

The Indemnity Ordinance, 1975 — its Legal Implications

by Barrister Rafique-ul-Huq

This is not very uncommon thing in this country. Whenever a dictator (i.e. Martial Law Administrator) becomes a democrat and brings about so-called democracy in the country he gets his deeds and mis-deeds committed during the Martial Law period ratified by amending the Constitution so that his actions cannot be challenged in courts of law. So was the present case. On 6th April, 1979 the Constitution (Fifth Amendment) Act, 1979 was passed by incorporating a new paragraph, namely, paragraph 18 in the Fourth Schedule after the existing paragraph 17.

By the Fifth Amendment of the Constitution, before lifting of Martial Law, as is very common in this country, the laws and Ordinances passed during the Martial Law period are all ratified by incorporating a new paragraph in the Fourth Schedule of the Constitution. This was done by President Ziaur Rahman and subsequently by President Hussain Mohammad Ershad. Not only that, the same procedure was followed by Mr Justice Shahabuddin Ahmed when he handed over power to the next Government and resumed office as Chief Justice. So, it is not very uncommon in this country. Whenever a dictator (i.e. Martial Law Administrator) becomes a democrat and brings about so-called democracy in the country he gets his deeds and mis-deeds committed during the Martial Law period ratified by amending the Constitution so that his actions cannot be challenged in courts of law. So was the present case. On 6th April, 1979 the Constitution (Fifth Amendment) Act, 1979 was passed by incorporating a new paragraph, namely, paragraph 18 in the Fourth Schedule after the existing paragraph 17. Paragraph 18 is quoted below:

Moot Point for Food

Going by the latest projections of the World Food Programme (WFP), the new government's manoeuvrability in terms of food management for 1996-97 seems rather limited. But if the little freedom of action there is in the situation can be properly utilised during the current financial year there is a likelihood of a breakthrough attained in the coming years.

The estimated figures of food production, aid and import, for the on-going year, are a study in economic dilemma largely internalised these days with the euphemism of food being used as a political weapon losing much of its bearing in a unipolar world.

Coming to the brass-tacks, despite a projected modest improvement in food production by nearly a million tonnes, the provisional estimate for import keeps at a high notch of 1.97 million tonnes which is subject to adjustment as figures of IRRRI-Boro output are finalised. It is of little practical significance that the import of food in the current year is expected to fall below the last year's level of 2.46 million tonnes. Because what is important here to note is that we shall be in the third consecutive year of foodgrains importation. The continuous drag on the foreign exchange reserve is an incipient danger to the macro-economic stability. That's what should make us sit up and take note to apply a timely brake on.

If we continue to pay that price to keep political restiveness on food scarcity and prices out of the way, what we are basically courting is a severe squeeze on our powers to import industrial raw materials and vital capital goods, etc. With food bill soaking up most of the forex reserve what are we left with except balance of payment deficits like some other countries?

There needs to be a two-pronged strategy to make the best use of the given circumstances. We cannot frog-leap into higher productivity within a year, but it should be possible to save crops from damages by better disaster preparedness and well-monitored storing of cereals. Secondly, our food aid negotiations with the donors will have to be result-oriented. Emphasis should be laid on the need to preserve our macro-economic stability by maintaining a good forex reserve, which is the cornerstone of the economic reform programme the international community are so keen on.

Matter of Maintenance

Nine footbridges — a different version of demountable steel-frame overbridges — will be put up at the city's busy intersections within the next three months. The option for the imported structures, according to Dhaka City Corporation sources, was taken to get over the various complications faced at the time of constructing the concrete and pre-stressed bridges. Complications arising out of negligence of contractors, overhead power lines and objections from various city services should not however be the deciding factor in making a choice like that. The choice for the new variety, which will cost in total Tk 2.7 crore, must of necessity, be based on the utility and longevity aspects of it.

The new facility meant for a safe crossing of the roads by pedestrians and better movement of vehicles below it has an added advantage, which is that they can be disassembled when needed. But the points at which they are going to be erected will, in most cases, require laying more such footbridges. Problems with the existing overbridges are that they are man-made and therefore can be solved with a little more care.

The foremost problem concerns the maintenance of the bridges. Currently the bridges have apparently none to look after them or if there is any designated person or agency to do that, the person or that body is obviously shirking the responsibility. Second, most of the space on a bridge is occupied by vendors and this often forces pedestrians not to use the facility. We do not know if the new footbridges will be able to withstand the neglect their concrete counterparts are being subjected to at present. So we would like to suggest that all the bridges have cleaning squads who will routinely keep those tidy. Under no circumstances should the vendors be allowed to squat on the bridges with their wares. If such an obstacle is removed from the bridges, only then will they serve the purpose for which they are constructed.

Dhaka's Status

Dhaka ranks a notch or two above its other illustrious neighbours such as Delhi, Bombay and Karachi in terms of cost of living. After all, our dear old Dhaka has beaten a few sub-continental cities on some count. Is this a reflection of affluence or productive activities in the areas of industry and commerce or trade? The answer is both in the positive and negative.

Positive only in the internal sense because compared with other cities and towns of the country Dhaka still offers the best opportunities for people to have some means of livelihood. Negative because, too much of concentration in one city can never be a sign of economic health. That Tokyo has topped the list of living cost is not surprising. The industrial superpower's capital naturally has to be most costly because of competition for space and the sheer immensity of money supply. Does the same apply for Dhaka? We are afraid it does not.

Dhaka has outgrown the country in more than one sense. It presents a look of Bangkok traffic jam without having the Thai city's industrial and economic base. The stark contrast between poverty and affluence here is just one face, the other one is that of a spurious city state where one seems forced to forget about the rest of the country. That really explains why this capital is so costly.

I read with interest the article in The Daily Star on August 15, 1996 under the heading 'Help Repeat Indemnity Bill' written by Mr. Mahfuz Anam, the editor. He has made an appeal to Begum Khaleda Zia to help in repealing the Indemnity Bill. On the same day I also read another article written by my friend Barrister Amirul Islam — 'The Killing of Bangabandhu and the Indemnity Ordinance'. I have also read various writings and views on this very important issue.

I agree with my friends Mr. Mahfuz Anam and Barrister Amirul Islam that this is a black law and this must be repealed and/or get it declared as illegal and ultra-vires of the Constitution. This law is against human rights and contrary to rule of law for which we have been fighting so long.

This write-up is an attempt to analyse the legal implication of the Indemnity Ordinance, 1975. First let me quote the 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 be, 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 of, 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 about any matter or thing was done or step taken by any person mentioned in the certificate in connection with or in preparation of 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 conclusive evidence in favour of the person so mentioned.

From the reading of this article it seems to me that Mr Anam is under the impression that unless Begum Khaleda Zia supports Awami League the said Ordinance cannot be repealed. In other words, he thinks that the said Ordinance is now a part of our Constitution and as such it needs two-third majority in the Parliament to repeal it. On this point I have reservation. But if his appeal was to have a consensus on an important issue like this, then I fully agree with him and join in his appeal. Any person who believes in democracy and rule of law is not in a position to support such a black law.

My friend Mr. Amirul Islam had made a critical analysis of the law and he has rightly observed that this law is a black law and cannot get any constitutional protection. It goes against the very spirit of our Constitution. He has further said that this Ordinance does not come within the scope of Article 46 of the Constitution. So, he thinks that the Ordinance is unconstitutional and as such it has no existence in the eye of law. He has further said that if for the sake of argument Article 93 (1) is used to point out that such Ordinance could be promulgated as Parliament was not in session, then Article 93 (2) can be used to point out that the said Ordinance should have been placed in the first session of the next Parliament. Since it was not done, this Ordinance met with another death. So it cannot really be considered to have ever existed even.

Now let me discuss in short under what situation and circumstances this Ordinance was promulgated.

This Ordinance was promulgated by Khandaker Mustaque Ahmed, the then President of Bangladesh on 26th September, 1975. In the Preamble of the Ordinance it is stated that "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 of, 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 as such the said Ordinance was promulgated and it is further stated that Parliament was not in session and as such the President is satisfied that circumstances exist which render immediate action necessary" and accordingly he promulgated this Ordinance. In the said Ordinance it is stated that "it was promulgated in pursuance of the Proclamation of 29th 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."

Article 93 of the Constitution is Ordinance making power. This Article as it was on the relevant date is quoted below (relevant clauses):

1. At any time when Parliament is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation, have the like force of law as an Act of Parliament: Provided that no Ordinance under this clause shall make any provision —

(i) which could not lawfully be made under this Constitution by Act of Parliament;

(ii) for altering or repealing any provision of this Constitution;

(iii) continuing in force any provision of an Ordinance previously made;

2. An ordinance made under Clause (1) shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.

3. The President may, if he is satisfied that it is expedient to do so, cause any Ordinance made under Clause (1) to be referred to the Council of Ministers for their consideration and report thereon.

4. An Ordinance made under Clause (1) shall be subject to the same provisions as to its revocation as apply to an Act of Parliament.

(Emphasis supplied)

The Proclamation of 20th August, 1975 provides that Khondaker Mustaque Ahmed assumed and entered upon office of the President of Bangladesh with effect from the morning of the 15th August, 1975. In the said Proclamation it is stated that —

"The Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof, continue to remain in force."

Possibly, on the basis of this provision read with Article 93 of the Constitution, the then President promulgated the said Ordinance.

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Of Problems and Concepts

BETWEEN THE LINES

Kuldip Nayar writes from New Delhi

majority Punjab and Bengal when the subcontinent was partitioned. Still catastrophic was the phrase 'independent states' because, later the supporters of independent East Bengal (now Bangladesh), argued that the creation of two independent countries, one in north-western and the other in the eastern zones of India, was conceived in the Pakistan Resolution itself. Jinnah tried to explain this subsequently by saying that it was a typing mistake that made 'state' into 'states'.

Ismael Khan, a non-League leader, said what astounded him was that 'Jinnah ruled the word states' was a misprint. How can a chairman disregard the phraseology of the written constitution and base his ruling on his own unrecorded memory?

When I asked Zulfikar Ali Bhutto in Rawalpindi on March 25, 1972 to comment on the 'misprint' story, he laughingly said: 'Quite a costly misprint! I must be careful about my stenographer.' He said that before the creation of Bangladesh, this point was raised by the Bengali leaders. 'But the creation of Pakistan was the result of a total settlement' with

the British, what the resolution said was not very material,' he added.

It appears that the idea of creation two Muslim states was there when the Pakistan demand was first put forward. In the archives in London, there is a report on the findings of a Muslim League Committee constituted to implement the principle of the Lahore Resolution.

This committee had recommended the formation of two Muslim states: one in the north-west (Sind, Baluchistan, NWFP and Punjab, together with Delhi after amalgamation with Punjab); the other in north-east (Assam and Bengal, excluding the districts of Bankura and Midnapur, together with the district of Purnea from Bihar). Surprisingly, the committee did not say a word on Kashmir, which led India and Pakistan to wars subsequently.

The Pakistan Resolution did wonders, beyond Jinnah's own expectations. It was an avalanche that swept away all other ideas from the Muslim mind and transformed the League into the Congress of Muslims. Only the Patans in the NWFP remained unaffected

recipients.

Besides our pay commission does not cover the whole pay earner community. Question may arise that people have voted both the government and the opposition in the Parliament for this commitment also. If that is so, pay earners of private organisations too should be ensured with this Pay Commission benefit.

Nar Hossain
151, Bangshal Road, Dhaka.

Nationwide appeal

Sir, My husband and I have lived and worked in Sylhet for nearly 3 years. We are from the UK. We are writing to say how concerned we are about the many thousands of families who have been badly affected by river erosion and floods again this year.

An annual disaster on such a large-scale must inevitably task government resources. This is borne out by newspaper reports of inadequate relief, little food, no drinking water and sub-human living conditions. We took part in a flood relief expedition last year, which gave us some first-hand experience.

How can such a terrible situation be rectified? Can I suggest one possible way?

In England, if there is a large-scale emergency of any kind (whether it be in the UK or any other country), the Disaster Emergency Committee launches a NATIONWIDE AP-

PEAL simultaneously on the television, the radio and all the national newspapers, asking for donations from organisations, business firms, newspapers and the general public. Donations can be paid in at banks.

Millions of citizens, be they rich or poor, are willing to

make a contribution to help their fellow human beings in their misfortune. The public are kept up-to-date with how much money has been raised and how it is being used.

Ailsa Scarsbrook
Torongo-7
Air Port Road, Sylhet

Applications for being BKSAL members

Sir, I was observing the debate in the Parliament on the 5th August night. The PM and the Minister Tofael Ahmed, brought allegation that BNP founder Gen. Ziaur Rahman applied while in military service to be a member of BKSAL and they have his signed application in their possession. By stating above, the government wants to prove that BKSAL formation was desired by all sections of the people at the period concerned.

Those who were in government service in those days know very well that this statement is nothing less than hypocrisy of the greatest kind. The fact is that the AL government at that period forced all the government servants at all levels to sign that printed form, and not only that they made it a point that government servants must make procession to go to the official residence of the then home minister and shout slogans in favour of BKSAL and Bangabandhu. It was notified

verbally through the proper channel that those who would not participate in signing or in the procession would be marked and would face the consequences in time.

The signing of the application by the government servants including Ziaur Rahman thereby constitutes a document in perpetuity that the then government had taken away the fundamental rights of the people. A free citizen of a free country has the basic right to be or not to be a member of any party.

It would be better for AL if it does not dig out stories of its past performances. The nation has listened to their appeal to forgive them for their past mistakes so that they get a chance to make up those mistakes and can march ahead in nation-building works.

Efforts of justifying BKSAL shall be counter-productive all the way.

Nurul Basher
Khilgaon, Dhaka.

To the Editor

Letters for publication in these columns should be addressed to the Editor and legibly written or typed with double space. For reasons of space, short letters are preferred, and all are subject to editing and cuts. Pseudonyms are accepted. However, all communications must bear the writer's real name, signature and address.

"Have you seen this..."

Sir, A certain English daily has recently felt it to be most timely to use its front page for printing a four column wide and about fifty lines deep photo to show its genuine feelings towards the citizens as if to prove that, after all these years, the Editor of this paper has abruptly awakened. The picture or the photograph sometimes appears to be that of garbage dumped at a certain place, or shows a huge hole in the middle of the road or a traffic jam at a certain junction, as if all these started to materialise overnight and nothing of the sort ever was in existence during the BNP rule.

This particular paper captions his heartfelt agony in bold letters which reads, 'Have You Seen This, Mr. Mayor?' making it almost a daily phenomenon.

New questions is, I would like to know from the Mayor whether or not he has ever noticed the herd of cattle that are being reared at the corner footpath opposite to New Model De-

gree College, Sukrabad, occupying the corner footpath of Dhanmondi Lake for over forty years. Along this Dhanmondi Lake, in several places, we find that cows are being reared by someone who has enough power to carry on with his or her business for years, polluting the whole atmosphere of the area. As I am not the editor of any newspaper, nor a photographer or have one working under me, I am unable to print the picture of the cattle heads that are being reared at this particular place. Nevertheless, I would like to say: Have you seen this, Mr. Editor?

Nahtasha Kamal
Wari, Dhaka

I respect your right to be sarcastic, but cannot understand the reason for being so in this case. If a newspaper does something useful (you seem to think so) — even belatedly, then it should be commended, and not ridiculed.

For your information The Daily Star has consistently carried out report and photo campaign for improving our

Pay Commission

Sir, The Daily Star, dated 28.07.96, printed that Begum Khaleda Zia the Leader of the Opposition at the Jatiya Sangsad demanded announcement of the Pay Commission immediately. So far we remember, Pay Commission was not a part of their commitment before election. It was the commitment of AL.

We have seen from our past experience that, if ever the word 'pay commission' was uttered, instantly price hike of daily necessities took place. Again when the employees start agitation for early implementation of the pay commission, the whole market becomes aware and an increase in the price of commodities. So it is obvious that price hike takes place twice, thrice or more before reaching the benefit of pay commission to the