



CONSTITUTION DAY SPECIAL

Who 'We, the People' are?

S M MASUM BILLAH

OUR Constitution starts with three words: "We, the People". The words are simple but mighty. They are also revolutionary in nature.

They are mighty because they signify the collective mind of the nation. They are revolutionary because they represent a glorified moment of the Bengali nation's commitment for oneness. This oneness develops into an image of a document which we call the Constitution.

The Constitution, thus, is the 'embodiment of the will' of the people. How and when do people speak to express their 'will'? People speak and articulate their will only on rare occasions. In that rare moment people articulate a Constitution. That is called a 'constitutional moment'. No other moments are comparable with that moment. Other moments are those of normal politics and routine functioning of the mechanisms set out by the constitutional moment.

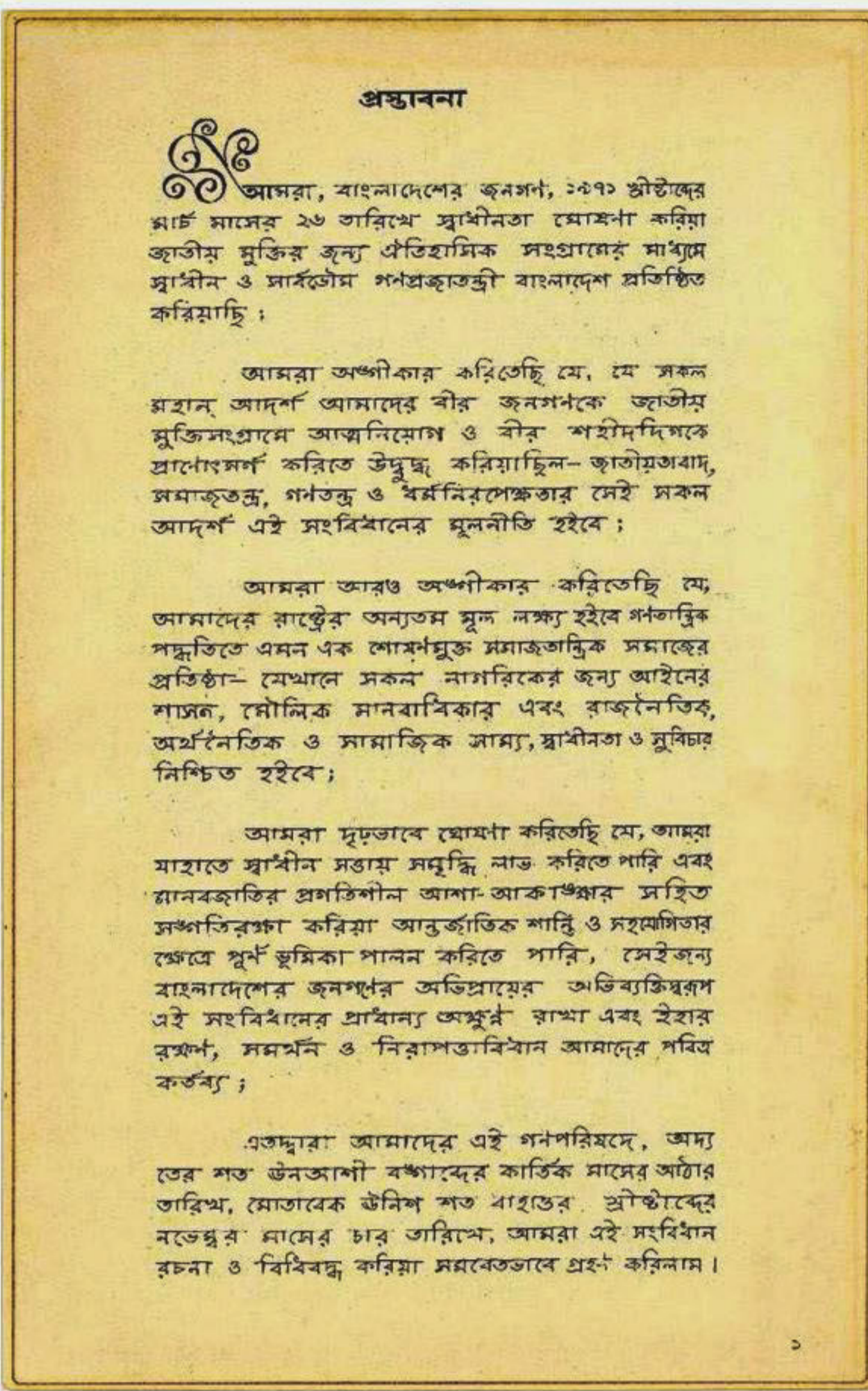
The day is an occasion for us to look back on the Constitution we 'adopted', 'enacted' and 'gave to ourselves'. We had plenty of promises to keep (democracy). We had dreams to accomplish (egalitarian society). We had visions to achieve (social justice). And you can name many more defining features of the constitution.

The constitutional feature that mostly strikes me is its devotion to popular sovereignty. This is what is widely referred to as 'power belongs to people' (article 7). But how is the power of the people to be applied? The Constitution relies on the doctrine of trust -- the power is exercised through their elected representatives. The constitution promotes the culture of popular sovereignty by giving the branch closest to the people -- the jatiya sangshad, a great deal of final say. Thus, the jatiya sangshad is the primary conduit of the people's will.

But could we say that the will of the sangshad can always be taken to be the will of the people? If not, is popular sovereignty under the Constitution a misnomer?

Let us consider three propositions related to this issue. Firstly, it can be claimed that the Constitution presupposes a procedurally constrained popular sovereignty. Theoretically, any conceivable sovereign under the Constitution could be nothing but constrained. The people's sovereignty is manifested only at the time of national election that takes place once every five years. People have hardly any other constitutional device at hand to recall their representatives during this time. In this sense, popular sovereignty seems to concede an important set-back in an age when people's 'trust' needs to be renewed constantly. Sovereignty under the constitutional dispensation, therefore, seems to exclude the manner of functioning of the government.

The second proposition is related to the ascertaining of the intentions of the Constitution. We may recall that it was ultimately the framers of the Constitution who drafted the Constitution for the people. Therefore, in discovering the meaning of the Constitution we should have to look either at the writings of the framers or consult the works on which they relied. If their writings or the works relied upon are not readily available, there is every possibility that there will be confusion in ascertaining the intention of the Constitution. For example, what is meant by the words 'secularism', 'socialist society', 'progressive aspirations of mankind', 'religion', 'property' and 'ownership' etc. used in the constitution? Yes, one can use a word but behind every word there is an idea. Was it the same idea of the people that the framers effectively sensed and passed into the words of the constitution? Above all, framers' idea also changes with the passage of time!



The third proposition is the people's apparent non-participation in the Constitution amending process. The Bangladeshi constitutional amendment practice effectively bypasses the people firstly by making a large part of the Constitution unamendable, secondly by omitting to take people's consent before any crucial constitutional amendment.

decided everything by themselves to shape their future generation's destiny in every conceivable manner? Standing in 2014, is it not constitutionally desirable, to ensure 'intergenerational equity' in exploiting the natural resources we have in Bangladesh? ii) Have the successive constitutional amendments put a question mark on our quest for a specific 'constitutional' identity for the Bengali nation? For example, we still debate on the constitutional orientation of our cultural and political identity.

All these three propositions sometimes tempt me to question: who actually 'We, the People' are -- whose sovereignty is compromised in one way or another? Are there people who are 'un-people' in the same country? There are practical answers to these, I know, which can be answered by many Ps: politics, plenty, poverty, property, people etc. But I want to be optimistic on this day of the Constitution.

We can attempt at least some theoretical responses to the above three propositions. As to the first, one device to ensure people's will is to confine the shangshad within the bounds of the people's will by means of accountability -- judicial review, for example. The court speaks for the people. If it sees that the parliament is transgressing the limits of the 'trust' entrusted by the people, it can declare a law unconstitutional. Of course, however, there is every doubt in Bangladesh context about the ultimate success of this judicial device.

The second proposition takes us to the question of constitutional ambiguity. Ambiguity, however, in some cases may be a potent strength to attain probability. We have the beacon before us -- the proclamation of independence -- to help us to ascertain the meaning of the ambiguities in the light of the spirit of the liberation war. Ambiguities, in fact, help us focus our view on the nation's problems. Let me recall the words of political theorist Hanna Pitkin. Pitkin says

that to understand what a constitution is one must look not to some crystalline core or essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that a particular concept helps us to hold in tension. The tension commences a dialogical interaction between the nation's foundational aspirations and evolving tenets of the people.

As to the third proposition: the unamendability provisions are related to the nation's identity. A constitution acquires identity through experience. This identity represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways transcend that past (Jeffrey Jacobsohn: 2010). Democracy does not consist ideally of governance by present democratic will, but also, in fundamental part, of adhering to the nation's fundamental, self-given commitments over time. We need constantly to remind ourselves the basics of our nationhood.

Irrespective of the tensions and prospects mentioned above, at the end of the day it is "We, the People's" Constitution. And we should be proud of it. A constitution is like an old house -- to borrow the analogy of Joseph Raz, an American philosopher. Raz says about the American constitution: "it is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth century house lives in a house built two hundred years ago. His house has been repaired, added to, and changed many times since. But it is still the same house and so is the constitution."

Raz's house analogy is also relevant for us. It is 'we, the people' of Bangladesh who built the house with their blood, tears and sweat. It is ours. Let us celebrate it.

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Ending discrimination through legal measures

RAIHANATUL JANNAT

ARTICLE 27 of the Constitution of Bangladesh entails the phrase 'equality before law'. Therefore as Bangladeshi nationals, our inherent right is to be treated equally as humans regardless of any other factor. As of 2009, National Human Rights Commission was established by National Human Rights Commission Act 2009, allowing Bangladesh conform to international human rights standards. However, at this day and age, can you imagine of a situation where you are discriminated on the grounds of your identity? Seems unlikely but unfortunately it does exist as a bitter truth for over 6.5 million people in Bangladesh.

Individuals from the Dalit -- 'untouchable' community have to face such discriminations every day as a normal aspect of their lives. And as there is no specific directions against 'untouchability' in our laws, the sufferings of Dalits are unable to invoke protection from the legal system.

Generally, the misconception is that maintaining castes system exists only within the Hindus. This is far from the truth as Bangladesh's ancient cultural heritage derived from its roots upholds the 'untouchability' issue despite any cast, creed or religion. It might not be an established 'caste-system' as such but the 'caste mentality' prevails through accepted social norms of patronage and hierarchy.

Traditionally identifying as Hindus, some Dalits have converted to Islam or Christianity in recent times but it has failed to change their life of deprivation. The members of Dalit community were

it even though the constitution's ban on discrimination is not imposed. As a Dalit, you will be told of the areas you can and cannot live in, the schools you can and cannot attend the people you can and cannot mix with, and even the burial grounds you can and cannot use!

Thus, the living conditions of the Dalit community are far below the poverty line with very limited access to housing, health services, employment and education. According to a study conducted by Indian Institute of Dalit Studies (IIDS) in 2007, over 62% of the Dalit community were illiterate and it has not improved drastically in the last seven years. As poverty forces the Dalit community to maintain a stable household income, education remains as an unattainable luxury. Therefore the newer generation of Dalits are mostly unable to ensure a better future through education and continue to be the ever-newer faces of the illogical 'cast mentality' discrimination. However, majority of the Dalits who dare to achieve educational qualifications, are forced stick to their fore fathers professions due to the co-relations between employment and social standing.

In order to combat such a blatant breach of the constitutional rights in mid-2014 the Law Commission articulated a draft Anti-discrimination law. The draft law seeks to define 'discrimination'; provide legal and state protection to such disadvantaged minority groups; treat such accepted notions of discrimination as punishable crimes -- up to 10 years' imprisonment applicable to both organisations (Government and/or private) and individuals; and take positive steps to improve the general lifestyle of those minority groups -- by including them in the national census. Through the draft law, complaints against discriminations may be lodged directly to the NHRC and cases can be filed to the court. It also advocates the formation of an 'Anti-discrimination crime cell'. The draft law also suggests certain conditions whereby a speedy justice may be ensured.

After a thorough reading of the draft law, it seems optimistic for the Dalits even though it acts as an umbrella law by taking into account other forms of discriminations including religion, race, gender and physical disabilities. In summary the draft law seeks to incorporate the much-awaited protection against discrimination. However in a country where equality is an aspiration, a solid Anti-discrimination law will pave the way for a compassionate and equal society.

It will work as a deterrent for individuals and organisations who have come to accept such grave breach of rights are a mere social norm. In light of this, it is very important in the sake of global development and humanity -- that the government of Bangladesh applies it impartially and awards it the deserved attention thereby restricting everyday practices of social discriminations disguised as heritage.

THE WRITER IS A BARRISTER, LINCOLN'S INN, UK.



This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.

Query

We got married in mid-2009 and were happily married since then. However, for the last few months, I have discovered significant evidence, which indicates that my husband is involved in an extra-marital affair with another woman. I have first received proof of this incident in May of this year. I have made up my mind to seek divorce from him as I do not wish to continue our marriage any longer in such circumstances. No child has been born out of our marriage. I request your kind help regarding the following queries:

- 1.What constitutes adultery in the legal sense? What proof is required?
2.What is the punishment (if any) for a person who has committed adultery?
3.Can I seek divorce in the present circumstances?

Anonymous.

Response

I would like to thank you for soliciting advice in this regard. Upon receipt of the query I have understood that your husband is having an extra-marital relation with another woman, but as there is no specification of whether the other woman is married or not, I will discuss various different scenarios regarding this.

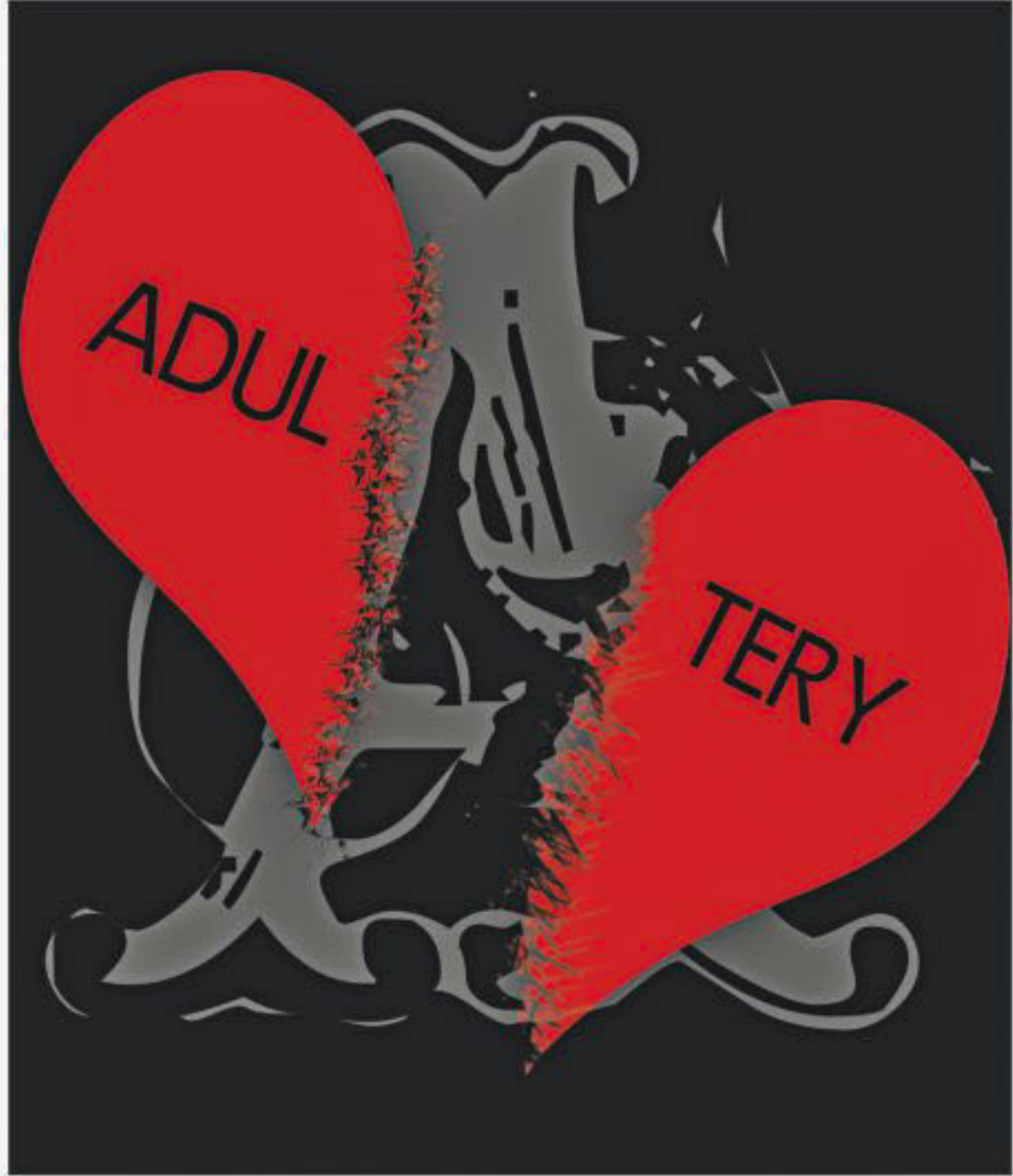
Adultery is a very common phenomenon in the Western world, however, over the past few years, it has become a much talked about subject in Bangladesh. I can understand the feelings of you and your family.

Adultery, in Bangladesh, is considered as a criminal offence which is dealt in Chapter XX (Offences relating to Marriage) of the Penal Code 1860. Section 497 of the Penal Code 1860 not only lists the punishment that one might face for committing adultery but also specifies the elements required to be proved to punish someone for adultery. It says if a person has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man shall be guilty of adultery. However, if a man has sexual intercourse with a woman knowing and/or believing that she is the wife of another man and does so without the consent of the woman, herself, that would amount as rape and such person shall be tried under the laws of Bangladesh in relation to rape. But that is a different scenario all together.

To establish that a person has committed adultery, the essential and deciding criteria that needs to be proved is that the person had sexual intercourse with a married woman without the consent or connivance of the husband of that woman. In a case, it was the decision of the Bangladesh Court of law that adultery cannot be committed with unmarried woman, widows or prostitutes. For your reference I am, hereby, citing the case (Nurul Huq Bahadur vs Bibi Sakina and another 1985 BLD 269)

Therefore, if your husband is having an extra marital relation with an unmarried woman, then he has not committed adultery. Moreover, your husband needs to have sexual intercourse with that woman, otherwise his actions will not be considered as adultery.

You said you have direct evidence which proves that your husband is having an extra-marital relation.



But if none of the evidence shows that there has been a sexual intercourse between your husband and that woman and that the woman was married, your husband will not be guilty of adultery then.

Assuming that your husband has had sexual intercourse with another married woman, if such claim can be proved in the court then your husband will be punishable with either an imprisonment for a maximum period of five years or he may be subject to a fine. There are even instances when the person guilty of committing adultery may face both imprisonment and fine as a form

of punishment. So far as divorce is concerned, under the Dissolution of Muslim Marriages Act, 1939 you can obtain a decree from the court for dissolution of marriage if your husband treats you with cruelty by being associated with women of evil repute. However, it is very likely that in the kabin-nama, clause no. 18 the right to divorce has been delegated to you already. Hence, you can easily invoke your right under the kabinnama and divorce your husband, if you so wish. In such case you need to go through the court process and you need not show any reason thereto, unless prescribed in clause 18 of the kabin-nama.

I hope you will have answer to your queries from the aforesaid opinion.

FOR DETAILED QUERY CONTACT OMAR@LEGALCOUNSELBD.COM

After a thorough reading of the draft Anti-discrimination law, it seems optimistic for the Dalits even though it acts as an umbrella law by taking into account other forms of discriminations.



assigned menial jobs by the ancient dominant classes and their descendants still cannot break through to other occupations due to the inherited social stigma. Therefore irrespective of their religion: be it Hindu, Muslim or Christian, the Dalits have been deliberately exploited and oppressed throughout generations. These discriminations are so wide-spread and accepted that the society does not question the practice of