LAW *opinion*

On right to freedom of religion and the plight of Ahmadiyas

RIDWANUL HOQUE

THE recent governmental action banning publications of the Ahmediyas (or Ahmadis) must have shaken the conscience of those who believe in democracy, peace and justice. The action has sparked off huge debates and justifiably severe criticisms. A legal challenge of the government's order has already reached the court of justice. This short article purports to explore some legal aspects of the governmental action with reference to Pakistani situation where the same issue has caused a lot of problems..

Ahmadiyas, sometimes called Quadianis, claim themselves as Hanafi Muslims but do not believe in the finality of Islam's Prophet - Mohammad (SM). Resultantly, they have been facing rivalries and oppositions across the world, although Pakistan is the only state to have declared the Ahmadis as non-Muslims. In Bangladesh and India, there is no legislation that goes to the extent of declaring Ahmadiyas non-Muslims or even limiting their activities. Nor is there any law that defines who is or not a Muslim. In India, the issue of Ahmadis came into forefront in the seventies. On one occasion, the court very pragmatically held that the Ahmadis are Muslims [Shibauddin Koya AIR (1971) Ker. 206].

In Pakistan, Ahmadis have been declared as nonMuslims and their freedom of religion curtailed by a whole series of ordinances, acts and even constitutional amendments. This was concomitant with the process of Islamisation of Pakistani legal system orchestrated largely by General Zia-ul Haq. Following a constitutional definition of 'Muslims' in 1974 that indirectly excluded the Ahmadis, a law-suit was brought seeking injunction to prevent Ahmadis from observing Islamic practices. But the court declined to act and Ahmadis were allowed to maintain mosques and to call for azans. Things changed gradually. Besides being declared as non-Muslims, activities of Ahmadis were made an offence by an Ordinance of 1984. Notably, within the process of Islamisation of Pakistani legal system, Shariah Courts were created to review compatibility of any law with the 'Injunctions of Islam'. On the other hand, there were Constitutionally guaranteed fundamental human rights (e.g., freedom of religion, protection of minorities etc) which also created a basis of judicial review. The Ahmadis went to the Shariat Court to unsuccessfully challenge the authencity of the 1984 Ordinance. The challenge was aborted as the court held that the Ordinance was not un-Islamic. (Mujibur Rahman, PLD 1985 FSC 8). On another occasion, the court held that Muslims and Ahmadis are two separate and distinct entities (Khurshid Ahmad, PLD 1992 SC 522). These judgments left the Ahmadis effectively insecure and observance of their religious activities still remained a criminal offence. Having lost the legal battle of sustaining their religious rights, the community went to the Supreme Court to challenge the 1984 Ordinance on the ground of constitutionality. (Zaheer-ud-din, 1993 SCMR 1718). Not surprisingly, the court interpreted the right to freedom of religion from the perspective of an Islamic state's obligation to promote and preserve the state religion, i.e., Islam. Consequently, the Court decided by a majority that the Ordinance was not unconstitutional, thereby throwing the Ahmadis into an apparently perpetuating state of insecurity and frustration. It seems that the court's unduly restricted interpretation of 'freedom of religion' was much influenced by the Pakistani politics of that time. Labeling the Ahmadis as 'non-Muslim minority', the Court held: "The freedom of religion is guaranteed by Article 20 .... The overriding limitation .... is the law, public order and morality. The law cannot override Article 20 but has to protect the freedom of religion without transgressing bounds of morality and public order. Propagation of religion by the appellants (Ahmadis) who as distinguished from other minorities, having different background and history, may be restricted to maintain public order and morality."

Right to freedom of religion is a very special kind of fundamental right which touches a person's belief as to his creation, life and death as well as his way of life and thinking. Interaction with religion and the state has been therefore inevitably critical and intriguing and maintaining a peaceful atmosphere between different believers of the same or different religions has emerged as a potentially difficult job for the state. A strategy of attaining that objective of peace is by resorting to the state principle of secularism or by adhering to the principle of ensuring human rights for all ethnic, social and religious minorities. But secularism is not always an ideal solution to the problems with freedom of religion, unless there is democratic political will. An examination of the developments in this field in India reveals that freedom of religion is not absolute even in a secular state. And, from the Pakistan's experiences as above, we have learnt that interpretation of freedom of religion in a religious state brings forth a further dimension to the judicial discourse.

Truly speaking, as regards legal and political difficulties ensuing from the interpretation of the right to freedom of religion, Bangladesh does not fit into the systemic position of either Pakistan or India. Although Bangladesh initially adopted secularism as one of its core fundamental principles of state policy, she has abandoned the principle later, following, of course, not a truly democratic process. On the contrary, it is not a Islamic state either. Nor is its legal system Islamised, although Islam has been made 'state religion' by amending the Constitution through another undemocratic means. Bangladesh is a democratic, plural society with a record of fairly peaceful coexistence of a diverse number of religious, ethnic or linguistic minorities. Its Constitution is a unique piece of supreme legal document encompassing almost all human rights. The Constitution has unequivocally and emphatically insisted on democracy, rule of law and social, economic and political justice. Needless to say, the level of democracy or civility of a society is measured in terms of its record of preserving and promoting fundamental human rights of all including minorities without any sort of discrimination.

A pertinent question, therefore, is whether Ahmadiyan activities are against public order and morality justifying the government's action. As we have seen above, in Pakistan, the activities of the Ahmadis were legally prohibited and they were declared non-Muslim on the ground of public order and morality. But the situations - legal, political and constitutional - in Pakistan are clearly not the same as in Bangladesh. ....Another potential argument in defence of the governmental action might be that government did not actually prohibit the Ahmadis' activities, nor were they declared non-Muslims and thus their right to freedom of religion is kept untouched.

Fighting for freedom of religion!

Article 39 (1) of the Constitution guarantees freedom of thought and conscience. Interestingly, unlike freedom of speech and expression guaranteed by Art. 39 (2), this right has not been subjected to any legal restrictions. Correspondingly, the threshold of the government's obligation not to interfere with the citizens' freedom of thought is high. Prohibition by government of Ahmadiyan publications is undoubtedly a severe blow on the community's freedom of thought. More importantly, the banning order has violated the community's right to freedom of religion. Article 41 of the Constitution guarantees freedom of religion, albeit subject to 'law, public order and morality'. However, it is a cardinal principle of constitutional jurisprudence that 'public order and morality' ground does not authorise the parliament to take away the very right to freedom of religion. That said, it should also be noted that law does not also allow any one to impede social order or to jeopardise public morality. What is tricky is that government does often play politics with 'public order and morality' ground as this has not been defined in the Constitution or any other law. Absent such a definition, it is a challenge for the courts to determine what 'public order and morality' means in a given situation. Thus when a governmental action is alleged to have violated freedom of religion of a person or people and the government advances the ground as justification, the court has to make a balancing exercise keeping in mind that the concept of public order and morality is not static, rather society-specific.

A pertinent question, therefore, is whether Ahmadiyan activities are against public order and morality justifying the government's action. As we have seen above, in Pakistan, the activities of the Ahmadis were legally prohibited and they were declared non-Muslim on the ground of public order and morality. But the situations - legal, political and constitutional - in Pakistan are clearly not the same as in Bangladesh. We have seen that present constitutional scheme disallows the type of action the government has taken. One might however argue that there are at least two potential elements that might liken the situations to those of Pakistan. These are: (i) that the principle of absolute trust and faith in the Almighty Allah is a fundamental principle of the Constitution and state policy and (ii) that Islam is the state religion of Bangladesh. A closer look at these previsions will show that attack on Ahmadis' freedom of religion cannot be justified with reference to these provisions. Because, true faith in Islam requires us to show tolerance to others who expresses different opinions and even to those who oppose Islam. That Islam itself acknowledges various sects is particularly educative for us. State religion provision of the Constitution does not permit the state, it is argued, to lay unreasonable restrictions on Ahmadis' freedom of religion, because the provision does not obligate the state to do anything in relation to state religion. This is merely a recognising or declaratory provision. Another potential argument in defence of the governmental action might be that government did not actually prohibit the Ahmadis' activities, nor were they declared non-Muslims and thus their right to freedom of religion is kept untouched. Instead, it has only forfeited some of the Ahmadiyan publications on the ground that these did hurt the belief of general of Muslims. As said earlier, regulation of religious activities may be justified on the ground of public order (Jibendra Kishore, 9 DLR (SC) 21). The 'public order' ground must, however, be exercised bona fide and objectively. In Bangladesh Anjuman-E-Ahmediya (45 DLR 185), the court upheld the forfeiture of a book as it outraged the religious belief of bulk of Muslims. But now the government seems to have forfeited the Ahmadiyan books on a wholesale basis and seemingly to console those who are demanding the complete prohibition of practising Ahmadiyanism.

Thus at any rate, governmental action in question appears to be blatantly illegal and incompatible with its constitutional duty to preserve and promote human rights for all.

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LAW *views*

Frustrating constitutional amendment

H.M FAZLUL BARI

The Constitution of the People's Republic of Bangladesh is going to be amended for the fourteenth time. Ours is a rigid Constitution amendment of which requires some procedural technicalities. As the BNP-led coalition govt. has landslide majority in the Parliament, the proposed amendment is expected to be passed without much difficulty.

The Constitution (14th Amendment) Bill contains inter alia the following major changes:

(a) A new Article, 4A will be inserted in the Constitution to make provisions for preservation and hanging of portraits of the President and Prime Minister in Govt., semi-govt. offices etc.

(b) An amendment has been proposed to Art. 59 for holding fresh election at the local govt. bodies after the expiry of their tenure within 90 days. It also provides for temporarily appointing govt. officials as administrator to the elected representatives at the end of their terms to hold a new election within 90 days.

(c) The proposed amendment in Art. 65(3) provides for 45 reserved seats for women in the parliament which will be distributed on the basis of proportionate representation of the political parties. This system will be for 10 years.

(d) The proposed amendment in Art. 148 will empower the Chief Election Commissioner to administer oath to the ups if the speaker fails to do so within 3 days of election.

Nothing is sillier than insertion of Art. 4A in the Constitution for hanging the portrait of President and the Prime Minister. In fact, not a single Constitution in the world contains such a provision. Again, such an amendment is inconsistent with the very sanctity of the Constitution itself.

Amendment of Art. 59 (3) is a positive step to develop our nascent democracy, in particular the election of local govt bodies. The provision is intended to prevent prolonged continuity in the office sine die on the plea of judicial injunction on fresh election. Suggestions may be put forward that there must be transparent rules, which demarcates the powers, functions of the elected representatives and govt. officials in interim period. If these provisions are believed to be honestly made, the govt. should be immediately concerned with the election of Upazila Parishad.

Art. 65(3) alongwith amendment in the fourth schedule hits the most talked issue of women representation in the Parliament. To many, the proposed proportionate representation is later than the worst. While the women were demanding direct election the selection of women MPs will be a backward step as well. Again indirect election is deviation from the basic spirit of the Constitution.

The proposed amendment of Art. 148 reveals the bitter political rivalry of our lame democracy. Nevertheless this amendment is welcome in the sense that the speaker who might belong to a losing party may be disinterested to administer oath of newly elected MPs. Therefore, the power of CEC to do the same is logical enough. Again it is worth noting that oath administered by speaker is more honourable than by CEC.

Our constitution has been amended for 13 times. In most cases, except 1st, 12th, 13th, the Constitution was just emasculated to benefit the persons in power, rather than to meet people's aspiration. The 14th amendment is not an exception to that. We will welcome the amendment if direct election of woman MPs is ensured and Art 4A does not introduce an absurd issue like hanging of portraits. The Constitution is the solemn expression of the will of the people. But what does the proposed amendment of the Constitution bring for the people?

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RIGHTS *column*

Nomination of women is undemocratic

BARRISTER M. MOKSADUL ISLAM

ARTICLE 11 of our Constitution states that "The Republic shall be a democracy ... in which effective participation by the people through their elected representative in administration at all levels shall be ensured". Moreover under Article 65(2) of our Constitution a Member of the Parliament must be 'elected ... from single territorial constituency by direct election'.

About a half of our population are women and without any doubt their voice should be heard for our own good. Participation of women in all spheres of national life has been described by our Constitution as a fundamental principle of the state policy (Article 10). Another fundamental principle of state is that it will encourage special representation, inter alia, by women in the local government institutions (Article 9). To formulate a theory for direct election for the women parliamentarians may not be an easy one and would certainly cause conflict with the regular members. However any attempt by the government to create rubber stamp Parliamentarians should be utterly rejected by the people. This issue need to be addressed in a broader perspective.

Understandably any provision for a limited number of regular seats to be reserved only for the women parliamentarians may not be acceptable to many diehard politicians. Direct election with the regular member or members would certainly create conflict of interest between the members. However if we can identify the causes where women representation is very much needed e.g. dowry, women education, etc. and directly elect a woman with the regular member or members for those specific purposes only. And regular member or members will have exclusive jurisdiction in all other areas then there should not be any problem in directly electing a woman member from a 'single territorial constituency' as envisages in Article 65(2). For this specific purpose a 'single territorial constituency' can consist of one or more regular 'single territorial constituency'. A woman member should be advised to avoid other areas where the regular members will have exclusive jurisdiction

The provision for 'reserved seat' for 30 or 45 in the name of so called women empowerment is absurd as it goes against all norms of democracy. This nomination or selection process may also lead to nepotism and there is every possibility that many innocent women would be forced to submit themselves to the trap of the unscrupulous politicians. Parliamentarians nominated for the 'reserved seats' not only lacks any constituency to serve but also lacks accountability to any citizen of the country. These reserved women parliamentarians will have no 'single territorial constituency' as envisaged in Article 65(2) of the Constitution.

There is nothing wrong when an exception is made for something (for example Article 45 which modifies fundamental rights in respect of disciplinary force or Art. 47 which made provisions for some exceptions to the Fundamental Rights) provided it is not arbitrary and guided by rules. In one hand probably our Constitution is the only Constitution which defines democracy (Art. 11), on the other hand it is full of contradictions and sometimes it is really difficult to find consistency between the Articles. For example it is really hard to equate Article 46 (which provides provision for indemnification) with the provisions of Fundamental Rights described in Part III of our Constitution; and in many places undemocratic theories are formulated only to favour party politics at the cost of democracy. For example insertion of Chapter IIA in Part IV of our Constitution which created provision for Non-Party Care-Taker Government and most importantly Article 70 which strictly restricts a member to cast vote against his political party or to decide against leadership and the same also prohibits floor crossing.

There is no provision in our Constitution which supports indirect election, however, in 10th amendment Clause 3 of Article 65 in contradiction with Clause 2 of the same made a temporary provision for 30 'reserved seats' in the Parliament exclusively for women folks who were elected by the three hundred regular elected members. This temporary provision expired on 14th July 2001. However, present government has decided in principle to amend (14th amendment) our Constitution and increase the number of reserve seats for women to 45. Neither they will be directly elected nor will they have any 'single territorial constituency'.

The provision for thirty reserved seats was first enacted when autocratic regime was in power and present government is attempting to do the same under the guise of absolute majority, backed by Article 70. This absolute majority has probably made our government blind and people are seeing, at least to some extent, similarity between a government with absolute majority and autocratic regime.

If the purpose of creating exclusive 'reserve seats' for our women folks is only to address the women problem in general then we do not need 30 or 45 rubber stamps because that purpose can well be served through the existing 'Ministry of Women & Children Affairs'. Each and every one of the 45 women Parliamentarians will apparently have the jurisdiction covering the entire country. As a result they will not server any purpose as everyone's responsibility is no one's responsibility and as none will have any territorial jurisdiction no one can be held responsible for any thing. On top political doctrine of 'collective responsibility' has no place in our politics.

In the above premises the idea of reserve seats for our women folks is completely eyewash and also a phoney idea formulated to divert the attention from the real issue. It may not be wrong to say that any provision for reserve seats for women parliamentarians is an insult to our women and should simply be rejected immediately by people from all walks of life as it certainly violates the fabric of democracy and as such our Constitution.

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