



LAW campaign



FOR YOUR information



4th November

Plea for a Constitution Day

SHAHDEEN MALIK

In a speech, in Maryland, USA on 17th May of this year the Prime Minister of Norway, Kjell Magne Bondevik said: "Today is the day all Norwegians look forward to every year. May 17 has become a magic date, a day for parades, music and ice cream. Throughout the length and breadth of Norway we come together people of all ages, from all walks of life to celebrate our national unity, our democracy and our traditions."

17th May is Norway's Constitution Day, and this year the Prime Minister of Norway celebrated it in the USA.

5th February, the Constitution Day of Mexico, is a public holiday. And the Americans celebrate their Constitution Day on 17th September.

The Constitution on the Constitution

In the Preamble of our Constitution, a solemn date is mentioned 4th November. The Preamble of the Constitution reminds us that we, the people of Bangladesh, had given "to ourselves" this Constitution on the 4th November, 1972. In the words of the Constitution:

"In our Constituent Assembly, this eighteenth day of Kartrick 1379 B.S., corresponding to the fourth day of November 1972, A.D., do hereby adopt, enact and give to ourselves this Constitution."

The Preamble also provides:

"... it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh..."

Article 21, in part, provides:

"It is the duty of every citizen to observe the Constitution"

More importantly, the Oath of Office is also in terms of the Constitution

"I will preserve, protect and defend the Constitution..."

The Third Schedule of the Constitution contains the oath of office required for the nine 'constitutional' offices. Of these nine offices, the Oath of Office of the President; Prime Minister, including Ministers, Ministers of State and Deputy Minister (Chief Advisors and Advisors, when applicable); Speaker; Deputy Speaker; Chief Justice and Judges (of the Supreme Court); Chief Election Commissioner and Election Commissioners; Comptroller and Auditor General; and Chairman and Members of the Public Service Commission contain the above phrase.

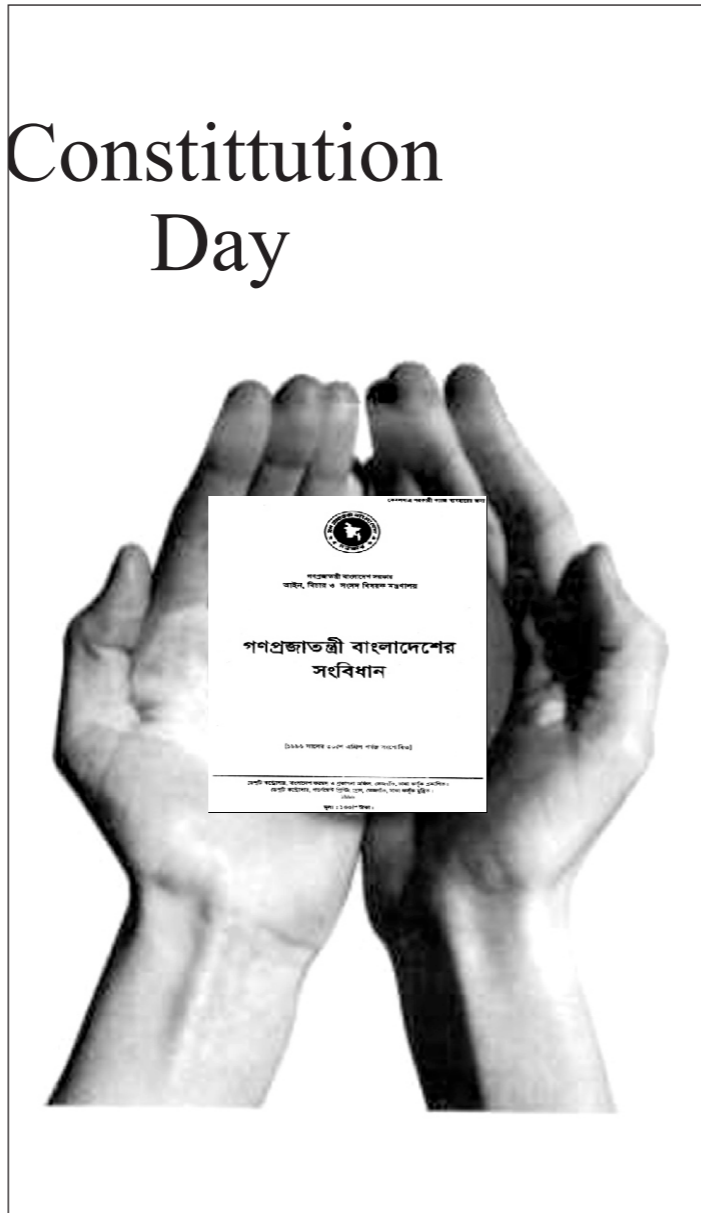
A Member of Parliament also takes an Oath of Office but her/his oath does not include the obligation to "preserve, protect and defend the Constitution", presumably because a Member of Parliament does not have executive powers.

Since the return to democracy through parliamentary election in 1991, many of the national issues, concerns and debates have certainly been grounded in the Constitution. The debate about the Care Taker Government of the early 1990s, and return to the Parliamentary form of government from the Presidential (introduced by the 4th Amendment to the Constitution, and continued during the regimes of army generals), soon after the 1991 election were constitutional issues of the earlier period while the Supreme Judicial Council, which is at the centre of national attention and deliberations now, is also grounded in the Constitution.

Abit of history

In terms of the origin of our state, the liberation war of 1971 was legally fashioned as the war to realise the right of the people to frame and give to themselves a Constitution. This is reiterated in our Proclamation of Independence as well. One may recall that the general election of 1970 was for electing a Constituent Assembly to frame and adopt a Constitution. It was not a parliamentary election for forming a government of Pakistan. Pakistan, at that time, did not have a Constitution as the 1962 Constitution of Pakistan was abrogated in 1969 by General Yahya Khan and Pakistan needed a Constitution to lay down provisions for parliamentary election and the formation of a government.

Following from the above proposition and after the coming into force of the Constitution on the 1st anniversary of our independence 16th December 1972 the Constituent Assembly elected in 1970 stood dissolve. The task, for which we elected the representatives to the Constituent Assembly, was accomplished -- the Constitution was framed and enacted. Hence, there was no need for the Constituent Assembly to continue. After the dissolution of the Constituent Assembly in December, 1972, the first parliamentary election, under the



Constitution, to form a government was held in March, 1973.

Constitution limits power

The constitution, needless to say, can be read in many different ways, with various nuances and priorities. For me the Constitution is most important on two counts: it sets the goals and visions of the society we want in Bangladesh and for which the liberation war was fought and, secondly, it limits the power of those 'in the power'.

Almost all articles of the Constitution can be read as limiting the power of those 'in the power'. For example, the Constitution limits the President's power to two functions: nomination and selection of the Prime Minister and the Chief Justice, though on a few other matters he can have a limited say. Also, the President must strictly follow the Constitution, as otherwise, "The President may be impeached on a charge of violating this Constitution" [Article 52(1)]. Similarly, the Constitution defines and limits the functions and power of all the important posts/and positions in the country. Incumbent in any of these posts and positions can only do what the Constitution permits them to do, and also only in the manner prescribed by the Constitution.

The provisions which limit the powers of those 'in the power' most drastically and effectively are the Articles guaranteeing our fundamental rights. It's a different matter that those 'in the power' exceed the limit. Only last week the

killing of three persons in different police custodies have made headlines. This would not have happened if the police power were actually restricted by the Constitution which prohibits all kinds of torture and cruel, inhuman and degrading punishment or treatment [Article 35(5)].

Our official budget, the accounts of government's incomes and expenditures, is a law, passed by the parliament, as provided for by the Constitution. The government's fiscal powers are, thus, also limited by the Constitution.

One can go on and on to cite various other similar examples of how the Constitution limits the power of those 'in the power'. Ultimately, as the Constitution itself provides in Article 7, the power belongs to the people and not those 'in the power'. It is just that for a limited period (5 years) the people entrust a particular group to exercise the people's power, on behalf of the people, within the limits set by the people in the Constitution.

Goals and visions of the Society

The other fundamental aspect of the Constitution is that it sets out the goals and visions of the future prosperous society in Bangladesh. This vision is contained in Part 2 of the Constitution and this Part is called: "Fundamental Principle of State Policy". These policies provide, for example, that it is the responsibility of the State to take measures for securing to its citizens the provisions of the basic necessities of life, including food, clothing, shelter, education and medical care; or to provide guaranteed employment at a reasonable wage, and so forth. These visions are not limited to basic necessities only but also includes, for example, measures to conserve the cultural traditions and heritage of the people.

It's a different matter that this Part 2 has been subjected to numerous amendments, to transplant a different vision of the society. For example, the principle of secularism which had provided (in Article 12) for the elimination of communalism in all its forms as well as elimination of the abuse of religion for political purposes, and elimination of any discrimination against, or persecution of, persons practising a particular religion as subsequently been deleted from the Constitution. Hence, currently after Article 11 in the Constitution, the next Article is Article 13. Article 12 of the original Constitution has been deleted, but not replaced by a new Article.

Plea for a Constitution Day

I am sure there is no disagreement that we must govern ourselves in terms of rule of law, where the separation of power and independence of the judiciary are the cornerstones, along with due and respect for and guaranteed adherence to the fundamental rights of the people (irrespective of their religion, race, caste, sex or place of birth). And the powers exercised are only those which the people delegate to a particular group (political party/parties) and this delegation for a limited period (5 years) is affected through general elections.

These are all constitutional premises and promises and isn't it time, after 32 years of the adoption and coming into force of the Constitution, that we renew the pledge to be governed only in terms of the Constitution, once a year. A "Constitution Day" on 4th November (the date of birth of the Constitution) would be such an occasion to renew our pledge to ourselves to be governed democratically under the Constitution.

One can understand that those in power may not be very keen on designating the 4th November as the Constitution Day. Such a day would be a reminder of the limits of their power, and of the responsibilities cast upon them by the Constitution to exercise the power in manners and methods expressly dictated by the Constitution. However, such a day is necessary precisely for those very reasons, i.e., we the people have agreed to be governed only in terms of the Constitution. Any exercise of power beyond the Constitution is illegal, ab initio.

It shouldn't be out of context to note that we are almost afflicted with proliferation of "days". We hardly have a fortnight without some "day" or other to celebrate or commemorate. Various UN related "days"; environment (quite a few of these), housing, immunisation, peace, disarmament "day"s and so on are celebrated and 'covered' by the media with all kinds of messages from the high and the far.

Some organisations, for a few years now, have begun to arrange programmes and events on the 4th November to renew our pledge to abide by our Constitution. This now need to be done on a national initiative.

Dr. Shahdeen Malik, Advocate, Supreme Court.



LAW week

PM okays probe into judge's 'graft'

Prime Minister Khaleda Zia has sent the reference file to the president for formation of the Supreme Judicial Council to probe an allegation of misconduct against an additional judge of the High Court.

The president is likely to ask the chief justice soon to form the council headed by the chief justice and probe the allegation. Chief Justice KM Hasan on October 20 sent a file to the president for his approval for formation of the Supreme Judicial Council following the allegation that Judge Syed Shahidur Rahman had taken money from an accused in a woman's repression case to help him get bail. The president sent the file to the Prime Minister's Office on October 23 for approval. Supreme Court Bar Association President Rakanuddin Mahmud at a meeting of the Bar on October 1 alleged that Judge Shahidur received Tk 50,000 from a client for fixing a bail. -Daily Star, 29 October.

Murder case against OC

A murder case has been filed with the Court of the Chief Metropolitan Magistrate, Dhaka, against the former officer-in-charge (OC) of Khilgaon Police Station and a sub-inspector (SI) for beating a young man to death in police custody on October 25. Metropolitan Magistrate Emdadul Haq took the case into cognisance following a hearing and asked the Dhaka Metropolitan Police (DMP) commissioner to appoint an investigation officer of the Criminal Investigation Department (CID) to probe the matter. The police headquarters has also formed a three-member committee, headed by Deputy Inspector General (DIG) Abdul Mannan, to investigate the custodial death of Shakil Ahmed Chowdhury Sumon, a mobile phone trader at Meradia, Khilgaon. Two other members of the committee are Special Superintendent (SS) of Special Branch Mahub Hossain and SS of the CID Abdul Momin Mian Chisti. The probe body has been asked to submit a report by 1 November with recommendations to stop recurrence of such incidents, says a police headquarters press release. It may be mentioned that on 27 October, the OC of Khilgaon Police Station was withdrawn following the allegation of the custodial death. The case was filed by Nurjahan Begum, the victim's mother, against OC Entejar Rahman and second officer SI Mahubb. -Ittefaq, 29 October.

Jail Killing Case resumes

The Jail Killing Case has resumed after an eight-month stay, with the prosecution submitting a petition seeking further adjournment of the hearing for four weeks. The High Court stayed all proceedings in the case on January 26 following a petition filed by the prosecution for holding the trial in the High Court instead of the lower court. The petition to hold the trial in the High Court was rejected by the court on August 25. The prosecution submitted the petition for adjournment on the grounds that they wished to file an appeal with the Supreme Court against the rejection order of August 25. However, the court rejected the petition for adjournment after the hearing and ordered the prosecution to proceed with the case with the three prosecution witnesses who had appeared before the court. The court also removed 12 state defense lawyers as they were absent from the court yesterday and appointed two new state defense lawyers to conduct the case in their place. It may be mentioned that National leaders Syed Nazrul Islam, Tajuddin Ahmed, AHM Quamruzzaman and M Mansur Ali were killed inside Dhaka Central Jail on November 3, 1975. Kazi Abdul Awal, the then deputy inspector general (prisons), filed a case with Lalbagh Police Station the following day. Accused KM Obaidur Rahman MP, Nurul Islam Manzoor, Shah Moazzem Hossain and Maj (ret'd) Khairuzzaman are now free on bail, while Tahaeruddin Thakur, Lt Col (dis-

missed) Syed Faruk Rahman, Lt Col (ret'd) Sultan Shahriar Rashid Khan and Maj (ret'd) Bazul Huda are in custody. Accused Shariful Haq Dalim and 11 others have been absconding since the investigation into the case began. -Law Desk.

Death threat to kill Home Minister

The outlawed Purbo Banglar Communist Party (PBCP) has given death threat to none other than Home Minister Altaf Hossain Chowdhury, his family and relatives. The M-L faction of the PBCP also threatened not to spare any minister, police officer, and bureaucrats along with their family members for torturing the families and well-wishers of the party. A hand written press release was faxed to some local newspaper offices at 7:08pm on 17 October on behalf of the party's central committee. The release, which grilled Altaf for his recent comments on outlawed parties and deteriorating law and order in the country's northern region, was under signed by in-charge of PBCP's Khulna-Bagerhat region Tushar. The PBCP (M-L) warned of dire consequence if any action was taken against members of communist, 'revolutionary' parties and their families. -Bhorer Kagol, 20 October

20 mobile courts to watch law and order

The government has set up 20 mobile courts and formed 40 teams of strike forces backed by 5,000 to 7,000 personnel to ensure law and order and public safety during Ramadan in Dhaka from. The courts will also take action against hoarders, adulterated food sellers, traders charging more prices than fixed by the government, muggers, robbers and other criminals. Each court headed by a class one official with magisterial power will have jurisdiction over one police station out of the 20 in the capital, except for Airport and Cantonment police stations. The strike forces will rush to any spot to cordon off criminals and take them to the mobile courts, which will act immediately against them. The courts were also empowered to take action against transport workers for claiming extra fare and all other law-breakers and to remove illegal installations. Police, paramilitary Bangladesh Rifles, Armed Police Battalion and the Rapid Action Team will be involved in the drive. -Jugantor, 28 October

7 cops suspended for negligence

Seven police personnel including a Habildar have been suspended in Kushtia and Thakurgaon for negligence in duty. Our Kushtia correspondent reported that four policemen including Habildar Fakar Uddin were suspended yesterday. The rest are constables Delwar Hossain, Shamsul Huda and Tanzinur Rahman. They were on duty at Kushtia General Hospital where alleged outlaw Yeanim, accused in a murder case, was being treated under police custody. Yeanim was caught by people on October 21 at Harinarayanpur Bazar in the Sadar upazila and handed over to police after beating. But he escaped from the hospital. A BSS report from Thakurgaon said three constables of Ruhea police camp were suspended for negligence in duty during a dacoity in the area under Thakurgaon Sadar upazila. The suspended constables are Nazrul Islam, Farid and Rahman, police said. The dacoity was committed on Wednesday last near the police camp. -Daily Star, 28 October.

OC chargesheeted in rape case

The officer-in-charge of Jiban Nagar thana in Chuadanga has been chargesheeted in a rape case.

The investigating officer (IO) of the case submitted the charge sheet against Md Shah Alam under the Women and Children Repression Prevention Act in a magistrate court here recently. Alam is now in custody and under suspension.

Alam had raped a woman brought to his residence on 11 September to work as a domestic help. The two women -- Shahinoor Begum and Chotti Begum -- who took the woman to the OC's residence have also been chargesheeted. The OC was arrested on September 15 after the victim filed a case. -Prothom Alo, 26 October.

New labour law for tea sector in the making

Formulation of a comprehensive and updated labour law for the tea sector is underway to preserve rights of tea garden workers. This was disclosed on the concluding day of a two-day workshop of tea sector stakeholders, beneficiaries and government representatives on 24 October. The workshop, titled "ILO's Tea Sector Intervention in Bangladesh", was organized by ILO GENPROM (Gender Promotion) in collaboration with GENPROM-WEEH (Women's Empowerment through Employment and Health). It was said at the workshop that there were labour laws and policies, but their implementation to safeguard rights of workers, particularly those in tea sector, was not satisfactory. On the other hand, of the 48 labour laws in general, five were exclusively applicable for labourers in the tea sector, the workshop was told. As such, proper implementation and application of labour laws for tea garden workers was important, the speakers said. Moreover, out of 184 ILO conventions, only 33 have been ratified by Bangladesh. The speakers said tea garden workers were not getting their agreed upon salaries, pension and other benefits. Facilities for education, healthcare were insufficient and poor. Absence of sufficient education hinders labour migration from the tea sector while the sector can not absorb the increasing work force. There should be more jobs in the sector. But such a possibility is bleak as the export market is shrinking, rather than booming. Moreover, an educated work force is required for development of the sector, the speakers said. -Daily Star, 26 October.

2,000 acres land of armed forces grabbed

Encroachers have taken over 2,000 acres of land of the Armed Forces Board under the defense ministry. This information was revealed by a report of the ministry. Of the board's 3,000 acres in Gaibandha, Thakurgaon and Dinajpur districts, only 1,000 acres are controlled by it, said the report that came upon an instruction from the parliamentary standing committee on the defense ministry at its September 21 meeting. Frustrated at the finds of the report, the committee asked the ministry to form a committee to recover the lost land. It was also revealed that a large chunk of land belonging to army has also fallen to grabbers' hands. -Daily Star, 20 October.

Hearing on frigate case adjourned

A Dhaka court has adjourned till 05 November the hearing on the framing of charge against former prime minister Sheikh Hasina and five other accused in the frigate purchase graft case. Judge Rezaul Karim Khan of the Special Court for Dhaka Division ordered the adjournment following a time petition by Hasina. In the petition, lawyers for Hasina stated a criminal revision was filed with the High Court for quashment of the case and hearing on it will be held shortly. So, they prayed for adjournment of the hearing on the charge-framing. A petition for adjournment of the hearing was also filed with the special court yesterday by another accused, Abdul Awal Mintoo, president of the Federation of Bangladesh Chambers of Commerce and Industry. The court heard both petitions and granted the adjournment. -Daily Star, 21 October.

Amendments of the Constitution

By all counts, the constitution has been subjected to far-reaching changes from the mid-seventies to the late eighties, including changes in the four fundamental principles. Principles of socialism and secularism have been re-interpreted or deleted and the independence of the judiciary impaired through amendments. Most of the other changes have been characterised as 'for personal' and not 'national' reasons.

The Constitution, since coming into force on the 16th December 1972, has been amended thirteen times:

1. for changing the form of government from parliamentary to presidential and back again to parliamentary (Constitution (Fourth Amendment) Act, 1974, (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1986 (Act XXVIII of 1991));
2. twice for validating acts and deeds, and orders and laws passed during the martial law regimes (Constitution (Fifth Amendment) Act, 1979, (Act I of 1979) and Constitution (Seventh Amendment) Act, 1986 (Act I of 1986));
3. twice for qualifying an individual who was otherwise disqualified to hold a particular constitutional post (Constitution (Sixth Amendment) Act, 1981 (Act XIV of 1981) and Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991));
4. for the return of the Chief Justice to the Supreme Court (Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991));
5. for creating the post of Vice President and then abolishing it (Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively);
6. for limiting the terms for the office of the President and that of Vice President (Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991);
7. for extending the period to 120 days from 60 that may intervene between the end of one session and the first sitting of Parliament in the next session and then restoring the earlier provision (Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively); and
8. for providing a Non-party Caretaker Government before holding the general election for Parliament (Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996)).

9. Part VI that deals with the judiciary, the least "dangerous" part of the government, was amended at twenty-one different places.

Paraphrased from: Justice Muhiammad Habibur Rahman, "Our Experience with Constitutionalism", 2:2 (1998) Bangladesh Journal of Law, 115, at pp. 118-19.

Syed Ishtiaq Ahmed,

"It is never desirable to amend a constitution in the interest of individuals or the government in power. Yet several of the amendments to our Constitution are such as have been made sometimes in the interest of the individual and sometimes merely to keep a government in power."

From Syed Ishtiaq Ahmed: "The Constitution Journey of Bangladesh", Constitutional Day Lecture, 4th November, 2000, published in the Daily Star, 13th November, 2000.

Courtesy: ERGO, Legal Counsel.

READER'S queries



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: I would like your opinion and suggestion regarding my family affairs. I am married for about twelve years and I have two sons, one is 6 and the other is 2 years old. Recently my husband has married her women colleague without my consent. After this incident I left my husband and now staying with my parents. My children are with me. I have decided not to go back to my husband and divorce him. I want to know precisely what are the procedure(s) I have to comply to do that and is there any way to convict my husband for the second marriage without my consent? I also want to know who would be the legal guardian of my sons?

Farida Hamid, Green Road, Dhaka.

Your Advocate: I can realize the state of your mind at this critical moment. Fact remains that a sudden turn of events have made you stand face to face with dreadful realities of life and compelled to divert your positive thoughts and concerns into areas which you could never dream of. You are now thinking of divorcing your husband, taking penal actions against him and knowing the legal position as to the guardianship of your sons. As for your first question, The Muslim Family Laws Ordinance, 1961, section 8 empowers a wife, wishing to exercise the right of divorce delegated to her, to divorce herself in accordance with the procedure laid down in section 7 of the said Ordinance so far as those apply in case of a woman. That means you have to have power of divorce delegated by your husband for taking the privilege of this section. If you do not have the requisite power of divorce you have to file suit for dissolution of marriage in the Family Court.

Let us suppose that you have delegated power to divorce yourself from your husband. In that case you will have to give the Mayor of the Dhaka city corporation a notice in writing expressing in clear terms your having done so and a copy of the same to be served upon or mailed to the address your husband. Within thirty days of the receipt of the notice the Mayor shall constitute an 'Arbitration Council' for examining the possibility of reconciliation between the parties. Subject to reconciliation talak shall take effect on expiration of ninety days from the day on which the notice is delivered to the Mayor. In case the wife is pregnant talak does not take effect until the pregnancy ends.

So far as the penal action against your husband is concerned, he may be prosecuted for taking second wife without permission of the Arbitration Council to be given subject to your consent. Taking second wife without permission of the Arbitration Council is punishable under section 6 (5) of the Muslim Family Laws Ordinance, 1961 with simple imprisonment which may extend to one year or with fine which may extend to ten thousand Taka or with both.

As for the guardianship, the father is the natural and legal guardian of his children. You, of course, may maintain custody of your sons until they attain 7 years of age with proper right to visitation of their father. If you marry another person you may lose their custody.

Corresponding Law Desk

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