LAW VISION

The role of foreign judgements to enrich domestic legal regime

PROFESSOR K. SHAMSUDDIN MAHMOOD

IN general, the sources of law are initially either 'formal source of law' or 'material source of law', one from which a rule of law originates and derives its validity, force and authority and the other from which the same (law) derives the subject matter or content, respectively. As a matter of fact, the formal source of law varies with the sentiment and attitude of a particular community which they believe and conceive i.e., if law is regarded as being created by the will of the state, that is the formal source of law. Again, if law is command of the sovereign, such sovereign is the formal source. On the other hand, material source of law, includes sources that generate, enact or make rules/laws, of which, there exist two different streams of sources, namely legal material source and historical material source. These two streams of material sources are distinctive in their constituent elements, degree of legal authority or for that matter their persuasive instinct too.

> Across different countries of the world, lawyers, while making their submission/arguments before a court often place foreign judgments and decisions in support of their submission/arguments, to convince them thereby not only facilitating entry, integration and acclimatisation of decisions in the realm of legal domain in pursuit of justice, equity and good conscience, but also as a gateway to grant their admittance.

The organs or instruments of a sovereign state (i.e., legislature, custom and authority of the President to promulgate Ordinance under article 93 of the Bangladesh Constitution) through which legal rules/laws are being created and known are legal material source. They are not only authoritative but also, as a matter of norms, accepted and followed by all courts of law within the territorial jurisdiction of that particular state. However, the other material source of law (known as historical material source) are unauthoritative in nature and initially not allowed by any courts of law 'as of right', though subsequently may turn into law, if and when the same be argued and put forward before a court to be accepted and thus when accepted, assumed the status of precedent/case-law. Common examples are 'foreign judgments', but sometimes even views and opinions of jurist and authoritative textbook writers also come within this group.

Across different countries of the world, lawyers, while making their submission/arguments before a court often place foreign judgments and decisions in support of their submission/arguments, to convince them thereby not only facilitating entry, integration and acclimatisation of decisions in the realm of legal domain in pursuit of justice, equity and good conscience, but also as a gateway to grant their admittance. This is how advanced and modern version of legal interpretations and findings spread around the world at large and thus, wisdom and erudition of judges and legal luminaries enrich the legal domain.

Looking back, soon after our independence till date, an array of foreign judgements/decisions has been cited by legal counsels of Bangladesh before the higher judiciary and their Lordships upheld and accepted them as just and equitable. In *Mrs. Aruna Sen* v *Govt. of Bangladesh* (1975) 27 DLR (HCD) 122, his Lordship D. C. Bhattacharya J., by taking into consideration the English decision of *Liversidge* v *Anderson* (1942) AC 206, upheld the view taken by Lord Atkins that "… every imprisonment without trial and conviction is prima facie unlawful…" in cases of preventive detention by executive authority. Taking into consideration the decision of *Radul Shak* v *State of Bihar and another* (1983) AIR (SC) 1086 in the *Bilkis Akhter Hossain* v *Bangladesh and others* (1997) 17 BLD (HCD) 395 a claim under public law for compensation in case of infringement of human/fundamental rights and freedom was recognised.

There are few noteworthy pronouncements of judgments by the Supreme Court of Bangladesh under constitutional jurisdiction too, like that of – *Dr. Mohiuddin Farooque* v *Bangladesh* (1997) 17 BLD (AD), *Muhammed Taiyeb* v *Government of Bangladesh* (2015) 23 BLT (AD) 10, *Shah Abdul Hannan and others* v *Bangladesh* [Writ Petition no. 3507/1998], *Maulana Md. Abdul Hakim* v *Bangladesh* (2015) 67 DLR 83, *Children Charity Bangladesh Foundation* v *Bangladesh and others* (2017) 5 CLR (HCD) and *Bangladesh National Women Lawyers Association (BNWLA)* v *Bangladesh and others* (2009) 29 BLD (HCD) 415.

Again in the cases of *Dine Ara Begum and others* v *Bangladesh Rubber Industries and others* [Civil Appeal no. 1 of 2010], *Maksudur Rahman and others* v *Bashati Property Development Limited and others* [Company Matter no. 17 of 1995] and in *Hussain Mohammad Ershad* v *Bangladesh and others* (2000) 29 CLC (AD) on the question of application of international obligations of sovereign states on international conventions and treaties respectively were placed before the higher judiciary and were accepted.

In the above mentioned cases, our judiciary was gracious enough in allowing noteworthy decisions of other jurisdictions to get admittance or entry into the legal regime of Bangladesh and be considered as settled principle of law for future generation to cherish and admire the legal worth of such timeless landmark judicial pronouncements. This is how the historical material source of law enriches the domain of legal jurisprudence in our country and the world at large.

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LAW TRIBUTE

In Memory of Professor M. Shah Alam

PROFESSOR ABDULLAH AL FARUQUE

PROFESSOR M. Shah Alam, founding Dean of the Faculty of Law of the University of Chittagong, and former Chairman (Acting) of the Law Commission of Bangladesh died on 31st August 2020. His untimely departure created a vacuum in the legal arena in Bangladesh. Legal academia will deeply miss him for his outstanding scholarship on several branches of law. I had known him as a colleague of the Faculty of Law at the University of Chittagong for more than twenty years. I learned a great deal from him through personal interactions and exchanging views on numerous occasions. He received his legal education in the Former Soviet Union. Later on he worked as a visiting fellow of Tokyo University with the Japanese Fellowship. He was also a senior Full Bright scholar of New York University. He had written several books on international law, and constitutional law. He was prolific in both Bangla and English. He was a professor, mentor, prolific researcher and a visionary law teacher. He was very popular among his students and colleagues. But beyond this popularity, he was a father figure for many of students, a mentor of his colleagues.

He was a pioneer in introducing clinical legal education in Bangladesh. Clinical legal education is considered as an important mechanism of lawyering skill. Considering its importance, he integrated clinical legal education in the curriculum of the Faculty of Law, University of Chittagong, which was first of its kind in Bangladesh. He had excellent capacity of reaching students. His extra-ordinary skill and art of teaching law had remarkable impact on his students. He was incredibly resourceful and enthusiastic about ideas and people. He also tried to popularise text of laws and legal education in Bangla. He always nurtured his students, and junior colleagues so that they can flourish academically and professionally. He strongly believed in social engineering role of law and propagated this idea. But he was more than a traditional teacher. He had extra-ordinary human qualities. He always thought for the welfare of the students and cared his students beyond the classroom.

His teaching philosophy was unique in the sense that he believed that students are not mere passive learners rather they are active participants in the learning process as he encouraged his students to ask questions. His scholarly work on many areas of law left indelible mark. His scholarly writings on constitutional law, public international law, in particular, the law of the sea are highly acclaimed in legal academia. He had also contributed to development of legal arguments for Bangladesh regarding its maritime entitlement in the Bay of Bengal. He inspired thousands of his students and most of his students are now highly established in legal sector. His dedication for the Faculty of Law and his students was unparalleled, and his passion for knowledge was limitless. He shaped profoundly legal mind

of his students as lawyer, judge and teacher to serve the country, people and justice system.

Professor Shah Alam was an ardent advocate of legal reform to update laws in order to promote access to justice, human rights and the rule of law in Bangladesh. He had served as a member of the Bangladesh Law Commission twice and made immense contribution to reform of existing laws. Finally he was a true patriot and a valiant freedom fighter. His thoughts, ideas and thinking will continue to inspire us.

THE WRITER IS PROFESSOR OF LAW, UNIVERSITY OF CHITTAGONG.

RIGHTS ADVOCACY

Analysing the Draft UN Treaty on business and human rights

M S SIDDIQUI

MULTINATIONAL enterprises (MNEs) are active in some of the most dynamic sectors of national economies with the capacity to assert a positive influence in fostering development. Some of those enterprises make real efforts to achieve international standards by improving working conditions and raising local standards of living conditions.

Some MNEs, however, do not respect international human rights standards and can thus be implicated for abuses such as employing child labourers, discriminating against certain groups of employees, failing to provide safe and healthy as well as just and favourable conditions of work.

The international community is trying to enforce more rigorous scrutiny of MNEs' negative impact on human rights and on the environment. The United Nations initiated a study and the report came out in 2008 entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights". The study proposed a Framework based on three pillars: (a) the obligation of the state to protect, (b) the corporate responsibility to respect, and (c) the access to remedies for victims of human rights violations.

Based on report, the UN Human Rights Council (HRC) adopted Resolution 26/9 (2014) on the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights". It has elaborated an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The Resolution also establishes the Intergovernmental Working Group, and in order to organise the Working Group, the sessions devoted to constructive deliberations on the content, scope, nature and form of the future international instruments. The report has been updated and revised in third and fourth sessions in 2018. More than 200 civil society members also gave their opinion.

In July 2019, the Working Group released a new revised version of the draft treaty on business and human rights on the basis of those working sessions and on the basis of the comments and suggestions presented orally or in writing by states, as well as through informal consultations with governments, international organisations, civil society and other interest groups, which took place in June 2019. The revised draft treaty maintains the four pillars on which the future instrument will base. These are: (a) the prevention of human rights abuses, (b) the right of victims to access justice and effective remedies, (c) the international cooperation for the effective implementation of the instrument, and (d) the monitoring mechanisms.

States and civil society organisations (CSOs) agree that prevention is a fundamental element of the future instrument to avoid the costs of complex litigation and, above all, to avoid the suffering of victims particularly women, children, people with disabilities, indigenous peoples, migrants, refugees and internally displaced persons and the financial guarantees to deal with possible compensation claims.

The revised draft treaty proposes that subject to their domestic law, states parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for the following offences, among others: war crimes, crimes against humanity and genocide; torture, cruel, inhuman or degrading treatment; enforced disappearance; extrajudicial execution; forced labour; the use of child soldiers; forced eviction; slavery and slavery-like offences; forced displacement of people; human trafficking, including sexual exploitation; and sexual and gender-based violence. The revised draft treaty is a crucial step forward in the process of establishing a legally binding instrument in the field of business and human rights.

THE WRITER IS A LEGAL ECONOMIST.

LAW WATCH

Are internet shutdowns lawful?

ARAFAT IBNUL BASHAR

THE notion of access to internet as a fundamental human right has been growing exponentially. A survey of more than 27,000 adults across 26 countries, conducted by the BBC World Service between 2009 and 2010 found that almost four in five people around the world felt that access to internet is a fundamental human right. Countries such as Estonia and Finland have gone on to declare that access to internet is a human right of their citizens. Even in our neighbouring India, the High Court of Kerala in *Faheema Shirin RK* v *State of Kerala and others W.P. (C) No. 19716/2019-L* has clearly stated that right to access internet is a fundamental human right. But such notion has received fair share of opposition with most common argument against it being that internet is an enabler of rights, not a right itself. Frank La Rue, the United Nations Special Rapporteur on the "Promotion and Protection of the Right to Freedom of Opinion and Expression," in 2011, in his report to the UN Human Rights Council on the promotion and protection of the right to freedom of expression online, stated that the internet is an enabler of human rights and vastly expands the capacity of individuals to enjoy their right to freedom of opinion and expression. The UN Human Rights Committee in General Comment no. 34 has concluded that the freedom of expression under article 19(2) of the ICCPR includes the freedom to receive and communicate information, ideas and opinions through internet. The massive use of internet globally signifies that it has become a key means by which people can enjoy certain human rights, mostly freedom of speech and expression. Therefore, internet censorship or total shutdowns might not be a violation of right to internet access *per se* but could easily result in violation of freedom of speech and expression.

But the freedom of speech and expression is not an absolute right. As provided in article 39(2) of Bangladesh Constitution, restrictions can be imposed on the grounds of security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation or incitement of an offence. Laws such as the Penal Code, 1860; the Foreign Relations Act, 1932; the Indecent Advertisement Prohibition Act, 1963; the Contempt of Court Act, 1926; the Special Powers Act, 1974 etc. regulate restrictions on freedom of speech and expression in our country. Globally, freedom of speech and expression have also been restricted on the grounds of blasphemy, obscenity, perjury, right to be forgotten or for the protection of intellectual property, trade secrets, non-disclosure agreements, privacy, etc. Thus, internet censorship is constitutional and to some extent considered lawful in international human rights regime. But such restrictions are only permissible if they are clearly provided by law or international human rights norms, proven to be necessary and are the only means available for the protection of rights of others. But total internet shutdowns, i.e. cutting off access to the internet entirely, regardless of the justification provided are disproportionate and thus a violation of the freedom of speech and expression.

Globally, the government-led internet shutdowns have been on rise as of late. As internet has become an easily accessible platform to facilitate online protest and disclose incidents of human rights abuse, total internet shutdowns are being employed by states to curb or silence political opposition and to censor dissenting social content or debate. Total internet shutdowns are thus violating an individual's freedom of speech and opinion. Though censorship of internet is legal and may be quite necessary at times for the greater interest of the society, absolute shutdown of internet is neither expected nor justified. Even censorship of internet must be carried out in exceptional circumstances and grounds for much censorship must not be vague and not beyond what the laws prescribe. Although all states might not have the means to ensure that internet access is broadly available to whole of its population but they can surely refrain from intentionally preventing or disrupting access to internet.

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