

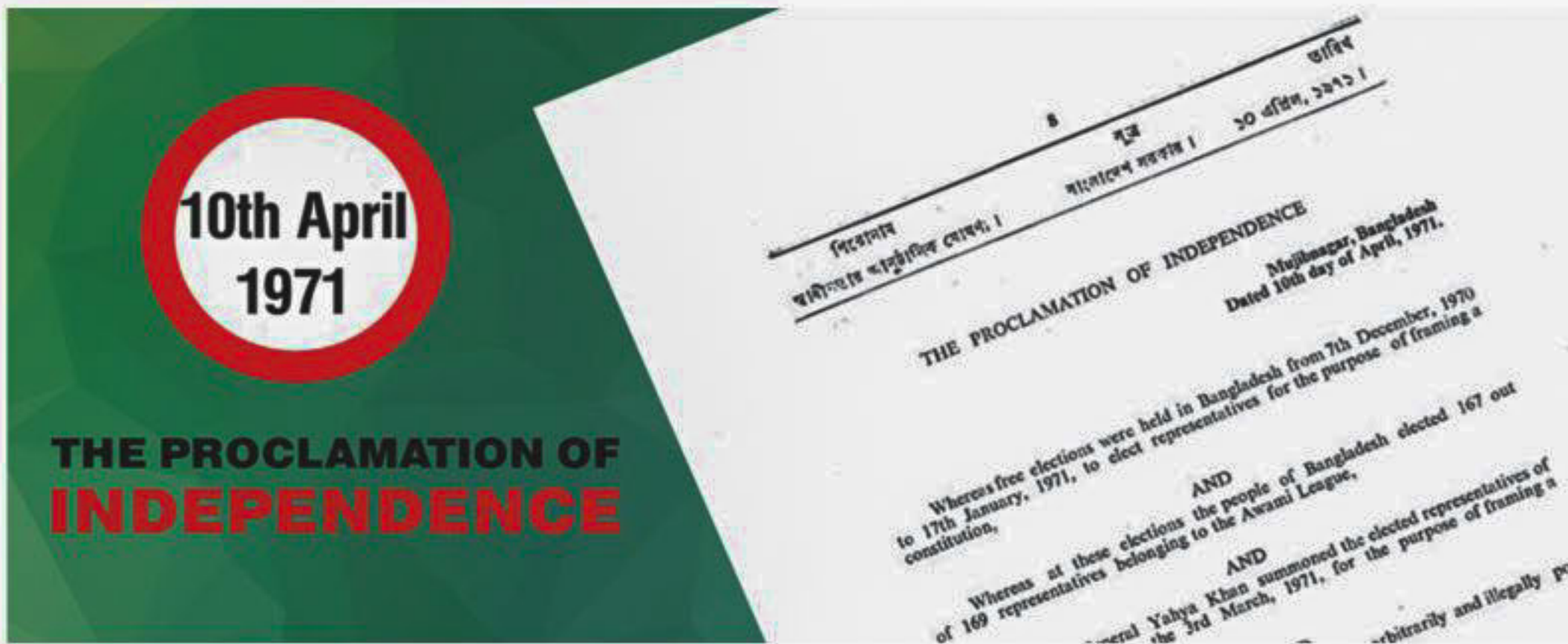
LAW TRIBUTE

From being a makeshift Constitution during the Liberation War, the Proclamation of Independence has now become a historic constitutional document for the constitutional law enthusiasts who might seek to dig deep into the politico-legal history of Bangladesh.

EMRAAN AZAD

IT is a well-established fact that the Pakistani military forces launched 'Operation Searchlight' against innocent civilians and unarmed Bengali population in the night of 25 March 1971 to stage one of the most notorious genocides of the nineteenth century. As we know, that genocidal attack eventually resulted in the commission of, among others, murder, rape, destruction and displacement of millions of people from the then East Pakistan, later to become the People's Republic of Bangladesh. Immediately after the 25 March military crackdown, Bangladesh unilaterally declared its independence on 26 March 1971. With the dramatic shift of world interest in the Bangladesh Liberation War of 1971, the country eventually established a political Government-in-exile in Mujibnagar on 17 April in order to legitimately exercise its right to self-determination. Did we have that Mujibnagar Government-in-exile without any Constitution? Can a Government, even during war, function without a Constitution? Perhaps, these questions can be answered if we remember what happened to the country's constitutional order on 10 April 1971.

On this day, Bangladesh adopted the Proclamation of Independence for the purpose of legitimising the Mujibnagar Government, thereby supplying a legal justification required to achieve recognition from the global powers. Distinguishing the lawful Liberation War from any 'legally not acceptable' secession movement, the political leaders clarified in the Proclamation of Independence Bangladesh's entitlement to be a free nation. This necessity led in the adoption of the constituent instrument within just sixteen days after the start of the Liberation War. Importantly, the Proclamation was logically put into a retrospective operation since 26 March 1971. This historic instrument was meant not only to be the formal announcement of Bangladesh's independence, but also to be the State's first ever Constitution. Not to be confused, this 'first Constitution' remained effective till the declaration of the Provisional Constitution of Bangladesh Order of 1972 (declared on 11 January 1972) which was eventually overtaken by the Constitution of the People's Republic of



Bangladesh, adopted by the Constituent Assembly on 4 December 1972.

I regard the Proclamation as the country's first constitution mainly for three reasons: firstly, the Proclamation of Independence provided the law to govern the State that came into being on 26 March 1971. Secondly, it was adopted by the elected representatives of the people of Bangladesh who were chosen through the 1970 elections that were held in fact to constitute a Constituent Assembly for making a constitution for the then Pakistan. Since that aim of the elections were made to be futile by the Pakistani rulers, those elected representatives lawfully constituted themselves into a Constituent Assembly of a free nation, Bangladesh. The Proclamation thus emanated from a democratic and constitutionally valid source. Thirdly, keeping in mind the idea of separation powers, those elected representatives divided state authorities and powers among different organs of the newly declared independent State of Bangladesh.

The basis of framing the country's very first Constitution is well reflected in paragraph 10 of the Proclamation which reads as follows, "We the elected representatives of the people of Bangladesh, as honour-bound by the mandate given to us by the people of Bangladesh whose will is supreme, duly constituted ourselves into a Constituent Assembly."

The indication to "mutual consultations" among the elected Constituent Assembly members evidences that the making of this first Constitution

was a participatory one. The instrument legally gave birth to a body-politic and adopted the principles of "equality", "human dignity" and "social justice" as the bases of governance of Bangladesh. Indeed, these are the constitutional values for which Bangladesh had long struggled against imperialism and Pakistani colonialism.

As a constituent instrument the Proclamation introduces the territory of the then East Pakistan as the "sovereign People's Republic of Bangladesh" to be effective from 26 March when the declaration of independence was made by Bangabandhu Sheikh Mujibur Rahman.

As a matter of separation of state powers, a presidential form of government was chosen until a Constitution was adopted after the end of Liberation War. President's functions were clearly described. The President, for example, was made the Supreme Commander of the Armed Forces and given all executive and legislative powers of the State including the power to grant pardon. In absence of a parliament and given the fact that the Constituent Assembly can only enact the Constitution and cannot make laws for every day governance, it was legal and legitimate that the President was given legislative power on an ad hoc basis. Under the authority of the Proclamation of Independence, the very first legislation titled the Laws Continuance Enforcement Order 1971 and subsequently the Provisional Constitution of Bangladesh Order 1972 were made by the

President. To assist the easy functioning of the State, the President was also empowered to appoint a Prime Minister and form a cabinet of Ministers.

Keeping aside the discussion on separation of powers, constitutional law experts must appreciate the global significance of this instrument for its all-out effort to recognise and respect the principles of international law and particularly those of the UN Charter. The global face of this constituent instrument is reflected in its reference to the commission of the international crimes such as genocide by the Pakistani military forces and their collaborators.

One can sensibly imagine that during the early days of ruthless war, nothing more could have been expected from the Proclamation of Independence. Though this instrument of independence seemed to be a provisional constitutional arrangement for the State governance, it actually incorporated the most basic features of a Constitution by which a country could be governed during a war. In several judicial decisions of the Supreme Court of Bangladesh, the constitutional authority and sanctity of the instrument was recognised. For instance, in a case, the War Risk Insurance Ordinance 1969 was held to be not a continuing law of Bangladesh under the Laws Continuance Enforcement Order 1971 as it was found to be inconsistent with the Proclamation of Independence. Undoubtedly, the Proclamation here was treated as a higher constitutional normative order.

Finally, because of the 15th Amendment to the Constitution, the Proclamation of Independence has now found its due place in article 150(2) and Seventh Schedule of the Constitution of Bangladesh. From being a makeshift Constitution during the Liberation War, the Proclamation has now become a historic constitutional document for the constitutional law enthusiasts who might seek to dig deep into the politico-legal history of Bangladesh. To conclude, the Proclamation of Independence is still worth a name as the first Constitution of Bangladesh.

THE WRITER IS LECTURER IN LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS (BUP).

YOUR ADVOCATE

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.

Query

I travel to work from Amin Bazar to Dhaka on a regular basis using the water way. I have been using the same route for about last 25 years and over the time I have noticed the deterioration in the condition of the river. Pollution has reached to such an extent that the water is toxic and the river reeks. The toxic water is impacting the surrounding environment and all living beings. I wish to know what measures are there for constantly occurring pollution and environmental damage.

Shanjib Chowdhury, Savar

Response

Thank you for your question Mr. Chowdhury. Since the dawn of civilisation water has been the lifeline for any city and Dhaka is no exception. Environmental pollution is as old as the civilisation itself. Pollution is the hefty price that we are paying for urbanisation and our ignorance has made the situation even worse. It has become a major concern in the last few decades.

Water pollution is creating a serious health hazard for the inhabitants of this country. The dumping of municipal wastes, hospital wastes and toxic discharges from most industries pollute both surface and ground water sources.

Article 18(A) of the Constitution of Bangladesh clearly states: "The State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens." There are a number of laws including Bangladesh Water Act 2013, National River Protection Commission Act 2013, and the Environment Conservation Act 1995 (as amended in 2010) which have provisions for the protection of the environment, and control and mitigation of environmental pollution. The Environment Conservation Act 1995 was itself enacted for fulfilling three major objectives namely: conservation of environment, improvement of environmental standards and the control and mitigation of environmental pollution.

The primary reason of river water pollution is the surrounding industries like chemical industries, dyeing industries, tanneries etc. In section 2(b) of the 1995 Act, "pollution" is broadly defined and includes contamination, or alteration of the physical, chemical or biological

properties of any air, water or soil or other forms of life etc. The Director General of Department of Environment is given the power to take all such measures that she/he deems necessary or expedient for the purpose of protecting the environment along with abating environmental pollution, and issue necessary directions in writing to any person.

The Director General not only has the power to prevent, investigate and carry out programmes, she/he can inspect any place, premises, plants, machinery or substances for the purpose of tackling pollution and give appropriate orders or directions to authorities or persons competent for prevention, control and reduction of environmental pollution (section 4 of Environment Conservation Act 1995). In order to ensure adequate protection of the environment all industries are required to obtain an environmental clearance from the Director General. Under section 15, the

Environment Court can impose the maximum penalty of 10 lac taka both for natural and juristic persons for environmental offences. The Environment Court Act 2010 is aimed to establish one or more Environment Court/s in each district with a Joint District Judge and the said judge shall in addition to his ordinary function dispose of the cases that fall within the jurisdiction of an Environment Court. On average 100 cases are filed in every year in the Environment Courts of Bangladesh which can exercise jurisdiction in any matters arising out of the Environment Conservation Act 1995. Under this existing law, complainant has to prove his/her case and s/he has to bring evidences on behalf of the case and a speedy trial is the main objective behind the establishment of Environment Court.

The protection and improvement of environment is intimately related with the protection of people's lives and livelihoods. To ensure eco-friendly sustainable development for the present and future generations Environment Courts and Acts are working intensely. Even after all these productive measures the responsibility lies on each and every one of us, as citizens of Bangladesh to do our part for the environment and its protection.

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RIGHTS ADVOCACY

DELARA HOSSAIN

AT present, in Bangladesh, violation against child rights is menacing phenomena. Children from all classes are facing various forms of physical, sexual and psychological torture and abuse. In order to, protect children from all sorts of violence and torture and ensuring their rights, Bangladesh has ratified many international conventions to translate those legal provisions into national system. In reality, this remains a high ambition, due to the absence of systematic institutions, and capacity.

Bangladesh has ratified the United Nations Convention on the Rights of the Children (UNCRC) in 1990, and made commitment to fulfill the rights of the Bangladeshi children. The Government of Bangladesh has attempted to implement and apply the principles and provision of the UNCRC in protecting the rights of the child. Despite numerous efforts made by the Government of Bangladesh, till now a large number of children are victim of violence. However, one remarkable outcome is the enactment of the new Children Act, 2013, and this law has reflected on some of the provisions of the UNCRC. The age of the children has increased from

16 to 18 but yet, no initiative has taken for harmonising the definition of 'children' in different national laws. Not having the rules of the Act, implication of this Act is not in practice yet and thus it is losing its credibility.

In the light of the UNCRC provision, this Children Act 2013 has aimed for some ambitious initiatives such as- the formation of the Child Welfare Boards at all level of the country, setting up of Child's Affairs Desk at the police station, and appointment of the relevant officials, children courts, family institutional care and few more. Realistically, it requires substantial administrative set up, trained human resources, and strong financial support.

Currently, lack of coordination among different government ministries is a major barrier for the implementation of any of this Children Act 2013. At present, there is no separate children directorate. The Ministry of Women and Children's Affairs (MoWCA) coordinating 23 ministries/ divisions dealing with children related issues. It is extremely difficult for the Ministry of Women and Children's Affairs to coordinate with this large number of various ministries / divisions within their present administrative and budgeting



capacity. Nonetheless, again the government has essentially agreed to establish a separate directorate but execution plan seems not to be coming soon because of the election.

Absence of institutional accountability, lack of coordination, systematic monitoring mechanism are major barrier not only of the implementation of the Children Act, 2013, these are hindering the existing legal practices. Severe delays at the legislative and judicial procedure failing to provide exemplary punishment to the perpetrators.

As per The Daily Star report, from 2001 to 2015 22,386 women

and children received treatment form the one stop crisis center being victim of either rape or other forms of violence. This led to 5,003 legal cases being filed, and simply 820 cases got verdict and among these number of cases merely 101 perpetrators received punishments. A large number of the recipients' children of the one stop crisis center even did not report any legal cases against perpetrators.

It is high time actions are needed to strengthen the child right governance in Bangladesh to protect the rights of the child.

THE WRITER IS MANAGER, CIVIL SOCIETY AND POLICY ADVOCACY, SAVE THE CHILDREN, BANGLADESH

LAW EVENT

RAIHAN RAHMAN RAFID

THE publication ceremony of two books written by Professor Dr. Mizanur Rahman was held at Nawab Ali Chowdhury Senate Bhaban, University of Dhaka (DU) on 7 April 2018, organised by the Faculty of Law, University of Dhaka.

"Human Rights: Theory, Law and Practice in Bangladesh" and "Samaj Rastra Manabadhikar (Society, State & Human Rights)" were launched in the ceremony by the invited guests.

The ceremony was attended by a number of academics, legal professionals, students and other distinguished guests. The speakers shared their thoughts on the book and discussed how author's writings bring different aspects of society, culture, politics, economics, and human rights together, in light of the original Constitution of 1972. The esteemed guests included Professor Dr. Gowher Rizvi, Advisor to the Prime Minister on International Affairs; Professor Dr. M Shah Alam, Former Member of the Law Commission and Former Dean of Law, University of Chittagong; Professor Dr. Abul Barakat, University of Dhaka; and Professor Dr. Md. Rahmat Ullah, Dean, Faculty of Law, University of Dhaka.

At the very beginning of his speech, Professor Dr. Abul Barakat introduced Professor Mizan as the "Political Economist of

Legal Jurisprudence". He said, multidisciplinary understanding is a common essence to all of Professor Mizan's writings. He considered Professor Mizan's books as highly exceptional work, endorsing the thoughts reflected in them.

Professor Dr. Shah Alam said that the best contribution of Professor Mizan is his various



innovations in legal education of Bangladesh. By introducing programmes like street lawyering, community law reform, human rights summer school and many others, Professor Mizan has basically produced a strong community of 'anti-generic lawyers' or 'rebellious lawyers' who are now contributing both in bench and bar. Professor Shah Alam observed the books written by the author are the products of his long struggle to revolutionise the thinking in legal education of Bangladesh.

As the chief guest of the event, Professor Dr.

Gowher Rizvi said, we all benefit from the experience, knowledge and insights of Professor Mizan in the arena of international law and human rights law. Talking about human rights violation, Professor Rizvi said that the lawmakers are usually above the law and enjoy immunity in contradiction to the concept of rule of law. Speaking against the prevalent discrimination in the society, he highlighted the necessity of passing the proposed anti-discrimination law by the parliament.

Professor Rizvi further added that minority rights must be specified in the human rights since the minority groups suffer the most in our country and are periodically facing attacks, even desecration of their sacred places.

Professor Dr. Md. Rahmat Ullah presided over the ceremony. In his concluding remarks, Professor Rahmat said that the socialist aspirations are yet to be materialised in our country and we fail to treat human rights with a holistic approach. He commented that serious reading of the books authored by Professor Mizan, will help the readers identify the differences between current scenario of Bangladesh and the aspirations that we had during liberation war struggle in 1971. All the guests wished a wider readership of Professor Mizan's two books.

THE WRITER IS STUDENT OF LAW, UNIVERSITY OF DHAKA