



LAW interview

THE PROCLAMATION OF INDEPENDENCE

Context and multiple purposes

"The Proclamation will remain a sacred parchment in search of our constitutional identity in the history and in emergence as a State for years to come remaining as the eternal spirit of Bangladesh, a beacon to inspire and guide our people to strive for the Peace, freedom and justice", says Barrister Islam.



In response to the clarion call given earlier (7 March) for the supreme sacrifice. At this turning point of history, people needed to express their paramount will through their elected representatives giving expressions supposed to last for all times to come.

Facts and events speaking for themselves as stated in the Proclamation while justifying our cause for freedom and justice, exposed Yahia's army as an occupation force resorting to Genocide, Crime against Peace and humanity causing millions of death, destruction, rape and arson and thus having lost all the legal and moral authority, acting under a command having no semblance of legitimacy (as declared later by Pakistan Supreme Court in *Asma Jilani's* case).

ON 17 April 1971, the formal Proclamation of Bangladesh's Independence was read out and the Government-in-exile took its oath at Mujibnagar Amrokanon, Meherpur Kushtia. Proclamation of Independence served as the interim Constitution of Bangladesh from 26 March 1971 to 16 December 1972. M. Amir-Ul Islam, Bar-at-law, a noted constitutional jurist of Bangladesh, drafted the Proclamation of Bangladesh Independence, which was later adopted by the Constituent Assembly. Law Desk talks with him on the background and significance of Proclamation of Independence.

Law Desk (LD): How did the idea of giving a formal proclamation of independence come about? And how was it drafted and adopted in April 1971?

Amir-Ul Islam (AI): A constitutional document in the form of Proclamation of Independence was an indispensable follow-up of the declaration made by Bangabandhu Sheikh Mujibur Rahman at the fateful juncture of our history as the clock moved at midnight changing the calendar, with it our destiny embarking upon a new era on 26th March 1971. On this journey chartered with challenging task for our people and for those joining as vanguards, taking to arms to rebel the enemy as forewarned by the leader to resist the enemy with whatever they had

Secondly, being a party to the armed conflict it was a corollary of the liberation war against the occupation force of Pakistan; we needed a legitimate authority to take responsibility on behalf of the people in conducting the war. Since we were fighting for freeing our country from Yahia's occupation in the midst of a multi polar world involving the question of balance of power, we owed it to the people of the world at large and governments of the respective countries as well as to the International organizations i.e. United Nations as to our cause and of our commitments in our "Resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of United Nations".

The Proclamation not only gave the government the legitimacy as was to be recognised by the world at large but it also gave a momentum to the war of liberation and particularly the "Muktibahini" operating in difficult situation for the objects acknowledged by the Proclamation for which many sacrificed their lives in order to liberate the country. Proclamation thus being based on sound legal and constitutional argument helped the freedom fighters gaining momentum in fighting a legitimate war and to receive such acknowledgment in the international media. This helped building the world opinion. Pakistan's propaganda could not make any dent on our status and the

legitimacy of the cause for self determination reinforced by our pledge to abide by the laws at all times 'whether in war or in peace'. The Proclamation thus made out a full proof case for Bangladesh.

In drafting the Proclamation, I was mindful that we not only owe it to our people to explain the reasons of which our people were already aware but we particularly owed it for the world and to our future generations to know what made us to make this ultimate decision.

Thirdly, in order to seek our recognition as a State party from all the governments and international organizations, we had to communicate with other States which we did soon after the government took the oath in Mujibnagar.

As a matter of fact, we felt the need for having such a constitutional instrument with regard to formation of Govt. headed by Bangabandhu Sheikh Mujibur Rahman as president, Tajuddin Ahmed being the Prime Minister, Syed Nazrul Islam to be the Vice President of the Republic, during absence of the President to act as the Acting President. It was simultaneously accompanied with Laws Continuance Enforcement Order both dated 10th April to come into effect since 26th March 1971.

LD: Why a further proclamation was necessary when there was already a declaration on 26 March 1971?

AI: This was the moment for transforming a de facto government into a de jure status. The Proclamation provided it with the constitutional cloak and introducing new identity for our country to be known as "Peoples Republic of Bangladesh". In the mean while, we have already received the text of Bangabandhu Sheikh Mujibur Rahman's declaration of Independence made at the early hour of 26th March by the transcript of wireless message received at various border posts. We were also under the pressure and demands from our leaders from different parts of the country and from those armed and civilian officers having joined the liberation war for the formation of a government so that they could perform their duties with their allegiance to a legitimate authority so that they can enjoy thereby the status of lawful armed forces. In this background, Proclamation of Independence was not only a necessity but also an imperative, as we owed to our people, freedom fighters and the world at large.

LD: What is the historical and constitutional significance of the proclamation?

AI: It is important to put on record that on 1st of March, 1971, there was a meeting of the Awami League Parliamentary party having overwhelming majority in the



From left: Syed Nazrul Islam, Phani Bhushan Majumder, Tajuddin Ahmed and M Amir-Ul Islam in an occasion during the height of independence days 1971.

Constituent Assembly for the approval of the draft Constitution of Pakistan on the basis of 6 and 11 points. I being the elected whip, working closely with Bangabandhu, was given responsibility for organizing a meeting to conduct the session scheduled to be held at Hotel Purbani. Accordingly all the arrangements were made while Yahia's declaration came over the radio that the session of parliament scheduled to be held on 3rd March was postponed indefinitely. Threats were held out from the Cantonment upon the management over repeated telephone calls that the hotel would be raised to the ground by the army tanks rolling out of Cantonment soon. In the meanwhile, hundreds of thousands of people encircled the hotel. People from nearby shops and offices came out on the street. All offices, shops and other activities including the Cricket match came to a halt. People around the Paltan, stadium, Gulistan and Motijheel around the hotel made into one solid mass. A stream of human mobilization was spread into one human chain all around the entire city (No tank could however roll out but the threat remained hanging for Yahia's treacherous move "Operation Search Light" on 25th March, as he left Dhaka that night leaving the darkest spot in human history). I drafted a resolution for the meeting at Purbani conferring and empowering Bangabandhu Sheikh Mujibur Rahman with all the powers to be exercised by him on behalf of all the

lected members as well as on behalf of the people of Bangladesh to take such decisions, make pronouncement and declaration as he would deem fit and necessary. As I proposed, it was unanimously passed and approved by acclamation. It was logical therefore that at the first available opportunity, the elected representatives would meet which they did and confirmed the declaration followed by the speech of Mr. Tajuddin Ahmed dated 10th April. Accordingly followed the Proclamation, read out and made public for the entire world in the oath taking ceremony of the government on 17th April at the place, since named as Mujibnagar.

The present and future readers of the Proclamation would no doubt realize by reading the document itself as to its historical and constitutional significance more than what I would ever be able to tell and this would continue to be expounded as has been already done in the making of the Constitution and will remain a sacred parchment in search of our constitutional identity in the history and in emergence as a State for years to come remaining as the eternal spirit of Bangladesh, a beacon to inspire and guide our people to strive for the Peace, freedom and justice.

While drafting the Proclamation, a rare privilege, greater than any work I could have ever done, the awareness, alertness and articulations as flow from it, cannot be an expression of an individual. This could only can stem from the collective

oneness of mind of a nation sharing together for realization of a dream inherited from our past generations and their experience culminated over centuries in to an urge to become the master of their own destiny; and that is the rare moment of history when individuals overcome their barriers and limitations otherwise inherent in physical existence distinct from the rest merging into a single entity becoming part of the process in the making of a Nation, a Country-a State in the family of nations "So that we may prosper in freedom and may make our full contribution towards International peace and co-operation in keeping with the progressive aspirations of mankind".

The Proclamation of Independence has already received the status of 'genesis of Bangladesh Constitution' as pronounced by our Supreme Court in the Judgment of 8th Amendment case and further elaborated in the Judgments of Mr. J. Khairul Haque.

Having had the privilege as member of the institute of International law and Comparative Studies and an active member of movement for colonial freedom in UK in early part of sixties headed by Lord Fenner Brockway and participating in active deliberation towards the need for two Covenants (ICCPR and ICESCR) while they were at conceptual/consultative/drafting stage for providing teeth to the 1948 UDHR, I carried those memories and experiences actively in my mind as well as those visions of understanding the right to self determination and human rights germinated since those days, helped me in drafting the Proclamation of Independence for our dream country to be named as People's Republic of Bangladesh.

LD: It seems that the new generation is not well aware of the proclamation of independence. How can we overcome this vacuum?

AI: Regarding the gap about the awareness on Proclamation of Independence, I firmly believe in the destiny of our people that it is bound to be removed due to the crying need and the quest that has already generated in search of one's identity among the new generation. As witnessed in America that the history of Independence, American Declaration of Independence and their Bill of rights are taught even in their schools as well as in colleges and Universities before the text of the Constitution is introduced in the class. I am sure that this is going to happen also in Bangladesh.

LD: Thank you for giving us time to comment on our questions.

AI: You are welcome.

HUMAN RIGHTS advocacy



Right to Life: 'Judicare' of 'Medicare'

S M MASUM BILLAH

WE howl for proper medicare, but negligence is the fate. So who would cure the 'medicare'? 'Judicare' i.e. proper judicial redress against medical malpractice? Big question, no doubt. Concern for medical negligence is not something new in Bangladesh, though legal comprehension of it is still in a grey area. Death news on the allegation of medical malpractice often bewilders our eyes and gives a saga on the state's promise to attain the fundamental goal of promoting public health. The constitution of Bangladesh has guaranteed the right life as one of the absolute fundamental rights. Right to life has been interpreted to mean not only physical existence but also right to live with all its full encompasses. So, without achieving the right to health mere recognition of right to life does not become full-fledged and meaningful. Non-access to adequate health care and absence of due diligence has the effect of jeopardizing the right to life.

Definition of medical negligence itself is open to wider interpretation. In Bangladesh there is no particular law on the point except some scattered references on several medical code, ethics and civil and criminal statutes. This area squarely falls within tortious liability which is not usually welcomed by our courts or the lawyers feel reluctant to resort to courts for various reasons. While the doctors should not be liable for mere 'error of judgment', they may not avoid responsibility in case of sheer

disregard to patients and unskillful demonstration of medicare service. Alleged attachments of doctors with hospitals and pharmaceuticals industries which does not conform to the standard health service as reasonable people would expect in the particular situation, brings the ethical aspect of the problem. So, it is submitted that a comprehensive law on medical negligence with its qualifications having its emphasis on medical ethics, is needed so that the 'medicare' can be effectively 'judicially' scrutinized.

Negligence and medicare

Every person who enters into a learned profession undertakes to bring a fair, reasonable and competent degree of skill, and one will say whether in a particular case, the injury was occasioned by the want of such skill by the doctor or hospital. Area of medical negligence may be pervasive in nature. It does not merely mean 'daktari obohela' (doctor's negligence) but 'chkitshai obohela' (negligence in treatment). Medical negligence connotes culpable carelessness in the field of medical science. It involves risk to the health and being of an individual who entrusts his well-being into the hands of a medical professional.

The leading English case setting down the standard of care is that of *Bolam v Friern Hospital Management Committee*, in which McNair J said: 'the test is the standard of the ordinary skilled man exercising and professing to have that special skill'. Lord Scarman in *Maynard v West Midlands Regional Health Authority* accepted this test



without qualification, and in *Sidaway v Bethlem Royal Hospital*, he interpreted it as follows: 'A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion... In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment'.

Medical negligence and Right to Life

Ain O Salish Kendro (ASK), leading human rights NGO in Bangladesh, had discovered 504 specific medical negligence cases that happened in between June 1995 to September 2008, most of the narratives are sadly disappointing and sketch the

horrendous picture of our state and standard of medicare. Let me give some headlines reflected therein. 'Asma's only kidney removed, brings death at last'... 'six succumbed to death for bad saline in Rangpur Medical Hospital'... 'Mahbuba ke harate holo sontan o jorau'... 'news anchor Rashida Mohiuddin caused to death after coming for a dental surgery'... 'Cinema celebrity Manna dies, medical negligence alleged'. The list is never ending.

Human rights, guaranteed by universal jurisprudence, have a 'feel of actuality' only if human health is free from disease and is freely available to everyone. Bangladesh, in its Constitution, has declared "right to life" as a funda-

mental right. Indeed, in its Fundamental Principles of State Policy, the State has been obligated to ensure the "basic necessities of life, including food, clothing, shelter, education and medical care and to 'raising of the level of nutrition and the improvement of public health'. Thus we have constitutional remedies where health is in jeopardy, under Articles 15, 18 read with Articles 31, 32, 44 and 102 as sentinels of citizen's health right.

Victims of medical negligence, institutional or individual, are thrown to a point of no return. The frequent allegation of medical negligence culminating into devastating consequences on life of people (specially on children, old and women) casts on a dark saga on the health care leading the 'right to life' (an all encompassing) at threat and establish the 'worth of human dignity' as pledged by the constitution (an reflected in Code of Medical Ethics) a sheer mockery to our conscience.

In *Dr. Mohiuddin Farooque v. Bangladesh & others* (Writ Petition No. 1783/1994 known as Doctor's Strike Case, the petitioner challenged the continuance of strike by government doctors wherein the court treated it (strike) as 'failure to perform their statutory and Constitutional duties to ensure health services and medical care to the general public, arising out of the abstention from duties by the striking doctors. It was emphasized that the wilful absence of the doctors of BCS (Health Cadre) as members of the Association from their statutory and public duties caused threat to life and body of the public is of no legal effect.

The all-encompassing phenomenon of right to life has received recognition from Bangladesh apex court. The High Court Division has responded pro-actively in a writ petition filed by ASK and BLAST in 2006 in giving rule to explain why there is no course of action on the part of the government medical regulatory bodies and recognizing the right to health as a corollary of right to life as submitted by the petitioners. The court recognized that failure to comply with the guidelines of medical practice regulation (a statutory obligation) has direct bearing on fundamental rights guaranteed by Article 27 (equality before law), 31 (right to life) and 32 (protection of law).

Areas of address

If reality is allowed to supplant myth, the folly of the medical ethics and health justice standard in Bangladesh becomes clear. This is not a nation where all can afford the best that medicine has to offer. Instead, the medical profession must serve at least two very different populations, one reasonably well insured and able to afford a relatively high standard of care and the other poor and uninsured, wholly dependent on direct and indirect forms of charity for the care it receives. To blink in the face of this painful reality and judge the medical care provided to the poverty-stricken under a standard of care the state must come forward with coherent, systematic and pro-people responses. Of course, any reform must not also forget that absence of effective safeguards for the doctors may be a 'disservice to the nation'. Following areas need a

serious concentration:

- Legal Reform (i.e. Medical Negligence Law)
- Accountability (Reform in medical administration and Regulation)
- Optimum budget in healthcare
- Let the people know the medical ethics
- Medicare citizen's charter
- Redressal Forum apart Court
- Check commercialisation of 'hospital-diagnostic' endeavours.

Conclusion

Pathological conditions, writes Krishna Iyer in a Book review on medical negligence, command medicare as an aspect of social justice. This blend of 'medicare' and 'judicare' provides the perspective for a remedial jurisprudence governing medical negligence as an inevitable ancillary to the right to health. Integral to social justice, inalienable from human health and functionally auxiliary to the rule of life is delictual law, medico-criminal justice and statutory pharmacopoeia, the Indian legal legend adds. The law of medical negligence is indispensable if the right to life is not to be a fleeting breath imperilled by a physician's flaw, surgeon's knife, anaesthetist's indifference or equipemental inadequacy. Indeed, the inculcation of constitutional jurisprudence in the field of medical negligence is the demand of time. To address 'medical negligence' the rule of law must run faster to defend the right to life.

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