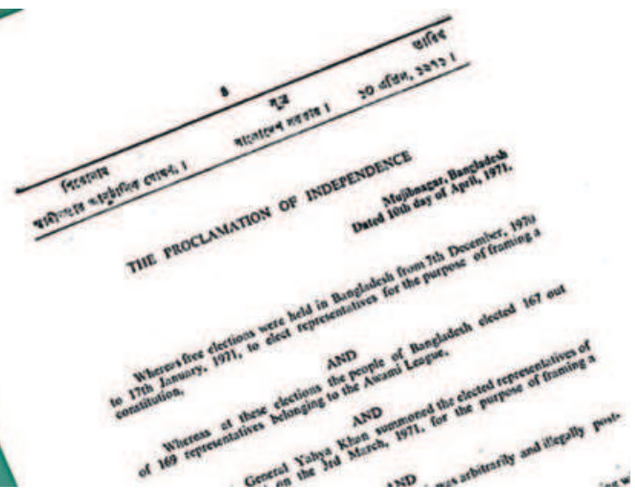
LAW INTERVIEW

# THE PROCLAMATION OF INDEPENDENCE 1971

## Not a mere creation of the skillful draftsmen, rather a reflection of the will of the people

**I believe the drafters of the POI took a very bold step. That is because the ICJ's advisory opinion regarding the UDI in respect of Kosovo has only recently decided on the legality of the UDI. As for principles of international law, principles of self-determination, the right of self-defence, the UDI, amongst others, are all well-reflected in our POI.**

**Dr. Muhammad Ekramul Haque** is a Professor of Constitutional Law and Comparative Constitutional Law at the Department of Law, University of Dhaka, of which he is also an alumnus. He did his PhD in Constitutional Law and International Law at Monash University in Melbourne, Australia. Dr. Haque is one of the leading scholars in the fields of constitutional law and comparative constitutional law in Bangladesh, and his contributions focus on how comparative constitutional experience and international law reflect and help shape the understanding and developing contents of Bangladeshi constitutional provisions and their interpretations. He is a member of the Research Group on "Cross-Judicial Fertilization: The Use of Foreign Precedents by Constitutional Judges", International Association of Constitutional Law (IACL) and the International Society of Public Law ICON·S. His most recent publication includes *Encyclopedia of Public International Law in Asia* (BRILL NIJHOFF, 2021), in which he served as the State Volume Editor for Bangladesh. Currently, he is writing one monograph and co-editing two books which will be published later this year, namely *International Encyclopedia of Constitutional Law* (Kluwer Law International), and *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary* (Springer Australia) and *Implementation of Sustainable Development in the Global South: Strategies, Innovations and Challenges* (HART Publishing UK) respectively. On the 52nd anniversary of the adoption of the Proclamation of Independence, the **Law Desk** spoke with him on the following issues:

THE PROCLAMATION OF INDEPENDENCE

Mujibnagar, Bangladesh
Dated 10th day of April, 1971.

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971, to elect representatives for the purpose of framing a constitution,

AND

Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a

**Law Desk (LD): What role do you think the Proclamation of Independence (POI) played in the liberation war of 1971?**

**Muhammad Ekramul Haque (MEH):** The promulgation of such a well-drafted unilateral declaration of independence (UDI) provided Bangladesh with an international legal contour to its emergence as a new state. The significance of the POI which was adopted on 10 April 1971 is manifold in the liberation struggle of Bangladesh. First and foremost, it created the entire legal framework for the liberation war and stands as the first constitution of Bangladesh. Secondly, with its retrospective effect, it reiterated the point that the liberation war did indeed begin on 26 March and since then there was a sovereign government. Thirdly, it fulfilled the remaining elements of statehood under traditional political science, namely government and sovereignty. Fourthly, it highlighted that Bangladesh was exercising its legitimate right of self-defence against the unjust and treacherous war waged against its people. Fifthly, it highlighted the continuous genocide being committed and in particular the atrocities committed on 25 March, which alone is enough to prove under international law that Pakistan committed genocide. Sixthly, it emphasised the fact that we were exercising our legitimate right to self-determination and self-defence. Finally, it talked about having established effective control over the territory of Bangladesh, which is one of the key requirements for a legitimate government in international law.

**LD: What is the importance of the POI in connection with Bangabandhu's declaration of independence?**

**MEH:** The connection can be clarified in 3 key-points. First, the 6th paragraph of the POI recognises the declaration made on March 26 and acknowledges that the struggle for liberation did not begin from 10 April. Secondly, the reason the POI itself is important is that it formalised Bangabandhu's declaration of independence on 26 March. Lastly, it is a unique UDI because, amongst other reasons, it highlighted the point of effective control for the Mujibnagar government in-exile.

**LD: Would you comment on the historical context in which the POI was drafted?**

**MEH:** The advent of Bangladesh by the exercise of the right to self-determination through the making of UDI was distinctive in nature back in 1971. Till then, the right to self-determination was more commonly used in the context of decolonisation. On the other hand, Bangladesh took a pioneering step and exercised this right to achieve its independence. Prior to this, there was no instance of successfully claiming the right to self-determination in a non-colonial setup for independence. In this regard, the example of Bangladesh has contributed to the development of the jurisprudence of international law.

**LD: How is a document like the POI treated in international law? Do you think it reflected the relevant principles of international law?**

**MEH:** I believe the drafters of the POI took a very bold step. That is because the ICJ's advisory opinion regarding the UDI in respect of Kosovo has only recently decided on the legality of the UDI. As for principles of international law, principles of self-determination, the right of self-defence, the UDI, amongst others, are all well-reflected in our POI. However, it is unfortunate that despite contributing to the development of the jurisprudence of such principles, the example of Bangladesh is hardly mentioned by scholars.

**LD: Do you think the 1972 Constitution fully reflects the values espoused in the POI?**

**MEH:** Generally, the answer would be in the affirmative. First, the source of the supreme power in both documents has been given to the solemn will of the people. Article 7(2) of the Constitution, which enunciates this point is considered to be the polestar of the constitution. Secondly, the fact that lawmakers have to be elected in order to be legitimate has been reflected in both documents. Thirdly, the values of equality, human dignity, and social justice enshrined in paragraph 12 of the POI are also enunciated in the preamble of the 1972 Constitution. Fourthly, the value of free choice mentioned under article 25(b) of the Constitution was essentially the basis of the POI. Fifthly, the value of supporting oppressed people under article 25(c) further corresponds with the main idea behind the POI. However, one facet where the constitution did not fully reflect the POI would be in the realm of international law obligations, where the POI proved to incorporate a kind of blank cheque towards its intentions to apply international law and on the other hand the Constitution applied a more restrained version of this ideology through a limited perspective in article 25.

**LD: How do you think the POI reflected the will of the people of Bangladesh?**

**MEH:** The POI was not merely a creation of skillful draftsmen but rather a reflection of the will of the people. The first evidence of this connection can be found in the 10th paragraph of the POI where it is mentioned that the mandate of the Mujibnagar government was given by the people whose will is supreme. And secondly, the 4th paragraph from bottom of the POI again highlights the fact that the members of the Mujibnagar government were all duly elected and thus reflected the will of the people.

**LD: Many thanks for talking to us.**

**MEH:** You are welcome, and thanks are also due to *The Daily Star* for showing interest to discuss about the POI, which I think will create newer scopes for developing newer ideas in the constitutional law study of Bangladesh.

RIGHTS WATCH

# Questioning the 'token repatriation' of the Rohingyas

**SAKHAWAT SAJJAT SEJAN**

Last month, a delegation from Myanmar visited the Rohingya camps in Bangladesh to advance the talks in relation to the repatriation of the Rohingyas on a pilot basis. The Myanmar representatives planned to verify documents and repatriate around 1000 Rohingyas to Myanmar. But they have not assured citizenship for the returnees or recognised their identity as Rohingyas. Neither have they specified their place of settlement after their return to homeland.

Allegedly, the Myanmar military junta has initiated this 'token repatriation' scheme to eyewash the ICJ's probe of accusations (rape, murder, arson, genocide etc.) against the military forces. To pacify peer pressure from China and other states, Myanmar is doing so to legitimise their military regime among international community. But rights-groups claim that the situation in Myanmar is not stable and safe enough to repatriate the Rohingyas. Internal conflicts and violent clashes with military regime are ongoing. Security forces are present in Northern Rakhine and arresting or executing the Rohingyas who are unofficially returning to the country.

In this misty situation, it is never advisable to repatriate the Rohingyas. International refugee law and the United Nations High Commissioner for Refugees (UNHCR) discourage return in the origin country during the existence of a military regime, political unrest, serious harm, or apprehension of serious harm. The UNHCR's handbook on voluntary repatriation says: (i) refugees must be prior informed of the situation in the origin country; (ii) origin country must support the repatriation process; (iii) it shall ensure such return in non-militarised, non-political, and peaceful areas; and (iv) it must comply with the humanitarian mandate of the UNHCR. Absence of any of these safeguards will make the return questionable and doubtful. Needless to say, the Rohingyas in Bangladesh want to return to Myanmar voluntarily but a return without transparency will put them at grave risks. This means voluntariness must be considered as a prerequisite to start and complete the much-awaited repatriation.

Unfortunately, the UN Refugee Convention 1951 does not directly discuss about the voluntariness principle of repatriation. The OAU Refugee Convention 1967 might be a resort in this regard. The Convention enshrines two standards to ensure voluntariness while repatriating, i.e., (a) situation in the country of origin and consent of refugees to return in such situations, and (b) the condition of the country of asylum, whether it permits a free choice to return or not. False promises, wrong information or concealment of any necessary information regarding repatriation would invalidate the process.

Human Rights Watch emphasises that repatriation must be dignified to constitute voluntariness in the process. Absolute voluntariness is the most practical approach for sustainable return. In sustainable returns, refugees cannot be imposed with a lot of restrictions and denied the rights of a refugee to influence their free will or achieve voluntariness. In the case of the Rohingyas, Bangladesh is continuously saying that there are no other solutions except voluntary repatriation. But questions remains if the voluntary repatriation is ever achievable in the existence of the military regime in Myanmar.

Because, first, the UNHCR's collaboration with the representatives of military junta to initiate 'token repatriation' is violation of its own handbook and international refugee law. The voluntary repatriation handbook designates such returns during military regime as 'unadvised return.' Secondly, voluntary repatriation is accomplished through return with safety and dignity. Myanmar officials have been very much shady regarding these terms and conditions of repatriation, specially the Rohingyas' right to movement and to return with dignity. Voluntary repatriation must always be unconditional.

That the UNHCR and the Bangladesh government shall immediately step back from such repatriation does not comply with voluntariness principle of international refugee law too. Because it will not only violate the right to dignified return of the Rohingyas but also create complications for the disposal of The *Gambia* v *Myanmar* case in the International Court of Justice (ICJ).

Arakan Rohingya National Alliance claimed that the token repatriation will help the military junta pose counterarguments and pretend sincerity towards the Rohingyas, once the hearing restarts in the ICJ. Free Rohingya Coalition also termed this unadvised repatriation as 'PR Campaign' to align with the ongoing case in the ICJ and ease pressure from international community including China. It seems like a futile, political, shrewd and impracticable approach from Myanmar's military junta to execute (un)voluntary repatriation and gain international acceptance. These questions and doubts make this repatriation of the Rohingyas non-humanitarian and unadvised.

The Writer is a Lecturer in Law, Feni University.