"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

LAW INTERVIEW

Reinterpretation of sharia in the light of social conditions will ensure human rights

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Law Desk (LD): What is your opinion regarding the growth of Muslim personal laws since independence of Bangladesh?

Anisur Rahman (AR): In the South Asian legal context, personal laws have undergone development through legislative enactments, policies, and judicial interpretation. Over the period of three decades post-independence, there have been three distinctive types of development with regard to Muslim personal laws. For the first decade, the growth happened through a rights-based approach. A significant step forward was the introduction of *Kabinnama* incorporating the provision of delegated divorce. In the first two decades, the judiciary contributed to a rights-based development by way of interpretation of the Muslim personal laws touching lives of women– one of the landmark judgments in this regard was regarding custody of children (*Abu Baker v. Bakar, 1985*). The judgment came in stark contrast with the previously existing legal positions where a colonial, protectionist approach was preferred. In the following decade, a development-based approach can be said to have been adopted by the Supreme Court of Bangladesh – an utilitarian *neo-Ijtihad,* said Clark Lombardi (2006). In this approach, women's rights were considered in development terms (or social progress) and judges sought to reinterpret revelations disregarding the rulings of the previous jurists. In this regard, we may mention the Hefzur Rahman (1997) case, through which our judiciary entered into a global debate over Islamic modernity. This led to another development in the third decade, the increasing involvement of human rights-based non-government organisations in the production of knowledge to be considered as Islamic law. The human rights approach and its vocabularies had come to replace Islamic legal traditions. In reaction, a *neo-traditionalist* approach reappeared in the judicial interpretation as our Supreme Court had invited religious clerics in the making of Islamic law. The latter group not only became part of the judicial law making in Bangladesh—the nascent [claimed] secular state— but also claimed legal authority to interpret Islamic law in the court (*M. Tayeeb v. Bangladesh*, 2012).

> *We should not dispute that the ultimate objective of sharia is to establish social justice, and this is not in contradiction with the objectives of human rights. Keeping it in mind, we can interpret sharia in a way that advances human rights guaranteed in the constitution and international legal instruments.*

LD: The colonial rulers purported to 'reform' personal laws. Hundreds of years later, we still question whether these reforms furthered pro-women or pro-political ends. With regard to reforms of personal laws, how do you evaluate the colonial legislative legacy?

AR: The reforms undertaken during colonial rule were largely political, in my opinion. In our country, we have been following the colonial tradition, which, perhaps, has been considered a secular tradition. (*The Momtaz Begum v. Anwar Hossain* (2011) is a classic example of examining colonial legacy in the interpretation of Islamic law in Bangladesh.) As a result, enough attention has not been paid to developing Islamic jurisprudence. It is important to understand how secularism has developed in other countries of the world – for example,

in France and the United States. In the context of our country, it is important to remember that we should not understand secularism to mean an absence of religion, rather a platform for equality between and among all religions. It has been a great concern how to separate religion from politics in a multicultural/multi-religious society.

LD: How do you evaluate the role of the judiciary in interpreting personal laws and upholding women's rights?

AR: Overall, the judiciary has played a commendable role. Two approaches are noticed– modernist and traditionalist. However, it is also to be mentioned that there are some noticeable discrepancies between these approaches. With regard to some recent cases, we can see some gaps in terms of interpreting the sharia. In the recent *Kabinnama* case, the outcome was very positive in the sense that there should not be use of words indicating whether or not the bride is a virgin – this is discriminatory and a violation of the right to privacy. So the decision of the court is worth praising. However, the issues of the case were framed on the premise of the constitutional principles instead of Islamic law.

In contrast, as to the question of a Muslim Marriage Registrar and the very recent controversy that emanated from an observation of the higher judiciary lately– that was not an issue connected to sharia. The way the issue has been connected to sharia (if not the Quran) in bringing in menstruation to the discussion, deserves some attention. The judgment does not unambiguously discuss the sources of the sharia principles connected to the issue, rather has used the latter to determine the legality of state actions – this is a unique endeavour. There are a few instances before where sharia is used to determine issues governed by public laws, unlike religious laws. These are instances of inconsistencies.

LD: Bangladesh ratified CEDAW in 1984 but with reservations on articles 2, and 16.1(c) that deal with the equal rights of women during marriage and divorce. How do you see the position of Bangladesh regarding such reservation?

AR: In Bangladesh, men and women have respective rights in marriage and divorce, particularly in the light of the judicial interpretations and existing laws. One area in which there remains discrepancy is the economic right of women, i.e., post-divorce maintenance, inheritance. This has been a contested issue and we do not have any positive legislation or decision of the court in this regard. Our Supreme Court has missed an opportunity to positively decide on the issue while dealing with the Hefzur Rahman case in 1997. The latter is an important case to understand the way the traditionalist approaches to sharia have become dominant following the Islamisation of the constitution during the successive military regimes that ensued after the assassination of Bangabandhu Sheikh Mujibur Rahman, the founding father of Bangladesh.

It should also be noted that scholars of Islamic law have expressed that the human rights instruments have been adopted without paying due regard to Islamic culture and jurisprudence– as a result, Muslims may view these instruments as interventions upon their faith. The way out from this would be to reinterpret sharia in the light of social conditions to attain the objectives of the international human rights law. Allama Muhammad Iqbal has nicely elaborated on it in his lectures, a collection of which is published in 1974 under the title of *The Reconstruction of Religious Thought in Islam*.

We should not dispute that the ultimate objective of sharia is to establish social justice, and this is not in contradiction with the objectives of human rights. Keeping it in mind, we can interpret sharia in a way that advances human rights guaranteed in the constitution and international legal instruments.

LD: What would be your suggestion to foster the development of Muslim family law jurisprudence in the context of Bangladesh?

AR: We have to recognise that the Islamic jurisprudence must be properly developed in order to gain mass acceptance and to show that sharia and human rights are complementary to each other – this has to be done through judicial interpretation. We have to carefully evaluate where there is a scope of judicial Ijtihad. One such instance, as mentioned, is the judgment concerning custody of a child, wherein the absence of clear legal provisions was found and utilised as an opportunity for a pro-woman and pro-child (in the light of the best interest of the child principle) interpretation. We shall not outright eliminate discussions of Islamic legal thoughts— this will give rise to questions regarding the acceptability and legitimacy of a judgment.

LD: Thank you for your time.

AR: Thank you.

REVIEWING THE VIEWS

One Mushtaq, a Digital Security Act and the freedom of speech

Sakhawat Sajjat Sejan

CONSTITUTIONALLY it seems Bangladesh accolades unlimited freedom of thought and conscience and it muzzles any sort of pre-censorship on freedom of speech and expression with some reasonable restrictions considering the security of state, communal and religious harmony, decency or morality and public order etc. What amounts to reasonable restrictions can be found in article 39 of the constitution of Bangladesh. Firstly, the restrictions shall have close connection with public order and security, secondly, the restrictions shall not be excessive. And the court shall have to judiciously interpret the interest of the state.

Theoretically in a country of constitutional supremacy, a law shall uphold the constitutional spirit while getting enacted. But sadly, in Bangladesh the legislature at times endeavours to bypass constitution when enacting a law. Digital Security Act 2018 is such a bypass among a lot of other bypasses. A law which was passed to ensure digital security has turned into a mechanism for suppressing our expression of thoughts over digital platforms. Apparently, the Act is the last nail in the coffin of freedom of speech and expression in Bangladesh. With flawed and draconian provisions within it, the Act is subverting fundamental rights of the citizens of our country.

Primarily, the Act has failed to give a comprehensive definition of digital security by merely defining it as the security of digital devices or system (Section 2k). Following the preamble, the Act was supposed to ensure digital security of the citizens and citizens should have been the subject-matter of the Act as well. Functionally digital rights of the citizens was supposed to be safeguarded under the provisions of the Act. But unfortunately, the Act did none and came up as a resort for the government to suppress dissenting voices and even constructive criticisms of the government.

The death of Mushtaq, an activist and

a critique of government stirred the whole nation. He was arrested under four provisions of the Act i.e. 21, 25, 31 and 35 of the Digital Security Act 2018. Two of the sections (25, 35) are bailable whereas the rest of the two are nonbailable. The Code of Criminal Procedure makes scope for bail even in nonbailable offences if the investigation continues for longer period (more than 180 days). Mushtaq was in custody with and without trial for about 10 months which obviates the ground for bail not as of right but as of practice if not punishable by death sentence or life imprisonment in the criminal justice system of Bangladesh under Section 497 of CrPC. Notably, here section 40 of the Digital Security Act says the investigation shall be concluded within 105 days grossly and section 52 directs the trial shall be concluded within 180 days. Mushtaq was in custody for more than 300 days; neither the investigation ended in 105 days nor the trial in 180 days. Though it availed him the right of seeking bail under section 339(C) of the Code of Criminal Procedure, but he was denied bail by the court, that too for six times.

There is no proof beyond reasonable doubt that he was tortured to death, but this is presumable that being in jail for a crime far less grievous than murder or rape led to his death. Whether there are some other contributing factors or not remains the question of investigation. The same investigation mechanism that could not be accomplished within the prescribed days may deliver justice to the dead if duly maneuvered or may subjugate justice in the vicious cycle of legal hegemony created by state under the vices of the Digital Security Act.

Moreover, to ensure freedom of speech, expression, conscience, and thoughts, the government might look up to reform provisions of the Act that contradicts with spirit of constitution rather than repealing the whole Act. By examining the proximate interest of the state, it may impose reasonable restrictions on the expressions of the public. Ultimately, it will encourage a culture of accountability and rule of law.

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LAW WATCH

Corporal punishment is unconstitutional

OF late, a video of a madrasa teacher beating up an eight-year-old student mercilessly in Chattogram's Hathazari upazila got viral and stirred the whole nation. Such incidents go on to show how corporal punishment happens to be pervasive in some educational institutions, and how often the same is justified on grounds of 'amending' the students.

On many counts these instances are wrong. Such behaviour is criminal and is punishable as offence under the existing criminal law and also goes against a 2011 judgment handed down by the High Court Division and the Guidelines for the Prohibition of Physical and Mental punishment of the Students of Educational Institutions, 2010. The country has been actively working to enact a legislation categorically prohibiting corporal punishment and efforts are underway. These instances have to be taken seriously because, among others, these instances are unconstitutional, and in violation of the international obligations that Bangladesh has undertaken.

Article 35 of our Constitution deals broadly with protection of citizens in respect of trial and punishment. Article 35.5 provides that "no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." The 2011 judgment interpreted this provision so as to opine against corporal punishment. The Court observed "it should be obvious that if any person is protected from "torture or to cruel, inhuman or degrading punishment or treatment" after conviction of a criminal offence, then it stands to reason that a child shall not be subjected to such punishment for behaviour in school.

Article 19 of the Convention on the Rights of the Child (CRC) 1989, of which Bangladesh is party, provides that States Parties shall take all appropriate

legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardian(s) or any other person who has the care of the child.

Article 28.2 of the CRC provides further that States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention." Article 37 of the CRC requires States to ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

General Comment No. 8 issued by the Committee of the CRC focuses on corporal punishment and other cruel or degrading forms of punishment with a view to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take. The Committee recognises that the practice of corporal punishment directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.

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