

## Law and Our Rights

### LAW WATCH

## Legislative Process: Problems of People's Participation

by Abdullah -Al-Faruque

**Extreme measure of secrecy is still maintained at our administrative level when we live in the age of information. Free access of the people to information of legislative activities, meaningful involvement of diverse segments of the society who are both directly and indirectly affected by legislation is vital for democratic process. Apart from this, people's participation in the legislative process can enhance acceptability of the law as well as facilitates awareness of their rights and obligation.**

In democratic societies laws are regarded as the embodiment of the will of the people. There is a popular perception that laws enacted by an elected parliament can only ensure the people's expectations and their legitimate demands. However, this generalised idea is not quite right as we have experienced with many undemocratic laws passed by the popularly elected parliament. Very often, we ignore the aspect of society's participation in the legislative process which plays a vital role in making a people oriented law. We are frequently enacting and amending laws to meet up the needs of the ever-changing society. So it is imperative to take into consideration the societal needs and perspectives into making a particular law that may maximise people's welfare. Overlooking this much needed participatory approach to legislative process by our legislator hampers the desired outcome of legislation. We should bear in mind that a good law is not merely outcome of enlightened and democratic society but it is also the inevitable result of legislative process itself. So law must reflect the public opinion at large. Enlightened public opinion may generate popular sanctions which may help effective implementation of laws. Public opinion may be considered as an important supportive structure both for the legitimacy of law and for its effective implementation. The efficacy of laws depends upon their conformity to general expectation. The legislator ought to be well acquainted with the progress of this expectation, in order to act in concert with it.

Unfortunately, the participation of the society in the legislative process remains minimum level partly due to military regime during which laws were made in extra-constitutional way and partly due to hegemonic attitude of elected governments. During military regime, all the laws were made in the form of martial law proclamation and order while great portion of our laws are enacted in the form of "Ordinance" by the elected governments. As a result we have many laws but in terms of efficacy most of them can hardly

serve their ultimate purposes and live up to people's expectation.

Law making process in Bangladesh is mainly dealt with by the constitution and rules of procedure of Parliament. Constitution lays down only basic principles of law making process while rules of procedure contain substantive provisions. In our country a proposed law may be introduced either in the form of public bill which is generally raised by the concerned minister and any other bill other than public bill is called private bill. However, in our legislative history, most of the laws are formulated by the executive department in the form of public bill and the instance of law made through private member's initiative is very few in number as it has little chance of being passed without support of the Government. Executive department plays dominant role in the law making process. People's voice can be heard little at initial stage of formulation of law as strict measure of confidentiality by the executive level. Feelings and necessity of a particular law must spring from concerned section of people for whose interest law ought to be enacted and enough deliberations should be made to legislate any law. At second stage, when actual law making begins at Parliament, generally little deliberation takes place and laws are passed hurriedly giving no scope of taking into public opinion. There is a clear omission in the rules of procedure of the Parliament that the Select Committee shall circulate draft bill of having wide public interest for eliciting public opinion. However, our legislators hardly take this provision into consideration of circulation of public opinion. It is also one of the functions of the Select Committee on Bills to hear expert evidence and representations of special interests affected by the measures for enacting such law. Thus Rules of Procedure of Parliament obligate select committee to take into consideration the community's need and interest at large scale in enacting any law to make it welfare oriented. The ruling party virtually monopolizes the business of the Parliament so long as they com-

mands the majority support. Besides, greater portion of law originates in our country in the form of 'Ordinance' promulgated by the President when the Parliament is not in session or it stands dissolved. These ordinances are turned into law by the simple fact of majority of ruling party giving no scope of equate deliberation both public at large and in the Parliament. Undoubtedly, partisan and narrow outlook prevail upon greater welfare of the people. Consequences of these facts are evident in our legislative process which may be summarized as follows:

1. Law may suffer from lack of clarity of its mission. Law becomes complex and beyond understanding of the ordinary people.
2. Law may not adapt with the changing societies and paves the way for frequent amendment.
3. Law may turn into bad law as it fails to fulfill popular expectations and generates despair and frustration among people.
4. It may become instrument of oppression instead of instrument of social progress.

For above reasons, participation of people in the law making process is fundamental to shape democratic and progressive law. Pressing requirement of reflecting social interest in the legislative process becomes growing concern in view of the fact that law is no longer treated as divine will. Rather, law is increasingly treated as instrument of empowerment of people through dictate of people's will. Extreme measure of secrecy is still maintained at our administrative level when we live in the age of information. Free access of the people to information of legislative activities, meaningful involvement of diverse segments of the society who are both directly and indirectly affected by legislation is vital for democratic process. Apart from this, people's participation in the legislative process can enhance acceptability of the law as well as facilitates awareness of their rights and obligation.

The writer is a researcher of Legislative Process and Participation of the Society Project of Bangladesh Legal Aid & Services Trust.

## The Act of State Doctrine and the US Courts in Private International Law

by Barrister Khaled Hamid Chowdhury

It is not an infrequent occurrence that the government of a developing country passes a legislation which effects a private proprietary right in any movable or immovable property. Compulsory acquisition of private property by the government or nationalisation of industries and other establishments etc., may be cited as examples of expropriatory acts of a government which if done by providing compensation is called "acquisition" and if not so done, called "confiscation". After our proclamation of independence in 1971 this was a common saga. The purpose of the present article is to discuss the effect of such governmental acts in the sphere of private international law, particularly the attitude of the courts of the United States when facing such a contention.

For example, contracting parties belonging to the Third World countries have on many occasions contended that they are unable to fulfil their contractual obligation (most frequently, payment in US dollars) in a foreign currency for goods supplied by the US party to their US counterpart as their government has passed legislation restricting any payment in foreign currency (i.e., exchange control legislation) subsequent to conclusion of the contract. For countries with scarce foreign currency reserve this is perceived as a way out. This has obviously given rise to interesting issues and as noted below litigation has also involved Bangladeshis parties.

First one should point out that the English courts, in contrast to the US courts generally rely on the established principle of lex situs in private international law that a governmental act affecting any private proprietary right is recognised as valid and effective in England if the said act of another government was valid and effective by the law of the country where the thing was situated (e.g. an intangible thing such as a debt which was situated in that country) at the moment the act takes effect. The English courts also characterise the matter as being contractual and therefore decides the issue on the basis of contractual principles. An illustration is the famous case of Libyan Arab Foreign Bank v Bankers Trust Co. [1988] 1 L.R. 259 where, L.A.F.B. deposited \$ 131 million with Bankers Trust (US incorporated bank) in their London branch and \$165 million with the same bank in its New York branch.

The diplomatic ties between the US and Libya turned sour and the Libyan bank instructed the NY branch to transfer the money deposited in NY branch to its London branch by 2 pm on January 8, 1986. The US bank delayed in compliance and at 4 pm on the same day, President Reagan issued an executive order freezing Libyan assets in the US and in US branches overseas. The Libyan bank brought action in England for the full amount held in both branches. BT argued that payment should not be made as the place of performance of their obligation was in New York in US dollars and that this had become illegal

by the Reagan decree. They contended that although \$ 131m was deposited in London, it never left US. The House of Lords, the highest court of England held that the place of performance for payment is the place where the payment can be demanded under the contract and this place was London. In other words the debt was situated in London and not in New York. Libyan bank, being the creditor could always demand payment in London from BT in a currency other than US dollars and thus the Reagan decree was not to be given effect by the English courts. Regarding \$ 165m, HL held that as this was governed by NY law, the decree was effective. However, BT was still in breach as they failed to comply with the client's instructions to transfer the sum to London by 2 pm and was liable to pay \$ 165m.

If the above case was decided on the basis of the act of state doctrine and not on the basis of contractual principles, then it could be said that the English court had rejected the plea of act of state by BT because at the time of the decree (the act of state), the debt was not situated in the US thereby falling outside the effect of the decree. Now I propose to discuss the US position. The act of state doctrine in effect provides that US courts

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

*The act of state doctrine in effect provides that US courts shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.*

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

shall not inquire into the validity of the public acts of a foreign government committed within its own territory. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by the foreign government.

mandated that all deposits in Mexican banks, however denominated (e.g. in dollars), be repaid in Mexican pesos at specified exchange rates.

As a result, the value of the certificates was severely reduced, prompting some depositors to bring actions against the Mexican banks for breach of contract. In this case the plaintiffs failed because the court found the situs of the certificates of deposit at issue to be in Mexico. Thus the US court gave effect to the Mexican regulations in accordance with the act of state doctrine.

The second group concerns litigation in the US courts involving expropriation of foreign branches of US banks or of accounts held in these branches by the countries where the branches are located and subsequent claims by depositors against the US head offices of these banks. In Vishipco Line v Chase Manhattan Bank NA 660 F 2d 854 (1981), Vishipco had account denominated in South Vietnamese currency in Chase Manhattan Bank's (US bank) Saigon branch; 6 days before the fall of Saigon Chase Manhattan closed its branch and left Saigon. After the fall of Saigon, the new communist government passed legislation confiscating depositor's property in Saigon. Vishipco sued

Chase Manhattan in New York (where its head office was situated) for payment in US dollars as the old Vietnamese currency became useless after abolition by the new government. Chase refused to pay and pleaded act of state, i.e., the confiscatory legislation passed by the new government. The court held that the bank was not entitled to rely upon such order where the bank had ceased operation prior to the confiscation order.

The point was when the branch was closed, situs of debt moved to New York where the depositor may now claim payment instead. The legislation was not to be given retroactive effect. Impossibility of performance in the place where the deposit was made did not relieve Chase Manhattan from performing elsewhere. Moreover, a branch, unlike a subsidiary is not a separate legal entity. Thus depositors has a better chance to succeed by bringing their claim against head office as the liability of the bank remains.

The third and final group involves a plea of foreign act of state on a debt which is owed under a contract by a US national to a national of a foreign country. Here the obligation effected is that of the US party to a national of a foreign party. In the case of Republic of Iraq v First National City Bank 353 F 2d 47 (1965), after the revolution in which King Faisal II was killed, the Republic of Iraq confiscated his assets held in deposit and custody accounts with FNC Bank in New York. Iraq

Chase Manhattan in New York (where its head office was situated) for payment in US dollars as the old Vietnamese currency became useless after abolition by the new government. Chase refused to pay and pleaded act of state, i.e., the confiscatory legislation passed by the new government. The court held that the bank was not entitled to rely upon such order where the bank had ceased operation prior to the confiscation order.

relied on this law to claim these assets arguing that it was a matter of succession which was to be governed by the Iraqi law — the law of the domicile of King Faisal. The question then was to whom FNC Bank owed its obligation — to the Republic of Iraq or to King Faisal's personal representatives? If former was correct then confiscatory legislation would be effective, otherwise Iraq could not claim his assets. It was held that the issue related to a matter of property and not to succession and the situs of the bank account was where the account was held, i.e. New York. This meant that act of state plea was not successful.

In United Bank Limited v Cosmic International Inc 542 F 2d 868 (1976) Bangladeshi and Pakistani plaintiffs asserted conflicting rights to payment for jute products exported from the former East Pakistan and resold in the US prior to our proclamation of independence on 26th March, 1971 when our sovereignty was declared. The defendant Cosmic International, a Delaware corporation, held funds that represented the proceeds from the sale of jute products in question. The defendant admitted that it owed the money but sought judicial clarification to whom it should pay. The issue was whether the pre-1971 owners or the post-1971 successors owned the debt. Pre-1971 owner was an East

Pakistani corporation whose East Pakistani interests were expropriated without compensation by the Bangladesh government after liberation.

In other words should the US courts recognise the Bangladeshi expropriatory law? The answer was in the negative. The situs of the debt, as held by the US court, was where the debt could be enforced, i.e. in the US. This is where the debtor (Cosmic) was domiciled.

The aim of this article was to draw the readers attention to an important and interesting aspect of private international law which may effect international trade-related obligations which a foreign party owes to the US party or which a US party owes to a foreign party. The courts in the above cases have put emphasis on the primary point that the doctrine can be successfully pleaded if the subject matter of the action is situated within the territory of the country that has "performed" the act of state. It is hoped that the case law as analysed would contribute to an area which although is of considerable antiquity in countries like the United States and England, it is relatively new to our conception of private international law.

The writer is an Advocate of the Supreme Court having recently completed his LL.M. examination at King's College, University of London specialising in International Business, Banking and Admiralty Laws.

## The Kathmandu Commitment

Continued from previous issue

We realize that the media is an integral part of our lives. Acknowledging its tremendous force to change mind sets and mould public opinion, we appeal to all forms of media to play a proactive, investigative and supportive role in our struggle against gender based violence. We urge responsible and sensitive handling of such events. We believe that this is only possible if media is given access to information as a matter of right and the right to privacy of victims is respected by

spond to the problem of gender based violence and towards this end we commit ourselves as follows:

- As legal professionals and those involved in the formulation and enforcement of laws, we shall advocate and contribute to the reform of discriminatory laws and to the sensitive and effective enforcement of law, promoting awareness of the law and proactive use in countering violence against women and girls.
- As medical professionals, we shall advocate and work towards

honestly, keeping in mind that the victim should not be further victimized through our reporting, create awareness on gender issues and the need for social action against all forms of gender violence.

• We writers, recognizing that we cannot be expected to write according to a certain agenda, but also realizing the power of the word and the consequences of reinforcing gender stereotypes through writings, commit ourselves to the creation of a gender violence free society and heighten aware-



media. We also call upon the media to promote and portray positive gender images and confront stereotypes and discrimination.

We, individually and collectively, within our countries and in the region, commit ourselves to work towards eliminating gender bias and violence in our professions and work places and creating an environment and developing competence and sensitivity that will help to build a gender violence free community and society. We also undertake to work within our professions to develop and/or enforce a professional code of ethics that will prevent and re-

wards increasing awareness and recognition among all health personnel, about acts of violence against women and children and to take appropriate, preventive, curative, rehabilitative medico-legal action.

• As educators, we shall advocate and work towards education for equality, non-violence and peace, support research and training on gender violence, legal literacy, develop gender sensitive curriculum and pedagogical training.

ness, through our writings of the issues of gender violence and the value system which sustains it.

• We the performing artists and cultural activists, commit ourselves to promote the values of a gender violence free society and bring about attitudinal changes through our work. We also commit ourselves to forcefully resist any attempts to place restrictions on freedom of cultural expression, especially of women and cultural workers, placed by the governments or other pressure groups in any country of the region.

### What's on today...

**Award ceremony:** Abdus Salam International Award for Journalism 1997 will be presented. Venue: Osmani Memorial Hall. Time: 4:00 pm. Chief guest: President Shahabuddin Ahmed.

**Workshop:** A 2-day Asian regional workshop on 'new initiative for north-south dialogue on climate change' will begin. Venue: Sonargaon Hotel. Time: 9:30 am.

**Conference:** The 3rd Diabetes and Endocrine Conference, organised by Diabetic Association of Bangladesh and Bangladesh Endocrine Society, will begin. Venue: BCPS auditorium, Mohakhali. Time: 10:30 am.

**Workshop:** A week-long McARDO officers training workshop on 'Mcardo Health Project' will begin. Venue: Engineers Institute council room. Time: 9:00 am.

**Conference:** A 2-day conference on 'US society and culture', cosponsored by USIS and BAAS, DU, will begin. Venue: Academy for Planning and Development auditorium, Nilkhet. Time: 9:30 am.

**Seminar:** A seminar on 'The Bengali essays of Gobinda Chandra Dev: An overview' will be held. Venue: Room 2028, Arts Building, DU. Time: 4:00 pm.

**Debate:** Poet Jasimuddin Hall Debating Club, DU, has arranged a debate and cultural function. Venue: Hall auditorium, DU campus. Time: 5:00 pm.

**Seminar:** A seminar will be held marking the 120th birth anniversary of Allama Iqbal. Venue: National Press Club auditorium. Time: 4:00 pm.

**Rotary Club of Dhaka Midtown:** The weekly meeting will be held. Venue: Siza Court, 152 Monipurpara, Tejgaon. Time: 7:00 pm.

**Discussion:** Gano Forum has arranged a discussion session to mark the silver jubilee of the adoption of the Constitution of Bangladesh. Venue: Engineers Institute auditorium. Time: 4 pm.

**Memorial meeting:** A memorial meeting on writer-journalist Ronesh Dasgupta will be held. Venue: Central Shaheed Minar. Time: 4:00 pm.

**Workshop:** A 5-day workshop on 'reproductive and child health' will begin. Organisers: NIPSOM and UNFPA. Venue: National Institute of Preventive and Social Medicine, Mohakhali. Time: 9:00 am.

**Projection meeting:** On the eve of public offering of shares of Gachhihata Aquaculture Farms Ltd, a projection meeting of the company will be held. Venue: Winter Garden, Hotel Sheraton. Time: 7:30 pm.

## Metropolitan

### Coronary heart disease on the rise in Bangladesh

Speaker Humayun Rasheed Chowdhury yesterday laid paramount importance on sincerity and devotion of the country's physicians in combating killer diseases, reports BSS.

He was inaugurating a seminar on recent advances in cardiology at a city hotel. State Minister for Health and Family Welfare Prof M Amanullah, chief of the Aysha Memorial Specialised Hospital Maj Gen (Rtd) M A Rob, consultant Dr Azizur Rahman and cardiac surgeon from Singapore Dr Saw Hui Seong also spoke.

Prof M Amanullah said Bangladesh has all kinds of heart diseases including coronary heart disease which is on the increase. He said a survey done in 1985 revealed that number of coronary heart disease patients has multiplied by a factor of three while prevalence of congenital heart disease remains the same, around

5 per thousand, and rheumatic heart disease around 7 per thousand, over the same time period.

He said known risk factors for coronary heart disease are smoking, hypertension, diabetes and hyperlipidemia.

He said the treatment of heart disease patients is very expensive with higher mortality and morbidity. Prevention is not only better but cheaper as well in case of these disease.

The state minister said a poor country like ours can hardly afford treatment of heart diseases by surgery and intervention and the government is trying its best for establishing a full-fledged cardiac centre for training specialists to give proper treatment to the patients.

Parkway Group Healthcare Limited, Singapore and Aysha Memorial Specialised Hospital, Dhaka jointly sponsored the seminar.



Pupils of Bangladesh International School, Mohakhali, along with their parents and teachers went on a river-cruise to see rural Bangladesh on Friday.

### SAARC ENT Congress

#### Last date for registration Nov 15

The first SAARC ENT Congress is going to be held in the city from February 9 to 12, 1998, under the aegis of the Society of Otolaryngologists and Head-Neck Surgeons of Bangladesh, says a press release.

Delegates from Bhutan, India, the Maldives, Nepal, Pakistan, Sri Lanka, UK, USA, Canada, Australia, Japan, Singapore, Thailand, and host Bangladesh are expected to attend the congress.

The inaugural session and congress banquet will be held at Hotel Sheraton, while the scientific sessions and the closing ceremony will take place at Bangladesh College of Physicians & Surgeons, Mohakhali.

Interested persons have been requested to register before Nov 15, 1997 to avail the concessional registration fee of Tk 2,000 for senior specialists and Tk 1,500 for specialists under five years standing. Residents and accompanying persons will have to pay Tk 500 and Tk 1,000 respectively. The congress banquet will cost Tk 700 each.

Those wishing to present papers should send the abstract of their original work, stating purpose of the study, methodology, summary of results and conclusions, on or before Nov 15, along with registration fee. There will be provision for exhibition of scientific instruments and others in the congress venue.

For further details, please contact the Congress Secretary, Dept of ENT, Room No 707, Block-C, Institute of Post Graduate Medicine & Research, Dhaka-1000, Bangladesh (Phone: 88-02-864020; Fax: 88-02-9663251; e-mail: orlsb@bd.com).