



LAW alter views

Changes in the Constitution of Bangladesh

JUSTICE MOHAMMAD GHOLAM RABBANI

ON 4 November 1972 the Constituent Assembly adopted the constitution of Bangladesh. It was written in terms of the aspirations of the people or in other words, the members of the assembly could not dare to act otherwise. But subsequently the constitution got changed.

Man is not angel. It is not always possible for him to overcome expectation. To keep free from that there was among others a disability clause for the judges of the Supreme Court in article 99 of the constitution that after his retirement he shall not hold any office of profit in the service of the Republic. That clause was in the constitution of Pakistan both of 1956 and 1962 and is in the constitution of

India. In November, 1975 by a proclamation issued by the then Chief Martial Law Administrator the Words "not being a judicial or quasi-judicial office" were inserted in article 99 and thereby those offices of profit were made available to a judge after his retirement.

It is a historical fact that the people fought successfully for secular Sonar Bangla, yet another chief Martial Law Administrator by a proclamation in June, 1988, inserted article 2A in the constitution and that reads, "The state religion of the Republic is Islam, but the other religion may be practised in peace and harmony in the Republic."

Presidential form in the constitution was altered to parliamentary form on 18 September, 1991 and a proviso to article 145A was added as hereunder.

"145A. All treaties with foreign countries shall be submitted to the

President, who shall cause them to be laid before parliament."

"Provided that any such treaty connected with national security shall be laid in a secret session of Parliament."

Once elected the leaders of the majority party are the holders of real power in the land subject to the limitation that they are under a constitutional duty to govern in the interests of all and not in the interests of their party. The only real check on their power is the constitution and the force of public opinion, which demands freedom of information and freedom of discussion.

Author is a retired judge, Appellate Division, Supreme Court.

RIGHTcolumn

Adoption in Islam: Some issues

M. MOAZZAM HUSAIN

ISLAM, to begin with, does not recognise adoption so as to create a relationship of parentage. Nor does it confer any status, rights of inheritance or other rights on the adopted son. The whole Muslim jurisprudence being based on a different conception of legitimacy, adoption is, therefore, out of place in it (AIR 1922 PC 159). In the pre-Islamic days adoption was common in Arabia. The object of adoption was neither religious nor for acceptance of the adoptee as member of the adoptive father's family. In those days the Arabs used to adopt other's sons with a view to strengthening their manpower for wars with their enemies. According to Tayabji "It must have been a source in those unsettled times, to have sons real or adopted, able to bear arms."

The Holy Qur'an (Sura 33 ayat 4) expressly disapproves adoption as a mode of taking other's son as one's own. For the sake of clarity, we can better take recourse to the widely acclaimed English translation of the Qur'an by Abdullah Yusuf Ali entitled - "The Holy Qur'an-Text, translation and commentary." The English rendering of the ayat as found therein reads "Allah has not made for any man two heirs in his one body: nor has He made your wife whom you divorce by Zihar your mother: nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the truth, and He shows the (right) way." The note thereunder goes as follows: "If a man called another's son his son it might create complications with natural and normal relationships if taken too literally. It is pointed out that it is only a facon de parler in men's mouth, and should not be taken literally. The truth is the truth and cannot be altered by men's adopting sons." The consequence is that adoption in its technical sense is Un-Islamic.

"Acknowledgement" in Muslim law though presents a faint semblance with adoption in Hindu law it is in fact substantially different. Muslim law has made a special provision for conferring legitimacy on or rather recognising the legitimacy of a child, son or daughter, by the doctrine of acknowledgement. Where the paternity of a child, that is a legitimate descent from his father cannot be proved by establishing marriage between his parents at the time of his

between him and the child's mother. While the basis of acknowledgement is real paternity of the child as a Muslim never acknowledges another's child as his own, in case of adoption another's child is adopted.

In spite of the position of the Muslim personal law in respect of adoption the customs of adoption prevails among many sections of Muslims in the subcontinent. Such Custom is found to prevail in the Punjab (AIR 1936 Lah 80) Sind (AIR 1925 Sind 207) and Ajmer (11, IC 670). In some cases right of adoption is permitted by law. Thus in Oudh a taluqdar is permitted by Section 29 Oudh Estates Act to adopt a son (AIR 1932 PC 137). In some cases convert from Hinduism have retained the custom of adoption. But there is no presumption that a Hindu converts to Islam has such custom. The burden of proving that the custom has been retained lies in those who assert it (10 IC 816). Where custom is given priority by legislation over general Muslim law a special family or tribal custom of adoption will, if proved, prevail over the law.

The Muslim Personal Law (Shariat) Application Act 1937, shortly "the Shariat Act" was enacted for application of the Muslim personal law to the Muslims in India which by and large abrogated the customs and usage of adoption hitherto prevailing in different classes of Muslim families and tribes of India in isolated form.

Section 2 of the Shariat Act provides that in all question (save the agricultural land) regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage including talaq, ila, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts, trusts and wakfs (other than charity and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslim shall be the Muslim personal law (shariat). Section 3 (1) of the Act says: "(1) Any person who satisfies the prescribed authority - (a) that he is a Muslim (b) that he is competent to contract within the meaning of Section 11 of the Contract Act, 1872 and (c) that he is resident of Bangladesh may by declaration in the prescribed form and filed before the prescribed authority declares that he desires to obtain the benefit of the provision of this section and thereafter the provision of Section 2 shall apply to the declarant and all



conception or birth Muslim law recognises acknowledgement as a method through which such marriage and legitimate descent can be established. The Privy Council has pointed out that when a man and a woman have lived together for number of years as Husband and wife law presumes in favour of marriage and against concubinage and an acknowledgement involves the assertion that the father was married to acknowledge's mother (AIR 1916 PC 27). So when a man has in his favour a good acknowledgement of legitimacy the marriage between his parents will be held to have been proved and legitimacy established unless the marriage has been disproved. It is, therefore, clear that where the paternity of a child cannot be proved by establishing the marriage between its parents at the time of its conception or birth Muslim law recognises acknowledgement as a method whereby such marriage and legitimacy of the child can be established. Acknowledgement of parentage proceeds upon the theory of actual descent of the acknowledged child from the father who acknowledges it (1888)10 All 289 (FB).

The legal effects of a valid acknowledgement are: a) the child so acknowledged turns into the legitimate issue of the acknowledge and its paternity is established b) as a legitimate issue the child is entitled to inherit the properties of the acknowledge, its mother and other relations c) the acknowledgement establishes a lawful marriage between the child's mother and the acknowledge and the mother gets the status of the wife of the acknowledge with all legal rights incidental to a wife.

The fundamental difference between adoption and acknowledgement are: in adoption there is gift of the child by the natural parents to the adoptive parents but acknowledgement is an act of the father recognising his child whose legitimacy is otherwise clouded by absence of marriage

his minor children and their descendant as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

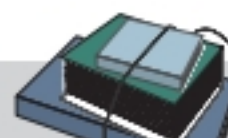
The Shariat Act 1937, brought about a uniformity of law among the Muslims in matters of the subjects enumerated in Section 2 of the Act. But a bare reading of 3(1) of the Act suggests that an option for a Muslim is left open for a declaration that he wants to take the benefit of said section in which case the provisions of Section 2 shall apply to him and his descendants as if adoption, wills and legacies were specified therein along with the matters enumerated.

Taking the advantage of legislative options the families and tribes having long prevailing customs and usage of adoption might be continuing as isolated cases with their custom of adoption. That too has been, for all practical purposes, abrogated by the Shariat Act 1937. The landscape of law governing the question of adoption by a Muslim suggests a clear disapproval to it particularly in its technical sense. In Islam it does not create any filial status, duties or obligations, therefore, unmeaning.

Islam is opposed to adoption in its technical sense not against eternal flows of love and affection in human being. Any Muslim man or woman can well raise another's child with all care, affection and love so as to generate filiation that surpasses the question of status, inheritance and other rights available to an adoptee. After all love is divine.

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Star LAW book review



Addition to legal literature

PROFESSOR M SHAH ALAM

Independence and Accountability of Judiciary -- A Critical Review by Sarkar Ali Akkas

published by the Centre for Rights and Governance (CRIG), Dhaka, 2004, xiv + 314 pp, price Taka 350/-.

THE recently published book titled as above can legitimately claim to be a major contribution and an encouraging addition to legal literature in Bangladesh. The book deals with various aspects of independence and accountability of judiciary in general, and relates them to situations in Bangladesh. In fact, author's main concern is the problems of independence and accountability of Bangladesh judiciary, and he has attempted to analyse them based on fundamental principles of independence of judiciary. He has sincerely and painstakingly sought remedies for the maladies of judiciary in Bangladesh.

The judiciary plays a dominant role to provide for rule of law which is so essential for strengthening the foundations of democracy. This is more important for a developing democracy like Bangladesh where weaknesses of democracy in the absence of a strong judiciary could pose threat to individual liberty. Access to justice, and judiciary as the last resort to justice is the demand of any democracy. Judiciary rescues the weak from the misuse of power by the strong; it protects the minority from the tyranny of the majority. For judiciary to be strong and effective, its independence as well as accountability is the first precondition. And this is now a burning issue in Bangladesh.

While there are a few writings on judicial independence and accountability in the form of articles, booklets and seminar papers, no attempt has yet been made in Bangladesh to conduct serious and comprehensive research on the problem. The present work seems to be the first such attempt, and its author Dr Sarkar Ali Akkas has been successful in his efforts. He has demonstrated both originality of thought and knowledge of the subject as well as the grasp of the relevant issues in Bangladesh. The author has mentioned in the preface that the book is based on his PhD thesis. He has indeed done a good job publishing the thesis in book form.

The author has analysed necessary conditions of judicial independence and judicial accountability, described the situations in Bangladesh and has skillfully related them to international standards and practices. Striking the right balance between independence and accountability and earning people's confidence in the judiciary has been the main focus of the book. The goal of such a balance is to enhance judicial efficiency and, thereby, generate people's confidence in the judiciary. The author has rightly argued that

"... public confidence in the judiciary is the most important requirement for its existence as an institution and judicial independence is a prerequisite to maintaining public confidence. judicial accountability is a significant factor that can contribute to, erode or enhance public confidence and undermine or strengthen judicial independence. This primary argument is the basis of all substantive chapters (from chapter 4 to 8) of the book." (p.7)

The author, on the one hand, has meticulously analysed various factors relating to independence of judiciary i.e. appointment, tenure, terms and conditions of services of the judges, and has rightly identified the executive presence, involvement and interference in them as impediments to true judicial independence. On the other hand, he has critically pointed to the inadequacy of the present mechanism of judicial accountability. For both purposes, the author has prescribed some remedies of which formation of a judicial commission is central. He conceives of such a commission as an independent body to perform such powers and functions in relation to judiciary, which are presently exercised by the executive.

The author has rightly pointed out the danger of both

Independence and Accountability of Judiciary A Critical Review

Sarkar Ali Akkas

Judicial and executive powers being concentrated in one person or body and has scrutinised the institution of magistracy in the lower judiciary of Bangladesh which wields such powers. He has strongly advocated for separation of such powers and in doing so cited the judgement of the famous case of Secretary, Ministry of Finance v. Hossain which paved the way for such separation without constitutional amendment or enacting new law for the purpose.

There are reasons to believe that detailed description and analysis of the conditions of judicial independence and judicial accountability in Bangladesh and recommendations made by the author would be of immense value to legal community, academia and policy makers of Bangladesh. The book would not only help understand the problems, but also provoke realistic pursuit for their solution.

Without belittling the merits of the book, it could be said that the author would have done better if he had devoted more attention to the analysis of Secretary, Ministry of Finance v. Hossain, the problem of contempt of court vis-à-vis criticism of court's activities and the all important issue of posting and transfer of judges of the lower judiciary which has become one of the unfortunate sources of executive corruption in Bangladesh.

Divided into nine well defined and neatly structured chapters, the book, besides dealing with the problems of independence and accountability of judiciary, has also described the historical development of judiciary in Bangladesh and its currently existing system, which speak of a rich heritage of judiciary in our country. The language of the book is simple and lucid, which makes its reading very pleasant and fascinating. Cover-design, binding, get-up and printing of the book as well as its reasonable price give the impression of a very good and accessible publication. I have reasons to believe that the book would be well received by legal community - law students, teachers, researchers and the members of the Bar and the Bench.

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LAWweek



Mobile courts deployment

The government decided to deploy 28 mobile courts in the capital during Ramadan and Durga Puja to ensure law and order and check market price.

The Rapid Action Battalion and the Bangladesh Rifles will be on special assignment to identify and control food adulteration, price hike of essentials, extortion, mugging and passenger harassment.

The decision came out at a high-level meeting on law and order and traffic congestion, chaired by State Minister for Home Affairs Lutfozzaman Babar, at the home ministry.

Representatives from the police, Bangladesh Rifles, Rapid Action Battalion, Bangladesh Ansars, coast guard, intelligence agencies, and the Bangladesh Road Transport Authority attended the meeting- *New Age, September 26.*

Partha admitted to hospital

Shaibal Saha Partha, one of the five persons arrested in connection with the August 21 bomb attack on an Awami League rally, was admitted to the Bangabandhu Sheikh Mujib Medical University Hospital a week after the High Court order.

Partha was earlier brought to the hospital for admission but he was taken back to the Dhaka Central Jail after the hospital authorities had decline to admit him as all seven seats for male prisons in the prison ward was occupied then.

The hospital sources said that Partha had pains in the stomach and chest and had difficulties having food. He also has problems in the eyes, as he had been kept blindfolded for several days, hospital sources said. A vacation bench of the High Court on September 20, when Partha was in remand, directed the government to provide Partha with treatment immediately after the expiry of his remand.- *New Age, September 28.*

2500 girls abused in six months

Around 20,696 girl children were violated physically and mentally from 2001 to June 2004, newsmen were told in Dhaka on Tuesday.

Around 2,480 girl children were victims of murder, rape, physical torture, sexual abuse, trafficking, dowry and acid victim between January and June alone.

Speakers at a news briefing of the Girl Advocacy Forum at the Dhaka Reporters Unity said a girl child faces discrimination even before her birth and has to bear this discrimination throughout her life.

The forum has undertaken various programmes to make people aware and change their attitude towards girl children to mark the Girl Child Day this year. The Women and Children Affairs Ministry declared September 30 as the Girl Child Day in 2000. -*New Age, September 29.*

Rip-off at Ctg Port

Chittagong Port and customs officials extract about Tk 783 crore from importers and exporters in bribes and tips a year, Transparency International Bangladesh (TIB) said in a stunning study released on September 28.

The watchdog study was based on the outcome of a yearlong investigation from July 2003 to June 2004 that says customs officials get Tk 451 crore and the port staff Tk 332 crore at Chittagong Port that handles over 75 percent of Bangladesh sea cargo. TIB identified such clandestine practices as adding to the cost of business in Bangladesh.

For unbridled corruption, irregularities and frequent strikes, the International Maritime Bureau identified Bangladesh as having the world's second most risky port next to Indonesia. -*Daily Star, September 29.*

Jail killing case: Order to arrest witness

A Dhaka court ordered arrest of an octogenarian witness in the historic jail killing case whose inability to give a statement before courts is delaying verdict on the high profile political case.

Court sources said 84 year old Saifuddin Ahmed could not appear before Metropolitan Sessions Judge's Court, Dhaka on the day because of poor health in a replay of similar things before.

Metropolitan Sessions Judge issued the arrest orders and asked the prosecution, counsel of accused-on-bail Taheruddin Thakur and officer-in-charge of Sutrapur police station to submit a report on Saifuddin's health by October 9. The court also fixed October 9 for delivering its next order on receiving the report. -*Daily Star, September 30.*

Injunction over mass arrest

The High Court on September 29 issued an injunction against the ongoing blanket arrests of opposition adherents and apolitical people alike under section 86 of Dhaka Metropolitan Police Ordinance (DMP) until October 3.

A HC Division bench comprising Justice Awlad Ali and Justice AFM A Rahman delivered the order on a petition filed by a number of rights groups protesting the indiscriminate arrest under the section. The bench will hear the case in full on October 3.

The government has again initiated a mass arrest programme, though it is yet to reply to the High Court's rule issued on April 27, 2004, asking it to submit a report within three weeks detailing the names and particulars of persons arrested since April 18 without any warrant.

The court also issued a rule nisi on the government to show cause within three weeks why Section 86 of the Dhaka Metropolitan Police Ordinance would not be declared to be without lawful authority and of no legal effect, being ultra vires of the constitution. -*Daily Star, September 30.*

READERqueries



Your Advocate

Q. My elder brother is now serving in a non-govt. organisation. He married one of his colleagues six years back. Unfortunately the marriage did not work out and my brother divorced his wife by registering the divorce in accordance with law. The copy of registered divorce was sent to his wife. Later after almost a year my said brother took a second wife and was happily leading his conjugal life. Soon after his second marriage a notice from a magistrate's court was served upon my brother to appear before the court to answer the charge of taking second wife without permission of the first wife. We were astonished to learn how a divorced wife may be the first wife and why one should take her permission. We have engaged a local lawyer. He has obtained bail for my brother but seems to be not hopeful about the result of the case. I came to know by a reading of the complaint that the talak gives was not legal and the charge is punishable up to one year in Muslim Family Law. If it so happens this will bring about a disaster in our family. We are now living in Dhaka. Some knowledgeable people here told us that the divorce is to be given through the Mayor and the registered talak was to be given to the chairman supported by affidavit sworn before a notary public. My questions are a) a Muslim can divorce his wife by pronouncing the word "talak" thrice without assigning any cause and after the period of iddat he can marry again. Moreover here it is registered. Can it be made illegal by any law? b) how legal talak is given? c) what would be the fate of the second marriage? d) how my brother can get rid of the case filed by his ex-wife? Your answer may help to save our family.

Ashik Aftab Bhuyan

Mymensingh.

Your Advocate: It seems that everything on your side has happened on a vague impression of law. This law should be well publicized so that lay people do not take avoidable sufferings. Answer to your first question is-Muslim personal law permits talak by pronouncement as you have understood but the Muslim Family Laws Ordinance, 1961, has made a mandatory provision requiring - any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talak in any form, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. Violation of this law is made punishable with imprisonment for a period not exceeding one year and also liable to fine not exceeding ten thousand taka. By legislative enactment the procedure of Talak is laid down to be followed by every Muslim. This is a special law made for the purpose and will prevail over the general law, that is, our personal law. And its violation is made punishable. Therefore, we as subjects of the state are bound to follow the prevailing law of the land or to take the consequences. Since the talak was not given in accordance with law the marriage tie legally subsisted and your brother's first wife took the opportunity of violation of law in this regard. If there is a subsisting wife permission of the Arbitration Council must be taken for taking a second wife.

With regard to your second question it should be remembered that talak in any form must be effected through the local UP-Chairman and in case of Paurashabha and City Corporation the Paurashabha Chairman and the Mayor respectively. The affidavit sworn before any authority and prior registration of talak by the Marriage registrar are not mandatory. Those are mere extra-legal formalities developed by practices. They by themselves do not validly dissolve a marriage unless the matter do not brought to the notice of the Chairman or the Mayor as the case may be. Once the notice of talak is given to the chairman with a copy of the same to the wife it takes effect after expiry of 90 days from the date of its receipt by the chairman and in case of pregnancy of the wife after pregnancy ends provided the steps towards reconciliation by the Chairman fail. The reply to your third question is the second marriage would not be void by reason merely of contracting it in violation of law nor the child, if born, would be illegitimate. But such violation is punishable as provided under law. Finally the way out for your brother. It is difficult at this stage and without having access to the records of the case to pass any opinion about its merit. Please take care that a good lawyer is engaged.

Your Advocate M. Moazzam Husain is a lawyer of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

FOR YOUR information



Declaration on the Rights of Disabled Persons

Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

Some basic features

The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual or social life, as a result of deficiency, either congenital or not, in his or his or her physical or mental capabilities.

Disabled persons shall enjoy all the rights set forth in the Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

Disabled persons have the same civil and political rights as other human beings. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration.

Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

Corresponding with the Law Desk

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