

# Salute to Bangabandhu

## The Killing of Bangabandhu and the Indemnity Ordinance

by Barrister Amir-Ul Islam

THE killing of Bangabandhu Sheikh Mujibur Rahman along with his family in 1975, the killing of Seraniab, Sheikh Fazlul Haq Moni, Moni's pregnant wife, and then the killing of the four national leaders in their jail cells, are all part of a dark conspiracy to leave the country bereft of leadership.

Justice and the rule of law have been subject to the utmost humiliation in this country by the trampling of the Constitution, the laws, the national conscience and civilisation. The killers of the Father of the Nation are not punished for their crime. On the contrary, they are rewarded with choicest diplomatic postings abroad. They participate as candidates in farcical elections. These self-declared killers are appeased by the perverted politics of this country to legalise illegal taking over of power.

Our Constitution provides every citizen of country with the right to protection by the law. This applies to each and everyone. The Constitution was in effect when Bangabandhu and his family were killed on August 15, 1975. Just as Articles 27, 31 and 32 were in effect then, these articles are still in effect today. In signing the Constitution, the Father of the Nation declared that protection of life and freedom was the fundamental rights of the people. But it is an irony of fate that his life and his safety was snatched away by brutal killers.

After the killing of Bangabandhu, under the protection of the killers and strictly guarded by a tank force, Khandakar Mushtaque Ahmed declared himself president. He imposed martial law and on September 26, 1975 promulgated the Indemnity Ordinance. Under this ordinance, it is maintained, the court cannot take any legal action against the changing of government on August 15, 1975, the imposition of martial law or any preparations and planning in the implementation of these matters. And a certificate of the president or any one authorised by him would be required to avail the provisions of this ordinance. Such certificates would bear mention of such an action which was required for the change of the government or the imposing of martial law. The promulgation of any law for the sake of usurping a lawful government, or forming an unlawful government in disregard to the Constitution or imposing martial law without any constitutional validity, is certainly void in the eyes of the Constitution. This is specifically mentioned in Articles 7 and 26.

Article 7(2) "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that the other law shall, to the extent of the inconsistency, be void."

Article 26(2) "The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

It is not possible to make any law for indemnity against the law outside the limitations mentioned in the Constitution. If any such law is enforced, it cannot be considered legal in the eyes of the Constitution and the law. Article 46 of the Constitution only bestows a lawful and elected parliament with the authority to indemnify and that authority is extremely limited and conditional.

Parliament may by law make provision for indemnifying a person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area of Bangladesh or validly any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area.

None of the above mentioned are present in the Indemnity Ordinance 1975. No action of the 1971 War of Liberation is covered by the Indemnity Ordinance, rather the contrary.

Secondly, this ordinance was not promulgated for the sake of maintaining or restoring order. The Indemnity Ordinance of 1975 clearly states its objective is to indemnify any action carried out for the change of government or for the enforcement of martial law. There is no such provision in Article 46. So the Indemnity Ordinance is not covered by this article.

The Indemnity Ordinance can in no way be considered a law as it was enforced unconstitutionally.

The Fifth Amendment was passed to give legal status to orders passed under the martial law and other actions in this regard.

Other than the questions of validating unconstitutional taking over of power or enforcement of martial law or the question of how valid such laws are even after the withdrawal of martial law and whether unlawful actions can be rendered lawful by the appendage 3A of the Constitution, the fact remains that the Constitution was in effect even with the prevalence of martial law. If anyone thinks that the killing of Bangabandhu, his family and his four national leaders cannot be brought to justice, they should remember that the Indemnity Ordinance was not enforced by any military order. It was enforced by the president with his powers in accordance to Article 93 of the Constitution. It was said that since the parliament was not in session, this ordinance was promulgated in requirement of the situation of the

time. The following questions bear significance in relation to the constitutional legality of this ordinance.

1. In Article 46 of the Constitution, only the parliament has the power to indemnify. So any indemnity provision promulgated by the president without the parliament is not acceptable by the Constitution.

2. According to Article 46, the parliament can only pass the indemnity law for anyone who carried out any action for the sake of the liberation struggle during the War of Independence or for the maintenance or restoration of order in any area of Bangladesh. So the indemnity law is void and unlawful for the changing of a government or the enforcement of martial law.

3. This Indemnity Ordinance is virtually still-born, void before even coming into effect.

4. For the sake of argument if Article 93 (1) is used to point out that such a law can be passed through the enforcement of an ordinance as the parliament was not in session, then Article 93(2) can be used to point out that according to the rules such ordinance have to be raised and passed at the first meeting of the next parliament. So, not being passed in the parliament, this ordinance met with another death. So it cannot really be considered to have ever existed even.

5. Many are of the opinion that the Fifth Amendment has legalised this ordinance, despite all shortcomings and the court cannot question its legality. In reply to this it may be pointed out that a still-born law, being ineffectual since inception, cannot be legalised through any order. It was dead at birth, the illegitimate child of the killer Khandakar Mushtaque.

6. According to the Supreme Court verdict concerning the Eighth Amendment, no amendment can be brought about which is contradictory to the fundamental structure of the Constitution. In this regard, the Indemnity Ordinance is contradictory to the fundamental structure of the Constitution.

All are equal in the eyes of the law and are entitled to equal protection of the law for their rights, their lives and their bodily safety as ensured by Articles 27, 31 and 32. As the Indemnity Ordinance is contrary to fundamental rights, in accordance to Articles 7 and 26 this ordinance is void, ineffectual, contradictory and fit to be abolished. According to the verdict of the Eighth Amendment, the rule of law is a part of our basic constitutional structure. The Indemnity Ordinance is contrary to this basic structure. So it cannot be made lawful even by means of a constitutional amendment.

7. The Fifth Amendment itself is contradictory to the Constitution. It is not constitutional to do anything by means of martial law or order outside of this law. And any effort to legalise any such law goes against the continuity of the constitution and is contrary to its basic structure.

8. According to the verdict of Justice Hanudur Rahman regarding the Asma Zillani case in the Pakistani Supreme Court, a force taking over power illegally can never be the source of a legal law.

9. Again, the Fourth Schedule of the Constitution changed by means of the Fifth Amendment, is a unique and exceptional article in accordance to Article 150 of the Constitution.

The initiators of the Constitution wanted to limit this article for those laws of the transitional period from the declaration of independence till the commencement of the Constitution. Other than that, the use of any such amendment to legalise any unconstitutional law is against the existence of the Constitution itself. For the sake of the Constitution, the Fifth and the Seventh Amendment must at one time or the other be declared unlawful. If not, any legal or illegal government can add all unconstitutional laws to the Fourth Schedule and, if it has a two-thirds majority in parliament, can pass this article which it will no longer be possible to challenge these unconstitutional laws. Once this can be carried out, it will not be possible to touch these laws. The court will not be able to question them. The people will not be able to even murmur in protest. In the name of amending the constitutional schedule, this is actually a gross in justice rendered to the Constitution. Thus this plea is being made to the legal world, for the sake of constitutional honesty and continuity, if this nation has not destroyed it completely, and if the rule of killers is to be thwarted, then the people must be told that the Indemnity Ordinance is a fraudulent Ordinance by means of which the killers of Bangabandhu have still not been tried. This is no law, it is a symbol of murder. It is forever contrary to the interests of Bengalis, of Bangladesh and the constitution.

10. Moreover, the Fifth Amendment has only given legal coverage to martial law orders, and authority, actions, verdicts and penalties resulting from such orders. Since there is no mention of giving legality to any ordinance in the Fifth Amendment or 3A of the Third Schedule, the Indemnity Ordinance 75 can be declared void. It is merely a symbol of murder. It can be used as an admittance to killing. As it is not a law, there is no need for any law for the parliament to suspend it. Any such law would indirectly give recognition to the Indemnity Ordinance. So the Indemnity Ordinance cannot be viewed as an obstacle to trying the killers of Bangabandhu Sheikh Mujibur Rahman, his family and the four national leaders. This trial will take place when the state is sincere and when an environment for the trial is created. Since the Indemnity Ordinance has found place in the law books, it must be removed from the law books. A case may be filed to take this despicable symbol of murder from the sacred tomes of law a fling it to the pit of hypocrisy and darkness.

The author is a well known lawyer and a public speaker. He occasionally writes for this paper. The above is a translated extract from a bigger piece written in Bangla.



Bangabandhu and Begum Mujib in a family photograph taken after Sheikh Kamal's marriage. In first row extreme left is seen the present prime minister Sheikh Hasina. (1975). —Photo PID

## Bangabandhu Sheikh Mujibur Rahman: Creator of Bangladesh

by Arshad-uz Zaman

AUGUST 15, 1996 is the birth of Bangladesh. This is the first time that the date has been recognised officially and is being observed solemnly.

It has taken 21 years for the Bangalee nation to reach this point, August 15, 1975 signalled the halt of the forward march of the nation which had freed itself from foreign domination after a bloody War of Liberation. Indeed an attempt had been made to throw the clock back under a smoke-screen of pseudo Islam. Mercifully for the newly-independent state, that attempt failed.

Bangalees of the then East Pakistan created a sovereign independent Bangladesh on December 16, 1971 when the Liberation Forces and the Indian Armed Forces defeated the Pakistani occupation forces, who surrendered at the Suhrawardy Uddyan of Dhaka on December 16, 1971.

That is immediate history. For current phase of the struggle of the Bangalee people for the creation of an independent homeland, it really started immediately after the partition of India in 1947 and creation of two sovereign states — India and Pakistan and Pakistan itself partitioned by 1400 miles of Indian territory. Geography was thus the most important factor which ultimately led to the emergence of Bangladesh as a sovereign, independent state.

Geography alone will not explain how a Pakistan divided in two parts split asunder and Bangladesh was born. Here we must strongly underline the Bangalee nationalist factor, which has existed long before the partition of India in 1947. It had to be in Bangladesh that the full flowering of Bangalee nationalism took place.

The Bangalees produced for the occasion the most charismatic nationalist leader of her long and tortuous history — Bangabandhu Sheikh Mujibur Rahman. It was evident that by the year 1971 Bangabandhu had totally galvanised his people, whom he could lead to any battle he wished. He was a true son of the soil, who rose to the stature of supreme leadership through years of intimate association with his people, who put their implicit faith in him.

They proved it at the polls organised by the Pakistani Martial Law authorities. Sheikh Mujib's Awami League won 167 out of 300 seats in the National Assembly throughout Pakistan. This gave Sheikh Mujib the right to form the government. Pakistani authorities were in a quandary. They hemmed and hawed and the Bangalees of East Pakistan led by Bangabandhu Sheikh Mujibur Rah-

man moved inexorably towards independence.

The speech of Bangabandhu Sheikh Mujibur Rahman before a million Bangalees on March 7, 1971, will remain the greatest speech ever delivered by a Bangalee leader to his people. In clear unambiguous words Bangabandhu told his people "the struggle this time is the struggle for emancipation. The struggle this time is the struggle for independence". He also told his people to turn every hamlet into a fortress. Fight the enemy with whatever you have. This was the culmination of his mission of leading his people to independence.

On the midnight of 25 March when he was being taken away by the Pakistani military to an uncertain fate, his declaration of independence was a mere formality. He knew his people would not fail him and they did not.

The War of Liberation became a total national effort involving every Bangalee, wherever he or she happened to be. The Bangalees took up arms and fought gallantly on the battle field. Such was the preparation of the nation over the decades that the morale of the nation did not sag for a moment.

Whereas the battle raged on Bangladesh soil, a massive worldwide campaign went on to free Bangabandhu, who should have been the Prime Minister but was languishing in Pakistani jail. Bangladesh cause was espoused worldwide, a no mean achievement.

The victory of the Bangalees in Bangladesh and the worldwide chorus in favour of their leader played a decisive role in leading to the freeing of Bangabandhu Sheikh Mujibur Rahman. He started in right earnest to put order to his war-ravaged country. He had the supreme satisfaction of seeing his life's work fulfilled — the Bangalees were free. He was unable to steer the nation to economic emancipation as on the night of 15 August 1975, he and the members of his family, near

and far relations were shot dead. This was followed by killing of four front-ranking national leaders of the Awami League in Dhaka jail on November 3, by the same assassins before they fled the country.

Since that date rulers, who have been in power have followed, either by design or fear or both, the process of erasing the memory of Bangabandhu Sheikh Mujibur Rahman. A whole new generation has grown up with the haziest of notion about that great leader, who led them to independence. In the process those rulers have belittled the War of Liberation itself.

Sheikh Hasina, the daughter of Bangabandhu Sheikh Mujibur Rahman has led her party, the Awami League, to victory in the elections of 1996. The events of August 15, 1975 were masterminded by those who opposed the birth of independent Bangladesh and they found local collaborators. With her election victory Sheikh Hasina has a wonderful opportunity to put the nation back on its track. She has launched the new idea of a government by consensus. If I understand it correctly, it is that on all the important national issues — and there are many — party politics should be set aside and the bigger problems tackled together.

On March 26, 1971 the Bangalees of Bangladesh started their War of Liberation. If they achieved that target it was because the entire nation had become like one man and this was achieved under the leadership of Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation. This was the most glorious hour of the Bangalees. For the people of Bangladesh the War of Liberation is an event on which there is no difference of opinion. People are justifiably proud of their achievement. Throughout the war of 1971 and until 15 August 1975, there was no controversy about the leadership of Bangabandhu.

The nation had to wait till 15 August 1996 commemorating this day Bangabandhu Sheikh Mujibur Rahman was the undisputed leader of all the Bangalees of Bangladesh. Let 15 August be a True National Mourning Day.



FRIDAY, SEPTEMBER 26, 1975

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH  
MINISTRY OF LAW, PARLIAMENTARY AFFAIRS AND JUSTICE  
(Law and Parliamentary Affairs Division)  
NOTIFICATION  
Dacca, the 26th September 1975.

No. 692-Pub. — The following Ordinance made by the President of the People's Republic of Bangladesh, on the 26th September, 1975, is hereby published for general information:—

### THE INDEMNITY ORDINANCE, 1975

Ordinance No. XLX of 1975

an ORDINANCE

to restrict the taking of any legal or other proceedings in respect of certain acts or things done in connection with, or in preparation or execution of any plan for, or steps necessitating, the historical change and the Proclamation of Martial Law on the morning of the 15th August, 1975.

WHEREAS it is expedient to restrict the taking of any legal or other proceedings in respect of certain acts or things done in connection with, or in preparation or execution of any plan for, or steps necessitating, the historical change and the Proclamation of Martial Law on the morning of 15th August, 1975;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render immediate action necessary;

NOW, THEREFORE, in pursuance of the Proclamation of the 20th August 1975, and in exercise of the powers conferred by clause (1) of article 93 of the Constitution of the People's Republic of Bangladesh, the President is pleased to make and promulgate the following Ordinance:—

1. SHORT TITLE — This Ordinance may be called the Indemnity Ordinance 1975.

2. RESTRICTIONS ON THE TAKING OF ANY LEGAL OR OTHER PROCEEDINGS AGAINST PERSONS IN RESPECT OF CERTAIN ACTS AND THINGS (1) Notwithstanding anything contained in any law, including a law relating to any defence service, for the time being in force, no suit, prosecution or other proceedings, legal or disciplinary, shall lie, or be taken, in, before or by any Court, including the Supreme Court and Court Martial or other authority against any person, including a person who is or has, at any time, been subject to any law relating to any defence service, for or on account of or in respect of any act, matter or thing done or step taken by such person in connection with, or in preparation or execution of any plan for, or as necessary step towards the change of Government of the People's Republic of Bangladesh and the Proclamation of Martial Law on the morning of the 15th August, 1975.

(2) For the purposes of this section, a certificate by the President, or a person authorised by him in this behalf, that any act, matter or thing was done or step taken by any person mentioned in the certificate in connection with or in preparation or execution of any plan for, or as necessary step towards, the change of Government of the People's Republic of Bangladesh and the Proclamation of Martial Law on the morning of the 15th August, 1975, shall be sufficient evidence of such act, matter or thing having been done or step having been taken in connection with, or in preparation or execution of any plan for, or a necessary step towards, the change of such Government and the Proclamation of Martial Law on that morning.

KHANDAKER MOSHTAQUE AHMED  
President

M.H. RAHMAN  
Secretary

DACCÁ,  
The 26th September, 1975.

## Bangladesh Constitution, the Indemnity Bill and Human Rights

by Waliur Rahman

THE British don't have a written constitution. They run the business of the state on the basis of customs and usages, and they do it quite well. This uniqueness of the British system presupposing respect for tradition accounts for their sense of tolerance and sang-froid. This also makes the government less visible. If you ask a London Cabby to take you to Downing Street he may be wandering where? When Lord Melbourne was invited to become prime minister he was hesitant; his private secretary protested — "Why damn it, if it only lasts for two months, it is well worth while to have been Prime Minister of England."

Most of the other countries of the world, one hundred eighty-five member states of the United Nations, have however written constitutions.

The closest parallel of the Bangladesh Constitution making can be discerned in the experience of the founding fathers of the American Revolution. The result was the Declaration of Independence 1776 and the constitution of the United States 1787. To have even a better understanding of the American Constitution, one must read the Federalist Essays by James Madison, Alexander Hamilton and John Jay, most famous of which is the Federalist No. 10. The letter of Sullivan Ballou to his wife in 1861 during the civil war can best be appreciated in this light.

In both the British and the American experience one element is most pronounced: respect for values of their peoples and commitment of the ruling classes to the weal and welfare of the governed. Magna Carta permanently guaranteed that the king's power must be limited by law; And that the king could not levy taxes with-

out the consent of a council of the realm; and that he could not imprison a free man or deprive him of his property right except by the judgement of the law of the land. In America the Founding Fathers strictly adhered to the principle of separation of powers between Executive, Judiciary and Legislature. America became a melting pot of ideas, cultures and contrasting thoughts which propelled her to become the most powerful nation in human history and perhaps the freest in the world, with fundamental human rights occupying the centerpiece of the permanent American constitution.

The constitution making process in Bangladesh, had to take into account, the sacrifice of millions of martyrs as well as the basic philosophical background that prompted the Bengali leaders headed by Bangabandhu Sheikh Mujibur Rahman from 1947 onwards, for establishing a Bangalee homeland. A homeland that had to perform, reflect the hopes and aspirations of the deltaic region of Bengal spanning over a good thousand years of history. In this respect as well the basic spirit — of the constitution, passed in the constituent Assembly on November 4, 72, closely parallels in many respects the spirit of the American constitution, which cannot be seen without regard to the period of unrest arising out of the conflicts between the settlers, mayflower devotees and the British Royalty across the Atlantic. It found its most eloquent expression in the phrase, taxation without representation is tyranny. The American revolution was of course not without the moderating influence of the Girondists of the French revolution.

The Bangladesh Constitution also reflected the thousand-year-old history of a struggle that can be defined as a struggle for Bengalee nationhood. This struggle manifested itself in various planes, the peasants as much as the writers; thinkers as much as philosophers; politicians as much as the middle-class bourgeois. The passive message of resistance in terms of hopes and aspirations of a people, the Bangalee people, spans over thousand years. Many Buddhist monks periodically kept running away to escape both perceived oppression of Hindu satraps as well as Muslim invaders of the early years, to Nepal and Tibet, with valuable Bangalee manuscripts. The writings of Al Awaj, Jorashandha, Mir Mosharraf Hossain, Michael Madhu Sudan Dutt, Tagore — all represented a particular strain. The battle of Plassey, the Sepoy Revolution of 1857, Khudiram, Pretilota Waddebar, Bagha Jatin — all represented quintessential Bengali resistance against suppression. It is not a surprise that most of the resistance, local or national, against the foreigners, had always found a happy ground on the soil of Bengal. The raiding of the Chittagong armoury was one of the first flashes of serious challenge to the British Raj and foreign rule.

It is an interesting point to be researched by scholars that Islam took roots in Bengal not through swords, but through the gentle approach of the Sufis and religious leaders. The historic records left behind by Ibrah Batuta, Francois Bernier, Roman Geographer Starbo and Tavernier — all depict a picture of Bengal and Bangalee people who were happy within their environs, with plenty of food and agricultural products sufficient for them-

selves and for export. Bengal excelled in cotton and silk spinning and made name far and wide.

This tells a story. Story of a people, story of a nation who will fight for their liberty, their honour, their independence. What happened in the language movement, followed by Bengalee charter of emancipation in the shape of six points, eleven point charter of students in '69 and the Declaration of Independence on March 26, by Bangabandhu Sheikh Mujibur Rahman, was but a manifestation of the same spirit of the Bengali people.

The constitution of Bangladesh of November 4, 1972, amply represents this spirit. Thus the amendments inflicted following the events of August 15, 1975, had changed this very spirit, the spirit which had its roots in the thousand-year-old history of Bengal. The 5th Amendment, and the seventh — all ran directly against the very spirit of the struggle for sovereign nationhood. The amendment to the preamble of the constitution from — "through a historic struggle for national liberation" to a historic war for national independence — ran counter to all that we stood for. The insertion of the Indemnity Bill is thus not only repugnant to every norm of civilized nationhood; it is against the very basis, the raison d'être of our independent sovereign nationhood. You cannot kill the father of the nation or the leaders of the War of Liberation and grant Constitutional indemnity to the murderers. This has got to be righted in time. Let us not forget that a Yasmeen murder case was covered up by a simple government press note, a Nurjahan

was stoned to death or the sudden explosion of terrorism throughout the length and breadth of the country is all but an emanation from the designs of the enemies of the state taking shelter in the legal cover of the conspiracy hidden in the words of the Constitution under the garb of the Indemnity Bill.

On this day, the solemn day of August 15, the entire nation, irrespective of political spectrum, should do a moment of soul-searching and join hands to rid the constitution of this most pernicious and vengeful amendment. It is not directed against any group or belief. It is an obligation on all of us, the entire population of Bangladesh, for giving respectability to us as a sovereign nation and for giving our *Proffano* a sense of pride and dignity and also a sense of belonging to this very dear land of ours.

What the conspirators did on the black night of the 15th of August 1975 and on Nov. 3, 1975 is not only a national crime; it is a crime against humanity. They not only killed the leaders, they brutally murdered men, women, and children. A young Russell crying for mercy was not spared.

President Bill Clinton while opening the Dodd centre, dedicated to late Senator Tom Dodd, who was a prosecutor at the Nuremberg War Crimes Trials made some historic remarks. Speaking under the rubric — "A commitment to human dignity, democracy and peace, the president stated, where the rule of law prevails, where governments are held accountable, where ideas and information flow freely — economic development and political stability are more likely to take hold and human rights are more likely to thrive. History teaches us that democracies are less likely to go to war, less likely to traffic in ter-

rorism and more likely to stand against the forces of hatred and destruction..."

Recusant Mushtaque's Proclamation of Indemnity Ordinance 26 September, 1975 and General Ziaur Rahman's acceptance and inclusion of the Government in the Constitution of the country is perhaps one of the most abominable deeds perpetrated by mankind in human history. Not only that, the murderers were rewarded by Late President Zia by giving them cushy diplomatic assignments abroad. National ethos and democratic values dipped to its nadir. General Ziaur Rahman's democratic protestations and his lady wife's democratic profession will all come to naught if the present BNP leadership does not dissociate themselves from the criminal decisions of post-1975 era and help the government and the international community bring the perpetrators to book. Former president Ershad's remarks on Bangabandhu and declaration of National holiday on August 15 deserve appreciation.

The recent moves by US congressman Benjamin Gillman, Chairman of the House Foreign Relations Committee are reassuring. Segun Bagicha colleagues must coordinate with all important chancelleries of the world including the OIC countries, to track the perpetrators down and bring them to justice.

Justice is needed for democracy, justice is needed for human rights — the very essence of our struggle for liberation and independence. "On all great subjects," says JS Mill, much remains to be said, and of none is this more true than of the English Constitution."

I hope the day is not far off when we can say the same thing about our own.