"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

Founding Constitution and our state of democracy

LAW OPINION

RIDWANUL HOQUE

BANGLADESH emerged as an independent country on 26 March 1971 when the nation declared its breaking out of Pakistan's colonial rule. It all began with the Declaration of Independence by Bangabandhu Sheikh Mujibur Rahman, the 'undisputed leader' of the people. Soon thereafter followed the Proclamation of Independence of 10 April 1971, providing the nation with its first constitution (see The Daily Star, 10 April 2018). Put into effect on 26 March 1971, the first interim constitution was promulgated by the Constituent Assembly, composed of the 'elected representatives of the people of Bangladesh'. The Proclamation formally legalised Bangladesh's independence, gave the country the name Bangladesh, established the 'Constituent Assembly' for framing a Constitution, and installed the historic interim government with the President as its head. Importantly, the Proclamation recognised that "the will" of the people of Bangladesh would be "supreme", while declaring 'equality, human dignity and social justice' as the fundamental principles of the new republic. Briefly, the first founding constituent document adopted the principles of popular sovereignty, democracy, and social inclusivity as constitutional identities.

After the physical liberation of Bangladesh from Pakistan on 16 December 1971 but before the founding Constitution was adopted, the country embraced the parliamentary form of democracy – 'the manifest aspiration of the people'. This significant transition was effectuated through the Provisional Constitution of Bangladesh Order of 11 January 1972, promulgated by the President. A few months later, the Constitution Drafting Committee met in its first meeting on 10 April 1972. The Committee held over seventy meetings and several public consultations after which it readied the draft constitution by early October 1972. The Constitution Bill was introduced in the Constituent Assembly on 12 October 1972.

On 4 November 1972, the 'people of Bangladesh', acting through the Constituent Assembly, adopted the nation's founding Constitution that came into force on 16 December 1972, ceremonially coinciding with the nation's victory day. The Constitution of Bangladesh has been a revolutionary, autochthonous document based on supreme sacrifices of the people who liberated Bangladesh.

The above-noted two pre-Constitution instruments recognised deliberative democracy and popular sovereignty as founding values. Drawing upon these and other values for which the nation had long fought, the founding Constitution entrenched four 'high ideals' as its fundamental principles – 'nationalism, socialism, democracy and secularism'. These fundamental constitutional cores were indeed the nation's identity principles. By one reading, except for 'democracy', other three fundamental principles seem to be new to the first interim Constitution. In reality, however, that is not the case. The other three principles are integral to 'democracy'. Even hegemonic Bangalee nationalism, which is an affront to inclusive constitutionalism, can be made to come to terms with 'democracy' when one takes seriously the opening words of the Constitution – "We the people" – within which is included any non-Bangalee group or people. That this is the light in which all fundamental principles of the Constitution have to be understood and interpreted is evident in the entrenchment of popular sovereignty and constitutional supremacy in article 7. Nevertheless, the lack of recognition of other nations was deficient at the time in terms of inclusive democracy. That deficiency is somewhat remedied in 2011 in the newly inserted article 23A.

Apart from the four fundamental cores, the Constitution's edifice was also premised upon the values of the rule of law, respect for fundamental human rights and freedom, and equality and justice – social, economic, and political. To my mind, thus, the first principle of the Constitution has been a liberal and deliberative democracy.

Unfortunately, however, the trajectory of Bangladeshi democracy has been a chequered one. In 1975, assailment of democracy came from within internal forces of politics. And, after the brutal assassination of Bangabandhu in August 1975, the nation fell prey to forces of un-constitutionalism extrinsic to politics. It had for long sixteen years been under the grip of lingering autocracy, transitioning to democracy only in 1991. Even thereafter, Bangladeshi democracy remained unconsolidated, illiberal, and quite exclusionary. During the autocratic regimes, the four fundamental cores of the Constitution were drastically compromised and defaced. Occasionally there were parliaments, but the general elections were sham and engineered. Corruption and terrorisation of politics reached an alarming state.

Post-1991 democracy in Bangladesh has remained equally non-deliberative and unstable. This scenario is largely attributable to pre-1991 politico-constitutional crises. Another culprit is the practice of predatory politics. It seems that the greatest challenge to democracy is ensuring effective participation of the people through free, fair, and competitive elections. First and foremost, democracy cannot sustain without a fair and competitive election and the existence of tolerative multiple political parties. Beyond that, a truly effective democracy, which the founding Constitution had mandated, requires a complete accountability of those in charge of powers to those from whom the state-power originates. These goals were indeed the founding aspirations of the Constitution itself.

By contrast, the challenge of ensuring free and competitive elections has been in the centre of a lasting democratic crisis in Bangladesh, beginning at least in 2007 when a two-year-long emergency was imposed. In the last decade or so, that democratic crisis culminated in many deviations from practices of liberal democracy. For example, the system of election time care-taker government was abolished first by a questionable judicial intervention and then by a hastily enacted non-consensual constitutional amendment. Tagged with this has been the second example of non-competitive general elections of 2014, boycotted by major political parties. A consequence has been the absence of an opposition party in the current parliament, despite the officially declared opposition. Further importantly, 152 out of contestable 300 seats were elected without contestation of any sort. Because of the so-diagnosed crisis of democracy, we have witnessed in recent times serious strains on the principle of respect for human rights, dignity, and liberty of the people. Not to blame any political party, but it is reasonable to conclude that this state of affairs is not compatible with the vision of democracy the founding Constitution aspired for.

A constitution of any nation is its autobiography (Justice Albie Sachs) in the sense that it grows with the aspiration and goals of that nation. Seen in this light, the founding aspiration of a deliberative democracy based on the higher values of justice, rule of law, and responsible governance was to continually guide Bangladesh's politics. Almost 50 years into the Constitution's founding, that transformative aspiration has remained largely unfulfilled. To be optimistic, however, there is much to reply on democratic resilience and the power and agency of the people, the makers of the Constitution.

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LAW IN-DEPTH

Who are and are not lawyers?

SAQUIB RAHMAN *and* NAFIZ AHMED

REPORTED llast year, in *Bangladesh Bar Council and Ors* v *A.K.M. Fazlul Kamir and Ors* [14 ADC (2017) 271], Chief Justice Sinha mentioned how it is a crying need of time that legal academia and profession maintain a close tie. He praised the nexus between lawyers and law education providers during the sixties and seventies and mentioned that law teachers should be allowed to enrol themselves as Advocates in the courts.

For readers who are unaware, chapter 4 clause 8 of the Canons of Professional Conduct & Etiquette quotes - 'An Advocate should not as a general rule carry on any other profession or business, or be an active partner in or a salaried official or servant in connection with any such profession or business. [emphasis added]'. Hence, it is clear that, in Bangladesh, a faculty member of law has to suspend his law practicing license (in case he already is in possession of such) while being employed at a university.

The above is certainly of disadvantage to the legal community, specially students who are left out from receiving the best (probably) from the most meritorious bunch of law graduates, who traditionally are seen to pursue academia in Bangladesh. Though a bunch of further arguments can be made to establish why it is impractical to bar law academics from practicing, the aforementioned clause at this point of time is outdated to the extent that it arguably bars the in-house counsels from being Advocates in the courts of law.

Most major companies and banks have their own legal wings. Lawyers belonging to such wings do not usually represent the companies as litigators, but look after the legal documentations and act as liaison officers, working with the enlisted panel of lawyers or law firms that handle the company law suits. However, whether they represent their companies or not is immaterial, considering the fact that in accordance with the concerned clause, they do fall as salaried company employees. Hence, provided the Bar Council of Bangladesh wishes to strip off the licenses of those Advocates working at legal departments of companies and banks, they may well do so. Though, the reality is that the Bar Council has no ready means to find out whether an Advocate is employed elsewhere, thus, allowing the in-house counsels to conveniently 'forget' to notify the Bar Council to suspend their law practicing permissions for the time they remain employed.

In order to avoid the risk of being debarred, lawyers in Bangladeshi law firms may consider not being on employment agreements, but on retainership agreements, where they would be paid professional fees that must be declared by them to be taxed on. That way, on paper, Advocates would not only remain independent but perhaps an advantage on the part of the firms' lies as well, considering tax savings.

It can possibly be understood that while bringing these laws into force, the Bar Council did not actually intend to prohibit legal scholars working as law teachers from practicing law, since it would deprive the legal system of some of its brightest minds. It is also highly unlikely that the Bar Council intended to deprive the Advocates from creating partnership firms, given that it is a common practice around the world.

It is perhaps safe to state that it is beyond any doubt that changes are required to be made in the Canons, given that the current clauses fail to meet modern day realities. Consequences of the strict implementation of the Canons at this point seems ludicrous and may at best serve the interest of very few, harming too many.

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LAW EVENT

19th HRSS held

ALI MASHRAF

EMPOWERMENT through Law of the Common People (ELCOP) organised its internationally recognised and much acclaimed annual event – the 19th Human Rights Summer School (HRSS) from October 13-23, 2018, at Proshika, HRDC, Koitta, Manikganj. The theme of the 19th HRSS was "Human Rights and Digital Age". This year, the school trained up 42 law students from 17 different law schools of South Asia.

The two-week long residential training programme on human rights jurisprudence and advocacy was inaugurated by Mr. Md. Fazle Rabbi Miah, MP, Honourable Deputy Speaker, Jatiya Sangshad on October 13, 2018. For the next 10 days, the participants attended lecture sessions, took part in group activities and simulation sessions, went for community visits in the locality to inquire about the views and perspectives of the local people regarding their rights as human beings, etc.

The resource persons and instructors of the 19th HRSS comprised of sitting judges of the Supreme Court of Bangladesh, renowned jurists and human rights activists, lawyers, academics, law enforcement agency and media personnel, etc. Through all the sessions of Summer School, the participants got to gather in-depth knowledge about various aspects of human rights, the changing nature of human rights in the fast-moving digital age, the need for protecting the rights of human beings in cyberspace.

The valedictory ceremony was held on October 22, 2018. Mr. Justice Syed Mahmud Hossain, Honourable Chief Justice of Bangladesh was present as the chief guest while Professor Dr. Md. Rahmat Ullah, Dean, Faculty of Law, University of Dhaka graced the event as the special guest. The ceremony was presided over by Professor Dr. Mizanur Rahman, President, ELCOP and former chairman, National Human Rights Commission of Bangladesh.

The valedictory ceremony ended with certificates being handed out to all the participants and prizes being presented to the winners in different categories of the Summer School. Md. Azhar Uddin Bhuiyan from the University of Dhaka won the Professor Z. I. Chowdhury Memorial Trophy for Academic Excellence, Shayma Manira from the University of Dhaka won the Professor K. A. A. Quamruddin Memorial Best Fellowship Trophy, Arzoo Karki from Kathmandu School of Law won the Justice K. M. Subhan Memorial Best Mooter Trophy and Humaira Binte Faruque from Eastern University won the Professor A. R. Chowdhury Memorial Trophy for Best Cultural Performance.

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GLOBAL LAW UPDATES

Not to examine triple talaq ordinance: Supreme Court of India

THE Supreme Court of India on Friday November 3, declined to assess the constitutionality of an ordinance, promulgated on September 19, making the declaration of instantaneous triple talaq by a Muslim husband of his wife an offence.

The Chief Justice Ranjan Gogoi being the head of the Bench in this petition, reasoned that two months have already passed since the promulgation of the ordinance, which has a life of only six months unless ratified by the parliament.

In other words, the Chief Justice left it to the parliament to debate the legality of the ordinance, saying the Winter Session of the Parliament is shortly to commence.

"We don't like to interfere…", the Chief Justice addressed the lawyers for Samastha Kerala Jamiathul, one of the biggest religious organisation of the Sunni Muslim scholars and clerics in Kerala, which had challenged the ordinance.

Senior advocate Raju Ramachandran said the very promulgation of the ordinance is a "fraud on the Constitution." But the Chief Justice Gogoi restrained the line of argument, saying it was not necessary to "go so high."

The court allowed the petitioner to withdraw the plea.

The Jamiathul said the only objective of the ordinancee is "to punish Muslim husbands."

The Women (Protection of Rights on Marriage) Ordinance, 2018 was notified on September 19 makes instant triple talaq a penal offence.

SOURCE: PTI

Section 4 imposes a maximum sentence of three years imprisonment when a Muslim husband pronounces talaq thrice consecutively. The offence is cognizable and non-bailable.

"If the motive was to protect a Muslim wife in an unhappy marriage, no reasonable person can believe that the means to ensure it is by putting an errant husband in jail for three years and create a non-bailable offence for merely saying 'talaq, talaq, talaq'," the petition contended.

"It is absurd that for an utterance which has no legal effect, whether spoken by Muslim, Hindu or Christian, it is only the Muslim husband who is penalised with a three-year sentence.

Protection of wives cannot be achieved by incarceration of husbands… the intent behind the ordinance is not abolition of triple talaq but punishment of Muslim husbands," Jamiathul, represented by advocate Zulfiker Ali P.S, contended.

It urged the court to stay the operation of the ordinance while questioning the haste with which the government promulgated it.

The petition contends that the Supreme Court has already declared the utterance of triple talaq "null and void". If triple talaq has thus no legal effect, why should the government go ahead and make it an offence now?

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