



LAW in-depth

Fundamental right to profess one's faith

MUHAMMAD ZAMIR

ONE of the significant lines in the Quran is Verse 6 of Sura 109 'Kaafirun', which states- "To you be your Way, and to me mine." This encapsulates through its wisdom, the spirit of tolerance that is so necessary for the proper functioning of society and governance.

This aspect of our life has assumed special importance given the degree of intolerance that is manifesting itself in our social inter-actions. Almost every day, there are newspaper reports of incidents that indicate inability of some communities to profess their faith. Bangladesh came into being through the sacrifice of millions with the stated purpose of ensuring equality of opportunity for her citizens. With this aim in view, fundamental freedoms were woven into the body of our Constitution. This was done so that we would be in conformity with international legal practice.

The Second World War was an example of how things can go terribly wrong if a State decides to discriminate against a single community. Consequently, the Charter of the United Nations addressed itself to forestall any such repetition. This intellectual resolve was demonstrated in the efforts of those involved in framing the Charter. They correctly viewed the whole scenario philosophically and did not just restrict themselves to the codification of provisions solely directed towards the political end of ensuring ways and means for the proper maintenance of international peace and security. Accordingly, Article 1(2) of the Charter categorically pointed out that one of the purposes of the United Nations was to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.'

This approach towards religion and freedom of thought was further clarified in Articles 18, 20 and 29(2) of the Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly on 10 December, 1948. The interesting aspect was not just the re-affirmation of the right of everyone to freedom of thought, conscience and religion but also the inclusion of the right and freedom to change his religion or belief. It was also added that a person, 'either alone, or in a community with others, and in public or private' had the right to 'manifest his religion or belief in teaching, practice, worship and observance' of his faith. The nature of the observations in the UDHR was further highlighted by the fact that 'everyone has the right to freedom of peaceful assembly and association'. There was only one restraint. It was decided that 'in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society'.

American jurists have in particular, over the last fifty years, played a significant role in the evolution of how to treat this important issue. In several opinions, they have addressed this matter very astutely. They have for instance held that the 'the term religion has a reference to one's views of his relation with his Creator and to the obligation they impose of reverence of his being and character and of obedience to his will' and that 'the freedom of religion embraces the concepts of freedom to believe and freedom to act' (16A Am Juris 2d, Const. Para 465). This trend has also been further elaborated by Indian jurists who have pointed out that 'religious practices or performance of acts in pursuance of religious beliefs are as much part of a religion as faith and belief in particular doctrines' (Commissioner, H.R.E.v. Lakshmindra, AIR 1954 SC 282). The treatment of this subject has gone on to acknowledge that 'the freedom also includes the right to hold no religious belief at all (McGowan v. Maryland, 366 US 420). Fortunately, this controversial aspect has not reached our shores yet.

The Bangladesh Constitution, in letter and spirit has tried to emulate this international perception of the right of each individual to freely profess his own faith. Although Article 2A stipulates that the State religion of the Republic is Islam, it also records that 'other religions may be practised in peace and harmony'. The desire to ensure social justice also reflects



itself in Article 25(1) where mention is made that the State shall respect 'the principles enunciated in the United Nations Charter'. Article 28(1) and (3) also states that there cannot be discrimination on grounds of religion.

This spirit is carried forward within the Bangladesh Constitution in Article 41(1) and (2). The Article in more ways than one has tried to guarantee the freedom of observance of one's religious faith. What is however interesting is the implied connotation and its similarity with the provisions of the UDHR. The spirit of this Article clearly indicates that this right is 'subject to law, public order and morality' and then guarantees for every citizen the right to 'profess, practice or propagate any religion.' It also indicates that 'every religious community or denomination has the right to establish, maintain and manage its religious institutions.'

Analysts have always drawn our attention to the fact that the language of Article 41(1) of the Bangladesh Constitution is exactly the same as used in Article 18 of the Pakistan Constitution of 1956 and to fundamental right No. 10 of the Pakistan Constitution of 1962. On the other hand, it has also been observed that the language of Article 41(2) is similar to the language of Clause (1) of fundamental rights No 12 of the Pakistan Constitution of 1962. This is obviously interesting in terms of scope.

The question arises as to whether the guarantee provided by Article 41(1) is absolute. There is some disagreement on this but it is generally reckoned that it is not completely so. It is true that that the guarantee has been made subject to law and by connotation to the Jatiyo Sangshad, but this notional 'plenary power' is really restricted by implication to the regulation of the manner of professing, practising and propagating religious beliefs and the working of religious institutions like wakf and 'Debuttar' (Jibandra Kishore v East Pkistan, 9 DLR (SC) 21 and Durgah Committee v Syed Hussain Ali, AIR 1961 SC 1402).

As such, in principle, it does not suggest that there may be (because of such regulation) a law, which would have powers to regulate the actual performance of religious rites. It only proposes that if there is requirement to take specific steps with regard to worship or professing a faith, than such steps should not violate existing legal provisions. It also connotes that in order to constitute a violation, that act must legally construe as

being a source of disturbance of peace or be a tangible interference with regard to religious acts and observances of others. It is this feature that led to the historical decision that the act of using voice amplifiers or loud speakers was a kind of noise pollution and preaching through such a format was a violation of the right under Article 41 (Church of God v KKRMC Welfare Association, AIR 2000 SC 2773).

It would therefore appear that the State is responsible for ensuring the freedom to practice one's faith unless those run counter to public health, public order or morality or are essentially economic, commercial or political activities associated with religious practices (Ratilal v Bombay, AIR 1954 SC 388). The general idea is that laws are for general welfare and public convenience.

Unfortunately, in the recent past, contrary to established custom, the right to practice one's religious belief is being subjected to serious stress in Bangladesh. I am not referring in this context to communities belonging to the Christian, Hindu or Buddhist faiths. I am drawing the attention of the readers to the disappointing issue of Ahmadiyyas in Bangladesh.

Misdirected enthusiasm appears to have persuaded some of us to take out the wrong leaf from Pakistan, where this community has been declared as 'non-Muslim minority' and their freedom to practice their form of belief severely 'curtailed' by several ordinances and even constitutional amendments. The Ahmadiyyas have been unsuccessful in the efforts to challenge the controversial 1984 Pakistan Ordinance promulgated against them. The Pakistan Supreme Court in a rare example of disquiet has also upheld that this Ordinance is constitutional. There has been only one winner in this scenario-prejudice.

This unnecessary and regressive view, most unfortunately, has now crept into our country. It is creating insecurity and drawing criticism of our nation's ability to tolerate differing opinions. The whole principle of democratic governance and equality of opportunity is being smeared by the actions of a few who have taken upon themselves to be 'the righteous agents of discrimination.'

Freedom of thought and conscience as well as the freedom of association are being threatened needlessly. The moral high ground that should be the claim of any current administration is being flawed. The decision to impose restrictions in the publication of Ahmadiyya literature has also been introduced unnecessarily. Anti-Ahmadiyya agitation has dramatically grown both in Dhaka and Chittagong. Do we really need such demonstrations? Can we not leave it to Allah to determine who is correctly observing His tenets? Then too, there are legal provisions. If anyone feels aggrieved that his constitutional rights are being affected, let that persons go to Court. Any other form of registering protest, particularly through emotional violence, is wrong.

It is time to appreciate that the right to profess one's faith is an inherent part of his freedom to exist as a human being. Anything else is unacceptable.

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LAW opinion

PRESERVING THE SEAS Role of international and national laws

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WORLD Environment Day, which commemorated each year on June 5, is one of the prime vehicles through which the United Nations stimulates awareness of the environment globally and enhances political attention, co-operation and action to save the environment. This year the theme of the World Environment Day is 'Wanted! Seas and Oceans Dead or Alive?' It urges each and every human being to keep seas and oceans healthy and alive rather than polluted and dead forever.

Threats to the seas and oceans

The common assumption that living marine resources are inexhaustible has been proven incorrect. Recent technological advances and expanding human activities around the world in the high seas are sequentially depleting fish stocks, destroying ocean biodiversity, productivity and ecosystem processes in a ways that are harmful and sometimes irreversible.

Loss of bio-diversity and the attendant decimation of stocks of living resources, widespread appearance of ecosystem imbalances and impairment of ecological processes may well undermine the adaptive potential of species and ecosystems and their ability to meet future human needs.

However the major direct threats to marine and coastal biodiversity can be divided into five related categories: over-exploitation of marine living resources; introduction of alien species; development and its side effects; and global change, in particular climate change, including ozone depletion.

Furthermore, nitrogen overload from fertilisers is creating a growing number of 'oxygen-starved dead zones' in coastal waters across the globe. Marine litter is killing up to a million seabirds and 100,000 sea mammals and turtles each year.

Therefore, seas and oceans are in a state of crisis and how international community responded over the years to save the seas and oceans should be examined and strengthened further to make the regulatory system more effective and thereby save the seas and oceans from pollution and future degradation.

Responses of the International community

International Convention for the protection of Pollution of the Sea by Oil was the first effort to save the seas and oceans from pollution. Thereafter many conventions were adopted. In 1973 the International Convention for the Prevention of Pollution from Ships was adopted under the auspices of the International Maritime Organisation (IMO) and in 1976 United Nations Environmental Program (UNEP) established the regional seas program, which has led to over thirty regional treaties.

In 1982 the international community finally adopted the United Nations Convention on the Law of the Sea (UNCLOS), which addressed pollution of the marine environment comprehensively with a view to establishing rules and standards of global application - a constitution for the oceans. UNCLOS requires states to pay particular attention to two main environmental objectives: to prevent, reduce and control marine pollution and to conserve and manage marine living resource. Chapter XII of the UNCLOS adequately and exclusively deals with the protection and preservation of marine environment. Article 194(3) of the UNCLOS elaborates the obligation to prevent pollution damage by addressing particular sources of pollution from land-based activities; from seabed activities; from activities in the area; from dumping from vessels; from or through the atmosphere. Article 194(5) requires special protection for rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and outperforms of marine life. However instead of treating the ocean as 'an indivisible ecological whole' the UNCLOS partitioned it - horizontally, vertically, and functionally.

Again in the Jakarta Mandate, a declaration adopted by the Conference of Parties (CoP) to the Convention on Biological Diversity (CBD) at its second meeting in Jakarta in 1995, identified marine and coastal biodiversity as an area for priority action. The Mandate singles out coastal management, marine protected areas, fisheries, mariculture, and the introduction of alien species for special attention. The Jakarta mandate recommended a number of steps to preserve the coastal and marine ecosystems, which are worth noting

1. Parties should institute integrated coastal area management.
2. Parties should establish and maintain marine protected areas for conservation and sustainable use.
3. Parties should use fisheries and other marine living resources in a sustainable manner.
4. Parties should ensure that mariculture operations are sustainable.
5. Parties should prevent introduction of harmful alien species and take measures to control or eradicate such species when they are introduced.
6. Parties should identify priority components of biodiversity, monitor their status and threats, and identify measures for conservation and sustainable use.
7. Parties should build the capacity to use and share equitably the benefits of marine genetic resources and biochemical within national jurisdictions.
8. Parties should take responsibility for trans-boundary harm and global threats to marine biodiversity.

All these steps would be a unique step to save the seas and oceans, if effectively enforced. However, mere commitment is not enough without positive steps.

Bangladesh perspective

Bay of Bengal has provided Bangladesh world's largest beach as well as a rich coastal area filled with unique and diverse biodiversity. The coastal zone of Bangladesh is of 710 km long, which is unique and complex. It has a great natural ecosystem value not only for its multiple renewable resources of direct economic benefit to the nation but also for its outstanding aesthetic value and scientific interest. Burdened with a large population lacking adequate natural resources on land, Bangladesh will have to depend more and more on her sea territories. But increased pollution, destruction of biodiversity and ill management of seaport has become a major threat in Bangladesh.

Bangladesh Government enacted the Territorial water and Maritime Zones Act 1974 (Act No XXVI of 1974), which contains some provisions to prevent marine pollution. According to section 6 of this Act the Government may by Gazette notification establish conservation zones in the sea for maintenance of the living resources. Section 8 of the Act empowers government to take such measure, as it deems appropriate for preventing and controlling marine pollution and preserving the quality and ecological balance in the marine environment in high seas adjacent to the territorial waters.

According to the section 26 of the Marine Fisheries Ordinance, 1983 uses or attempts to use of any explosive, poison or other noxious substances in water is an offence. Section 28 empowers government to declare any portion of Bangladesh fisheries water as marine reserve for special protection of aquatic flora and fauna therein.

Again According to section 41A of the Chittagong Port Authority Ordinance, 1976 (Ordinance No. LII of 1976) causing pollution of the water or environment to the port area shall be punishable with fine, which may extend to one lakh taka.

All these provisions have a great significance to preserve our sea resources including fish stocks and prevent pollution in marine environment. But all these provisions are not utilised and enforced adequately and effectively.

Concluding Remarks

To save the seas and oceans, prevention mechanism should be considered and adopted. This suggests the need for a cradle-to-grave regulatory approach, which would also require greater use of environmental impact assessment procedures and other prevention mechanisms at source such as pollution from land based activities. Regulating the oceans currently targets the rubbish dump; it would be more effective when it will target the sources. Nevertheless adoption of the Jakarta Mandate to the Convention on Biological Diversity is a significant step forward to save the seas and oceans. But implementation of this mandate requires greater national action and regional and international co-operation and only then we would be able to preserve our seas and oceans.

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LAW alter views

WOMEN IN PARLIAMENT

Direct Election is the best alternative

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THE fourteenth amendment of the Constitution introduced provision for 45 reserved seats for women for 10 years, which attracts sharp and swift reaction from many stakeholders. While the concerned quarters are demanding for direct election of women MPs, the present amendment instead calls for distribution of these reserved seats among political parties on the basis of proportional representation in the Parliament. A new Article 65(3) along with amendment in the Fourth Schedule hits the most-talked issue of women representation in the House of the Nation.

In 1972 our constitution started its journey with a traditional provision of 15 reserved seats for women MPs for 10 years. The Fifth Amendment (1979) increased the number from 15 to 30 and period was extended from 10 to 15 years. This period expired on 10 December, 1987 and as such the Fourth Parliament (1988) had no reserved seats for women. The Tenth Amendment (1990) provided for 30 reserved women seats for a further period of 10 years beginning the commencement of the next parliament. This period also expired on 5 April 2001 and consequently we witness 8th parliament with landslide decrease in the total number of women MPs. If we count women's reserved seats along with general seats, increased women participation is evident in the Parliament except in the 8th & 4th

No. of Parliament	Reserved seats for women	Women MP from general seats	Total number of women MPs	Total number of MPs in Parliament	Percentage of women MPs
First (1973)	15	0	15	315	4.78%
Second (1979)	30	0	30	330	9.09%
Third (1986)	30	2	32	330	9.69%
Fourth (1988)	0	4	04	300	1.33%
Fifth (1991)	30	5	35	330	10.00%
Seventh (1996)	30	7	37	330	11.21%
Eighth (2001)	0	7	07	300	2.33%

8th Parliament is not included here

parliament. The figure illustrates the presence of women MPs in the parliament

Though women constitute half of our population, they are in a disadvantaged position and their status is unequal with that of men. Various attempts have been made to uplift their status by ensuring their meaningful involvement in the policy making process as well as other socio-economic measures. The purpose of art 65 (3) is to ensure a minimum representation of women in the legislative process and to ensure a better participation of women in national politics. The noble philosophy behind the incorporation of such provision has become meaningless due to selection process of women MPs. The selection of women MPs worked as a balance of power and party having majority in parliament used them as tools to serve their political purpose. For instance, in 1991, BNP having simple majority used these seats as a tool to achieve its absolute majority paving its way to go to power. And it was possible for Ershad to pass the Seventh Amendment to the constitution using the women MPs.

The present provision of proportional representation among political parties is a step forward than the previous one. To many, it is better than the worst, as it restricts the party having majority to take all. In other respect, new proposition is same wine in the new bottle. In this process, party allegiance and lobbying with the party high command will be sole criterion for selection. Again women MPs will be puppets in

the pursuit of political gain of parties. In this system there will no particular women's constituency and therefore, will lack geographical representation. In addition, proportional representation of women MPs is not based on the total number of popular votes, rather than on the number of MPs of political parties. The proposal does not conform to the one of the most basic spirit of democracy direct election.

In practice, selective MPs suffer from inferiority complex regarding status, rights and responsibilities. After all, the new model will in no way infuse new blood in the empowerment process of women. Because these 45 women will really represent none but the party which will select them.

There is an undercurrent of demand for direct election and substantial increase of women representation in the House of the Nation, on the part of the stakeholders. All major political parties promised direct election of more women MPs in their election manifestos. It is unfortunate that BNP is deviating from its election pledge.

It is pertinent to note that women's active participation in the Parliament is mostly dependent on the proper functioning of the House itself. It is irony of our fate that not a single Parliament so far has been centre of democratic norms and practice. Our nascent parliamentary democracy is tainted with unnecessary walkout, boycott by the opposition, and treasury bench has never been enthusiastic with the presence of opposition in the House. As a result, streets instead of parliament, have become centre of all activities of democracy here, and we are moving towards confrontational politics gradually. Consequently, we are still languishing behind sweeping corruption, waves of crimes and acute lawlessness.

Among the various ways of electing representatives, direct election soul of democracy is most logical. The gov. has discarded this norm terming it 'impractical' as a single women seat consists of multiple constituencies. But this is a lame excuse to introduce a controversial alternative which in no way will improve the condition of women. The Modern democracies are based on party system. Then a woman candidate will clearly be supported by her fellow comrades in a big constituency. All major political parties will nominate candidates to 45 seats and, more women will be in the electoral process which will ensure better selection of candidates. The general voters may examine the performance of their leaders. It will increase the presence of women in party structure and national politics. This will ultimately mature the women leadership in the country.

The active and constructive participation of women in the political process has empty been demonstrated by the fact that attempt has been made to increase the number of women reserved seats. There is growing trend of more women representation in various local bodies as well. But debate remains as to their effective participation in the parliament rather than to be puppet's as selective members of political parties. One way of improving leadership and managerial capacity of women should necessarily include direct election of 45 reserved seats in the Parliament, that the gov. as well as the opposition should take initiative to make the parliament effective.

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