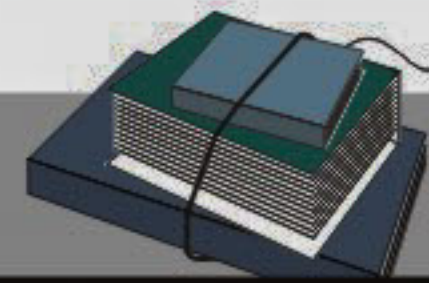




REVIEWING *the views*



Constitutional guarantees and religion: The ambit of Article 41



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BA^{NG}LADESH claims to be a secular state, being arguably neutral on the matter of belief. In a country with people with a wide range of religious beliefs, it is particularly important to guarantee their observances without discrimination. In Bangladesh, the Constitution makes such a provision in Article 41. It provides that subject to law, public order and morality, (i) every citizen has the right to profess, practice or

propagate any religion, and (ii) every religious community or denomination has the right to establish, manage and maintain its religious institution.

While this might sound just about right, one is bound to trip on the phrase "subject to law, public order and morality". What does this mean? What is obvious, however, is that it clearly indicates that this right is not absolute. This, in turn, raises a host of questions. What, for instance, is the extent of the legislature's power to revoke this right? When can the

Parliament take away one's religious freedom? What is the standard for determining "morality" for the purpose of Article 41? Even at the very root of it, how does one define "religion"?

The Article guarantees the right to practice and propagate not only matters of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of a doctrine. Of course, religion is a matter of faith but it is not necessarily theistic. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their well being, it would not be correct to say that religion is nothing else but a doctrine or belief. It, as the Indian jurist, Durga Das Basu professes, has its outer expression in acts as well. 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. The freedom of religion embraces the concept of freedom to believe and freedom to act. The freedom also includes the right to hold no religious belief at all.

The renowned lawyer and legal scholar Mahmudul Islam in his book, "The Constitutional Law of Bangladesh" writes that the right to propagate one's religion means the right to communicate his belief to another person or to expose the tenets of that faith, but would not include the right to "convert" another person to his faith. But the latter person has the right to adopt another religion in the free exercise of his conscience.

The right conferred by Article 41 however, as mentioned above, is not left unbridled. The freedom of religion is subject to the interest of public order that it would not authorize the outrage of the religious feelings of another class with deliberate intent.

The words "subject to law, public order and morality" save the power of a competent legis-

lature to prohibit deleterious practices, such as the sacrifice of human beings in the name of religion, or to direct the exhumation or removal of graves or interred corpses for the purpose of detection of crime or for preventing breach of the peace between fighting communities. Moreover, the legislature may regulate the manner of professing, practicing and propagating religious beliefs and the working of religious institutions. This, however, does not mean that a law can be enacted for regulating the actual performance of religious rites. Where, nonetheless, certain secular steps have to be taken, then these steps may be regulated by law. In addition, this Article does not protect any wrong practiced in the name of religion. It does not extend to the doing of acts, in the name of religion, which are offences under the law. The violation of right to freedom of religion must also be tangible. There must be some actual interference with religious acts and observances.

In the end, while a glimpse into the local, Indian and Pakistani judicial decisions do provide some insight into the operative aspect of Article 41, there are still some fundamental questions that remain open to debate. This is particularly so when Article 41 is examined in context of the Constitution as a whole. The doctrine of "basic features" is not to be found in any of the express provisions of the Constitution. It has been engineered over the years. But the Supreme Court itself has not been yet been able to enumerate any definite list of basic features. How much of Article 41, for instance, constitutes a "basic feature"?

In the light of all this, it would be interesting to see how the law develops in this respect, and whether the judiciary is bold enough to break their conservative mould to clarify matters in this regard.

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HUMAN RIGHTS *analysis*

Corporal punishment banned in schools

Educators who use physical or humiliating measures to punish children will now be facing disciplinary action. The ban on corporal punishment was initiated by the Bangladesh Legal Aid and Service Trust (BLAST) and Ain o Salish Kendra (ASK), who filed a writ petition with the High Court after becoming gravely concerned regarding incidents of corporal punishment in Bangladesh. The alleged incidents are believed to result in children dropping out of school, becoming seriously injured (often requiring hospitalization), and even committing suicide. On August 9, the Ministry of Education, in compliance with an order from the High Court, sent a circular to those charged with the education of children instructing them to take the necessary measures to ensure that children are taught in a safe environment, free from cruel and inhumane treatment from a teacher or school administrator.

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RECENTLY the government has banned corporal punishment in all educational institutions across the country including madrassas. The Education Ministry banned corporal punishment by describing it as inhuman and merciless punishment. This directive came in persuasion of a High Court order. Last July, the High Court Division has ordered the government to take adequate measures to stop corporal punishment subsequent to allegations that a 10-year-old boy had committed suicide after he had been beaten by his school teacher. Undoubtedly, this order marks a new era in human rights situation in Bangladesh but it is sad that it took a young life to get such path breaking decision.

Whether we admit or not beatings are widespread in our schools. Many of us grew up hearing that beating is the most effective mode

of reprimanding children. Well informed adults might know the mental damages that a child suffers due to beating. However, it being the usual norm for disciplining children, many of us refuse to pay attention to the downside of beating. Not only us but many nations in the world are divided in question of beating as a disciplinary mode.

However, it is up to sociologist and behavioural scientist to come up with the conclusion whether beating is the most effective method of disciplining children. But from law student's view it is submitted that difference between moral and legal wrongs are often too blurred. If law speaks of humanity, violation of legal right should also touch the morality of people. But true, everything that is morally wrong may not be the violation of law and vice versa.

Human rights are rights that are inherent of being born as a human. These are not choices that you make for others, we born with these rights. As humans we have the right to be treated with dignity.

Even a criminal punishment needs to be proportionate to the wrong doing. Nations that are known for enforcing human rights strictly prohibits beating in all walks of life even for inmates. How can then it becomes legal to beat a child for not listening. After considering the pros and cons of corporal punishment at schools many even made spanking which is a milder form of beating as misdemeanour.

Before discussing different approaches that has been taken by developed nations as to corporal punishment, we have to know what corporal punishment is.

Defining corporal punishment

According to Black's Law Dictionary corporal punishment includes any kind of punishment inflicted on the body, such as whipping or slapping, but not the execution of the death penalty itself. In other words corporal punishment is the deliberate infliction of pain intended as correction or punishment. Corporal punishment can be inflicted in 3 different settings-

- Parental or domestic corporal

punishment: within the family

- School corporal punishment: where students are punished by teachers or school administrators;

- Judicial corporal punishment: as part of a criminal sentence ordered by a court of law.

The High Court Division of Bangladesh has ordered in respect to corporal punishment in schools only. The decision does not extend to parental or judicial corporal punishments. Now let's see how other developed countries have dealt with this issue.

Corporeal punishment in other countries

The Bill of Rights of the US Constitution 8th amendment explicitly prohibits infliction of "cruel and unusual" punishment. In 1977, *Ingraham v. Wright*, case the US Supreme Court decided that 8th amendment only applies to criminal cases but not to school setting. It was a 5 to 4 decision and Justice Brennan strongly opposed the majority decision in his dissent. However, 30 states ban corporal

punishment in public schools, and two states, New Jersey and Iowa, additionally prohibit it in private schools. The remaining 20 states go by the law namely, Restatement (Second) of Torts 1965. It allows corporal punishment at school where such punishment is "reasonably believed necessary for the child's proper control, training, or education." In those states if corporal punishment is excessive or unreasonable to the extent of misbehaving, the educator is subject to possible civil and criminal liability.

In Canada, corporal punishment has been banned in public and private schools since 2004. The first province to ban school corporal punishment was British Columbia, in 1973. In the UK, corporal punishment was outlawed in state schools in 1987 and in all private schools by 2003. Corporal punishment has been outlawed in almost all of Europe except the Czech Republic and France. In Queensland, Australia, school corporal punishment of girls was banned in 1934, but for boys in private schools it is still legal as of 2010. New Zealand has outlawed corporal punishment. In Africa only South Africa has outlawed corporal punishment in schools and in Asia it is Japan that had banned corporal punishment at school setting.

Conclusion

It is quite evident that the developed counties are more conscious about strictly enforcing human rights issues. We might not be yet at the same standing as some other countries which have outlawed corporal punishment in schools. But it only takes a spark to start the fire. If we start from now sure we will be able to achieve our desired goal of ensuring equal rights for all.

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RIGHTS *corner*



Malaysia government ratifies disability rights treaty

MALAYSIA'S ratification of the Convention on the Rights of Persons with Disabilities can help bring real improvement in the lives of people with disabilities in Malaysia, Human Rights Watch said August 16, 2010. But Malaysia should withdraw its formal reservations to the treaty that will undermine its efforts to protect and promote those rights, Human Rights Watch said.

The Disability Rights Convention affirms broad protections for people with disabilities, including the rights to life, freedom from discrimination, equal recognition before the law, and access to justice, education, employment, and health. The treaty will go into effect in Malaysia on August 18, 2010.

"Malaysia has taken an important step to protect the rights of people with disabilities," said Shantha Rau Barriga, disability



rights researcher and advocate at Human Rights Watch. "But the convention should be seen as a springboard for changing Malaysian laws, policies, and practices that violate the rights of people with disabilities."

While the Malaysian government has indicated plans to improve acceptance of people with disabilities into the mainstream, there are still problems with putting the plans into practice, Human Rights Watch said. Compliance with the 1984 law that mandates that public buildings be designed for accessibility is sporadic. In addition, a non-binding plan announced in 2009 to ensure that one percent of the government work force is reserved for persons with disabilities has not matched expectations.

The dropout rate for children with disabilities is a major concern, Human Rights Watch said. In part, this results from a lack of access to schools for children who use wheelchairs, for example, and in part from a lack of facilities, programs, and trained personnel to assist children with learning disabilities. The country's education regulations even exclude the "non-educable" from schools.

Malaysia entered formal reservations to the Disability Rights Convention concerning the prohibition of torture and other ill treatment (article 15) and the right to liberty of movement and nationality (article 18). It also made a declaration limiting the government's legal application of the principles of non-discrimination and equality.

Human Rights Watch urged Malaysia to withdraw these reservations immediately and to ensure that anyone with disabilities in Malaysia has the full protection of all rights set out in the convention. Countries that have ratified the Disability Rights Convention should make formal objections to Malaysia's reservations and declaration, Human Rights Watch said.

Malaysia's reservations are especially problematic, Human Rights Watch said, because the government has yet to ratify other major human rights treaties that incorporate these rights, specifically the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition against torture is one of the most basic under international law, permitting no exceptions. Malaysia has recently withdrawn a number of its reservations to the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child, but should remove all the remaining reservations, Human Rights Watch said.

"Malaysia's reservations are troubling and send a terrible message to people with disabilities," Barriga said. "What possible justification could Malaysia have for objecting to protecting persons with disabilities from torture or allowing them to move around the country?"

Human Rights Watch also urged Malaysia to sign and ratify the Optional Protocol to the Disability Rights Convention, which allows individuals to send complaints of human rights violations to an international monitoring body. At present, Malaysia's Persons with Disabilities Act provides no mechanisms for redress, and expressly prohibits legal actions against the government for violating the rights of persons with disabilities.

"By ratifying the Disability Rights Convention, Malaysia made progress toward fulfilling one of its pledges as a member of the United Nations Human Rights Council to adopt more international human rights instruments," Barriga said. "However, its reservations to the convention fall far short of honoring that pledge."

Source: Human Rights Watch.

