

LAW OPINION

FORTY THREE YEARS OF OUR CONSTITUTION

DR. M. SHAH ALAM

EVERY year we pass 4th November, the day of adoption of our Constitution, without any special ceremony or celebration. The Constitution was made effective from sixteenth December, 1972. We also pass this day without specially mentioning this event. So we have not made any occasion to specially recall or celebrate the day when we adopted our Constitution or the day when the Constitution entered into force. This is rather unusual, but true. Since our Constitution was made effective on the sixteenth December, the Victory Day, therefore, that the day has great significance as the Constitution Day too, has been perhaps rendered forlorn by joyful emotions and celebrations of the Victory Day.

I propose on the occasion of forty three years of the life of our Constitution that fourth November be formally declared as the Constitution Day of Bangladesh, with or without declaring it a national holiday, to be observed with due solemnity and marked by programmes aimed at increasing constitutional awareness amongst the people and reaffirming the promise to uphold the constitutional ideals, goals and principles. Constitutional development in Bangladesh has not been very easy and even. The Constitution was born healthy, but grew up to become sick and wounded, struggling to gather sufficient strength to stand and move upright. This truly reflects equally unhealthy social, economic and political development of the country.

The Constitution of Bangladesh had undergone over the last forty three years massive alterations, manipulations and amendments. It also suffered suspension and restricted application. Yet, proving its inner strength and sustainability, our Constitution stood the test of time. Often strangled by tampering

amendments, the Constitution had experienced agonising ordeals, but never died. It has already demonstrated its staying power and sufficient potentiality to regain its force to guide the nation.

Let us make a short historical review of the Constitution, and the constitutional development with

to be a legal document embodying the highest ideals of democracy, fundamental human rights and dignity, justice, people's welfare and rule of law. Despite all sorts of experimentations with many provisions of the Constitution, these ideals and the provision that the people are the owners of the state

to fulfill the objectives for which it was meant. Special Powers Act, 1974, which was passed by the Parliament under the authority of the Second Amendment, was more misused than used for fighting rampant corruption and sabotage. In fact, prevailing conditions in the country demanded more of effective political and

to save the nation from near collapse, wanted a new constitution, without revoking at the same time the original one. Result was insertion in the Constitution of the provisions which rendered it beyond recognition. I believe, this was an extraordinary and temporary measure.

constitutional development occurred after a popular movement had overthrown General Ershad's Government in December 1990. A fairly free polls under a Caretaker Government and election of a new Parliament created fresh hopes for a new and healthy constitutional journey. After the return to parliamentary democracy under Twelfth Amendment, the Constitution was restored in original form. But unfortunately rigged polls again posed a threat undermining the democratic provisions of the Constitution. It necessitated another popular movement to compel the incumbents to hold elections under Caretaker Government. This was done under the Constitution Thirteenth Amendment.

Most of the changes in the Constitution between August 15, 1975, and the time when the Constitution Eight Amendment was passed in the Parliament, were brought forth by martial law proclamations, orders, regulations etc., later embodied in the Fifth and Seventh Amendments passed by parliaments which were outcomes of grossly rigged polls.

Relying on the doctrine of basic structures as upheld by our Highest Court, some other amendments of the Constitution can also be very legitimately questioned. First amongst them is the declaration of Islam as the state religion of Bangladesh which was made under the Eighth Amendment. The spirit of democracy, the principle of equality, the rule of law and secularism are so real and vibrant in our Constitution that declaring any religion as the state religion is very puzzling.

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sincere tributes paid to the founding fathers of the Constitution who enacted one of the best versions of a written constitution, then in existence in the world. The Constitution Committee headed by Dr. Kamal Hossain, took immense pains to learn from the constitutional experiences from around the world and crystallised them into a body of legal principles and provisions, worthy of a nation which earned independence by blood of the people. Naturally it turned out

power are declared in Article 7 of our Constitution.

Original Constitution of Bangladesh was characterised by genuinely true norms and principles of democratic governance. But the socio-economic and political development of post-liberation Bangladesh rendered the Constitution almost unworkable. Harsh realities dictated constitutional amendment providing for preventive detention (Second Constitution Amendment) which apparently failed

administrative management rather than constitutional sanction for adopting punitive measures.

Increasingly worsening situations in the post-liberation Bangladesh ultimately led to adoption of the Constitution Fourth Amendment which was almost absurd in nature, absurd in the sense that it was more of the nature of revision of the Constitution than of amendment. In fact, the then Awami League Government in its desperate attempt

Subsequent civil-military regimes for long years made all sorts of experimentations with the Constitution by way of willful amendment to suit their own purpose, but never dared revoke it. Rather, the incumbents always tried to give semblance of constitutionality to their rules, attempting thereby to take shelter behind the authority of the original Constitution as a source of moral and legal strength.

A qualitative change in the

BOOK REVIEW

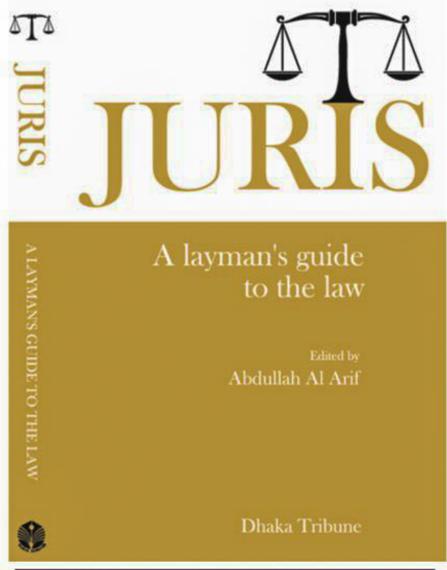
A Juristic initiative by the talented folks

JURIS: A layman's guide to the law' is the most recent initiative to bring the law to the general mass. The book is a compilation of 84 selected articles were regularly published in Dhaka Tribune's weekly law page. The articles were written by about 35 most talented young legal minds of Bangladesh and edited by Abdullah Al Arif. Law should be understandable to all and all should have some basic acquaintance with their legal rights and responsibilities, and Zafar Sobhan, Editor of Dhaka Tribune urged so in this book.

This hardback is catalogued into twenty nine different chapters. The title of the opening article, under the 'Women's rights' chapter, is "From the bedroom to the courtroom", authored by Barrister Farzana Hussain. In this article, the author argued to bring out our bedroom issues like domestic violence into the light of courtroom. Marital rape, an unsung paradox in the country is being discussed comprehensively. Apart from this, many other vibrant and courageous views are being discussed in this portion, i.e. victim's character in rape trial, violence against women, skin colour discrimination in TV commercials, vulnerability of female garments worker and so on.

The next chapter is 'Legal know-how' emphasising on procedural matters to enforce one's rights. Further, a variety of fees, which are not revealed in reality, has been addressed properly.

Following two chapters inscribe on legal system and legal education. Reporting on court proceeding has now become a sensitive issue as far as the contempt of court is concerned. Hence, subsequent portion focused on matters relating to the idea of



Juris: A layman's guide to the law
Editor: Abdullah Al Arif
Publisher: Palal Prokashoni

freedom of expression and its limits. At present, constitution turns into a fashionable word but what constitutes a constitution? - S M

Masum Billah, a PhD candidate at Victoria University of Wellington, raised this question in the chapter on constitutional matter followed by a chapter on children's rights.

Each page of this book has gathered diverse of opinions and views. The use of interesting cartoon art-work depicting law and human rights issues has increased the possibility of attracting the readers of all kinds. This is helpful for the readers to concentrate on the topics and relate the issues with real-life experiences.

To prove the truth of multiplicity, this layman's guide contains many practical issues like human trafficking, tort, Alternative Dispute Resolution, intellectual property rights, labour and employment, right to information, refugees, human rights, drug adulteration, food safety, medical malpractice, rights of the ethnic community, rights of the people with disabilities, third gender rights and many others. Moreover, it has featured legal luminaries, book reviews and so on.

Considering the taste of readers and importance of issues, articles selection and synchronisation have been done quite cautiously, and it reflects the importance of this book for all legal and non-legal minds. The terminologies used in this book are very straightforward and reader-friendly, which makes it a layman's guide in true sense. On reading this book, one would easily have an idea on basic legal issues.

THE REVIEWER IS RAISUL ISLAM SOURAV, ASSISTANT PROFESSOR OF LAW AT DHAKA INTERNATIONAL UNIVERSITY.

FOR YOUR INFORMATION

Right of private defence

UIDOY TASMIR

PUNISHING someone without lawful authority is not accepted in any civilised legal system. This principle applies to irrespective of any innocent or accused person under trial. Inflicting punishment is the absolute authority of the State mechanism. However, it does not necessarily mean that no one can prevent any crime that is going to happen before him/her. It is reasonably expected that citizens ought to protest against oppression and be the defenders against any unjust act. But this protest

However, private defence must be weighed with due prudence. It is totally justified on certain circumstances. As per the aforementioned sections of penal code, it is clear that an unlawful offender can never claim private defence. Anyone claiming this right should use force only intending to prostrate the offender or make the offender disable so that he/she would not be able to commit the crime. Killing of the offender should not be the primary intention unless he/she faces death apprehension.

Section 99 of the Code limits the rights of private defence in three cases. Firstly, where a public servant does an act strictly in accordance with law, he/she commits no offence at all; and in that scene private defence will not be applicable. Secondly, if a public servant acts in good faith without his jurisdiction, there is no private defence unless it causes an apprehension of death or grievous hurt. Lastly, if any person gets enough time to take protection of the public authorities, the right of private defence is not applicable to him.

Section 100 of Penal Code provides that right of private defence of body extends to causing death or any other harm to the assailant, where the assault can either reasonable cause the apprehension of death, grievous hurt, rape, gratification, unnatural lust, kidnapping or abduction or wrongful confinement.

According to section 102 of the Code, the right of defence in case of body commences as soon as a reasonable apprehension of death of the body arises from a threat or attempt to commit the offence and ends when the other party is disposed of the weapon. In case of property, the right of private defence commences when there is a reasonable apprehension of danger to the property. The right in relation to the property continues till the apprehension of danger or actual danger ceases. In case of right to private defence, the burden of proof lies on the person who claims he/she has exercised this right.

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must be reasonable and in a defensive mode.

Defending one's own life and property against any kind of offence has been recognized in the legal system of Bangladesh through the idea of 'private defence' in its Penal Code, 1860. According to section 96 of such, nothing is an offence which is done in the exercise of the right of private defence. According to section 97, anyone has the right to defend his/her own body or property and of another person facing threats as such.

The law of private defence is founded on two principles: firstly, everyone has the right to defend one's own body and property as also the body and property of another. Secondly, the right cannot be used as a matter of pretention for justifying aggression. This right can never be exercised to take revenge over the alleged offender but rather only as a means of one's own protection; it is not reckless, unrestricted and absolute right.

YOUR ADVOCATE



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 are a Hindu couple who got married in 2000. The marriage was performed by a Purohit of our locality in Chittagong following all religious formalities under Hindu law. But we didn't get any registration for the marriage. Recently, we have heard that the marriage of Hindus can be registered. Can we register our marriage now and if so how? If we do not register, will it affect our marriage anyhow?

Response
Thank you for your query. It is under-

stood that you are desirous to know about certain issues related to the registration of Hindu marriages in Bangladesh.

It is important to mention that previously registration of marriages solemnised under Hindu law was not possible in Bangladesh up until the passing of The Hindu Marriage Registration Act, 2012. Under this Act, rules were formulated in January 2013, namely the Hindu Marriage Registration Rules, 2013. Amended in September 2013, section 3 of the Act provides that such registration is

discretionary, i.e. the marriage will be considered as valid even if the same is not registered.

Now, though your marriage took place in 2000 and the registration related law was enacted only in 2012, as per the law you can now register your marriage now or anytime in future.

A Hindu marriage performed in Bangladesh may be registered with the Hindu Marriage Registrar, who has jurisdiction over the locality of the marriage area. In case of City Corporation area, one or more (but not more than three) registrars are appointed, and in case of other areas, one registrar is appointed for each Upazila (Sub-district). Marriage needs to be registered with the registrar, who is appointed for the area where the marriage took place.

To register the marriage, either you or your wife will have to make an application to the marriage concerned registrar. A passport size photograph of both the bride and the bridegroom must be attached with the application. After submitting the application if the registrar is satisfied that the marriage has been conducted properly, he will register the mar-

riage. While may not be very relevant for you to know, for the readers in general it is pertinent to mention that National IDs or Birth Certificate or Junior School Certificate or Secondary School Certificate or any other equivalent certificate needs to be provided to the registrar in order to verify the age of the bride and bridegroom. If such documents are not available then an affidavit, verifying the age of the parties, has to be provided by the parents or guardians of the bride and bridegroom. The minimum age of the bridegroom is 21 years and the bride is 18 years which is also as per the general law.

Hindu marriage registration fee is BDT 1000/- and fee for the transcript/certificate is BDT 100/-. Bridegroom is responsible to pay the registration fee. Upon registration, the parties may apply for transcript/copy of the registration from the Registrar. It is expedient to mention that a Marriage Certificate may also be issued though the same is not required under the law. I would be very glad if your above reply could assist you to meet your queries.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.