

LAW in-depth

Ban on Ahmadiyya publications Constitutionality of the decision

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Democracy is the rule of those who get the highest number of votes cast in an election. In no way democracy is a rule of majority. The four party alliance, now running the administration of Bangladesh, got 48% votes of the total. Rest of the people (52%) did not confide them to run the state affairs. Nevertheless it is the democratic system developed and practised for centuries through which people express their choice and confide a political party, for several years, to run the state apparatus, which gets highest votes in the election, though it does not represent majority. After the election the winning party, democracy desires so, should hear voice of all and execute their demands as far as practicable through balanced state policy.

Among the political systems hitherto emerged, democracy is the best. It is unique not because it gives equal status to all the citizens in terms of voting rights, but it ensures rights of all the diverse groups and cross-section of people of any given polity. The efficacy of democracy is tested by how far it is able to protect the rights of minority. Functioning of democracy is characterised by expression of dissenting opinion and ventilation of resentment. Tolerance and respect for others belief pertain to the fundamental teaching of democracy without which its continuance will be in jeopardy.

Minority rights in Bangladesh are protected by articles 27, 28, 29, 31, and 41 of the Constitution. There are, broadly, two types of minorities, religious minority and ethnic minority, who constitute almost 15% of the total population. In spite of the constitutional safeguards, minority remains deprived most of the time. Ethnic minorities in Chittagong Hill Districts had organised armed resistance in response to the policy of state earlier on, which they did not accept. The Hindu community has been subjected to threat, persecution, killing, rape etc. in different times. Recently another religious minority, Ahmadiyya Jamaat, has experienced ban on their publications. The government by an order on January 8 proscribed all publications of Ahmadiyya Jamaat igniting severe criticism and protest.

Article 41 of the Constitution guarantees freedom of religion as (a) every citizen has the right to profess, practise or propagate any religion; and (b) every religious community or denomination has the right to establish, maintain and manage its religious institutions. Citizens can enjoy freedom of religion subject to law, public order and morality. 'Subject to law' in no way can be interpreted to take away the right to profess, practise and propagate religion. Legislature can only regulate the manner of how to profess, practise, and propagate religious belief and the functioning of religious institutions. (Jibendra Kishore Vs. East Pakistan, 9 DLR (SC) 21.)

Religion is such an influential institution that it has become inevitable part of human existence. Every religion developed its own ideas about human creation, their destiny and gave a code for this mundane life. The uniqueness of religion is that one cannot always explain it by reasons, it is a cluster of beliefs to which most of the human beings take resort. Religions are numerous, their sub-sects and ideas are so diverse that religion should be left at the private sphere of citizens, state has nothing to do with the religions of the citizens. Most of the western countries, taking lesson from their medieval experience, incorporated the principle of secularism, the principle which was successfully imprinted in the original Constitution of Bangladesh. Madina Pact, concluded under the authority of Prophet Muhammad (SM.), is widely cited as a good example of secular practice.



PHOTO: AFP

In a modern state religious issues are kept beyond the interference of state, a citizen can believe in a religion, or he/she may be a non-believer. Faith and belief in specific doctrines are very much part of the religion. (Commissioner, HRE Vs Lakshmindra, AIR 1954 SC 282). The freedom of religion includes the right to hold no religious belief at all. The constitutional guarantee for freedom of religion goes so far that it also includes anti-religious programmes. (McGowan Vs. Maryland, 366 US 420).

Let us examine under which law and authority government has proscribed the publications of Ahmadiyya Jamaat. When taking the decision government considered article 41 of the Constitution and section 295A of the Penal Code. Government policy makers argue that government may ban any publication which hurts the religious belief of others and without which peaceful environment of society cannot be maintained.

Government decision does not seem to be correct because the decision is, at the first sight, violative of article 39 and 41 of the Constitution. By this decision government has taken away the right of the Ahmadiyya community to profess, practice and propagate their religious belief guaranteed by article 41 and their freedom of speech, expression and its publication guaranteed by article 39. Though these rights have been given on the condition of law, public order, morality etc, but there is no sign or strong indication that religious belief of Ahmadiyya community and their publication hurt feelings of majority or constituted considerable threat to public order.

There was no referendum or any other credible evidence that majority people demanded ban of Ahmadiyya publication, which government could cite to substantiate their decision. Only some small religious groups, who hold at best 7-8% support of the total population, masterminded the whole issue of banning Ahmadiyya publication. The way some extremist

groups organised violent assembly is punishable under the Penal Code. Instead of controlling their violence and penalising them government bow down to their grossly unreasonable demand and rewarded them by banning all the publications of Ahmadiyya community.

Government's decision suffer from a serious contradiction because of its inherent lacuna. The extremists demanded to declare Ahmadiyya community non-Muslim and ban all their publications. Government only banned all the publication of Ahmadiyya community recognising their religious identity valid as government did not declare them non-Muslim. Here lies the basic contradiction of governmental decision. If the government considers the religious identity of Ahmadi Jamaat valid, they must have the constitutional right to profess, practice, and propagate their beliefs and make them published. Government on the one hand let them to practice their religion, on the other proscribes to profess and propagate the same. This basic contradiction indicates that government did not consider the matter judiciously.

Tolerance is the basic lesson of democracy. Ventilation of dissenting view is the safeguard of a vigorous society. Without the protection of minority rights, a democratic polity cannot sustain itself. Its solidarity and progression depend on the recognition of minority groups and peaceful enjoyment of their beliefs and rights. Muhammad (SM), Prophet of Islam, concluded Madina Pact with Christians, Jews and even with infidels, against whom prophet continued his life long struggle. He followed the principle of secularism for ensuring a peaceful environment for all existing communities, the principle which deserves universal utility for any country having many religious and ethnic denominations. Bangladesh is not an exception to it.

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LAW alter views

Separation of judiciary: the sooner, the better

HYBAT JAN CHOWDHURY

Every nation has a legal framework of its own, i.e. the Constitution. It sets the basic rules by which the country is to be governed. Among many other essential fields in any type of governance the one that is considered absolutely indispensable for its healthy existence, sound stability, smooth running and unhindered continuation is the country's legal system. That is why in any democratic system we have the legislature where rules are framed and laws are enacted keeping in mind the welfare and well being of the people. Effective legal system, both on paper by legislation and on the ground by its implementation, is viewed as most vital in a true democratic governance. It has to strictly follow the law of the land, uphold complete independence and remain free from any interference from any quarter.

When one speaks of legal matters, legal system, legal problems and legal implications, one just cannot loose sight of the judiciary or the judicial system, because one is intrinsic part of the other and both together constitute an integral entity. One just cannot function without the other. A sound judiciary is the pre-requisite to an effective legal system. Here lies the essential and most vital need for an independent judiciary, the complete separation of judiciary.

The demand for the separation of judiciary from the executive is not a new one. People, those who matter most and are genuinely concerned have all along been voicing their

concern and worry. We have already heard from the minister of law, justice and parliamentary affairs that it would take years to accomplish it. Is it so? How long people have to wait for such a thing to happen? Enough explanations and excuses have been put forward in order to justify the inability or delay. But why? Why the party when in power is found reluctant but when in opposition is seen venting loud cries for it?

The absence of an independent judicial system leads to many types of interference from various quarters that would impede the appropriate functioning of the judiciary and eventually fails to draw the people's trust and confidence that one expects to see. But the party in power finds it useful to meet its needs of the time. Hardly, if ever, do they realise that such a situation often throws the country's legal system into disarray and that is exactly where we have sadly found ourselves at present. And when the country's legal system gets into such a state one could clearly see why and how the country's law and order situation is falling into such a pathetic plight. People find themselves helpless and now appear to have resigned to their fate although some faint hopes, even remotely, keep on lingering in their hearts and minds that some day their dream of a peaceful life might somehow be fulfilled.

Few days back a media report revealed that some accused got bail at a time when the hearing of those cases was taking place at the trial court. The report has also said that

some life-term convicts in seven separate murder cases have been released on bail recently. This reminds us of some locally familiar but popular sayings such as "pardon after seven murders", "cat turning into saint after killing seven mice". Once such people i.e. the accused and the convicts move around scot-free, would it contribute to the improvement of law and order situation? And would the families of victims and witnesses of those cases be protected from undue influence, threat or harm emanating from the accused and the convicts? Perhaps the consequences of such actions have been overlooked or ignored by those who matter most and thus obviously fail to perceive what appalling results would ensue following the release of these convicts.

Once the country's law and order situation goes out of control no amount of joint operation of police, army, BDR could ever bring back the required discipline and order. We are in dire need of proper discipline in every sector. Any legal action to bring in such kind of discipline ought to have some effective umbrella of a potent legal system, not only on paper but also on its implementation in the field. This is more the reason that the country's judicial system be separated from the executive and made completely independent without any further delay. The sooner we accomplish it the better it would be for the people and the government alike.

The author is a former senior official of International Civil Service.

RIGHTS corner

Execution of child offenders

Time to end the practice

AMNESTY INTERNATIONAL

The execution of people for crimes committed when they were children must finally be consigned to history. Amnesty International said as it launched a two-year action aimed at stopping such executions by the end of 2005.

Child offenders are people convicted of crimes committed when they were below the age of 18. In a report, Amnesty International documents executions of such offenders in eight countries since 1990: China, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the United States of America, and Yemen. Most of these countries have now changed their laws to ban the use of death penalty against children, leaving the USA as the only country which openly acknowledges executing child offenders and which claims for itself the right to do so.

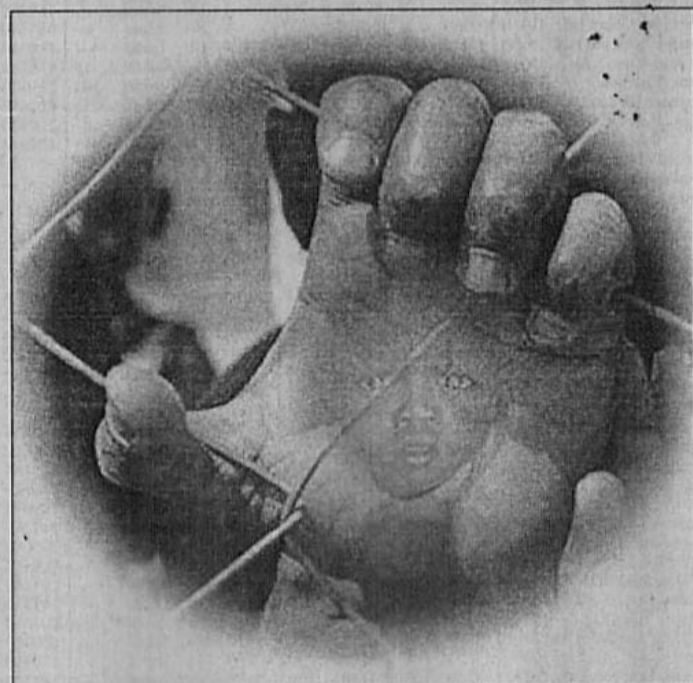
"The USA promotes itself as global human rights champion, yet it accounts for 13 of the 19 known executions of child offenders reported since 1998" Amnesty International continued, "As other violators drop away, the United States could be said to be the least progressive country in the world on this issue."

Three more prisoners -- Edward Capetillo, Raul Villarreal and Efrain Perez -- are scheduled to be executed in the United States before the end of June for crimes committed when they were 17.

In another report Amnesty International highlights the case of Nanon Williams, on death row in the USA for a crime committed when he was 17. His case also illustrates wider problems in US capital cases, including inadequate defence representation and the state's use of unreliable evidence.

Amnesty International is calling for Nanon Williams to be granted a new trial to answer the doubts about his guilt that have arisen since the trial. This time, in line with international law, the death penalty should not be an option.

The Inter-American Commission on Human Rights has concluded that the prohibition on the execution of child offenders has become a norm of jus cogens,



binding on all countries, and equivalent to the ban on torture and genocide. A recent meeting of Nobel Peace laureates described the execution of child offenders as "unconscionable". Four US Supreme Court Justices, one short of a majority, have said that the execution of people who were under 18 at the time of the crime is a "shameful practice" and a "relic of the past".

Characteristics of youth such as immaturity, impulsiveness, poor judgement, susceptibility to peer pressure, and a vulnerability to the domination or example of elders, together with a young person's capacity for rehabilitation and change, lie behind the global ban on the use of the death penalty for the crimes of children. Scientific evidence indicates that brain development continues into a person's 20s.

"Killing child offenders is to kill hope for the future. Almost every country in the world has abandoned this counsel of despair. The minority must be persuaded that they are operating on the wrong side of history," Amnesty International concluded.

A long-standing principle of international law prohibits the use of the death penalty against child

offenders, those who were under 18 years old at the time of the crime. Today, 192 countries have ratified the UN Convention on the Rights of the Child, one of the treaties which ban such executions.

Since 1990, there have been 34 executions of child offenders recorded worldwide in eight countries, 19 of them in the USA. Of the eight countries, Yemen, Pakistan and China have now abolished this use of the death penalty, although there are still some problems in enforcing the law in the latter two. A bill raising the minimum age for the imposition of the death penalty to 18 was approved by the Iranian parliament in December 2003 and is now awaiting approval by the country's Council of Guardians. The Democratic Republic of the Congo has abolished the special military courts that resulted in a child being executed in 2000. Amnesty International has not recorded any such executions in Saudi Arabia since 1992 or in Nigeria since 1997. Child offenders also remain under sentence of death in the Philippines and Sudan.

Amnesty International is a UK based international human rights body protecting and promoting human rights worldwide.

HUMAN RIGHTS advocacy

Breaking the chains of impunity

BARRISTER M. MOKSADUL ISLAM

HUMAN rights are meant to be equal for all human beings and there is no excuse for making different law for different groups of people. And most important of all fundamental rights, a citizen enjoys, is the right to life. Life is so precious to everyone that all other fundamental rights are meaningless without it. Sadly this right is under threat always. No one should be allowed to take someone's life without due course of law. Extra judicial killing, without being accountable for, is simply inexcusable and can never be allowed under any circumstances whatsoever.

Right to get justice is next important fundamental right. In order to ensure justice our democratic institutions should be upgraded to people's institution which would work for the betterment of the people. No democratic institution should suppress the people and take away their fundamental rights.

Violator of human rights, whatever his position is, should be brought to book. No one is above law and makers of the law should not consider themselves beyond law.

When machineries of the justice keepers become violators; leaving the victims and their families with agony and grief in vain; humanity cries with them. Indian Supreme Court observed in a case reported in AIR 1997 SC 610 that "If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'."

Those who are violating our fundamental rights are, apparently, far beyond the reach of their victims. Is there any difference between members of a disciplined force and terrorists when both torture and kill others ignoring law? All these acts can only be described as atrocities. Former one is patronised or protected by the State and the later one is patronised by some godfather. If the former group can be indemnified; one day time will come when godfathers will press for the indemnification of the later group.

Our democracy still is in its primary stage and yet to take an institutional shape. We failed to give our citizens proper education they need to understand democracy. The main feature of democracy is the voting right. Sadly this voting right can be purchased like any other commodities in the market. As a result it is very easy, for our leaders, to interpret the provisions of our Constitution, to legislate (e.g. Article 46 to legislate Indemnity Ordinance) or not to legislate (i.e. Article 98 for not appointing additional Supreme Court Judges) as they please because they need not worry about the next general election. In the next general election they simply will purchase other's democratic right. And most frighteningly these Articles are being wrongly interpreted not by any layman but by senior Advocates and Barristers of the country toeing the line of their political parties.

Actually we shelter under our Constitution and interpret it according to our need. Most of the people of this country do not know what Article 46 talks about and how it contradicts with the other fundamental rights guaranteed under Part III of our Constitution (e.g. 27, 31, 32 and 35). Our politicians to justify their actions always say that their actions were constitutional; even when actually they were not. Both the indemnity ordinances passed after the liberation, although the requirements or conditions required to take resort to Article 46 were absent, were done in clear violation of Article 26 of our Constitution and should be declared void. Article 26 clearly states that laws inconsistent with the fundamental rights are void.

Whatever be the label of an unconstitutional ordinance; be it "Operation Clean Heart" or otherwise, the culprits who tortured citizens to death should be brought before court of law to ensure justice. Otherwise people will loose faith on the democratic institutions. To break the chains of impunity, amongst others, firstly, we need to separate the judiciary from executive, should uphold constitutional provisions by giving its true and correct interpretation.

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