"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

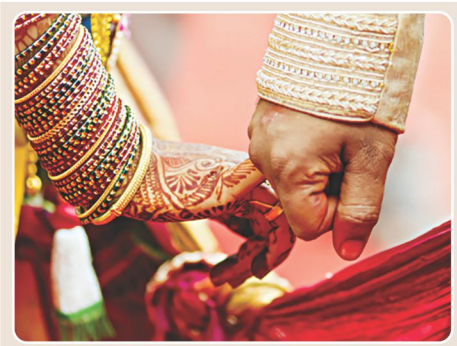
RIGHTS ADVOCACY

On marriage, convenience, rights, and politics

ARPEETA SHAMS MIZAN

IN Bangladesh, family law equals to religious law. Almost all marriages (be it Bangalee or indigenous) are intra-religious, homogenous, and conducted following the religious norms and customs. The only law allowing 'civil marriage', i.e. interreligious marriage is the age old Special Marriage Act 1872, which contains a blatantly unconstitutional provision. Section 2 of this Act totally bars a Muslim, a Hindu, a Buddhist and a Christian to opt for interreligious marriage. In practice, the provision has translated in parties making an affidavit before a notary denouncing their faith and claiming that they do not follow any particular religion. While freedom of religion is a fundamental right under the Bangladeshi Constitution, and while as per the Committee on Civil and Political Rights this right to freedom of thought, conscience and religion implies that marriage laws of each State should provide for the possibility of both religious and civil marriages; the 1872 Act offers right to marry at the cost of foregoing freedom of religion. It thus operates as a tool of enforced religious conversion or denouncement when marriageable adults (not citizens only!) wish to marry a person not sharing a similar faith. The Act further takes away the right of adoption for people marrying under this law which also violate the right to family and family life. It is indeed interesting to see that a law with so many constitutionally challengeable provisions has never been challenged before the apex court.

Secondly, the dominance of religious laws and norms regarding marriage becomes further apparent in the context of child marriage. Bangladesh has been fighting this social evil since before the independence, and yet the results are far less than satisfying. Child marriage cannot be held void or illegal because the religious laws sanction child marriage. Never mind that the religious laws came in a time when people rarely lived past 40. Never mind that child rights are human rights. Never mind that Bangladesh is a party to the CRC 1989. On the contrary, the State attempts to eye wash us by punishing a 'valid' act: go to jail for a few months, come back, and all is well. Law is effectively deterrent only when the parties will know that the court will give no rights under such marriage: no dower, no maintenance, no conjugal rights, no inheritance and yes, no custody for the father. So long as the marriage itself is not made void, child marriage prevention laws are a joke.



Since Bangladesh upholds the dominance of religious marriage laws over non-religious laws (by omitting to declare child marriages as void, by keeping Hindu marriage registration optional), Bangladesh has no legal justification to differentiate between Muslim marriages conducted under Islamic law.

In Bangladesh, marriage laws are political maneuvers calculated to preserve the vote banks while appeasing the stakeholders, NGOs and civil society. The final layer was added to this muddling business by the government proclamation of 2014 which banned Bangladeshi-Rohingya intermarriage. While a State has the right to take any measures necessary to ensure and preserve State security and internal law and order, restraints must be practiced so that such measure does not amount to encroachment upon the basic rights of the people within its territory. Further precautions must be observed when the alleged step may create a constitutionally challengeable double standard for its citizens.

It is claimed that the Rohingyas are 'allegedly' using marriage as a tool to gain citizenship. In fact, there are indeed many countries which regulate marriage permissions regarding non-citizens. However, marriage laws must not be arbitrary, must not be without a legitimate purpose and must not violate the basic human right of marriage. This means, laws can be made to prevent 'sham marriages' which are done to receive citizenship but are in effect no marriage because the parties never intended to be husband-wife. Also, such law must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right. The 2004 *R (on The Application of Baiai and Others) v Secretary of State For The Home Department* is a case on point, where the House of Lords discussed in detail the UK regulations to prevent sham marriages for immigration purposes. In France, marriages of convenience are regulated by the State council certificate granted upon satisfying the genuineness of a marriage. In *Klip and Kruger v Netherlands* (1997), the European Commission of Human Rights mentioned that even though there may be domestic laws to regulate marriages, the State could deny validating a marriage only when there was a reasonable 'suspicion that the intended marriage was one of convenience' and demand further steps for satisfaction.

As the matters presently stand in Bangladesh, it can be easily argued that such a ban is constitutionally, legally and religiously challengeable. First of all, most Rohingyas are Muslims. As such, if they get married to Bangladeshi Muslims, then the marriage would be solemnised under the Muslim Family Laws. Every Muslim Bangladeshi citizen is entitled to register his/her marriage under the Muslim Marriages and Divorces Registration Act 1974, and any denial would amount to a violation of the constitutional obligation of providing them with equal and due protection of law. Arguendo, while the 1974 Act does not apply to non-Bangladeshi Muslims, conducting Muslim marriages under Islamic law ought to allow a Muslim (even a Rohingya) to lawfully marry another Muslim (Bangladeshi or not). This poses a potential private international law problem, which has not been discretely solved by our legal system.

In the meantime, it can be argued that since Bangladesh upholds the dominance of religious marriage laws over non-religious laws (by omitting to declare child marriages as void, by keeping Hindu marriage registration optional), Bangladesh has no legal justification to differentiate between Muslim marriages conducted under Islamic law. Moreover, such differentiation would tantamount to arbitrariness and discrimination, violating the peremptory norm of international law and the jus cogens rule of non-discrimination on grounds of race.

Bangladesh is a party to ICCPR which contains in Article 23 the right to marriage and family as human rights which Bangladesh ratified with no reservation. The ratification obliges Bangladesh not to breach the provisions. The maxim of non-discrimination is considered both as a stand-alone human right and a part of the right to marry. Therefore, by arbitrarily proclaiming a blanket ban, the State is discriminating genuine marriages made of love and partnership, and opening a floodgate of misplaced attention and unnecessary criticism. And that Bangladesh cannot afford, at least for now.

Marriage laws in Bangladesh thus remain a muddy business.

THE WRITER IS LECTURER IN LAW, UNIVERSITY OF DHAKA.

LAW WATCH

Secularism and the virtue of tolerance

PSYMHE WADUD

SECULARISM, as one of our fundamental state policies, was unanimously adopted by the Constituent Assembly. The Assembly was of the view that without the high ideals of secularism, none of democracy, nationalism or socialism can thrive. The adoption of secularism basically was in response to the viles of communalism that West Pakistan subjected our people to and also was in line with the idea of never allowing the (ab)use of religion for any political purpose. However, the virtue of tolerance was always embedded essentially in the very word 'secularism'- "….secularism, not amounting to irreligion; where a Hindu shall profess his religion, so shall a Muslim, a Christian and a Buddhist. And no one shall interfere with the religion of others", as the then Prime Minister and the leader of the Constituent Assembly, Bangabandhu Sheikh Mujibur Rahman said (Constituent Assembly Debate, p. 20). Secularism only speaks for the freedom of 'living' a religion which embraces the concepts of the freedom to believe and the freedom to act in pursuance of that belief.

One has the inviolable right to believe in whatever religion (s)he thinks is proper and has a qualified right of practising that religion. Laws can, in no way, take this right away rather can only regulate the manner of professing and practising it. This right, reciprocally, gives birth to an obligation; obligation on part of those against whom such right can be claimed. In furtherance of this constitutional obligation, everyone needs to contribute individually and collectively towards the exercise of another person's right. And non-performance of such obligation surely is tantamount to a violation, in an indirect yet brawny way.

Everywhere around the world, the religious minorities suffer and get subjected to atrocities which can only (in)humanly be carried out. The Rohingya refugees are no exception to this unwritten transnational principle(!). None other than in an arguably 'secular' modern Myanmar, has Suu Kyi been able to bury her head in the sand over the ethnic cleansing of the minority Rohingya Muslims. Arguably so, because on one hand, the Constitution of Myanmar recognises the 'special position' of Buddhism as the faith professed by the majority and on the other hand, it also recognises Christianity, Islam, Hinduism and Animism as the religions existing in the Union (Articles 19 & 20). However, it seems that the constitutional recognition, in reality, did not get realised in the lives of the Rohingya minorities. Religion only may not be the sole factor working behind the present situation. However, other factors basically got fleshed out because of religion. It's their minority which has made them vulnerable to the means of exploitation, to the vested politico-economic interests of others.

In a similar way, we can view and analyse the rarely-discussed reality lived by the Dailt (untouchables) Muslims in India (BBC News, 10 May 2016); not to mention the rise in the numbers of 'cow vigilante groups' and its unimaginable impact on the not-arguably-secular State.

Bangladesh is not lagging behind either. Pre Durga Puja celebrations(!) in our country have always been two-faceted. As far as newspapers remind us, on one hand, Durga faces get the very final touches and simultaneously, many of them get defaced (The Daily Prothom Alo, 29 August 2016, 8 October 2015, 27 September 2014). The Hindu community has a constitutional right to celebrate their biggest religious festival as an integral part of the right to practise their religion, without any interference and a blow upon the exercise of this right only gives an indication that the majority, or a part, however small thereof, has started sailing towards bitter tomorrows. The Constitution of Bangladesh, unlike that of Myanmar, categorically provides for secularism as one of the State's fundamental principles. And hence, to my understanding, there is no scope for deeming otherwise or questioning the State's constitutional stance in terms of all the existing religions, notwithstanding the Article keeping the provision of State religion.

Optimistic minds would not like to contemplate the gravity of the situation of India and Bangladesh in terms of their respective Muslim and Hindu minorities. Nonetheless, even extreme optimism would not disagree that these incidents do have the potentials of leading to something irreversible. The 1982 Citizenship Law was not enacted overnight in Myanmar. It had a context with an undeniable significance. The separate identity of the Rohingyas was recognised under the democratic regime (1948-1962). However, despite such recognition, the Rohingyas did face discrimination. The situation worsened in 1962 in the wave of the military takeover which subjected them to demeaning and humiliating restrictions. Thus the prologue for 2016-2017 Rohingya tragedy was written more than 60 years ago, with the aid of some apparently insignificant and small-scale discrimination. Hence, today's India or today's Bangladesh, too, can be feared of as a proem to a shameful exodus in an unseen future.

One country's majority heaves a sigh of grief sympathising the sufferings of those who are minority in a neighboring land. We are empathetic towards the inhuman degradation a minority goes through, mostly when such minority resembles us, in one way or the other. Planet earth could be a better place to live in only if every majority was compassionate towards the minorities residing in their land irrespective of the resemblances and could comprehend the truest essence of secularism. Now is the time to practise tolerance, along with one's one religion. Because tolerance is what secularism stands for; tolerance is what Article 41 of the Constitution impliedly speaks of.

THE WRITER IS A STUDENT OF LAW, UNIVERSITY OF DHAKA.

GLOBAL LAW UPDATES

Say no to nuclear weapons

ACHIEVING global nuclear disarmament is one of the oldest goals of the United Nations. Basically this was the ultimate goal for achieving which UN started its journey nuclear disarmament has remained the most important and urgent objective of the United Nations in this field. 1946, General Assembly's first resolution was regarding nuclear disarmament. General and complete disarmament first came onto the General Assembly's agenda in 1959. Since 1975, it has been a prominent theme of the review conferences of States parties to the Nuclear Non-Proliferation Treaty. In 1978, the General Assembly's first Special Session on disarmament reaffirmed that effective measures for nuclear disarmament have the highest priority.

As of 2017, there have been major reductions in deployed nuclear weapons since the height of the Cold War. However, not even one nuclear warhead has been physically destroyed pursuant to a treaty, bilateral or multilateral, and no nuclear disarmament negotiations are underway. Surprisingly the doctrine of nuclear deterrence persists as an element in the security policies of all possessor states and their nuclear allies. The prevailing security challenges cannot be an excuse for continued reliance on nuclear weapons and for abrogating our shared responsibility to seek a more peaceful international society.

These facts provide the foundation for the General Assembly's designation of 26 September as the International Day for the Total Elimination of Nuclear Weapons. Commemorating this Day at the United Nations is especially important, given its universal membership and its long experience in grappling with nuclear disarmament issues. It is the right place to address one of humanity's greatest challenges, achieving the peace and security of a world without nuclear weapons.

The General Assembly declared the International Day in December 2013, in resolution A/RES/68/32 as a follow-up to the high-level meeting of the General Assembly on nuclear disarmament held on 26 September 2013. This Day provides an occasion for the world community to reaffirm its commitment to global nuclear disarmament as a high priority. It also provides an opportunity to educate the public and their leaders about the real benefits of complete elimination of such weapons and the social and economic costs of perpetuating them. The said resolution on 5 December 2013 was adopted with a vote of 137-28 with 20 abstentions.

In the backdrop of declaring 26 September as the International day for the Total Elimination of Nuclear Weapons, the Assembly called upon Member States, the United Nations system and civil society, including non-governmental organisations, academia, parliamentarians, the mass media and individuals, to commemorate and promote the International Day through all means of educational and public awareness-raising activities about the threat posed to humanity by nuclear weapons and the necessity for their total elimination in order to mobilise international efforts towards achieving the common goal of a nuclear-weapon-free world.

COMPILED BY LAW DESK (SOURCE: UN.ORG).