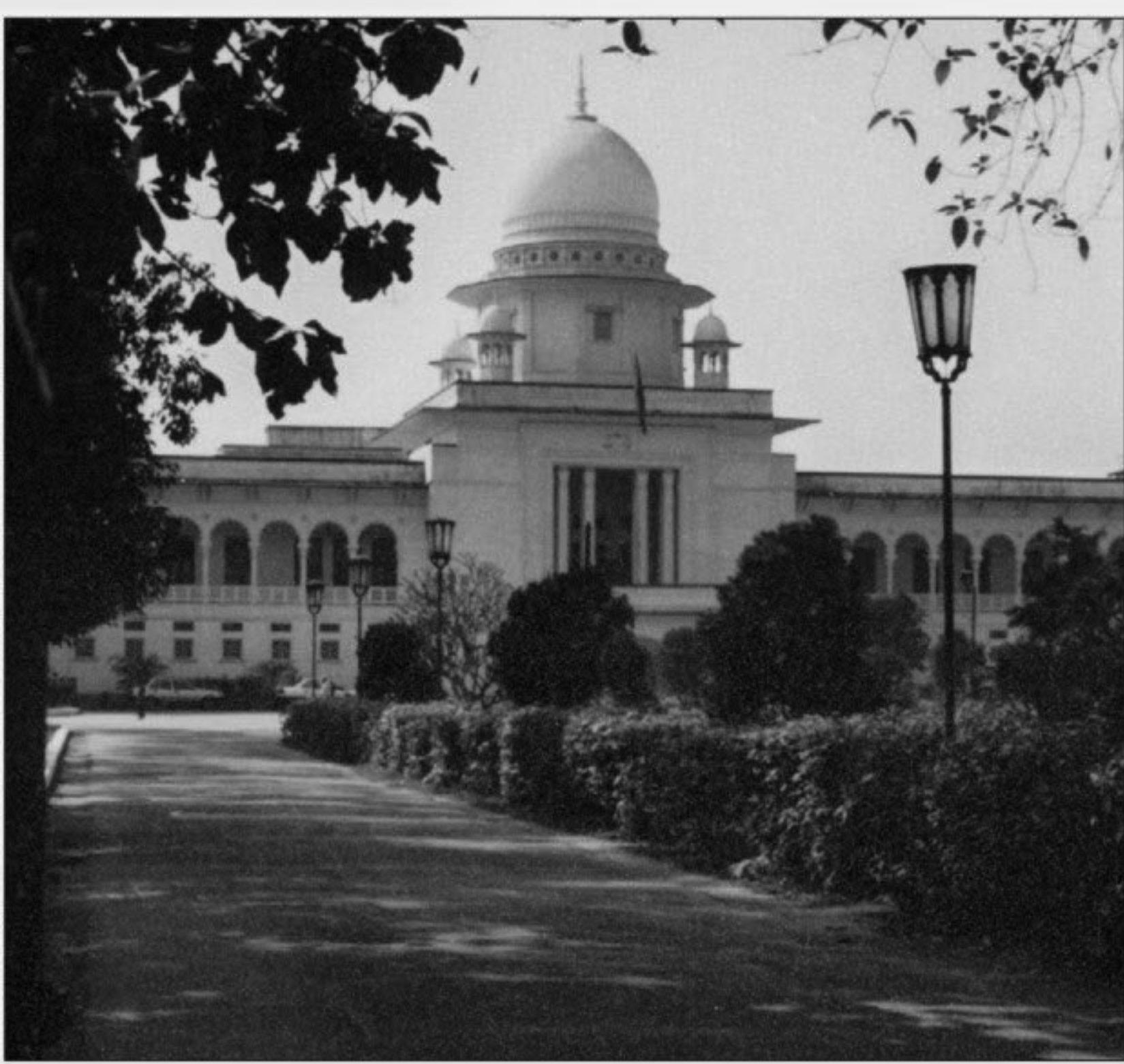




LAW alter views

# Constitutional issues are political as well as legal: Implementing the SC 5th Amendment judgement



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AFter the publication of the full text of the order and observations of the Appellate Division of the Supreme Court on the High Court Division's 5th Amendment judgement, the country seems poised for major constitutional changes. While the observers have tried to measure the political and legal consequences of the judgement, they have also spoken on the various options and ways of how best the directives of the judgement can be implemented.

One view was that after the full text of the Appellate Division judgement had been published, our Constitution already stood amended. It only remains for the government to implement it by official gazette notification, and reprint it. Many prominent jurists and even government ministers spoke in this light, referring to the Eighth Amendment judgement when no amendment was required to implement the Appellate Division judgement.

However, considering the number of important and delicate issues involved, this view apparently proved to be oversimplification of the mode of implementation of the judgement.

Most of the observers have spoken of the need for comprehensive amendment of the Constitution based on the judgement, because so many provisions with their chain reactions are involved in the matter. They have also suggested to include in the amendment package the issues not covered by the judgement but which are crucially important for further constitutional development.

After the SC Appellate Division's directives, a possible return to the 1972 Constitution is being discussed in the concerned circles. The burning issues which are dominating the agenda are how to retain Bismillah-ar-Rahman-ar-Rahim in the Preamble of the Constitution, although the government policy makers have already indicated their intention to so retain; revival of the original four fundamental principles of

the state policy in place of the present and their implications for other provisions of the Constitution including the fate of the Article 2A on State Religion; prohibition of the religion-based political parties; the issues of nationalism and citizenship; validation of many acts and actions under the shelter of the Article 150 and the Fourth Schedule on transitional and temporary provisions as enforced by the Fifth Amendment, now declared illegal by the SC judgement.

It must be appreciated that the HC Division judgement and the Appellate Division order upholding the judgement with many observations, modifications and condonations, have dealt with several provisions of the Constitution which are interlinked, and also that many of the provisions have bearing on the subsequent amendments which have not been mentioned in or covered by the impugned judgement of the Appellate Division. All these intricacies would need to be taken into account.

Strictly legal consequences of the judgement and its implications may in cases contradict social and political realities now prevailing in the country, which the party in power would likely not intend to ignore. The Constitution is both a political and legal document. Stakes of the government in any amendment move, be it for implementing apex court verdict or making fresh amendment, are pretty high. The constitution of any country ought to respond to social demand, which is not always easy to correctly measure and evaluate.

So, to take every detail and caution into account, it is advisable for the government to take a comprehensive amendment move based on the SC verdict and socio-political realities. Verdict is mandatory to implement. However, any impact of the verdict, considered better to avoid, can be taken care of, or balanced by amendment. Besides, new issues like Article 70, CTG, electoral reform, Articles 115 & 116 on lower judiciary, appointment of the judges of the higher judiciary etc. can be brought under amendment consideration.

Some of the delicate issues are briefly discussed below.

Without prejudice to SC judgement, and irrespective of the government's underlying reasons for wanting to retain Bismillah-ar-Rahman-ar-Rahim in the Preamble of our Constitution, it can be argued that these words can be conceptually so retained in a secular constitution. They have firmly entered our Bengali vocabulary to mean 'in the name of Creator, the Beneficent, the Merciful'. One can have firm belief in the original four fundamental principles of state policy, reposing at the same time firm faith in the Creator, calling Him by any particular name, dependent or independent of faith in any particular religion. The four original fundamental principles of state policy, namely, nationalism, socialism, democracy and secularism, and the one added by the Fifth Amendment e.g. the faith in the Creator, can co-exist in the body of the Constitution.

Real challenge for the government would be to address the SC verdict reviving the second part of the Article 38 of the original 1972 Constitution which many have interpreted as setting an objective of banning the religion-based political parties. It is to be remembered that, in the context of the pernicious use of religion for political purposes in the then Pakistan, the spirit of the Article 38 was to stop the abuse or misuse of religion for political purposes.

Now after the reinstatement of the original Article 38 in full, necessary amendment can take care, laying down such conditions, that religion ought not to be misused for political purposes, while a political party follows the teachings of any religion. Out-right prohibition of religion-based political parties would not be necessary, nor the impugned Article puts such demand in strict sense. In fact, the prohibition in the Article applies to communal associations or organisations, or such unions using the name of any religion and pursuing or harbouring political purposes. There is no mention of political parties in the Article.

It needs to be mentioned that by reviving the Article 12 where in sub-clause 12(b) endowing any religion with political or state status has been prohibited, Art.2A

on Islam as State Religion has become void by implication. Let us recall that when the state religion provision was inserted in the Constitution by the 8th Amendment for gross political purposes, almost all the political parties including to-day's Opposition condemned the move. It was a political stunt by the then government of General Ershad to exploit the pious religious feelings of the Muslims, which made no special contribution to the cause of the religion of Islam or to its followers, rather planted the seeds of suspicion and fear in the minds of the followers of other religions, psychologically alienating them from mainstream national life and thus dividing the nation.

Retaining Bangladeshi citizenship will not contradict our Bengali nationalism as one of the fundamental principles of state policy. 99% of the people of Bangladesh are Bengalis. We fought for independence on the basis of this national identity Bengali nationalism. We formed independent Bangladesh, and can be called Bangladeshis as its citizens, which also include other national or ethnic minority groups, whose separate identity we recognise. Ethnically or nationally we are Bengalis, while our state-identity or citizenship can be Bangladeshi. Likewise, a chakma, or marma, or khasia, or garo, or any other tribal community in Bangladesh, while he is not a Bengali, is a Bangladeshi.

Acts and actions accomplished under the Article 150 swelling the volume of the Fourth Schedule enforced by the 5th Amendment cannot be validated, for the Amendment itself has been declared invalid and illegal. Why the doors of the Constitution are to be left open for any future usurper of the state power while the main purpose of declaring the 5th Amendment illegal is to keep the doors shut? The Article 150 and the Fourth Schedule were meant to cover the acts and actions of the transitional period between March 26, 1971 and December 16, 1972, when the present Constitution entered into force. Any further use of the Fourth Schedule was not contemplated, and to do it would only be abuse of the Constitution. Many acts and actions

sheltered in the Fourth Schedule which were also necessary under several subsequent Amendments can be validated by a special Act of the Parliament.

Post-script

Recent media reports suggest that the party in power may incorporate a provision in the Constitution confirming the status of Bangabandhu Sheikh Mujibur Rahman as the Father of the Nation. In fact, there is mention of Bangabandhu as the Father of the Nation in a special provision of the Fourth Amendment Act (Section 35/b). This provision was never repealed. However, the provision was not incorporated in the text of the Constitution as part of any Article, or as a separate Article, nor it was accommodated in the Fourth Schedule. Now the suggestions are that it becomes such a part.

Bangabandhu Sheikh Mujibur Rahman is the Father of the Nation. This is a historical fact, and its acceptance is imperative as well as gratifying for the nation. However, this is not a constitutional issue, and hence its inclusion in any Article of the Constitution is better to be avoided. Of course, provision for display of the portrait of the Father of the Nation in the government offices can be inserted in the Article 4A under which portraits of the incumbent President and the Prime Minister are to be so displayed. Again, this is not a constitutional issue, and can be addressed by legislation, or by executive order.

Still, if we would so decide, we can show our constitutional respect to the great man by inserting at the very beginning of the Preamble of the Constitution after the words 'We, the people of Bangladesh', the words 'led by the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman'. He is the architect of a nation, which under his Declaration of Independence on the 26 March, 1971, launched the armed struggle for liberation. This fact was first constitutionally entrenched in the Proclamation of Independence of April 10, 1971, later incorporated in the Fourth Schedule under Article 150 of the Constitution.

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HUMAN RIGHTS analysis

## Police: In efforts to restrict labour trafficking

SAMAHA M KARIM

LABOUR trafficking is an emerging and controversial concept in Bangladesh. Even now, we are comfortable defining this offence as unsafe migration or labour exploitations or smuggling of migrants. It may be a political or debatable issue but the exploitations and fraudulent practices which cause suffering to the migrants need equitable redress under our domestic legal framework. Our age old migration process under the Emigration Ordinance is not adequate to deal with the unscrupulous practices of the recruiting agencies with are taking place within its ambit. According to US State Department's Trafficking in Person Report, 2010, "a significant share of Bangladesh's trafficking victims are men recruited for work overseas with fraudulent employment offers who are subsequently exploited under conditions of forced labour or debt bondage". This report ranked Bangladesh in Tier 2 Watchlist, which states, "During the year, the government did not demonstrate measures to reduce the demand for forced labour or for commercial sex acts". It also refers recent studies, which states that, "the majority of human trafficking in the world takes the form of forced labour. The International Labour Organisation (ILO) estimates that for every ten trafficking victim subjected to forced prostitution, nine people are forced to work. Also known as involuntary servitude, forced labour may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment

ment, poverty, crime, discrimination, corruption, political conflict, or cultural acceptance of the practice. Immigrants are particularly vulnerable, but individuals also may be forced into labour in their own countries. Female victims of forced or bonded labour, especially women and girls in domestic servitude, are often sexually exploited as well".

Classifying victims of trafficking

Bangladesh lacks a comprehensive law on combating human trafficking. Nari-O-Shishu Nirjatan Daman Ain 2000 mostly governs cases concerning women and children who are mainly trafficked for sexual exploitation and or immoral purposes. Labour trafficking is a grey area.

Role of Bangladesh Police

As we do not have any specific laws to deal with labour trafficking normally our police file these cases under Criminal Procedure Code, Passport Ordinance and Emigration ordinance. Thus the victim himself is criminalised which amplifies his sufferings to a greater extent.

Bangladesh police in order to minimise labour trafficking carries out a screening process by way of which it is trying to control illegal immigration. Police also has the authority to blacklist names, which prohibits one from getting passport. This is a measure used to minimise labour trafficking.

In order to address labour trafficking, the police on a regular basis scan and make inquiry about advertisements made on newspapers and leaflets with regards to



agencies which promise to send one abroad. The police try to assure that the offers are rational and come from only licensed genuine agencies. They also take steps against those recruiting agencies which are not genuine by recommending to cancel their license among other measure. When required the police can also enforce actions against publishing houses for aiding such forged agencies in their deceptive activities. Most fraudulent offers have stopped repeating in publishing houses.

Difficulties faced during investigation: Human trafficking in general is an organised crime, it involves a lot of stakeholders who take part in the process. Organised crimes are difficult to solve without availability of appropriate enforceable instruments. A comprehensive legislation can make it easier to

solve such organised crimes. Without the correct legal instruments it becomes difficult to allocate the offence under the accurate legal definition rendering it illegal. First and foremost there are legal loopholes and the police lacks tools. For example, if the police had access to a database such as the National ID, the process of finding, identifying and investigating a reported offender would become speedier. A lot of times victims and witnesses do not report offences because they are not willing to invest their time and energy into the investigation process which is tedious and time consuming.

Upcoming facilities to help labour migrants

Bangladesh police will soon launch "Citizen Help Request" on

its website by way of which nationals of Bangladesh living here and abroad can seek help online, report suspicious behaviour etc. Bangladesh police has already started on its website facilities of making GD. GDs made online are sent to local thanas from where inquiry starts more promptly. Mere information on the website would suffice.

Bangladesh police also plans begin SMS Complain, which means soon one can make GD via SMS.

Further development also includes a separate cell for migrants who are living abroad namely "Probashi Shohaiota Cell", where a migrants or an aggrieved person can lodge a complaint or information regarding migration issues.

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## Recommendations for a comprehensive law on trafficking

IN a recent workshop, BNWLA proposed the following recommendations to the Law Minister. Legal experts from Bangladesh and India made the following recommendations. At present, the Government of Bangladesh is planning to draft a comprehensive law on human trafficking and these recommendations were made to enhance Government's effort to do so.

Trial

1. SAARC countries need to make laws regarding trafficking in persons.
2. GD and 'Ezhar' should be made online in order to create a network.
3. Definitions of 'child' and 'trafficking' should be made more specific.
4. Video conferencing facilities and such other facilities require to be developed and made available.
5. It must be assured that witnesses will be present during trial when required.
6. The prosecution system must be victim friendly.
7. Trail in Camera or private trial system must be incorporated.
8. The current laws used for trafficking offences need to be updated/amended.

Inquiry

1. Separate inquiry cell required.
2. Inquiry must be carried out and completed within a fixed/certain time period.
3. Victim/witness protection laws to be made
4. All agencies should have ID cards in order to validate legitimacy.
5. A separate officer should be assigned for protection of victim and witness during inquiry process.
6. The officer in charge of inspection of the 'crime scene' must be provided administrative and legal protection by an updated law with regards to their protection.
7. When the case involves two locations, the entire case file should be allowed to be taken to the other area if required.

Rescue and resettlement

1. Child welfare committee should be established.
2. According to the SAARC Convention, Mutual Legal Assistance between countries should be made available/activated/established.
3. The laws used with regards to trafficking offences should be updated in accordance with the SAARC Convention.
4. The expenses for resettlement should be provided by the both the countries, i.e. the source and destination countries.

-From Law Desk.