উঁচিয়ে বিস্ময়ের সঙ্গে বলেন, আমি আমার জীবনে অনেক ক্ষুদ্র মানুষ দেখেছি, আপনার মতো ক্ষুদ্র মানুষ দেখি নি। কর্নেল তাহেরের বক্তব্য শুনে আদালতে হাসির হল্লা ওঠে।

সাংবাদিক লিফসুলজের বিখ্যাত গ্রন্থ Bangladesh : The Unfinished Revolution গ্রন্থে লুৎফা তাহেরের একটি চিঠি আছে। এই চিঠিতে তিনি কর্নেল তাহেরের জীবনের শেষ কয়েক ঘন্টার মর্মভেদী বর্ণনা দেন। এই চিঠি পড়ে অশ্রুরোধ করা কোনো বাংলাদেশি মানুষের পক্ষেই সম্ভব না।"

Sheikh Md. Zakir Hossain,J.-

I agree.