

A day to mourn

The blackest day in our history

THE nation will have to confront this day every year in its life. August 15 will revisit every year to haunt us with a shameful reminder of our inability to as yet atone for Bangabandhu's death by failing to ensure that justice in this case meets its natural ends.

The Daily Star has been the one, since its inception, to call on the government of the day, to declare August 15 a day of mourning. We have since then repeated our call every year, and we do so once again.

We also call upon the government to ensure that the Bangabandhu murder case be concluded without any further delay. It pains us to see that the case still remains in a state of limbo. It surprises us that no hearing of the case, suspended five years ago, has been held even once since. And no words can be strong enough to express our revulsion at the fact that so many of the judges have felt 'embarrassed' to give the case a hearing. The action of the judges, we feel, is an abdication of their bounden responsibility to dispense justice to the aggrieved. Equally disquieting is the fact that no appointment of judges have been made so far to expediate the case.

It will be well for us to remember that the culture of killing as a means of political change, commenced with the killing of Bangabandhu; and it has thrived with impunity under the shade of another disgraceful enactment, the Indemnity Act, now repealed, that legitimised a gruesome killing that wiped off all but two of Bangabandhu's family members. Nothing can justify the brutal killings.

Today is also a day of reflection. Reflect we must, most objectively, on the contribution to our national identity of a person whose place as a colossus in our history is indelibly inked. Let history be the judge of the man's foibles and fortes, but let us keep him above all controversies. Let no one deify or demonise him, but let no one hesitate to accord him the rightful place in our history as a man who united the nation to break off from the yoke of a repressive state.

By denying Bangabandhu his rightful place we only demean ourselves.

Ceasefire in Lebanon

Only a just deal can ensure durable peace

ISRAEL'S last minute pillaging of Lebanese towns, just before a UN brokered ceasefire came into effect, left no doubt about its real intentions insofar as Lebanon is concerned. In a brazen violation of all international norms and conventions, Tel Aviv tried to cause as much damage as it could to the people of Lebanon, even after agreeing to end the hostilities.

It is, however, good news that the warring parties agreed to a ceasefire when the possibility of a humanitarian disaster of unprecedented magnitude was looming large on Lebanon. As long as the ceasefire holds, there will be hopefully no civilian casualties in Beirut and other Lebanese towns. It is difficult to be highly optimistic about the future of peace as Israel is not known for its respect for internationally accepted agreements.

The UN and world leaders will have to work hard to prevent the possibility of a relapse into hostilities as some tricky issues need to be resolved before peace can attain a minimum degree of durability. Israel wants deployment of an international force and disarming of Hezbollah as precondition for abandoning its kill-and-destroy mission. The Hezbollah chief, on the other hand, has claimed that they will continue to fight as long as Israeli troops remain in Lebanon. Israel's stand on Hezbollah is understandable, as it has faced stiff resistance from the militant group during the month-long war. By applying disproportionate force and thus convincing the people of Lebanon that Hezbollah was their only saviour, Tel Aviv has actually created a situation where it will not at all be easy to leave Hezbollah out of any negotiations. Of course, the interpretation of the present crisis will be different if Israel wants to eliminate all the forces that might challenge its military supremacy in the region -- an objective that its western allies have been supporting rather unconditionally.

Much will now depend on the Lebanese government. Prime Minister Fuad Siniora has a difficult decision to make because giving Israel a freehand, through removing whatever resistance it is facing, might not mean lasting peace for his country.

The international community can ask for disarming Hezbollah only when it can guarantee that no Arab nation will fall victim to Israel's lust for territorial expansion in future.

THE BANGABANDHU MURDER CASE

Legal limits of judges' embarrassment

PROFESSOR M RAFIQUOL ISLAM

AN independent and impartial judiciary is a cornerstone of any dignified civil society. Such a judiciary is neither an end in itself, nor has any intrinsic value. Rather it is a means to administer justice according to the rule of law. Judges are given considerable judicial power, the exercise of which affects the present and future lives of those appearing before the judiciary. This power is not unfettered but entails precise obligations. Judges need to exercise their judicial power judiciously and fairly for public good within the bounds of law.

No society wishes such power to be exercised with the questionable integrity and honesty of judges, who may not be able to administer justice without fear or favour, affection, or ill-will. This expectation explains why justice is not only to be done, but also manifestly seen to be done. Judges have a definite duty to live up to this community expectation to retain public confidence in the trustworthiness of the justice system.

Public confidence in the judiciary, however desirable, warrants certain minimum standards of judicial conduct to promote it. Judges must observe these standards both in and out of courts. They need to treat the judiciary as a symbol of public trust by being accountable to the law in courts and fostering a public perception of dispensing the natural course of justice. There is a growing public interest in these judicial standards and public scrutiny of judicial conducts, the consequence of which is the increased accountability for judges. This judicial accountability is thought to be a self-evident good and a means of attaining the end of public confidence in the judiciary.

The constitutionalism in Bangladesh is premised on an independent and competent judiciary, separate from the two other organs (executive and legislature) of the government based on the separation of powers and constitutional checks and balances. The role of the judiciary is central to justice, the rule of law, and good governance that Bangladesh is striving to achieve ever since its independence in 1971.

The judiciary of Bangladesh has recently been at the centre of controversies surrounding its independence, impartiality, transparency, and accountability. These controversies have steadily been eroding public confidence in the judiciary and its judges in administering justice. On the face of such a state of affairs, a former Chief Justice (Justice AFK Huq) has observed that the judiciary is losing the confidence of common people that it once enjoyed.

One of such controversies is the Bangabandhu Murder Case, which has become the victim of judicial parochialism and government inaction. A number of judges of the Supreme Court have expressed their inability to hear the case on the ground of their feeling of embarrassment. The second and final leave to appeal has not been heard in the Appellate Division since August 2001 for want of judges.

The expression of embarrassment by a judge to preclude him/herself from a trial in which his/her impartiality may be open to question is practiced in the best interest of justice and public confidence in the judiciary. Grounds such as the involvement of personal conflict of interests, common busi-

The trial of the gruesome murder of Bangabandhu and his family members is a necessity of State, as all criminal offences in Bangladesh are statutorily recognised as offences against the State, not against the individual concerned. It is the sole responsibility of the government to facilitate all necessary logistics, including the appointment of adequate number of judges, to conclude all criminal proceedings. Any failure is squarely attributable to none else but the incumbent government.

ness interests, and relationship with the disputant parties may deter a judge from applying his/her judicial mind. This feeling of embarrassment is somewhat a nebulous and mental state of affair that is exceedingly difficult to regulate legally. As such, it is largely left to the discretion of the concerned judge who has such ground in a given case may preclude him/herself from hearing the case. The end in view is to display the personal fair-mindedness and integrity of judges in upholding the natural course of justice. Each and every feeling of embarrassment does not necessarily call for exclusion. There must be a causal link between the feeling of embarrassment and the application of judicial mind in a specific trial. Embarrassment that does not deject judicial mind should not be a cause of concern.

The disclosure of reasons for embarrassment can be very helpful for a competent authority, such as the chief justice or a body of senior judges, to determine whether a judge is actually and acutely embarrassed or apprehensive of distant and potential embarrassment as a consequence of his/her judgement. If the reason for embarrassment is not well founded, such embarrassment at subjective will of judges is likely to impair the performance of sacred judicial duty to provide fair and expeditious justice. Excessive preoccupation with judicial ethical obligation in the name of strict neutrality may frustrate the purpose of a judiciary in administering justice for all. Whilst judges are entitled to feel embarrassed in a given case, a mere expression of embarrassment is not enough. Their feeling of embarrassment must be justified objectively and applied judiciously only to facilitate the course of justice.

There appears to be no specific and explicit law in Bangladesh requiring judges to disclose their reasons for embarrassment. However, the requirement for the disclosure of reasons and its associated accountability may be deduced from the Constitution. Article 27 postulates that: "All citizens are equal before law and are entitled to equal protection of law." The oath of the judges under Article 148 of the Constitution requires them to swear in that they will "preserve, protect and defend the Constitution and the laws of Bangladesh" and "do the right to all manner of people according to law, without fear or favour, affection or ill-will." The Supreme Judicial Council, in exercise of its power under Article 96(4) of the Constitution, adopted a Code of Conduct for the Supreme Court judges, which is effective from May 7, 2000. Rule 12 of the Code provides that "in the event of any embarrassment to hear a case by a Judge, he shall inform the Chief Justice of such embarrassment so that the Chief Justice can take appropriate steps."

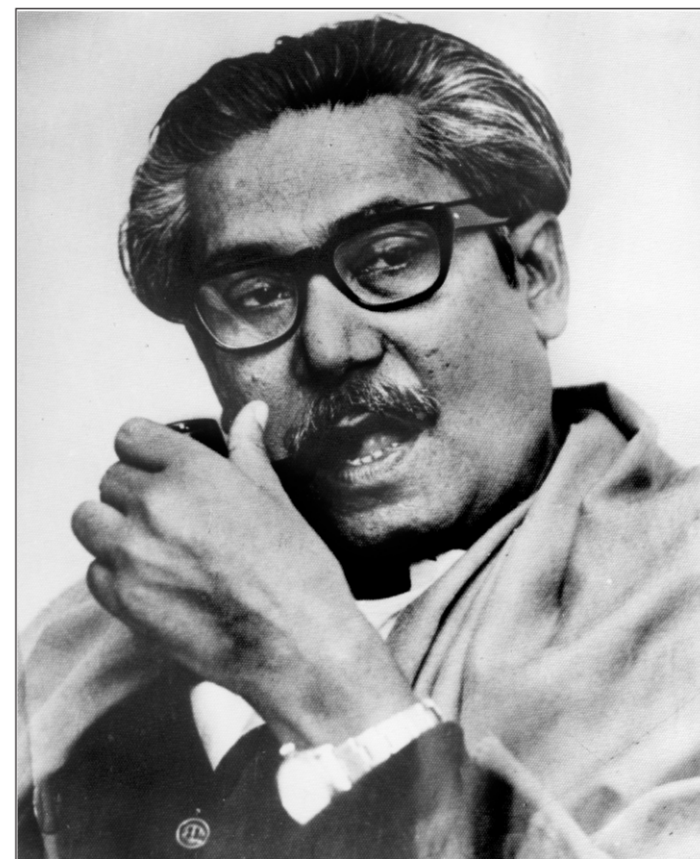
On the face of these provisions of the Constitution and the Code, one may argue with some measure of strength that the judges are not totally immune from disclosing the reasons of their embarrassment in a given trial. They cannot exonerate

themselves from their official obligations in a manner that undermines the Constitution, denies equality and equal legal protection to all, deters the natural course of justice, and brings extra-judicial (viz fear, favour, affection, or ill-motive) consideration. It is in the best interest of judges that they must disclose their reasons of embarrassment so that the public and the profession know that their feeling of embarrassment is not arbitrary, but to promote the natural course of justice. Such a disclosure in turn

The Constitution sets no limit on the number of judges to constitute the two Divisions of the Supreme Court. The President is entitled to appoint any number of judge as he deems necessary in each Division under Article 94(2) of the Constitution. Therefore the government could have appointed at least one more judge to the Appellate Division to resolve the impasse. Also Article 98 of the Constitution authorises the President to appoint ad hoc judge from the High Court Division to sit in the Appellate

hearing can resume even today if the government fulfills its duty to address the shortage of judges at the highest court of the country. The Law Minister has made it repeatedly clear that no new or ad hoc judge would be appointed for the Bangabandhu Murder Case. Seemingly the government has taken a partisan and political approach to this trial.

It is the constitutional and executive obligation of the government to appoint such number of judges that is necessary to ensure speedy and public trial by a competent court (Arts. 35 and 95 of the Constitution). It is also the constitutional responsibility of the Supreme Court to render justice by bringing the self-confessed murderers within the reach of the law expeditiously. But the Supreme Court has so far failed to finalize the appeal process in the Bangabandhu Murder Case, which the lower court had courageously dealt with. The embarrassed judges are obliged under their assumed oath to perform the judicial functions assigned to them without any fear or favour. They are entitled to maintain their political non-alignment and not to engage in activities that compromise their political indifference (rule 13 of the judicial Code of Conduct). Former Chief Justice Mostafa Kamal told the BBC Radio on 27 March 2002 that the case has repeatedly been stalled by judges' embarrassment. But "this is an important case which has political implications, and no judge wants to get involved in politics ... but ultimately the judges have to be bold enough to deal with the issue." The embarrassed judges failed to live up to the steadfastness of their judicious minds. Thus both the judiciary and the executive are collectively responsible for endlessly deferring the Bangabandhu Murder Case that has hamstrung the natural course of justice for the heinous crime of murder of an incumbent President.



The immunity of the embarrassed judges and their culture of secrecy come from the sheer lack of judicial accountability. Judges are entitled to feel embarrassed under certain circumstances, but citizens are entitled to receive justice under all circumstances.

maximises the stature of judges and reaffirms public confidence in the judiciary. The non-disclosure of reasons is fraught with the potential of generating public suspicion as to the bona fide of judges' embarrassment. It is also incompatible with the Constitution, the judicial Code of Conduct, and the spirit of judicial accountability.

The trial of the gruesome murder of Bangabandhu and his family members is a necessity of State, as all criminal offences in Bangladesh are statutorily recognised as offences against the State, not against the individual concerned. It is the sole responsibility of the government to facilitate all necessary logistics, including the appointment of adequate number of judges, to conclude all criminal proceedings. Any failure is squarely attributable to none else but the incumbent government. The government can overcome the current shortage of judges in the Bangabandhu murder trial through the existing constitutional arrangement.

Division on a case-by-case basis.

There are instances of such appointments. Two ad hoc judges were appointed from the High Court Division to the Appellate Division for the speedy disposal of Bengal Water Wage Ltd v Rahimuddin Ahmed in 1981. Pursuant to this arrangement, the Chief Justice Mahmud Amin Chowdhury requested the President in October 2001 to appoint a judge on ad hoc basis from the High Court Division, which went unheeded. A frustration of the Chief Justice with the government inaction in the Bangabandhu Murder Case was apparent when he remarked: "If you don't want to continue with the case, then do let us know, please. I don't get it why every government tries to pull the trigger resting the gun on the shoulder of the court."

The appeal petition has been in limbo in the Appellate Division since August 2001 for want of initially just a single judge and now 2 judges, regular or ad hoc, the appointment of whom involves nothing but the good will of the government. The

discretion secretly on petty technical grounds.

The embarrassment of judges in the Bangabandhu murder trial has solved nothing but caused a crisis in the due process of law. It has circumvented the constitutional guarantee of the protection of law for the both sides of the case. It has deprived the kith and kin of the victims of their right to receive remedial justice by punishing the murderers. The convict appellants are also entitled to a speedy trial, protection in respect of detention, trial, and punishment (Arts. 33 and 35 of the Constitution). The acquittal of some or all of them, as happened to 3 co-accused, through the final appeal verdict may not be ruled out altogether. Keeping them in jail-cells indefinitely with uncertainty and humiliation is a gross injustice to them in violation of their basic human rights under the Constitution.

Good governance calls for a balanced judiciary, which is both independent and accountable in exercising its judicial powers. The public appearance of judicial independence, impartiality, and transparency enhances public confidence in the judiciary. Judicial independence is not a privilege for judges, but "a safeguard of the freedom and rights of the citizen under the rule of law" (Guide to Judicial Conduct, The Australian Institute of Judicial Administration and The Council of Chief Justices of Australia, 2002, p 4). In Bangladesh, the successive failures of the Bangabandhu murder trial have become the subject-matter of public debates and media. The informed thinking of the people on the undue politicisation and polarisation of this judicial act has rendered the case a mass-oriented issue with increasing demand for justice. The Supreme Court and its judges are in positions of power to provide justice. In exercising its constitutional power on behalf of the people, the Supreme Court owes its accountability to the people, who are entitled to an institution in which they can be confident. Judges must be able to defend and explain the ways in which they exercise their judicial powers.

The profound inability of the Supreme Court in dispensing the natural course of justice in the Bangabandhu Murder Case has exposed the justice system to questionable public trust, the hallmark of honourable justice system. The immunity of the embarrassed judges and their culture of secrecy come from the sheer lack of judicial accountability. Judges are entitled to feel embarrassed under certain circumstances, but citizens are entitled to receive justice under all circumstances. Can the judges feel embarrassed at the expense of justice? Can a responsible and respectable judiciary allow convicted murderers to remain at large and unpunished for long 30 years? Both the Supreme Court and its embarrassed judges fail to discharge their judicial independence and accountability by both what they have done and what they have failed to do in the Bangabandhu murder trial. The repeated embarrassment of judges of the apex court with impunity in such a high profile murder case has become an embarrassment for the entire judiciary and albeit the government.

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The day that changed it all

ARSHAD-UZ ZAMAN

AUGUST 15 in the calendar of Bangladesh is a shattering event. The pain goes on increasing with every passing year.

On August 15, 1975 I was sleeping in my home in Algiers. A very early morning call woke me up. A colleague informed me that Bangabandhu Sheikh Mujibur Rahman had been assassinated with his whole family. I was too stunned to express any reaction.

January 1975. I reached Heathrow airport from Algiers and handed over a cheque of a million US Dollars to Bangabandhu Sheikh Mujibur Rahman. He was transiting through Heathrow on his way to Dhaka from Washington DC. President Houari Boumediene had given the cheque as help for the flood affected people of brotherly Bangladesh. After receiving the cheque, Bangabandhu pulled me on the side and enquired about the situation in Algeria and particularly regarding President Houari Boumediene. I told him that the Americans were after him since assuming the Presidency of the

Non-Aligned Summit in 1973, Algeria was expelling Israel from the huge continent of Africa. American attachment and friendship for Israel is well known and no wonder they were upset by the activities of the Algerian authorities. Bangabandhu told me: "Tell them that they are after me as well." These were the last words that I exchanged with Bangabandhu.

The famous US journalist Lawrence Lifschultz visited Dhaka recently in connection with the 30th anniversary of the murder of Freedom Fighter Col. Taher. Lifschultz in his writings has hinted at possible CIA involvement in the assassination of Bangabandhu Sheikh Mujibur Rahman and his family. Then the head of the National Security Intelligence in Washington was Dr. Henry Kissinger, right hand man of President Richard Nixon.

In 1973 during the Non-Aligned Summit of 100 Heads of State from Asia, Africa and Latin America, Bangladesh was admitted to this vast group, which was a major breakthrough in the diplomacy of the newly independent Bangladesh. On the insistence of an Algerian

From dictatorship to democracy, Bangladesh has seen three elected governments and Parliamentary democracy restored. The next election is round the corner. In spite of election politics din and noise, a feeling of malaise hangs heavy. On that fateful night of August 15, 1975, the nation lost the greatest Bangalee and has been in the wilderness ever since.

delegation, which had come to Bangladesh to invite Bangabandhu, he agreed to open immediately an Embassy in Algiers and send me as the Ambassador. During the Non-Aligned Summit, the widow of the assassinated President of Chile of South America, Allende, made an appearance. Her left leaning husband had won the elections and through the CIA a coup was staged under Gen. Pinochet and Allende was gunned down in the Presidential Palace. We now know from events surrounding the coup of Brig. Khaled Mosharraf, Gen. Ziaur Rahman's imprisonment within the cantonment, the sepy revolt, where Col. Taher played a leading role and release of Gen. Zia by Taher's men. Col. Taher, the romantic preparing to take Bangladesh to its Socialist destiny, somehow came to believe that Zia was his man. Zia

did not take long to hang Col. Taher within the Cantonment.

Taking charge of Bangladesh, Gen. Ziaur Rahman brought about sweeping changes. The most important of which is that he virtually threw out the 1972 Constitution. Let us recall that through the magnificent leadership of Bangabandhu the entire Bangalee nation was united in 1970-71 as never before. It is thanks to this unity that the entire nation fought like one and snatched victory. It is under Bangabandhu's leadership that the Bangalee nation became free in a thousand years.

The 1972 Constitution is the fruit of this National Unity, never to be achieved. The Constitution rests upon four pillars -- nationalism, democracy, secularism and socialism. Thanks to this Constitution Bangalees could hold their heads high within the comity of civilized

nations. Gen. Zia did away with that with a stroke of pen. The word "Bangalee" had been inscribed in the Constitution to describe our nationality. It was replaced by the never used word "Bangladeshi." Pakistan also never tolerated that we be described as Bangalee. In the mid fifties the two parts came to be known as East and West Pakistan. In the late sixties, when One Unit of West Pakistan was broken up the provinces under their earlier names, namely, the Punjab, Sind, North West Frontier Province and Baluchistan reemerged but the eastern part continued to be called East Pakistan and not East Bengal! For reasons best known to them Pakistan establishment had been terrified of the name Bengal.

The regime of Zia had overtones of Islam, whereas the people of Bengal have been perfectly free

from religious extremism or obscurantism. Looking for allies for his newly floated party, he withdrew all restrictions from religion based parties and Jamaat-e-Islami, which had been banned because of its collaboration with the Pakistan Occupation Army, reappeared on the political map of Bangladesh.

The nine-year dictatorship of Gen. Hussein Muhammad Ershad distinguished itself in the field of corruption and religious obscurantism got a free field to operate. He added in the constitution that "state religion will be Islam." Thus he drove the last nail in the coffin of secular character of the Constitution. The 13 million Hindus and large number of Buddhists and Christians became second class citizens of Bangladesh. In 1990 the people of Bangladesh in a magnificent display of People's Power took to the streets

by the hundreds of thousands and overthrew the dictatorship of Gen. Ershad and he landed in jail. He served a five year term in jail on charges of corruption.

From dictatorship to democracy, Bangladesh has seen three elected governments and Parliamentary democracy restored. The next election is round the corner. The ruling BNP-Jamaat coalition has done everything possible to load the dice in their favour. They have installed a so called independent Election Commission, which looks to the Prime Minister's Office before taking any action. The current Government has prepared Justice K. M. Hasan to head the Caretaker Government when in late October the BNP-Jamaat hands over power. Justice Hasan is a thoroughly partisan man, having served Gen. Zia as his Ambassador in Baghdad and has been a BNP partyman. The Caretaker concept was created in Bangladesh with the hope that the Head would be a non partisan, neutral person. The current government has increased the age of judges to accommodate Justice Hasan in the post. The current hot

topic is whether Gen. Ershad and his party will join the current regime in power. The truth is that Gen. Ershad's Jatiya Party has been steadily losing ground and in a recent bye election in Rangpur, the stronghold of Gen. Ershad, his candidate lost heavily against the BNP candidate in spite of Gen. Ershad spirited campaign.

In spite of election politics din and noise, a feeling of malaise hangs heavy. On that fateful night of August 15, 1975, the nation lost the greatest Bangalee and has been in the wilderness ever since. If I read the popular mood correctly, the nation is rooting for a new leader, who will pull it out of its present state and carry it to great heights. The bloody birth of the Bangalee Nation will not stop at anything less.

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