Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Hartal: Reflections on Law

By Ahmed Ziauddin

As the Court sits on March 1 to hear the parties, the whole country will look forward in trepidation that finally perhaps the hartals and its baneful effects will at least be tamed, if not totally eliminated. The Court must make issues clear and take firm position, based on law and Constitution. The politicians have disappointed the people, but the Court must not.

THE High Court Division of the Supreme Court of Bangladesh has finally decided to take-up the issue of hartal. It has issued a suo moto rule on country's two principal political parties and the government to show cause as to why pro-hartal and anti-hartal activities should not be declared a cognizable offence. In its rule, the Court asked the General. Secretaries of ruling Awami League and opposition Bangladesh Nationalist Party (BNP), the Secretaries of Ministry of Law and Parliamentary Affairs and Ministry of Home to explain why police should not be directed to take action in the event.

In issuing rule, the Court invoked its jurisdiction under Section 561-A of the Criminal Procedure Code 1898, which empowers and authorises the High Court Division "to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure ends of justice". Known too as inherent power of the High Court Division, according to the jurists, this law invests the High Court Division "with widest jurisdiction to pass orders to secure ends of justice and for that purpose to entertain application not contemplated by the Code." Unlike Indian example, the Court in Bangladesh has acted on its own.

Backdrop

While issuing the rule, the Court referred to a Bangla national newspaper and of its 10th to 12th February 1999 issues. Over the days between February 9-11, the opposition BNP observed 60 hours of national hartal causing, according to news reports, at least 6 deaths and scores of injuries including law enforcement officials.

BNP has also finalised further programmes hartals including 66 hours hartal from February 23 to 25. BNP reportedly has also set strategy to "ensure strong picketing during 66 hour hartal, especially in areas of ruling party's showdown". It has also decided to instruct activists to first try to picket peacefully and to be defensive. However, the activists can be offensive if the ruling party tries to obstruct them as in the past. Judging by the words, "offensive", "defensive" etc; BNP appears to be preparing for major confrontation. In January also, BNP observed 18 hour hartal extended till midnight.

Hartal, however, had been an important feature in political parlance of Bangladesh. Usually the political parties who remain out of government resort to hartals. Awami League, Jatiya Party and BNP all reversed roles and supported and opposed hartals depending on whether they were on or off the saddle.

Politics and Hartal

It will not be an exaggeration, as one observes Bangladesh politics, to equate between politics and hartal. In fact, street and floating children, who form frontline soldiers on hartal days , perhaps believe hartal as politics. Equally, many foot soldiers of the political parties understand politics be so. Political leaders also maintain hartal as a legitimate weapon.

The party in power has always preached against hartal and successive governments have even calculated costs of hartals. In recent time, Jatiya Party was first to put a figure on loss at hartal. This was followed by the BNP governments estimate. The latest figure coming out of the present government sources indicate a loss of Tk.180 million per hartal hour.

Intimidation and Violence

Intimidation and violence has become synonymous to hartal in Bangladesh. While reporting, newspapers used phrases like, hartal was observed etc. But now, increasingly the word "enforced" has replaced the word "observance' to reflect true nature of hartal. Hartals are now indeed imposed on the general populace. Activists join hands with members of criminal syndicate to ensure the enforcement of hartal. Hartal also provide a field day for the activists and criminals when anything goes; from forcible stripping of cloths to public execution.

In a recent touching commentary, Daily Star's editor has all but begged to the leaders of Awami League and BNP to cease the politics of violence and stop criminalisation of politics. While urging, he merely has re-stated sentiments of his readers. He sited two examples; killing of a pro-hartal picket Sajal by an anti-hartal activists and public burning of Muhammad Ali, a rickshaw peddler by BNP men. He has maintained that these killings are simply "executions" carried out by the parties concerned. He questioned whether parties can avoid moral responsibilities for these executions.

Legal Status of the Political Parties

In Bangladesh, not only the criminals commit crime but the people associated with or recruited by the political parties carry out all kinds of criminal acts. One cannot always say with certainties that whether the political activists indulge in crime or that the criminals join the political parties for protection. It is nonetheless indisputable that political parties do provide safe heavens for every kind of criminals; from rapists to loan defaulters.

The question however is the legal liability of the political parties; that how far political parties are amenable to law. For example, whether a shopkeeper who shuts his shop down for fear of hartal enforcers can claim compensation for loss of earning from the political party that called the hartal ? Or is it possible that party leaders can be criminally hold responsible for crimes committed by their cadres?

Political parties have Constitutional basis in Bangladesh. Bangladesh Constitution mentions political parties and in Article 70 even provides protection to certain interests of the political parties. Article 70 states that if "A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against his party".

Therefore, for all purposes, political parties have got legal personalities. Thus the parties can sue and can themselves be sued. Political parties can also be held responsible for criminal conducts.

Using Police for Political Purpose — A Common Phenomenon for Bangladesh. — Star file photo

High Court Division's Rule

What the High Court Division has demanded from the recipients of its notice is to show why pro-hartal and anti-hartal activities should not be declared a cognizable offence. The Court however has not impugned hartal itself. It has not questioned legality of hartal, but activities associated with hartals.

From the rule, it also appears that the Court has taken an approach to deal with criminal aspects of hartal, of its forcible enforcement and equally forcible attempt to break the hartal. The Court wants to ascertain whether pro and anti-hartal activities constitute a cognizable offence.

Cognizable offence generally means an offence for which a police officer may in accordance with Code of Criminal Procedure or under any other law, arrest without warrant. In other words, the Court wants to hear , pro and anti-hartal activities, if found a cognizable offence, why the police should not be directed to take action.

Un-chartered Water

With this rule, the Court has stepped into areas that it has never addressed before. But once there, the following issues should be looked at :

the legal status of the political parties,

legal liabilities of the political parties,

rights of the political parties vis-à-vis fundamental rights of assembly and association,

whether political parties have higher rights,

nature of relationship in law between a leader and worker who follows command,

legality of hartal,

hartal and crime

hartal and criminality

adequacy of present laws

compensation for damage or loss resulting from hartal to be paid by the party calling hartal.

The Court will also hear arguments on constitutionality of hartals based on Article 37 and 38 of the Constitution. Article 37 ensures freedom of assembly and Article 38 guarantees freedom of association. The Court most probably have to dissect between legality and criminality of hartals, and pronounce on acceptable and legal norms

As the Court sits on March 1 to hear the parties, the whole country will look forward in trepidation that finally perhaps the hartals and its baneful effects will at least be tamed, if not totally eliminated. The Court must make issues clear and take firm position, based on law and Constitution. The politicians have disappointed the people, but the Court must not.

The writer teaches law at Brussels Catholic University.

Politics shun violence - does it remain a dream for ever? — Star File Photo

BOOK REVIEW

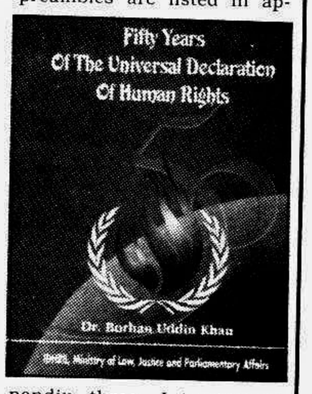
Fifty Years of the Universal Declaration of Human Rights

An In depth Study on the Global Declaration

By A. H. Monjurul Kabir

THE Universal Declaration of Human Rights (UDHR) conceived as a common standard of achievement for all peoples and all nations and having provided the basis for the development of the international covenants on human rights, has been and rightly continues to be a fundamental source of inspiration for national and international efforts for the protection and promotion of human rights and fundamental freedoms. Considering that the year 1998 would mark the fiftieth anniversary of the UDHR, a wide range of initiatives was taken globally at different levels. The Government of the People's Republic of Bangladesh under its Institutional Development of Human Rights in Bangladesh (IDHRB) Project of the Ministry of Law, Justice and Parliamentary Affairs also contributed though in a small scale to this worldwide commemoration. It published an in depth study on various aspects of the UDHR. Titled as 'Fifty Years of the Universal Declaration of Human Rights' the study first of its kind in Bangladesh, endeavours to cover the whole gamut of the declaration. The study on the occasion of 50th anniversary undertakes to determine its limited scope, the impact of the Universal Declaration of Human rights at the international, regional and national level. Chapter 2 outlines the relationship of Bangladesh with the United Nations by elaborating its membership history and then briefly establishes its ties with the UDHR. Chapter 3 traces the historical basis of the Universal Declaration and its drafting history while chapter 4 provides an overview of the Declaration and its significance. Chapter 5 documents chronologically human rights initiatives of the United Nations since the adoption of the UDHR 1948 until the Vienna Declaration and Programme of Action 1993 Chapters 6 to 9 compare various Conventions on human rights with the UDHR.

The object is to focus reflection of the rights mentioned in the Declaration to these Conventions, which were adopted subsequently. Thus chapter 6 provides a comparative analysis of the European Convention on Human Rights and the Universal Declaration. Chapter 7 draws a comparison between the two United Nations Covenants of 1966 i.e. International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights with the Universal Declaration. Similarly chapter 8 draws comparison between the Universal Declaration and the American Convention on Human Rights while chapter 9 deals with the African Convention on Human and People's Rights. Chapter 10 highlights the endorsement of the Universal Declaration of Human Rights in the national consultations of the world while chapter 11 presents the endorsement of the United Nations Charter. The endorsement of the status of international law in the national Constitutions of the world has been detailed in chapter 12. Chapters 13 to 15 compare Constitutions of three countries i.e. India, Pakistan and Bangladesh with the Universal Declaration. It aims to show how far these have relied on the Universal of Human Rights in guaranteeing rights to their citizens. The conclusions of the present study are depicted in chapter 16. Five appendixes are added to this publication. Appendix one contains some important international instruments on human rights. Selected regional human rights instruments are included in appendix two. International human rights instruments having reference to the UDHR in their preambles are listed in appendix three. International human rights instruments ratified and acceded to by the Government of Bangladesh are enumerated in appendix four. Appendix five specifies ratification status of major international human rights instruments (as of 31 December 1997).



Dr. Borhan Uddin Khan, an Assistant Professor in the Department of Law, University of Dhaka authored this scholarly study. Dr. Khan, a former UN/UNITR fellow in Public International Law, while critically examining the different directions of the declaration rightly observes: The Universal Declaration has its place in history and contemporary international relations because it draws from the past without being restricted to problems of the past. It sets standards for present-day international law. But not being a treaty, it retains sufficient flexibility to be adopted to current problems with which humanity is faced. Thus, after fifty years it still remains a goal to be achieved. The standard of the publication is quite impressive. But like most other government publications, it still beyond the reach of the commoners due to apathetic and flawed marketing policy. Such indifferent approach may frustrate the very object of the publication.

Fifty Years of the Universal Declaration of Human Rights
Author: Dr. Borhan Uddin Khan
Publisher: IDHRB, Ministry of Law Justice and Parliamentary Affairs
Price: Tk.500 (ISBN 984 31 0355 6)

Muslim Family Law : The Latest Assault on Society

By Khaled Ahmed

Allama Iqbal had written to Maulana Suleiman Nadvi to ask if it was right that Hazrat Umar as caliph had suspended the Quranic punishment of cutting of hands. In today's violent environment, it has become almost impossible to defend legal reform in favour of women. Important social development away from child marriage, slavery and unfettered polygamy may be undone simply because this retrogressive step favours men and further lowers the status of women.

THE Federal Shariat Court has started hearing petitions against the 1961 Muslim Family Law Ordinance in Lahore. Three judges, led by Chief Justice Mian Mahboob Ahmad, are hearing objections put forward by three Islamic scholars: Dr Nooruddin Jami of Bahauddin Zakariya University Multan, Maulana Fazlur Rehman, Naib Amir of Jamia Ashrafiya, Lahore, and Dr Mufti Ghulam Sarwar Qadri of Jamia Rizvia, Lahore. The plea before the Court is that sections 4,5,6,7 and 12 of the Muslim Family Law Ordinance (1961) be declared repugnant to Islam.

Section 4 of the Ordinance, after reinterpreting the tradition based on the Quran, had laid down that orphaned grandchildren may receive share from the property of their grand-parents. Section 5 had laid down that a nikah be registered with the union council to be legally valid. Section 6 had laid down that no married man contract a second marriage without the permission of Arbitration Council which shall ensure that the man had good grounds for second marriage and had obtained his first wife's permission to do so. Section 7 had laid down that a divorcing husband shall send notice of divorce to the union council and supply a copy of it to the divorcee wife, after which an arbitration council would try for reconciliation between the two parties. Section 12 had banned child marriage and set a minimum age for the marriage of boys (18 years) and girls (14 years), although marriageability is still adjudged many different ways in Pakistan.

The petitioners have opposed the above provisions of the Ordinance, in particular the irreducible legal requirement to register nikah and divorce at the union council, holding that unregistered divorce is not be invalid. They also favour the unfettered right of men to contract additional marriages without intercession of the union council and consent of the first wife. They oppose the ban on child marriage and consider the right of the orphaned children to inherit from grandparents' property as being against the Quran. As for the nikah document, they propose that each cleric solemnising the nikah be allowed to issue a personal certificate for legal purposes.

Codification Problems of Islamic Law

Islamic law is embodied in the 'fiqh' (case law) of the various historically revered imams (jurists). The imams differ in their consideration of the family law and have handed down verdicts rendered under different legal philosophies. For instance, the Hanafi fiqh does not mandate a 'wali' (guardian) for a daughter's marriage but the Maliki law does. Hanafi law has an elaborate doctrine about 'kufu' (suitability) under which an incompatible marriage can be undone, while the Maliki law is less developed on 'kufu'. Hanafi law was sought to be codified under Aurangzeb but the work of several hundred jurists, called Fatawa-e-Alamgiri, seems too inclined to favour the Mughal elite to be useful for today's egalitarian society.

No state can function without codifying its laws. And no codification is possible without suiting Islamic legal sources to modern times. This is where the problems arise. Reinterpretation of the Quranic 'nas' (clear edict), as achieved by the revered imams in the case of the Quranic modalities of divorce, is a case in point. (The petitioners before the Federal Shariat Court have objected to three simultaneous 'talaqs' allowed by fiqh, thus underlining a return to the 'nas' of the Quran.) It was the principle of 'nas' of the Quran that Allama Iqbal sought to reinterpret in his Sixth Lecture. Before him, Sir Syed had recommended this kind of reinterpretation. Pakistan's hudood laws suffer from errors of application because they are too literalist: like the law of the cutting of hands, the law about blood-money to be paid for death through accident, and the notorious Zina Ordinance that equates rape with fornication and thus victimises the raped woman.

History of Codification Through Family Law Ordinance

The British left the Muslim Family Law pertaining to nikah and divorce uncodified. The problems that arose were thus bequeathed to the judiciary to sort out. Evidence of nikah was established through unreliable sources and divorce was allowed in the chaotic manner that characterised the male-dominated Muslim society. After 1947, after prime minister Muhammad Ali Bogra remarried against the wishes of his first wife (who was an APWA activist), an effort was made to codify laws pertaining to nikah, divorce and remarriage. In 1955, the Commission on Marriage and Family Laws prepared a Report safeguarding, inter alia, the rights of the woman. The Commission was headed by Justice Abdur Rasheed. It comprised seven members, three women and four men. The Report was written by Justice Abdur Rasheed while a dissenting note to the Report was appended by Maulana Ehtesham-ul-Haq Thanvi, the cleric member of the Commission. The said 'alim' was descended from the famed author of Bahishti Zevar, a guide-book for the married woman that denies her fundamental rights.

The resistance to reinterpreting the Quranic law is intense but the truth of the matter is that Quranic law has been modified and reinterpreted in the past to suit men. The method of 'talaq' accepted by the Ordinance is violative of the method prescribed in the Quran.

The Commission accepted the principle that Family Laws had to be liberalised in the light of modern times, but when it came to making recommendations it inclined to a conservative interpretation. For instance, it did not outlaw divorce pronounced by the husband in violation of the Quranic 'nas'. But it did rule that nikah, to be of legal value, had to be registered. Its other recommendations have been given above. The Report was passionately opposed by the ulema and orthodox Muslims in 1956 for being against Islam. The civilian governments after 1956 avoided legislating on the Report, but General Ayub Khan made selected recommendations of the Report into law through an ordinance in 1961. A resolution against the Muslim Family Law Ordinance was subsequently presented in the National Assembly but was not passed. The Ordinance never carried consensus among the ulema and was considered by them as being against Islam. It was never presented in the parliament for proper legislation but stood as an indemnified law (by the elected parliament of 1970) of the Ayub era, like the Zina Ordinance of the Zia era, as indemnified by the 1985 parliament.

Non-acceptance of any reinterpretation of Muslim law to suit modern times has been the dominant trend among Indian Muslims. The famous Sarda Bill (made Act in 1928) against child marriage was supported by both Allama Iqbal and Quaid-e-Azam Muhammad Ali Jinnah in the 1920s while the ulema opposed it (including Maulana Muhammad Ali Jauhar). Marriage of under-age individuals is generally opposed by Pakistanis today who have tacitly superseded the fiqh version of the case, but the ulema have continued to support it as a part of the tradition of the Prophet PBUH. Errors in the enforcement of hudood laws by civilian governments have given grounds to the ulema, some also organised as militant jehadi outfits, to reject democratically elected governments as being too unacquainted with Islam to enforce real Shariat.

Conflicting Case Law on the Ordinance

Pakistani judiciary has had to set aside the condition of registration of nikah under Section 7 of the Muslim Family Law Ordinance in a number of cases where couples were saved from the punishment of stoning to death (not ordained by Quran). The Sindh High Court in 1988 decreed that since an unregistered nikah was acceptable under Shariat, the accused couple were not living in sin. Subsequently the Federal Shariat Court, accepting the Sindh High Court verdict, ruled against Section 7 of the Ordinance. The Federal Shariat Court didn't have the mandate to adjudicate on Family Laws but in 1985 the 8th Amendment inducted the Objectives Resolution into the main body of the Constitution and gave the Court the justification to consider Family Laws too. In 1993, the Supreme Court refused to accept the Objectives Resolution as a supra-constitutional provision. The PML government wants to make Shariat the supreme law in Pakistan and is therefore in favour of the Federal Shariat Court hearing the Family Law case while defending the Ordinance.

While listening to the defence, the honourable Federal Shariat Court was pleased to set aside the Report of the Council of Islamic Ideology recommending that provisions against polygamy be further strengthened in Section 6 of the Muslim Family Law Ordinance. The ground taken by the Court was that the Report had no effect and therefore could not be considered as binding. Conservative 'fiqh' inclines to the Quranic reference to polygamy in a number of verses but ignores verses that clearly prefer monogamy to polygamy. In 4:3 the Quran says '...but if ye fear that ye shall not be able to deal justly with them then only one, or that which your right hands possess, that will be more suitable to prevent you from doing injustice'. Then in 4:129, the Quran says, 'Ye are never able to do justice between wives even if it is your ardent desire'. Many scholars, including Syed Abul Ala Maududi who favoured the contents of the Muslim Family Law Ordinance, have inferred from these verses that the state should codify law against polygamy accordingly, but the conservative clergy is of the opinion that the above Quranic verses still do not constitute a clear order. In Tunisia and Turkey polygamy is banned under Muslim Family Law.

A Retrogressive Environment

Instead of reinterpreting the Quranic law and codifying it to suit the circumstances, the trend in Pakistan is to undo the progress made towards codification in the past. The assault on reform is intense and can be violent. The fundamental problem is that while men are free to be polygamous, women are not. Under the Ordinance the bride is required to state in the nikah-nama that she is unmarried, but the bridegroom is not. Thus men are not held liable if they misinforms about their marital status. The resistance to reinterpreting the Quranic law is intense but the truth of the matter is that Quranic law has been modified and reinterpreted in the past to suit men. The method of 'talaq' accepted by the Ordinance is violative of the method prescribed in the Quran.

Allama Iqbal had written to Maulana Suleiman Nadvi to ask if it was right that Hazrat Umar as caliph had suspended the Quranic punishment of cutting of hands. In today's violent environment, it has become almost impossible to defend legal reform in favour of women. Important social development away from child marriage, slavery and unfettered polygamy may be undone simply because this retrogressive step favours men and further lowers the status of women.

The writer is a contributor to the Friday Times, Lahore, Pakistan.

law watch

Times Square Restaurant Settles a Bias and Harassment Suit

By Katherine E Finkelstein

THE Times Square Brewery and Restaurant has agreed to settle a Federal lawsuit brought by former employees charging sexual harassment and discrimination in hiring. The settlement, disclosed Monday, requires the restaurant to pay $450,000 to $650,000, but does not require an admission of wrongdoing. The complaint was filed by the Equal Employment Opportunity Commission in Federal District Court in lower Manhattan on Aug. 28, 1997.

The case was notable for its swiftness: two and a half years from complaint to resolution, said Lisa D. Sirkin, senior trial lawyer for the Federal agency. The 27 employees found to have been discriminated against will divide $250,000 of the settlement, nearly $9,300 per person. The remainder is to be disbursed by the agency.

Bruce Cohen, a spokesman for the restaurant, denied that it had done anything wrong. He said the settlement was a "down and dirty business decision" to settle the suit to avoid the costs of litigation. He said the restaurant expected to pay only the minimum amount of $450,000, because it anticipated that a hotel might be built on the site, at which point the restaurant would close.

The case centered on Helen Liftig, the managing partner, who was accused by male employees of forcibly tucking in their shirts, squeezing their buttocks, feeling their thighs and using homophobic and racist slurs.

One litigant, Pradeep Kawatra, who was a night manager at the restaurant at 160 West 42d Street, said he first approached the equal employment agency in summer 1996 after Ms. Liftig told him that she preferred "Waspy" employees, referring to Caucasians. Kawatra, an immigrant from India, said in an interview yesterday that he later had to ask his wife what "Waspy" meant. Ms. Liftig also made disparaging remarks about several waiters, busboys and others that he had hired to work in the 227-seat restaurant, Kawatra said. He recalled that she criticized one waitress by saying, "She's so black, she looks like she just came out of Africa yesterday."

Kawatra recalled yesterday that after he fired one man he had hired because of Ms. Liftig's criticism, the man — who had apparently given up a job that paid well to work at the brewery — returned to borrow money to feed his children. "I couldn't sleep for two nights after that," said Kawatra, who then took his complaints to the Government.

Kawatra said he was fired after the employees staged a walk-out over working conditions and he was identified as a whistle-blower.

The writer is a contributor to the New York Times