

Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis

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Bangladesh was born on 26 March 1971 as an independent sovereign state in the world by making the Proclamation of Independence. In the eye of international law, the Proclamation of Independence was a Unilateral Declaration of Independence (UDI). Establishment of a country by the unilateral declaration of independence is a recognized method under international law to establish a new country.¹ The first foundation stone of the legal system of Bangladesh is the Proclamation of Independence which is the first legal document of independent Bangladesh. Later, the legal system was shaped by the Laws Continuance Enforcement Order, 1971 which imported majority of the laws now existing in Bangladesh. The article will trace the legal starting point of the country, the beginning of the constitutional journey and the formation of the government and the legal system of Bangladesh. The article shall examine the law making power during the continuance of the liberation war and afterwards.

The Proclamation of Independence: starting point of the constitutional journey of Bangladesh

The general perception about the constitution of Bangladesh is that Bangladesh had its first constitution in 1972, which was adopted on November 4, 1972 and became effective on December 16, 1972. However, according to the first paragraph of the preamble to the Constitution of 1972, Bangladesh was established as an independent state on March 26, 1971. The question is: did the country run without any constitution during the period between March 26, 1971 to December 16, 1972? The answer is: No. Legally speaking, Bangladesh had a constitution since its birth as an independent country. The Proclamation of Independence 1971 was the first Constitution of Bangladesh.

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¹ International Court of Justice advisory opinion on Kosovo's declaration of independence. See at <http://www.icj-cij.org/docket/files/141/16010.pdf>. The question before the ICJ was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The ICJ noted that 'general international law contains no applicable prohibition of declarations of independence.' By ten votes to four, is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

The Proclamation of Independence was a unilateral declaration of independence made by the Constituent Assembly of Bangladesh on 10 April 1971. The Proclamation of Independence constituted the Constituent Assembly which was composed of the representatives elected in the elections held in Bangladesh from 7 December, 1970 to 17 January, 1971. The Proclamation stated: '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.' Further, the Proclamation declared the establishment of Bangladesh as a state in the following words: 'We the elected representatives of the people of Bangladesh ... declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman.' The Proclamation of Independence contains three important things: firstly, it constituted the constituent assembly, the first formal legal body in Bangladesh. Secondly, it constituted Bangladesh as a sovereign People's Republic. Thirdly, it has mentioned the provisions regarding the powers and functions of different organs of the newly born state. It is submitted that because of its third function, the Proclamation of Independence must be treated as the first Constitution of Bangladesh. The Proclamation of Independence although was adopted on the 10th April, was given retrospective effect on and from the 26th March, 1971. Thus, legally speaking, Bangladesh had a constitution on the very first day of its creation, the 26th March of 1971.

A country is governed by a set of laws and that set of laws is treated as constitution for that country. In that sense, there is no doubt that the proclamation of Independence was a constitution. The Provisional Constitution of Bangladesh Order, 1972 has clearly mentioned that the Proclamation of Independence was made for the governance of the country. The first paragraph of the Provisional Constitution of Bangladesh Order, 1972 said that '[w]hereas by the Proclamation of Independence Order, dated the 10th April, 1971 provisional arrangements were made for the governance of the people's Republic of Bangladesh.'

Apart from setting provisions regarding powers and functions of the state, the proclamation affirmed its promise to observe international law. It added: 'We further 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 the United Nations.' The proclamation started with the background of the history of establishment of Bangladesh in the following words:

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 Constitution, AND Whereas the Assembly so summoned was arbitrarily and illegally postponed for indefinite period, AND Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war, AND

Whereas in the facts and circumstances of such treacherous conduct Bangabandhu Sheikh Mujibur Rahman, the undisputed leader of the 75 million people of Bangladesh, in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged upon the people of Bangladesh to defend the honour and integrity of Bangladesh, AND Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh, AND Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government, AND Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

The constitution by which the country was governed from 26 March 1971 to 10 April 1972 was the Proclamation of Independence. However, after issuance of the Provisional Constitution of Bangladesh Order, 1972 on 11 January 1972, two documents, the Proclamation of Independence and the Provisional Constitution of Bangladesh Order, together constituted the Constitution for the country and as such they continued to be the Constitution for the period between 11 April 1972 to 15 December 1972 (both dates are inclusive). The present Constitution became effective on 16 December 1972. Interestingly, article 151 has repealed certain laws including the Provisional Constitution of Bangladesh Order. However, article 151 has not repealed the Proclamation of Independence, the first part of the first Constitution. Thus, the Proclamation of Independence has been given a curious legal status. However, article 150(2) as it stands now says that '[i]n the period between the 7th day of March, 1971 and the date of commencement of this Constitution on the 16th day of December, 1972, the historical speech delivered by Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation, in the Racecourse Maidan, Dhaka on the 7th day of March, 1971, set out in the Fifth Schedule of the Constitution, the telegram of the Declaration of Independence of Bangladesh made by Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation on the 26th day of March, 1971 set out in the Sixth Schedule and the Proclamation of Independence of the Mujibnagar Government on the 10th day of April, 1971 set out in the Seventh Schedule are the historical speech and instruments of the independence and the struggle of freedom of Bangladesh which shall be deemed to be the transitional and the temporary provision for the said period.'

Laws Continuance Enforcement Order: Importing laws to the legal system of Bangladesh

It has already been discussed above that the legal system of Bangladesh formally started its journey with its first Constitution, namely, the Proclamation of Independence. The Proclamation also had established a government (which was popularly known as *Mujibnagar sarkar*) for the newly born country. The first

challenge for the new government to govern the country was to make a set of laws for the country. In order to have a set of laws, on 10 April 1971, the then Acting President of Bangladesh Syed Nazrul Islam issued the order—The Laws Continuance Enforcement Order, 1971 which was given retrospective effect on and from 26 March, 1971. The Order declared that the laws that existed in the East Pakistan on 25 March of 1971 shall be treated as the laws of Bangladesh subject to the sovereignty of Bangladesh. The order reads as follows:

I, Syed Nazrul Islam, the Vice President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence dated tenth day of April, 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the Proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh and that all government officials, civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of allegiance to all government officials within their jurisdiction.

This order shall be deemed to have come into effect from 26th day of March, 1971.

Thus, the laws that were in force on 25 March 1971 in the territory of Bangladesh shall continue to be the laws of Bangladesh on and from 26 March 1971 subject to one condition, that is, the laws must adopt the necessary changes consequential for the creation of the sovereign independent state of Bangladesh. However, the laws were accepted as the laws of Bangladesh on a ‘wholesale’ basis without going for ‘choose and pick’. In *M/S. Dulichand Omraolal Vs. Bangladesh*,² decided on 18 June 1980, the validity of the law, The Enemy Property (Continuance of Emergency Provision) Ordinance 1969, was challenged. The learned senior advocate of the Supreme Court Mr. Pal argued, inter alia, that the said law was not a valid piece of law made in the then Pakistan and as such it cannot continue as a law in Bangladesh under the Laws Continuance Enforcement Order, 1971. The Court decided the case against the contention made by Mr. Pal and accepted the law as a valid law which continued as a law in independent Bangladesh. However, the court did not in fact scrutinize the validity of the law; rather the court said that it will not examine the validity of the laws passed in Bangladesh before 26 March. The Court said:

We now turn to question of validity of Ordinance 1 of 1969 which Mr. Pal argues was not a valid piece of legislation, which could be continued by Laws Continuance Enforcement Order, 1971. The validity of the Ordinance has been impliedly so held in Abdul Majid's case aforesaid and we do not, except for the clarification already made, find any reason to dissent from it. However, the argument of Mr. Pal may be

² 33 DLR (AD) 30.

considered. His contention is that, President Ayub Khan in violation of his own Constitution, instead of abdicating in favour of the Speaker of the National Assembly handed over power illegally and unconstitutionally to General Yahya Khan, and Yahya Khan without any legal or constitutional authority abrogated the Constitution of the then Pakistan. He was an usurper and as such the Provisional Constitutional Order which provided, inter alia, continuity of ordinance which included Ordinance 1 of 1969 was without any Constitutional validity, and as such the Ordinance ceased to exist as a valid piece of legislation after the expiry of one hundred and eighty days, and so it was not an existing law on 25th March 1971 which could continue in terms of Laws Continuance Enforcement Order, 1971. The short answer to the ingenious argument is that, so far as Bangladesh is concerned, we are to look at the legitimacy of a law from the Proclamation of Independence made on 10th April, 1971 and the Laws Continuance Enforcement Order and the Constitution of Bangladesh. As regards argument of Constitutional legitimacy of Yahya Khan, all that need be said is that this is a political question which the Court should refrain from answering, if the validity or legality of the Law could otherwise be decided. In the present case, however, as we have said, we are to look for the validity of the Laws from the sources indicated earlier. A combined reading of Proclamation of Independence, Laws Continuance Enforcement Order, the Constitution of Bangladesh, President's Order No. 29 of 1972, President's Order No. 48 of 1972 and Act XLV of 1974 as amended by Act XCIII of 1976 clearly indicates, that Ordinance 1 of 1969 continued as a valid piece of legislation which has been repealed by Act XLV of 1974. No further argument or speculation is necessary, Mr. Pal's contention fails.

However, the Appellate Division of the Supreme Court of Bangladesh, in an earlier case of *Mullick Brothers Vs. Income Tax Officer and another*,³ decided on 30 November 1978, examined the validity of a law and decided that that law could not continue as a valid law in Bangladesh. In *Mullick Brothers*, the question before the Appellate Division was whether the law, Martial Law Regulation No. 32 of 1969 known as Income Tax (Correction of Return and False Declaration) Regulation dated 15.4.1969, was adopted as a law in Bangladesh by the Laws Continuance Enforcement Order or not. The Appellate Division examined the validity of this law and declared it as an invalid law incapable of being treated as a valid law in Bangladesh under the Laws Continuance Enforcement Order of 1971. Mr. Asrarul Hossain argued:

‘the Martial Law Regulation came to an end and after the revocation of Martial Law, it cannot be included in the definition of "Law" or "existing Law" or "regulation" as provided in the Constitution of Bangladesh. Any action taken or proposed to be taken under the Martial Law Regulation is, therefore, illegal.’⁴

The Court said:

The contention of the learned Counsel or the appellant raised the basic question as to the nature of the Martial Law Regulation promulgated by the then Government of

³ 31 DLR (AD) 165.

⁴ Ibid, para 7.

Pakistan and its validity as "Law" or "existing law" in Bangladesh after the war of liberation fought against the regime responsible for promulgation of Martial Law in 1969 and consequent emergence of Bangladesh as a sovereign and independent state. On the 16th March, 1971 Bangladesh proclaimed independence and a Proclamation was issued to that effect on 10th day of April, 1971 from Mujib Nagar. The relevant portion of the Proclamation reads as follows:- "In order to ensure for the people of Bangladesh equality, human dignity and social justice, declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Banga Bandhu Sheikh Mujibur Rahman, and do hereby affirm and resolve that till such time as a Constitution is framed, Banga Bandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice-President of the Republic, and that the President shall be the Supreme Commander of all the Armed Forces of the Republic, shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon." On the same day that is 10th April, 1971 Laws Continuance Enforcement Order 1971 was also proclaimed in order to establish the laws that were in force in Bangladesh on 26th March, 1971 subject to the proclamation of independence. The Laws Continuance Enforcement Order, 1971 shows that all laws that were in force in Bangladesh on 25th March, 1971 and were subject to the proclamation continue to be in force with such consequential changes as were necessary. The proclamation made it clear that the

President shall exercise all the Executive and Legislative powers of the Republic. The Martial Law, proclaimed by the regime against whom those Proclamations were directed, promulgated Martial Law Regulation 32 in 1969. The proclamation having been issued on the 18th April, 1971 and having come into existence on the 26th March, 1971 and the President of the Republic being responsible for discharging all the executive and legislative powers and only those laws which were not inconsistent with the proclamation of independence having been continued in force, the irresistible conclusion is that the Regulation made by the authority against whose authority the Proclamation of Independence is directed could not legally legislate for Bangladesh if such legislation was inconsistent with the Proclamation of Independence. The Martial Law Regulation promulgated by the Martial Law Regime lack the trappings of law. It is issued by one person who arrogates to himself all the State powers on the basis of force of arms and commands obedience to him by the force emanating from the military power. Law as it is understood in jurisprudence draws its authority from the will of the people of a country and absence of the expression of that will or rather silencing that will of the people through the strength of military force cannot be substituted for the jural concept of law. Martial Law comes into existence under certain conditions and it rules the country by Regulation and Orders and such Regulation and Orders if are desired to be continued are saved and preserved by a protective clause by a Constitution framed by a Parliament.⁵

The Court further observed:

Martial Law Regulations were promulgated by Chief Martial Law Administrator on the abrogation of Constitution and the Chief Martial Law Administrator assumed himself as the administrator of the country through Martial Law Regulations and other Orders. Martial Law Regulations were issued to administer the country at a point of

⁵ Ibid, para 8.

time when the will of the people which is the authority for all laws had come to a stupor. The only safety value (sic) of these Regulations are to the extent these are preserved and saved by the Constitution. On return to the Constitutional Government, regulation as referred to in the definition clause of the General Clauses Act is a regulation made under a constitutional instrument by a person or authority empowered on that behalf in Bangladesh. Martial Law is an antithesis of any Constitutional authority. Martial Law Regulation No.32 is not anywhere in the Constitution of the People's Republic of Bangladesh been saved.⁶

The Appellate Division also said that the High Court division had wrongly treated it as a valid law:

The learned Judges of the High Court have taken the view that although the Regulation was repealed by necessary implication in independent Bangladesh its effects continued to exist because the assessment is a matter passed and closed and is saved even after its implied repeal if there were any repeal at all by mere implication. We have already covered the premises of this observation and concluded that the question of repeal of the Regulation does not arise because repeal presupposes existence of a valid law. We have already concluded that the Regulation being a Martial Law Regulation has not been saved by any legal Instrument of the People's Republic of Bangladesh.⁷

It is submitted that the High Court Division decided *Dulichand* going against the stand taken by the Appellate Division. *Dulichand*, thus, had to examine the validity of pre 1971 laws before treating them as the valid laws in Bangladesh.

However, the Pakistani laws made during the continuance of the war (26 March 1971 to 16 December 1971) have never been treated as an existing law in Bangladesh. In *Md. Yahya Vs. Government of Bangladesh and others*,⁸ decided on 03 February 1982, the Court said that the Martial Law Regulation No. 81 issued on 6 June 1971 was not an existing law in Bangladesh. Martial Law Regulation No 81 promulgated by the Chief Martial Law Administrator of Pakistan on 7.6.1971 demonetised Pakistani currency notes of the then State Bank of Pakistan of 500 and 100 rupee notes and thereunder directed all holders of such currency notes to surrender them to Commercial Banks and to the Government treasury. The Court decided that '[s]ince we have found that the Martial Law Regulation 81 is not an existing law the Government of Bangladesh has no legal obligation to process the deposits of the demonetised notes.'⁹ Mr. Rafiqul Islam, the learned Advocate for the petitioner argued that 'in view of the provisions of sub clause (1) of clause 3 of 4th Schedule of the Constitution the Martial Law Regulation 81 Issued by the Chief Martial Law Administrator of Pakistan on 7th June, 1971 is an existing law and as such the respondents are bound to pay the value of the demonetised notes

⁶ Ibid, paras 9, 10.

⁷ Ibid, para 11.

⁸ 35 DLR(HCD) 182.

⁹ Ibid, para 10.

surrendered in pursuance of Martial Law Regulation 81 to the depositor.¹⁰ Rejecting this contention, the Court held:

It is seen that on 10th April, 1971 the Government of Bangladesh at Mujib Nagar issued Proclamation of Independence. In pursuance of the Proclamation of Independence and Laws Continuance Enforcement Order all laws that were in force in erstwhile East Pakistan before 25th March, 1971 should continue to be in force with such consequential changes as might be necessary on account of the creation of the State of Bangladesh. The question raised by the learned Advocate for the petitioner that Martial Law Regulation 81 is an existing law in Bangladesh require thorough examination in the background of the provisions made in the Constitution. By sub-clause 1 of clause 3 of the 4th Schedule of the Constitution it has been provided that all laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law. It appears to us from a reading of the aforesaid provision that all laws made and all things done under the authority or in pursuance of the Proclamation of Independence or any law were ratified and confirmed. This provision has been enacted in the Constitution for the purpose of ratification of things done by purported exercise of any law during that period. After promulgation of independence declaring the State of Bangladesh and waging the war of independence during the period in question it cannot be said that the Martial Law Regulation promulgated during that period by the Chief Martial Law Administrator would acquire the status of existing law.¹¹

However, the valid laws found in Bangladesh on 25 March were accepted as the laws of Bangladesh with some consequential changes for the creation of independent sovereign Bangladesh. Subsequently, Bangladesh (Adaptation of Existing Laws) Order, 1972 made necessary corrections in the laws. For example, '[w]here an existing law ... contains any provision extending the law to the whole of Pakistan or to whole of East Pakistan, that provision shall be so construed as to refer to the whole of the People's Republic of Bangladesh.' In *M/s. Hazi Azam v. Singleton Binda & Co.*,¹² the High Court Division held:

The basic concept which underlines the Proclamation of Independence is that a new State has been founded in the midst of a war with the State of Pakistan. This Proclamation as well as the Laws Continuance Enforcement Order were made at a time when the war was being waged. By the Enforcement Order, the continuance of all the laws which were in force in the territory, now Bangladesh, was enforced only subject to the Proclamation with the result that those laws which were derogation of the sovereign status of the new international personality were continued in force. The words "subject to the Proclamation and "with such consequential changes which may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the

¹⁰ Ibid, para 4.

¹¹ Ibid, para 5.

¹² 27DLR 589.

will of the people of Bangladesh" are very significant words which emphasise the independent and sovereign status of the new international personality. It naturally follows that all those laws which had some international implication in the sense that they involved some international agreement, commitment, obligation or relationship made, undertaken or created by the Government of India or Government of Pakistan which functioned as the administrative authorities in the past in the territories now Bangladesh, cannot be deemed to be the agreement, commitment, obligation or relationship made, undertaken or created by the new State of Bangladesh unless the same was specifically accepted by it in exercise of its sovereign will. It is, therefore, clear that the laws which regulate the rights and obligations of the citizen Or non-citizens within the municipal sphere of the country having no international involvement have been continued in force by the said Order.

The Constitution of 1972 has expressly repealed the Laws Continuance Enforcement Order, 1971 by article 151(a). However, the laws imported by the Order have been protected as existing laws by article 149 of the 1972 Constitution. Article 149 says that '[s]ubject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution.' Article 152 of the Constitution has defined the term existing law used in article 149 in the following words: "existing law" means any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not it has been brought into operation.'

Law making power: from President to Parliament

Bangladesh became an independent sovereign country on 26 March 1972. After its independence, the Proclamation of Independence vested the law making power to the President and the power was entrusted to the Vice-President in case of unavailability of the President. Thus, in independent Bangladesh, President got the law making power first and then the Vice-President got it. After the adoption of the 1972 Constitution, the legislative power was vested in the Parliament, according to article 65 of the Constitution, which stands till now. The Constitution also has created a limited scope for law making by some other bodies and authorities including the President (article 93) and the Supreme Court of Bangladesh (article 107). Thus, the following is the timeline of the legislative power, divided into two phases in Bangladesh since its independence:

Phase 1: Legislative power under the Proclamation of Independence

1. President under the Proclamation of Independence
2. Vice-President under the Proclamation of Independence

Phase 2: Legislative power under the Constitution of 1972

1. President under the Proclamation of Independence
2. Parliament (House of the Nation) under the Constitution
3. Delegated authorities under the Constitution

4. Supreme Court under the Constitution
5. President under the Constitution

Phase 1: Legislative power under the Proclamation of Independence

President under the Proclamation of Independence: the first law making authority in Bangladesh:

The Proclamation of Independence (which was issued on 10 April 1971 and became effective on 26 March 1971) was the first Constitution of independent Bangladesh. Apart from declaring the birth of the People's Republic of Bangladesh as an independent sovereign country, it contained, *inter alia*, the provisions regarding law making power in the People's Republic of Bangladesh. The law making power was vested to the President by the Proclamation of Independence. The Proclamation of Independence said: 'the President shall ... exercise all the Executive and Legislative powers of the Republic.' The Proclamation contained the names of both the President and the Vice-President of Bangladesh, which said: '... do hereby affirm and resolve that till such time as a Constitution is framed, Bangabandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice President of the Republic.' Bangabandhu Sheikh Mujibur Rahman was imprisoned in Pakistan on and from 26 March 1971. So, he was unable to exercise the legislative power under the Proclamation till his return to Bangladesh on 10 January 1972 (popularly known as '*Bangabandhur Swadesh Prottaborton Dibosh*'). He made the first law -- 'The Provisional Constitution of Bangladesh Order, 1972' -- on the 11th January, 1972 after his return to Bangladesh. However, it was not numbered as the President's Order (P.O.) unlike other orders issued by the President before the 1972 Constitution had been effective. It is submitted that this order ought to have been numbered as a P.O. just like other POs. Because this order clearly declared that it was promulgated under the authority granted to the President by the Proclamation of Independence. Interestingly, although article 151(b) of the present Constitution has not put any number to this order, the opening sentence of this article clearly termed it as a President's order by saying: 'The following President's Orders are hereby repealed.' In Thus, it appears that 'The Provisional Constitution of Bangladesh Order, 1972' was the first order in the form of a law issued by the President Bangabandhu Sheikh Mujibur Rahman.

The nature of the President's legislative authority under the Proclamation of Independence was, however, changed its character on the 11th January, 1972 when the 'Provisional Constitution of Bangladesh Order, 1972' was issued by the President. Section 6 of the Order declared that '[t]he President shall in exercise of all his functions act in accordance with the advice of the prime Minister.' At that time the country was transformed from the presidential form of government to the

parliamentary form of government considering the fact that ‘it [was] the manifest aspiration of the people of Bangladesh that a parliamentary form of government shall function in Bangladesh’ [Para 4 of the Provisional Constitution of Bangladesh Order, 1972]. After this order was issued, Bangabandhu Sheikh Mujibur Rahman became the Prime Minister of Bangladesh.

Vice-President under the Proclamation of Independence: the second law making authority in Bangladesh:

The Proclamation of Independence said that in case of unavailability of the President for any reason whatsoever, the Vice-President shall exercise all powers and functions of the President: ‘We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers and duties, due to any reason whatsoever, the Vice President shall have and exercise all the powers, duties and responsibilities herein conferred on the President.’ At the time of adoption of the Proclamation of Independence, the President was unable to enter upon his office and as such could not exercise his powers and duties due to his imprisonment in Pakistan. So, accordingly, the Vice-President enjoyed all powers and functions of the President during the period of absence of the President. According to the Proclamation, the then Vice-President (as was declared by the Proclamation) had to exercise all ‘powers’ of the President. It is to be noted here that the Proclamation did not say that the Vice-President shall act as the President or Acting President either. The Proclamation also did not say that the post of the President will be vacant if he is unable to discharge the functions of the President. So, constitutionally (according to the Proclamation of Independence), Bangabandhu Sheikh Mujibur Rahman remained the President even during the period of his absence from Bangladesh. The rules of textual interpretation of the said provision of the Proclamation clearly suggest that the Vice-President shall exercise the powers of the President, not as the President but as the Vice-President. Thus, it is clear that the Vice-President was empowered to exercise the powers of the president, not to act as the President. Maybe this differentiation, legally speaking, does not have any practical significance, but it has theoretical importance. However, after the adoption of the 1972 Constitution, it is deemed that the use of the term ‘Acting President’ had been legal. Because, section 3(1) of the 4th schedule of the Constitution validated all laws passed in the period between March 26, 1971 and December 16, 1972, which reads as follows:

All laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law.

However, let us now look at the legislation made during the tenure of the Vice-President Syed Nazrul Islam who discharged the functions of the President. The first law made by him was 'The Laws Continuance Enforcement Order' which was issued on 10 April 1971 and was given retrospective effect from 26 March 1971. This order started clearly by identifying him as both 'Vice-President' and the 'Acting President', as the order says: 'I, Syed Nazrul Islam, the Vice-President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence' However, the later orders issued by him did not contain the phrase 'Vice-President'; rather the term 'Acting President' was used in all subsequent orders issued by him. The preamble of the orders contain: 'in pursuance of the Proclamation of Independence of Bangladesh and in exercise of all powers enabling him in that behalf, the Acting President is pleased to make the following Order.'

However, the main point in this discussion on the law making power is that the Vice-President was given the power in case the President was not available. The first order issued by him ('The Laws Continuance Enforcement Order') has not been numbered as the Acting President's Order No. 1 of 1971, although it was so. The database of the laws of Bangladesh prepared by the Ministry of Law shows that 'The Bangladesh (Collection of Taxes) Order, 1971' is the 'ACTING PRESIDENT'S ORDER NO. 1 OF 1971.'¹³ This is in fact the second law made by the 'Acting President' (Vice President Syed Nazrul Islam). In fact, after the Proclamation of Independence, 'The Laws Continuance Enforcement Order', issued on the 10th April, 1971, was the first law made by the Government of Bangladesh established by the Proclamation of Independence and 'The Bangladesh (Collection of Taxes) Order, 1971' is the second one, issued after more than 8 months of the first Acting President's Order, on the 26th December, 1971. Interestingly, in repealing the Laws Continuance Enforcement Order of 1971, although article 151(b) of the present Constitution has not put any number to this Order, the opening sentence of this article clearly identified it as a President's order by saying: 'The following President's Orders are hereby repealed.' It is interesting to note that none of the two first orders issued by the President and the Acting President was numbered as P.O. or A.P.O.

On 5 January 1972, the then Acting President Sayed Nazrul Islam made a law as an 'ordinance.' The title of the law was: The Bangladesh (Adaptation of University Laws) Ordinance, 1972. On that day, the Vice President Syed Nazrul Islam acting as the 'Acting President' had the law making power under the Proclamation of Independence. Prior to making this law, all laws made by him were declared as 'Order.' It is submitted that this law was named as an 'ordinance' erroneously. There

¹³ http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=365 last visited on 3 May 2015.

was no reason for deviating from using the term order suddenly. Thus the word ‘ordinance’ used in this law was misleading and confusing.

Phase 2: Legislative power under the Constitution of 1972

Continued power of the President under the Proclamation of Independence

The Constitution of 1972 vested the legislative power to the parliament. But no parliament did exist at the time the Constitution became effective. Parliament was constituted by the election held in 1973 and the first session of the parliament was held on the 7th April 1973.¹⁴ The Constitution of 1972 made some transitional and temporary provisions in its 4th Schedule. According to section 3(2) of the 4th Schedule, in spite of the Provisional Constitution of Bangladesh order, 1972 being repealed by article 151(b) of the Constitution, the President’s legislative power under the proclamation continued to exist till the first meeting of the first parliament on April 7, 1973. Thus, the President remained the sole legislative authority (of course subject to the advice of the prime Minister as was mentioned in the Provisional Constitution of Bangladesh Order) even after the 1972 Constitution became effective, during the period of December 16, 1972 to April 7, 1973 when the First Parliament met its first session. Section 3(2) of the 4th Schedule of the Constitution reads as follows:

Until the day upon which Parliament first meets pursuant to the provisions of this Constitution, the executive and legislative powers of the Republic (including the power of the President, on the advice of the Prime Minister, to legislate by order) shall, notwithstanding the repeal of the Provisional Constitution of Bangladesh Order 1972, be exercised in all respects in the manner in which, immediately before the commencement of this Constitution, they have been exercised.

So, after the 1972 Constitution became effective, the President’s Orders started saying ‘in pursuance of paragraph 3 of the Fourth Schedule to the Constitution of the People’s Republic of Bangladesh, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order’, instead of the referral of the power to had been derived from the Proclamation of Independence, unlike in cases of the earlier P.O.s. For example, the preamble of Bangladesh Insurance Corporation (Dissolution) Order, 1972, promulgated on December 30, 1972 reads as follows:

‘WHEREAS it is expedient to provide for the dissolution of the Bangladesh Insurance Corporation, and for matters ancillary thereto; NOW, THEREFORE, in pursuance of paragraph 3 of the Fourth Schedule to the Constitution of the People’s Republic of Bangladesh, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order.’

¹⁴ <http://www.parliament.gov.bd/index.php/en/about-parliament/tenure-of-parliament> last visited on May 03, 2015.

It is interesting to note that the section 3(2) of the 4th Schedule has mentioned about the repeal of the Provisional Constitution of Bangladesh Order 1972, but it has not said anything about the Proclamation of Independence-the main law that granted the President's legislative power-which was not repealed by article 151 of the Constitution, unlike the Provisional Constitution of Bangladesh Order 1972.

Now, I am making an important question: Could the President promulgate an ordinance under the authority of article 93 of the Constitution in the period between 16 December 1972 and 07 April 1973. In other words, could the President promulgate an ordinance under article 93 after the 1972 Constitution became effective but before the creation of the first Parliament according to article 65 of the Constitution? The answer is: No. Because, article 93 of the original Constitution of 1972 empowered the President to promulgate an ordinance only when the parliament would not be in its session. Article 65(1) made a provision for the creation of the Parliament. So, before the creation of any parliament how could the President justify its ordinance on the plea of the parliament not having its session at that moment? Thus, in my opinion, in the absence of section 3(2) of the 4th Schedule, the country would not have any legislative authority. It is pertinent to note here that the ordinance making power of the President under article 93 of the Constitution became functional only after the creation of the first parliament in 1973, not before, not even after 16 December, 1972 when the constitution became effective.

Parliament (The House of the Nation) constituted under the Constitution of 1972

Finally, the 1972 Constitution granted the legislative power to the Parliament instead of the President. Article 65(1) says:

‘There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic: Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect.’

The legislative power of the parliament is subject to the provisions of the Constitution, according to article 65(1) of the Constitution. This article also created the scope for delegating the legislative authority by the Parliament, according to the proviso to article 65(1). However, the legislative power of the Parliament became functional only after the creation of the first parliament in 1973 and not before. Because, at the time the 1972 Constitution became effective, no parliament existed in the country. According to section 1 of the 4th Schedule, the Constituent Assembly stood dissolved at the moment the Constitution came into force that is on 16 December 1972. Section 2 of the Schedule added that the ‘first general election of

members of Parliament shall be held as soon as possible after the commencement of this Constitution.’

The Constituent Assembly (GonoParishad): the Constitution making authority in Bangladesh:

The President issued the “Bangladesh Constituent Assembly Order” (P.O. No. 22) on March 23, 1972 for the creation of the Constituent Assembly for the purpose of making a constitution.¹⁵ The Constituent Assembly met in its first session on April 10, 1972. On 11 April 1972, the Constituent Assembly formed the Constitution Drafting Committee headed by the then Minister for Law and Parliamentary Affairs.¹⁶ The Chairman of the Drafting Committee presented the Constitution Bill in the Constituent Assembly on 12 October 1972.¹⁷ The Assembly adopted the Constitution on 4 November 1972 which came into force on 16 December, 1972.¹⁸

The Constituent Assembly constituted by the Proclamation of Independence did not have any legislative power. It was given the power of making a constitution for the newly born Bangladesh. The 4th Schedule has said that the Constituent Assembly stood dissolved on 16 December 1972, the day on which the 1972 Constitution became effective. It is argued that the Assembly had the opportunity to perform the legislative functions after 16 December 1972, but no such legislative power was vested to the Assembly ever.

Form of Government: From Presidential to Parliamentary form

The proclamation of Independence, the first Constitution of Bangladesh, established a presidential form of Government. ‘Mujibnagar Sarkar’ established by the Proclamation was headed by the President Bangabandhu Sheikh Mujibur Rahman. The Proclamation vested all powers to the President:

‘that the President shall be the Supreme Commander of all the Armed Forces of the Republic, shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon, shall have the power to appoint a Prime Minister and such other Ministers as he' considers necessary, shall have the power to levy taxes and expend monies [sic], shall have the power to summon and adjourn the Constituent Assembly, AND do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.’

However, a parliamentary form of Government was established on 11 January by issuing the Provisional Constitution of Bangladesh Order. Section 5 of the Order

¹⁵ Abul Fazal Huq, ‘Constitution-Making in Bangladesh’ (1973) 46 (1) *Pacific Affairs* 59, 60.

¹⁶ Huq, Abul Fazal, ‘Constitution-Making in Bangladesh’ (1973) 46 (1) *Pacific Affairs* 59, 60.

¹⁷ Bangladesh, *Constituent Assembly Debates*(GonoParishader Bitarka, Sarkari Biboroni), Constituent Assembly, 1972, vol.2, 23.

¹⁸ *The Constitution of Bangladesh* Article 153(1).

said that '[t]here shall be a Cabinet of Ministers, with the Prime Minister at the head.' Section 6 added that '[t]he President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.' Later, the 1972 Constitution also established a parliamentary form of Government. However, it was argued in *A.K.M. Fazlul Hoque & others Vs. State*¹⁹ that the President could not change the form of Government exercising his legislative power under the proclamation of Independence. But it was held by the Court that the legislative power of the President under the Proclamation of Independence included all law making powers including the power to make a law changing the form of government. The Court held that—

in addition to conferring on the President all other powers including the executive powers, the Proclamation, after having noticed the prevailing circumstances invested him with all the "Legislative powers of the Republic". Obviously, the expression "Legislative powers of the Republic" is of the widest amplitude and admits of no limitation. The Proclamation, in our view, empowered the President designated by it to make any law or legal provision, even of a constitutional nature. We looked for but found no indication in the Proclamation to the contrary. On the other hand, assurance is lent to this view by the further provision in the Proclamation which empowered the President to do everything necessary to give the people of Bangladesh an orderly and just Government, including the power to appoint a Prime Minister and other Ministers. The impugned clauses (5) to (8) of the Provisional Constitution Order were thus authorised by the terms of the Proclamation.

Conclusion:

The Proclamation of Independence by which Bangladesh declared its independence was the first Constitution of Bangladesh. It was a well drafted declaration of independence that served as the Constitution for the newly born country. It contained necessary fundamental laws regarding governance of the country and enclosed the commitment of the state to observe the UN Charter and other obligations under international law as an independent sovereign country. The first significant legal achievement of the Mujibnagar Sarkar was the adoption of the Laws Continuance Enforcement Order, 1971 during the continuance of the liberation war. Legally speaking, the country faced no gap in constitutional or other laws necessary for the governance of the country and the regulation of other activities in the state. The adoption of the Laws Continuance Enforcement Order, 1971, which shaped up the entire legal system, reflects the political intelligence and the legal acumen of Mujibnagar Sarkar. After achieving independence, within a year after the end of the war the Constituent Assembly adopted the Constitution of 1972 which replaced the first constitution. This is the pride of the people of this nation that we have established our country and have been able to run it in a proper constitutional and legal framework.

¹⁹ 26 DLR (SC) II.